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| EAST NEWARK TOWNE CENTER, LLC, and EFSTATHIOS VALIOTIS<br><br>Plaintiffs,<br><br>vs.<br><br>BOROUGH OF EAST NEWARK and JOHN DOE I-III (being fictitious names),<br><br>Defendant. | : Superior Court of New Jersey<br>: Hudson County: Law Division<br>: Docket No. HUD-L-5225-13<br><br>**OPINION** |



**Date of Oral Argument:** October 9, 2015
**Date of Decision:** October 29, 2015

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**SARKISIAN, J.S.C.**

## Introduction

Presently before the Court is the defendant, the Borough of East Newark's motion for summary judgment dismissing plaintiff East Newark Town Center LLC ("ENTC"), and Efstahio Valiotis, a principal of ENTC, complaint. (See Df.'s Ex 1, ¶ 2-4). The defendant also moves for summary judgment on its counterclaims for breach of contract.

The motion arises out of a redevelopment project between the parties. The plan was to develop a vacant dilapidated property known as the Clark Thread Mill Property, located at 900 Passaic Avenue, East Newark, Hudson County, New Jersey. The parties began negotiating in 2007, until April 20, 2010, when ENTC withdrew from negotiations, largely in part to the 2008 recession, which caused a downward spiral in the housing market. Prior to the termination of negotiations, two (2) agreements were entered into: (1)

the "Interim Cost Agreement;" and (2), the "Escrow Agreement." (collectively known as the "Agreements").

The plaintiffs' complaint has asserted the following four (4) counts, for which they seek damages: (1) Breach of Interim Cost Agreement Contract; (2) Breach of Escrow Agreement Contract; (3) Breach of Implied Covenant of Good Faith and Fair Dealing with Respect to the Interim Cost Agreement and Escrow Agreement; and (4) Breach of the Implied Covenant of Good Faith and Fair Dealing with regard to Negotiations with ENTC. See generally Df.'s Ex. 1 – plaintiff's Complaint).

The plaintiffs contend that in or around April 2009, ENTC submitted a proposal that was identical to the plan contemplated by both parties, yet, the Borough unreasonable, arbitrarily and capriciously required further changes. (See Df.'s Ex. 1, ¶ 19). In addition, plaintiffs contend that because of these alleged delay tactics, ENTC incurred unreasonable and unnecessary costs in excess of $500,000 for the Borough's professional fees under the Interim Cost Agreement. (Id. ¶ 22).

The defendant argues that they are entitled to summary judgment as to all counts of plaintiffs' complaint and is entitled to summary judgment on its counterclaim for outstanding costs incurred by the plaintiffs under the Agreements.

## Summary of the Facts

In 2006, the Borough Council of the Borough of East Newark ("Borough Council") employed the authority granted to it under the Local Housing and Redevelopment Law ("LHRL") to further the redevelopment of "the complex of buildings that was once the Clark Thread Mill." (Df.'s Ex. 2, B000109, 000110, 000126). On November 30, 2006, the Borough adopted a resolution determining that the area was an area in need of redevelopment pursuant to N.J.S.A. 40A:12A-5.

On March 29, 2007, the Borough published a request for proposals that sought a "qualified and experienced developer ("Redeveloper") to redevelop that portion of the Borough designated as the Thread Mill District." (Df.'s Ex. 2, B000096-0000100). The RFP contained, among others, the following "Substantive Requirements:"

> 5. Financing Plan. Estimate the total development cost and identify the source(s) of funding. The Redeveloper should be prepared to provide affordable housing on site or to make a payment in lieu of such construction to subsidize the development of affordable housing. The Redeveloper should also be prepared to provide funding for the municipal costs incurred to date and to be incurred in connection

with implementation of the Redevelopment Plan, including preparation of studies, reports, and for planning and legal professionals.

* * *

7. Project Impact. Describe the anticipated demand on municipal services to be generated by the proposed development and any other financial impacts to be faced by municipality or school district as a result of the completion of the planned development. Include a detailed projection of property tax revenues or payments in lieu of taxes which will accrue to the county, municipality and school district following the completion of the planned development in its entirety. Also address the creation of jobs for local residents, particularly minority residents, and the sustainability of those impacts. The Borough intends to engage a consultant to address the impacts of the project on the Borough and it will consider the results of that analysis in determining the terms and conditions of any agreement the Borough is considering entering into with respect to the implementation of the Redevelopment Plan (including any financial agreement providing for payments in lieu of taxes that the Borough may consider employing as part of the project). Based upon the fiscal impact analysis, the Borough will consider on what terms and conditions to contract with the Redeveloper with respect to implementation of the Redevelopment Plan, and the Borough reserves the right to reconsider terms of the Redevelopment Plan if necessary in the best interest of the Borough.

* * *

By responding to the RFP the plaintiffs, as the respondents, inter alia, acknowledged and consented to the following additional conditions:

1. The issuance of this RFP is not intended to, and shall not be construed to, commit the Borough to execute any agreements.

2. The issuance of this RFP is not intended to form, nor shall it be construed to form, any joint venture between the Borough and any respondent to this RFP.

3. Neither the Borough nor any of its officials, staff, agents, or consultants will be liable for any claims or damages resulting from the solicitation or collection of proposals, nor will there be any reimbursement to any respondent for the cost of preparing the proposal or for participating in the RFP process.

4. By submitting a proposal in response to the RFP, the respondent accepts and consents to the process selected and implemented, and waives any and all claims as to this process.

On or about May 4, 2007, ENTC submitted its "Response to the Borough of East Newark Request for Proposals." (Id.). ENTC's proposal included "two (2) alternative visions for the Thread Mill District." (Id., B000005). After reviewing the response to the request for proposals ("RFP") on May 9, 2007, the Borough adopted a resolution which conditionally designated ENTC as the redeveloper of the Thread Mill Property. (Df.'s, Ex. 4). The designation was conditioned upon the parties successfully negotiating a

Redevelopment Agreement within ninety (90) days or such extension authorized by the governing body and, if not authorized, the conditional designation would terminate. Furthermore, the resolution also would require ENTC to pay all applicable Borough fees and costs in accordance with the Redevelopment Plan and request for proposals to be specified in the Interim Cost Agreement. (Id.).

**Interim Cost Agreement**

On the same day, May 9, 2007, the parties entered into the Interim Cost Agreement. (Df.'s Ex. 5). The Interim Cost Agreement provides for the payment of the Borough's interim costs associated with reviewing ENTC's redevelopment proposal during the "Interim Period." (Id. at Page 2, ¶ 3). The Interim Period is defined as "commencing upon the conditional designation of Redeveloper as redeveloper and shall terminate upon the earlier of" the date of full execution of the redevelopment agreement or such time that ENTC or the Borough "determine that a redevelopment agreement cannot be executed for any reason." (Id. at ¶ 1). Paragraph 1, states:

> **The Interim Period.** The phrase "Interim Period" shall refer to the time period commencing upon the conditional designation of Redeveloper as redeveloper and shall terminate upon the earlier to occur of either the full execution by the parties hereto of a redevelopment agreement or at such time as the Redeveloper or Borough determine that a redevelopment agreement cannot be executed for any reason.

Moreover, the Interim Cost Agreement expressly stated that the obligation to pay interim costs remains "even if a redevelopment agreement is not, or cannot be, executed for any reason." (Id. p. 2, ¶ 2) (emphasis added). Paragraph 2, states:

> **Payment of Interim Costs.** The Guarantors, jointly and severally, shall be responsible to pay to the Borough the Interim Costs (as this phrase is defined below) incurred by the Borough during the Interim Period. The Guarantors shall pay such costs and expenses incurred by the Borough during the Interim Period even if a redevelopment agreement is not, or cannot be, executed for any reason.

Pursuant to the Interim Cost Agreement, ENTC was required to establish an Escrow Fund of Twenty-Five Thousand ($25,000.00) Dollars and replenish the fund each time it dropped below Five Thousand ($5,000.00) Dollars. (Id. at p. 2, ¶ 4-5). The Interim Cost Agreement could be terminated by the Redeveloper or Borough at any time. (Id. at p. 2, ¶ 1). Additionally, there is no provision in the Interim Cost Agreement requiring the Borough to reach agreement on a redevelopment agreement. (Id.).

The specific obligations of the Borough pursuant to the Interim Cost Agreement are narrowly delineated. The Borough is required to maintain the escrow fund, as per the Interim Cost Agreement, "in a separate, interest bearing account" and that fund "shall be drawn down upon by the Borough to pay the Interim Costs." (Id. p. 2, ¶ 4). The Interim Cost Agreement also required the Borough to notify ENTC in writing, if that escrow fund drops below $5,000, so that plaintiffs can replenish the escrow fund. (Id. p. 2, ¶ 5). That agreement also requires the Borough to provide ENTC with (a) a statement of the interim costs paid from the escrow fund every thirty (30) days, (b) invoices from time-to-time during the course of the interim period, and (c) a final invoice when a redevelopment agreement is executed or the parties determine that a redevelopment agreement cannot be executed. (Id. p. 2, ¶ 6). Lastly, under the Interim Cost Agreement, the Borough is required to refund any balance remaining in the escrow fund at the end of the interim period to ENTC. (Id. p. 3, ¶ 7). By its terms, the Interim Cost Agreement did not require the Borough to do anything aside from provide an accounting of interim costs.

**ENTC's Initial Two Proposals**

Shortly after the Interim Cost Agreement was executed, ENTC presented two (2) proposals. The first proposal complied with the redevelopment plan, and included the construction of 613 residential units, approximately 95,000 square feet of retail and office space, a community center, and 1,334 parking spaces. (Df.'s, Ex. 2, B000006). The second proposal did not comply with the redevelopment plan (Id.). It was estimated that the Project would increase the Borough's 2004 population of 2,307 by 46-58% (1,067 new residents, if the project was to include 613 residential units, and 1,338 new residents, if the project was to include 767 new units). (Id. Ex. 2, B000077).

**The Parties Negotiations**

Defendant contends the goals of the negotiations were clear as evidenced by the testimony given in Mayor Smith's deposition that: (1) "successful completion of the building[;]" (2) "for [ENTC] to cover their fair share of the cost[;]" and, (3) "the affordable housing had to be put in with the regular residences that [they] were going to build there[.]" (Df.'s Ex. 32, 53:4-11 – Mayor Smith's Deposition; 93:16-21; 82:11-17).

Plaintiffs contend that through the course of negotiations, (1) defendant's proposed PILOT terms were unreasonable; (2) defendant unreasonably required the plaintiffs to pay for building a new school and purchase a fire truck; (3) the defendant unreasonably delayed after being told their PILOT terms were unreasonable; (4) Mayor Smith's statements demonstrate improper motives; (5) defendant acted unreasonably to plaintiffs' tax appeal; (6) defendant unreasonably continued to solicit proposal from the plaintiffs;

(7) defendant acted in bad faith with regard to school construction costs; and (8) defendant acted in bad faith with negotiating the number of units in the development proposal. (See Pt.'s Br. in Opp. at i – Table of Contents).

Defendant contends that consistent with the request for proposals, and from the outset of the negotiations, the Borough made it clear that an evaluation of the projected municipal costs of serving the Project would be a key factor in analyzing any proposed financial agreement.

Throughout June and July 2007, plaintiffs and defendant exchanged information, and on August 3, 2007, plaintiffs allege they provided defendant a "compliant plan program." (See Pts' Ex. K; Ex. L, B-001682; Ex. M, B-005044-45). On August 28, 2007, defendant provided its financial consultant Dr. Listokin's analysis to plaintiffs. (See Df.'s Ex. 8, B-007293). Dr. Listokin's analysis stated that, for both the 613 unit "compliant" plan and the 767 unit "preferred" plan urged by ENTC, a PILOT set at 10% of AGR would not cover the projected municipal costs of serving the development. (Id. Ex. 8, B007318, 007346, 007350, 007356). This information was conveyed to ENTC's consultant, Mr. Banker, on August 28, 2007. (Id. B007293).

In October, 2007, ENTC submitted three (3) different new proposals to the Borough for consideration. By letter dated October 3, 2007, it submitted a "compliant plan" including, among other things, 616 residential units, along with a "non-compliant" plan including, among other features, 799 residential units. (Df.'s Ex. 9, B006904, 006911, 006922). Later in October, 2007, ENTC submitted yet another "non-compliant" plan which included, among other uses, 853 residential units. (Df.'s Ex. 10, B00700, 007085).

Thus, as of the fall of 2007, defendant contends that the development plan remained uncertain, the ENTC's development proposal had not been solidified, the tax obligation of ENTC had not been decided, and the issue of affordable housing hindered negotiations. (See Df.'s Br. 14-15).

On August 6, 2008, ENTC received the revised analysis from Dr. David Listokin regarding the costs to be incurred by the Borough for municipal services and school expenses, based on revised development proposals, stating that the following materials were provided:

1. Dr. David Listokin's analysis of the anticipated costs to be incurred by the Borough for municipal services and school expenses, including the impact on State aid to the Borough's school district, based on conventional property tax (ad valorem) basis and a PILOT basis. Note that estimated costs attributable

to the project are reduced by $235,705 under the PILOT scenario as services required under the Kelly Act would not be required.

2. An explanation of the determination of the proposed PILOT payment at 17.75% of Annual Gross Revenue ("AGR") of the project calculated according to Section 14 of the Long Term Tax Exemption Law, N.J.S.A. 40A:20-1, et seq. AGR was determined based upon the commercial and residential unit sale prices your client provided; and

3. An analysis of the anticipated tax rates and tax levy as developed in conjunction with Joseph Faccone of Samuel Klein and Company, the Borough's auditors.

(Id. Ex. 14, P02309-2340).

The analysis performed by Dr. Listokin established that a PILOT should be set at 17.75% of AGR (based on then-estimated sales prices) to cover the costs of providing municipal services to the Project. (Df.'s P02323-2324). On August 20, 2008, the Borough transmitted Dr. Listokin's fiscal impact report which analyzed the municipal and school costs associated with the Project, explaining the manner in which the cost figures in his analysis were calculated. (Df.'s, Ex. 15, B02496-2507).

On September 10, 2008, given the decline in the estimated sales prices due to the looming recession, the Borough's special counsel, Ms. Babineau, e-mailed ENTC to address the calculation of the PILOT, which was based on estimated sales price. (Df.'s Ex. 16, B2639-2641). Essentially, the e-mail stated that the proposed PILOT payment percentage needed to be increased from 17.75% to 18.85% given the reduced estimated sale price per square foot of the development. (Id.)

As part of the negotiations, there was discussion regarding a new school and a new fire ladder truck. (Pts.' Ex. F, 85:4 – 86:9; Ex. I, 81:1-82:16). These costs were incorporated on October 29, 2008, when defendant stated it would consider reducing the initial AGR from 18.85% to an escalating AGR of 15%, 16%, 17%, and 18% in years one through four, but only if plaintiffs agreed to pay $2,900,000 as a one-time "developer contribution." (Pts' Ex. N, B-001906.) The $2,900,000 contribution included $955,000 for an aerial ladder fire truck, $1,500,000 "for the school contribution," and a potentially refundable $430,035 to protect the Borough if the PILOT did not cover its full costs. (Id.)

On December 31, 2008, ENTC's counsel e-mailed a copy of Thomas A. Banker's[1] report and analysis of the draft financial agreement to the Borough's counsel. (Df.'s Ex.

[1] Mr. Banker is one of two experts proffered by the plaintiffs in this case.

17, B06414-06439). The letter expressed Mr. Banker's concern regarding the effect of potential increases in tax rates, stating "[s]ince the escalators effectively doubly or triply escalate the PILOT amount, the [financial agreement] provides a limited benefit in the early years (approximately 10% for 5 to 6 years), after which the formula resolves to one where the PILOT is virtually equal to full taxes." (Id. at B6416). In his analysis, Mr. Banker compared the PILOT that was being considered for inclusion in the financial agreement with a PILOT based on 15% of AGR. (Id. at B6417). That comparison, however, did not address the Borough's costs, or opine that the PILOT based on 15% of AGR that Mr. Banker used for comparison would cover those costs. (Id.).

On March 23, 2009, the Borough responded to various concerns expressed by Mr. Banker with respect to the terms of the financial agreement, and specifically, the PILOT calculation. (Df.'s, Ex. 18, O3519). The March 23, 2009, letter enclosed a revised draft financial agreement. (Id. at O3523). That draft agreement listed as an attachment an application for tax abatement to be completed by ENTC. (Id. at O3524). The draft agreement also contained language, continued from at least one (1) preceding draft, reciting that the Annual Service Charge (or PILOT) payments were based on Dr. Listokin's cost projections. (Id. at O3535).

In a letter dated June 2, 2009, Mr. Johnson, ENTC's counsel, wrote to Ms. Babineau, the Borough's special counsel, stating that the financial agreement was acceptable in form to ENTC and requesting that the agreement be put into final form for execution. (Df.'s Ex. 19, B007416). Nevertheless, that letter also raised several comments regarding ENTC's desire to change certain aspects of the plan for development. (Id. B007416-7). Numerous tasks, necessary to finalize the agreement, were not completed, as delineated, in a letter by Ms. Babineau's, dated August 21, 2009, which indicated:

> We are eager to get the [Redevelopment Agreement] and [Financial Agreement] finished and before Council. As of today, what I have outstanding is:
>
> 1) no revised plans have been submitted; see first e-mail below;
>
> 2) no application for tax abatement filed; see 2d e-mail below (I know you told me #2 is related to #1);
>
> 3) no answer on the façade treatment see e-mail below from July 23; and
>
> 4) no sign off on [redevelopment proposal amendments]; see last e-mail below from July 24.

See Df.'s Ex. 20, B000444-5.

Thereafter, on September 25, 2009, Mr. Johnson responded that the Redevelopment Agreement is acceptable, and that his clients "have authorized Tom Banker to release the Financial Agreement and application and you should have them by Monday." (Df.'s Ex. 21 B008064).

On December 10, 2009, Mr. Banker forwarded a markup of the financial agreement containing various comments. (Df.'s Ex. 22 B07597). That version of the financial agreement contained provisions setting the PILOT at 17.25%, 18.5%, 19.5% and 21% of AGR for years 1, 2, 3, and 4 to end, respectively. (Id. at B07607). These provisions were not struck out in Mr. Banker's markup. (Id.).

On March 19, 2010, Ms. Babineau circulated revised drafts of the financial agreement and redevelopment agreement, which contained minor changes enumerated in an earlier e-mail from Mr. Banker, dated March 3, 2010. (See Df.'s Ex. 25-26).

**Termination of Negotiations**

Notwithstanding the progress of the negotiations to that point, approximately one (1) month later, on April 20, 2010, Mr. Johnson sent a letter to Ms. Babineau, stating:

> After our Team's lengthy and thorough analysis of the Redeveloper's Agreement, Amended Redevelopment Plan, and Financial Agreement, **I regret to inform you that under the storm cloud of the current financial crisis my client has decided not to pursue the redevelopment of its property** and most likely will pursue the redevelopment of its property under the existing Redevelopment Plan.
>
> **As a result of the three year negotiation process and the downward spiral in the market, the terms proposed by the Borough are no longer financially viable to my client.**
>
> My client would like a meeting with the Borough to further discuss this matter, particularly if ENTC decides to revert to the original Redevelopment Plan. Alternatively, if modifications can be made to the Redeveloper's and Financial Agreements there is a possibility of salvaging the project. Absent these modifications, my client will pursue alternative means of developing the site.

(Df.'s Ex. 27, B006639) (emphasis added); see also Df.'s Ex. 28, B006641 "Revised Memo" containing essentially the same language).

Nevertheless, some negotiations continued between parties, as ENTC continued to proffer proposals, some of which were characterized as "settlement proposals". (See Df.'s Ex. 29-30). However, the Borough did not consider these proposals as they contained even lower PILOT payments than the Borough had indicated was required to cover the projected municipal costs associated with the Project. (See Df.'s Br. at 21).

**The Escrow Agreement (dated, April 15, 2011)**

After the negotiations broke down in 2010, ENTC advanced alternative proposal for review, however, a dispute arose between the parties with regard to ENTC's obligation to reimburse the Borough for professional fees that had been incurred under the Interim Cost Agreement. As a result, the parties entered into the "Escrow Agreement" on April 15, 2011. (See Df.'s Ex. 31). Under the Escrow Agreement, plaintiffs (ENTC and Efstathios Valiotis) were required to pay $50,000 to be held in escrow for the first time by a named Escrow agent for the payment of professional fees previously incurred by the Borough in its review of plaintiffs' development proposals. (Id. at p. 2, ¶¶ 1, 3). The Escrow Agreement provided that the monies held in escrow were to be released upon the execution of a redevelopment agreement or June 15, 2011, whichever occurred first. (Id. at p. 2-3, ¶¶ 6, 9, 10).

**Discussion**

Summary judgment is appropriate where "the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law. R. 4:46-2; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). "All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1955).

Judicial review of a summary judgment motion requires a discriminating search of the record to determine whether there exists a genuine dispute of material fact. Millison v. El. Du Pont Nemours & Co., 101 N.J. 161, 167 (1985). A genuine dispute of fact exists when the evidential materials considered "in the light most favorable to the non-moving party ... are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "Mere assertions in the pleadings are not sufficient to defeat a motion for summary judgment." Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 383 (App. Div. 1960).

**I. Count One and Two of Plaintiffs' Complaint, Breach of Contract of the Interim Cost Agreement and Escrow Agreement.**

The plaintiff argues that a genuine issue of material fact exists with regard to the alleged breach of the Interim Cost Agreement and Escrow Agreement. In opposition, the

defendant argues that the plaintiffs have failed to "identify a specific action or inaction by the Borough that breaches a specific term of the subject contract." (See Df.'s Br. at 27).

To properly state a claim for breach of contract under New Jersey law, a plaintiff must prove (1) the existence of a valid contract between the parties; (2) the plaintiff adhered to its obligations under the contract; (3) the defendant did not adhere to their obligations under the contract; and (4) damages arising out of defendant's failure to adhere to their obligations under the contract. See Murphy v. Implicito, 392 N.J. Super. 245 (2007 App. Div.); see also Model Civil Jury Charge 4.10A).

When addressing a contract claim, it is evident that a contract "will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Memorial Properties, LLC v. Zurich American Insurance Co., 210 N.J. 512, 525 (2012). See also County of Morris v. Fauver, 153 N.J. 80, 103 (1998) (finding where the terms of a contract are clear, "the court must enforce it as written."). Similarly, "[i]t is of course not the province of the court to make a new contract or to supply any material stipulations or conditions which contravene the agreements of the parties." Marini v. Ireland, 56 N.J. 130, 143 (1970). These principles were summarized in Karl's Sales & Service, Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div. 1991), certif. denied, 127 N.J. 548 (1991):

> where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written. The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.

249 N.J. Super. 487, 493 (citations omitted).

In the present application before the Court, the issue is whether the plaintiffs established material facts, albeit in dispute, for the following elements of its breach of contract cause of action: (1) the existence of a valid contract between the parties; (2) the plaintiffs adhered to their obligations under the contract; (3) the defendant did not adhere to their obligations under the contract; and (4) damages arising out of defendant's failure to adhere to their obligations under the contract. See Murphy v. Implicito, 392 N.J. Super. 245 (App. Div. 2007); see also Model Civil Jury Charge 4.10A.

In their original brief, as to the Interim Cost Agreement, the plaintiffs did not, and presumably could not point to any specific paragraph or obligation of the defendant under the agreement, which the defendant breached. Instead, the plaintiffs asserted generally

that the plaintiffs "failed to 'turn square corners,'" and "[i]n short, defendant made unreasonable demands, acted in bad faith, and retaliated against plaintiffs as a result of the tax appeal – all facts disputed by defendant." (See Pts.' Opp. Br. at 23-24).

However, in the supplemental briefs invited by the Court after oral argument, plaintiffs, identified by way of example, an allegation of excessive fees unrelated to the redevelopment agreement "including but not limited to, billing plaintiffs for a review of ENTC's tax appeal.". (See Pts.' Sup. Br. at 8).

Given the above narrowly delineated issue, regarding potential excessive or unreasonable fees outside the scope of the interim agreement, the Court finds a thin genuine issue of material fact precluding summary judgment relief under the first count.

The interim agreement defines "Interim Costs," as follows:

> The phrase "Interim Costs" shall include, but not be limited to, all costs and expenses incurred by the Borough during the Interim Period relating to service provided, directly or indirectly, by its general municipal attorney, redevelopment counsel, planner and any other professional retained by the Borough in connection with implementing the Redevelopment Plan and the negotiation and execution of the redevelopment agreement with the Redeveloper relative to this project.

As such, a reasonable fact finder may determine the cost incurred by the plaintiffs, as to the tax appeal, fell outside the scope of the delineated agreement, and thus, resulted in a breach of contract by the Borough of East Newark.

As to the Escrow Agreement, the agreement specifies that "[t]he Borough and the Redeveloper agree to reasonably cooperate with each other and to make a good faith and diligent effort to complete negotiation of the Redevelopment Agreement on or before June 15, 2011." (See Df.'s Ex. 31 ¶ 10). Nevertheless, all the plaintiffs' allegations of bad faith in this matter, with one exception, occurred prior to the Escrow Agreement. The one exception being, an allegation that by e-mail, dated May 9, 2011, that the "Borough sent what they 'understood to be ENTC's proposal the last time we met.' (Pts.' Ex. II, B-007255). The plaintiffs interpreted this as an act of bad faith because the Borough disregarded an offer by the plaintiffs to reduce the number for their proposal. (See Pts.' Br. at 18).

The defendant's e-mail, reiterating their understanding of ENTC's proposal, which notes the proposed units at 830, instead of the lower proposed number by the plaintiffs, is insufficient by itself to constitute a breach of the Escrow Agreement. (See Pts.' Ex II, B-007282). Thus, under the terms and conditions of that Agreement, the Plaintiffs cannot demonstrate any material issue of fact to constitute a breach of the Escrow Agreement.

Therefore, the Court finds that plaintiffs have created a sufficient genuine issue of material fact precluding the defendant from summary judgment relief as to the breach of contract claims under Count 1, the Interim Cost Agreement but grants summary judgment for breach of the Escrow Agreement (Count 2). Since plaintiffs' Count 1 has withstood summary judgment as defined by the Court under this point, the Court is not inclined to grant summary judgment to the defendant on their counterclaim for outstanding invoiced costs under the Interim Cost Agreement in the amount of approximately $30,000.00. Accordingly, defendant's motion for summary judgment on their counterclaim is denied without prejudice.

## II. Plaintiff's Count Three, Breach of the Implied Covenant of Good Faith and Fair Dealing Claim as to the Interim Agreement and Escrow Agreement

The defendant asserts that it is entitled to summary judgment as a matter of law when there exists no factual evidence in the record to demonstrate they acted improperly under either the Interim Cost Agreement or the Escrow Agreement. Nevertheless, the plaintiffs argue several factual disputes remain, such as whether (1) defendant steadfastly insisted on a PILOT that was in bad faith; (2) opposed the redevelopment plan because of a fear of a ghetto; and (3) unreasonably required plaintiffs to pay for a fire ladder truck and to build a new school as a condition for agreeing to a redevelopment of the property.

In New Jersey, every party to a contract is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract. Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs., 182 N.J. 210, 224 (2005); Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). The covenant insures that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Wilson, supra, at 245, quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 421 (1997).

However, proof of "bad motive or intention" is vital to an action for breach of the covenant. Brunswick Hills, supra, at 225 (quoting Wilson, supra, 168 N.J. at 251). "Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to another party are of no legal significance." Wilson, supra, at 251.

The Court finds that in this case, the RFPs and Agreements clearly lay out the course of the negotiations and conditions and specifically requires a final redevelopment agreement, a financing agreement, which includes a pilot agreement. The Court further finds that the plaintiffs were on notice of the defendant's conditions for redevelopment

from the beginning of negotiations, vis-à-vis, the RFP, which stated, in pertinent sections that the defendant would "engage a consultant to address the impacts of the project on the Borough and it would consider the results of that analysis in determining the terms and conditions of any agreement the Borough is considering entering into with respect to the implementation of the Redevelopment Plan (including any financial agreement providing for payments in lieu of taxes that the Borough may consider employing as part of the project).

> Furthermore, the RFP stated that the defendant "reserves the right to reconsider terms of the Redevelopment Plan if necessary in the best interest of the Borough.

The redevelopment project represented a major change in the landscape of the Borough, essentially resulting in a 50% increase of population and thus a significant increase in service outlays by the Borough. Lastly, the RFP stated clearly, "the issuance of this RFP is not intended to, and shall not be construed to, commit the Borough to execute any agreements."

While disputed by the parties, the plaintiffs contend certain issues of fact exist as to the reasonableness of (1) defendant's PILOT payment calculations; (2) defendant's negotiating for a school and new fire ladder truck; (3) defendant's conduct regarding plaintiffs' tax appeal; (4) and the overall length and cost of the negotiations.

The Court finds that these allegations made by the plaintiffs, in context of the negotiations framework set forth by the Borough's RFPs and subsequent interim agreements and the Borough's authority to implement them under the Local Redevelopment and Housing Law," N.J.S.A. 40A:20-11, does not, in this case, give rise to a material issue of fact on a theory under a breach of the implied covenant of good faith and fair dealing, as a matter of law. The Borough made it very clear from the onset to any developer submitting a proposal that the Borough would consider any redevelopment plan's impact (1) municipal services, (2) the school district, or any other financial consequence. Thus, although the plaintiffs contend these demands, including but not limited to defendant's requirements for Pilot payments which were not in sync with plaintiffs' requirements, were unreasonable, given the negotiation framework, they are not a breach of any covenant of good faith and fair dealing when they may have resulted in an unfavorable deal for the plaintiffs.

The Court finds that the plaintiffs have failed to create a genuine issue of material fact that the defendant negotiated in bad faith entitling them to recover over $500,000 in costs under the Interim Cost or Escrow Agreements.

Therefore, Count 3 is dismissed.

## III. Plaintiff's Count Four, Breach of the Implied Covenant of Good Faith and Fair Dealing as to the Overall Negotiation.

The Court now turns to the fourth count of plaintiffs' complaint, which alleges that the defendant breached the covenant of good faith and fair dealing as to the overall negotiations concerning the Redevelopment Agreement, and as a result of that breach, the plaintiffs are entitled to damages under a final redevelopment agreement that the parties should have entered into. (See Df.'s Ex. 1 ¶ 59-61). Defendant contends that it is entitled to summary judgment regarding plaintiffs' allegation because there can be no implied covenant of good faith and fair dealing when no actual agreement existed as to the overall redevelopment. (See Pts.' Br. at 31).

In New Jersey, while every party to a contract is bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract, this obligation does not exist in the absence of a contract or agreement. See Brunswick Hills Racquet Club, supra, 182 N.J. 210, 224 (2005);. Peck v. Imedia, Inc., 293 N.J. Super. 151, 168 (App. Div.), cert. denied 147 N.J. 262 (1996) (finding "[i]n the absence of a contract, there is no implied covenant of good faith and fair dealing." quoting Nolan v. Control Data Corp., 243 N.J. Super. 420, 429 (App. Div. 1990), and citing Noye v. Hoffman-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div.1990), cert. denied 122 N.J. 146 (1990).

The Court finds that while New Jersey jurisprudence has explored exceptions to the general principal that "[i]n the absence of a contract, there is no implied covenant of good faith and fair dealing[,]"[2] the record before this Court does not require the Court to make such an analysis. See Peck, 293 N.J. Super. at 168.

The assertion that "[i]n the absence of a contract, there is no implied covenant of good faith and fair dealing[,]" has been generalized to contexts more similar to the facts, sub judice, compared to the cases cited by plaintiffs. See, e.g., Hogan v. Condinho, 2006 N.J. Super. Unpub. LEXIS 1527 (App. Div. August 3, 2006) (finding no covenant when a contract "failed to come to fruition" as to the purchase of real property; Alliance Media Group, Inc. v. Great Outdoor, Inc., 2007 N.J. Super. Unpub. LEXIS 2600 (App. Div. August 7, 2007) (finding no covenant as to an incomplete "DRAFT" agreement regarding a proposed joint venture between parties). Sun Pharmaceuticals, 2013 WL 1942619, at 7.

Moreover, the plaintiffs postulate an argument that public entities must "turn square corners," which creates the equivalent of a covenant of good faith and fair dealing as to

[2] Peck, Noye, and Nolan, all rise out of employment context.

all the actions by public entities, including their theory of recovery under this count. (See Pts.' Br. at 22-23); citing, inter alia, W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543 (1989). In W.V. Pangborne & Co., a dispute arose between the Department of Transportation ("DOT") and a contractor who was awarded a contract to perform the "rehabilitation and re-electrification of the Gladstone Branch of the Erie Lackawanna Line." Id. at 574. During the course of this work, the contractor submitted a request to recover enlarged fees for extra work related to a rock excavation, which was denied by the DOT. Id. The contractor was invited to engage in an administrative proceeding by the DOT over this claim, which the contractor did, but while awaiting the conclusion of the administrative proceeding the statute of limitations on the claim lapsed. Id. at 543 (1989). The Court found that the "DOT was estopped from asserting the statute of limitations because of its conduct that led Pangborne reasonably to believe that litigation was not necessary until a final agency decision had been made." Id. at 554. Furthermore, the Court held that "in the exercise of statutory responsibilities, government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens." Id. at 561.

The plaintiffs also cite to the case of City of Asbury Park v. Asbury Park Towers, in support of their contention that a public entities' obligation to "turn square corners" precludes a municipality from unreasonably acting under the terms of a final redevelopment contract that had been executed. See 388 N.J. Super. 1, 11 (App. Div. 2006). Under the agreement in that case, the developer was required to acquire all necessary properties and bear all costs associated with the acquisition. Id. Nevertheless, the redeveloper was unsuccessful in obtaining a specific property, and so the city brought suit placing $240,000 in escrow as the appreciated value of the property. Id. As a result, the developer sought to intervene to ensure the value paid was fair market, as it would contractually bear the expense under the redevelopment agreement. Id. Ultimately, the Appellate Court affirmed the lower court's decision to deny the developer's intervention, as the Court found "no factual basis to support [the developer's] speculative and conclusory assertion that the City might not seek to acquire the subject parcel at the best price obtainable within the legal parameters of the fair market value requirements in condemnation proceedings." Id. at 11-12.

Clearly, the factual context in the above cases provides no basis for this Court to compel the Borough of East Newark to turn square corners into the round peg of a viable theory under the implied covenant of good faith and fair dealing. There is no implied covenant of good faith and fair dealing without a contract in this case. Additionally, the Court finds that the doctrine to "turn square corners" has not been implicated when the parties failed to enter into a final redevelopment and financial agreement.

Therefore, Count 4 is dismissed. [3]

## Conclusion

For the aforementioned reasons, the Court **grants** the defendant's motion for summary judgment as to Counts 2, 3 and 4 and **denies** summary judgment as to Count 1 of the complaint. Defendant's motion for summary judgment on its counterclaim is **denied without prejudice.**

SO ORDERED,

Hon. Barry P. Sarkisian, J.S.C.

[3] The Court has not addressed defendant's arguments with regard to plaintiffs' claims being barred under the New Jersey Tort Claims Act, but for completeness, this Court finds that argument meritless, as it does not apply to claims arising under contract law. See N.J.S.A. 59:1-4 (stating "[n]othing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees.").