SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0223-15T1

NET 2 FUNDS, LLC,

Plaintiff-Appellant,

v.

HARTZ MOUNTAIN INDUSTRIES, INC.,

Defendant-Respondent.

HARTZ MOUNTAIN INDUSTRIES, INC.,

Plaintiff-Respondent,

v.

NET 2 FUNDS, LLC, a Delaware limited liability company,

Defendant-Appellant.

Argued June 6, 2017 – Decided May 9, 2018

Before Judges Ostrer, Leone, and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-6280-13 and L-6301-13.

Daniel R. Guadalupe argued the cause for appellant (Norris, McLaughlin & Marcus, PA, attorneys; Daniel R. Guadalupe, of counsel and

on the briefs; Deanna L. Koestel and Bradford W. Muller, on the briefs).

Joseph M. Aronds argued the cause for respondent (Horowitz, Rubino & Patton, attorneys; Joseph M. Aronds, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Appellant Net 2 Funds LLC ("N2F") entered into a contract to purchase a long-term ground lease owned by respondent Hartz Mountain Industries, Inc. ("Hartz"). After the parties failed to close, N2F and Hartz each brought suit to recover deposit funds being held in escrow by defendant Royal Abstract Corp. of New Jersey. In a bench trial, the court awarded the $950,000 deposit, plus interest, to Hartz. We affirm.

I.

Judge Robert C. Wilson's July 9, 2015 oral opinion found the following facts. In spring 2012, N2F, a subsidiary of IDT Corporation ("IDT"), began exploring new locations for its offices. One property N2F considered was located at 65 Challenger Road, Ridgefield Park ("Property"). The Village of Ridgefield Park ("Village") owned the land, and Hartz had a long-term ground lease to the Property, where it maintained an office building with a parking garage. After touring the Property several times and speaking with representatives of Hartz, IDT submitted a $9.5

million offer to purchase the long-term ground lease in December 2012.

Shmuel Jonas was the CEO of IDT and Executive Vice President of N2F. He testified to the following. When IDT became interested in acquiring the long-term ground lease, KABR Group ("KABR") was also a potential buyer for the ground lease, and Hartz communicated to both N2F and KABR that the first purchaser to "go hard" would get the Property. In the context of commercial real estate, to "go hard" means a buyer makes a deposit and waives some or all of the contingencies which would normally allow a buyer to retrieve its deposit. N2F agreed to "go hard," and a final contract between the parties was signed on February 28, 2013.

In the contract, N2F agreed to purchase the ground lease for $9,750,000, and to pay a $950,000 deposit into escrow. The parties agreed to close on July 28, 2013. The contract provided that if the closing did not occur due to the default of the buyer, the seller could terminate the contract and would receive the deposit, which would also serve as liquidated damages.

The contract also contained a provision stating that "time is of the essence." Under that provision, if a party failed to close on the July 28, 2013, the non-delaying party gave written notice scheduling a new closing date at least ten days thereafter,

and the delaying party failed to perform, then the non-delaying party would be entitled to terminate the contract.

N2F conducted physical inspections of the Property. N2F hired several engineers to inspect the Property, inquired into the specific provisions of the ground lease, interviewed tenants, and retained a consultant to review Hartz's due diligence documents.

In early July, Jonas called Hartz's Managing Director Constantino Milano in an attempt to delay the closing beyond July 28, 2013. The trial court believed Milano's "highly credible" testimony and his account of their conversation. Milano testified Jonas contacted him asking to delay the closing many months so N2F could collect relocation tax credits through the Grow New Jersey initiative.[1] The tax credits would not be available to N2F if it purchased the building before the Grow New Jersey incentives were available.

Milano rejected Jonas's request, and informed him closing would occur on July 28 pursuant to the signed contract. Milano

[1] "The Grow New Jersey Assistance Program," N.J.S.A. 34:1B-242 to -250, is "a program under the jurisdiction of the New Jersey Economic Development Authority" ("EDA") "to encourage economic development and job creation and" job preservation by providing "tax credits to eligible businesses for an eligibility period not to exceed 10 years." N.J.S.A. 34:1B-244(a).

explained that Hartz did not have the time to delay the closing because it already had a property lined up for a "1031 exchange."[2]

Jonas attempted to get Milano to structure their deal to convince the EDA the deal was not yet binding. Milano told Jonas he was not willing to "participate in [a] scheme" to maneuver around the EDA's requirements by concealing the already-existing contract. Milano suggested to Jonas that N2F forfeit its deposit and walk away from the deal.

Milano testified Jonas replied: "I'm not going to forfeit my deposit; I just won't come to closing and I'll fabricate some issues that you lied to me, you misrepresented to me; we'll have litigation for years. Maybe we'll settle; maybe we won't, but you're not going to get your money so quickly." Jonas said he "just won't close." Jonas also told Milano that if Hartz were to sell the property to another party, "I'll tie you up in court, and you won't get your money for years[.]" Milano told Jonas "that's terrific, very good; I'll see you in court."

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[2] Hartz planned to use the proceeds from the sale of the Property to buy a building in Seattle, Washington in a "1031 exchange." Under 26 U.S.C. § 1031 of the tax code, no gains or losses from the sale of property will be recognized "if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment." Ibid.

Milano told his lawyer to proceed with closing pursuant to the contract. On July 23, Hartz sent a letter advising N2F that Hartz was invoking the "time of the essence" provision of the contract, and set a new closing date for August 12. The letter warned that if N2F failed to purchase the Property on the rescheduled closing date, it would be in default and would "lose its rights under the Contract to the return of the Deposit."

On July 31, the Property was evacuated after an incident in which the building unexpectedly shook. Hartz officials summoned professional engineers from Petry Engineering ("Petry"), and they interviewed the tenants and inspected the building. The Village's construction official, fire marshal, and firefighters also inspected the building. Petry found the building was structurally sound and safe for occupancy, and the construction official found nothing wrong. On July 31, Petry sent Hartz a two-page report ("Petry Report"), which was shared with the tenants, but was not sent to N2F.

On August 1, N2F learned of the shaking incident through its lender and news reports. On August 5, Jonas wrote Milano raising the shaking incident and other matters. Jonas requested "[a] detailed explanation of this recent incident," "copies of all reports generated by structural engineers," and financial information. Jonas stated N2F needed at least sixty days to

evaluate the Property further to decide whether to void the contract, negotiate a reduction in price, or require Hartz to make repairs before closing. Jonas stated that N2F rejected Hartz's "time of the essence" letter and "will not close by the date set forth in your letter."

On August 7, 2013, Hartz denied N2F's request, stated Hartz would proceed with closing on August 12 pursuant to the "time of the essence" letter, and warned that if N2F did not appear at closing, it would breach the contract and lose its deposit.

N2F did not attend the August 12 closing. Hartz wrote N2F that its failure to close constituted a default, that Hartz was terminating the contract, and that Hartz would make a demand on the escrow agent to release the deposit to Hartz. On August 13, 2013, both Hartz and N2F made demands on the escrow agent, each claiming entitlement to the deposit funds.

On August 19, 2013, N2F and Hartz filed competing lawsuits seeking the deposit funds. N2F's complaint alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of section 2 of the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20. N2F sought damages and a declaratory judgment stating Hartz's actions were improper and N2F was not in default. Hartz's complaint alleged N2F was in breach

when it failed to close. Hartz sought a declaratory judgment that it was entitled to N2F's deposit funds plus interest.[3]

Hartz filed a motion for summary judgment. On May 29, 2015, the Law Division granted the motion in part and dismissed N2F's CFA claim. Judge Wilson held a bench trial on the other claims from June 29 to July 7, 2015.

On July 9, 2015, the trial court issued an oral opinion finding as follows. N2F "did not want the transaction to go forward" because "it would have lost millions of dollars of potential tax credits, if it had timely closed." Jonas threatened Milano that if Hartz insisted on moving forward "N2F would tie it up" in court and N2F did exactly that. Much of "the N2F case was in furtherance of that threat." "[T]he claims by [N2F] were simply a contrived pretext made up in a flagrant attempt to thwart the seller from [its] rightful claim to the deposit as the seller was ready, willing and able to close this sale." The court concluded "that Hartz substantially performed all of its obligations under the contract and that [N2F] breached by not attending the closing

[3] On September 3, 2013, Hartz entered an agreement to sell its ground lease for $8,525,000 to an LLC connected to KABR. KABR's structural engineers concluded the shaking incident was caused by "large trucks hitting the bumps in the road," and that "the structure as a whole appears to be sound." The sale was consummated on about October 17, 2013.

and purchasing the building it had contractually obligated itself to buy, as is."

The trial court held Hartz was entitled to the deposit funds plus interest. The court entered a final judgment on July 31. N2F appeals.

II.

"When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). "Appellate courts give 'no special deference to the trial court's interpretation and look at the contract with fresh eyes.'" Ibid. (citation omitted).

By contrast, whether a party breached the agreement is "a question for the factfinder, not the court." Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). "Whether conduct constitutes a breach of contract and, if it does, whether the breach is material are ordinarily jury questions." Mango v. Pierce-Coombs, 370 N.J. Super. 239, 257 (App. Div. 2004) (citing Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286,

(App. Div. 1998)); accord Chance v. McCann, 405 N.J. Super. 547, 566 (App. Div. 2009).[4]

Here, in a bench trial, the trial court determined that N2F breached the contract and that Hartz did not breach the contract. "'Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review.'" D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (citation omitted). Appellate courts "'give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions.'" Allstate Ins. Co. v. Northfield Med. Ctr., PC, 228 N.J. 596, 619 (2017) (citation omitted).

"Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Sipko v. Koger, Inc., 214 N.J. 364, 376 (2013) (citations omitted). The trial court "'has a better perspective than a reviewing court in evaluating the veracity of witnesses,'" and has "a 'feel' for the case that the reviewing court can not enjoy." Twp. of W.

[4] Another panel stated "that the determination of whether a party's conduct constituted a breach thereof[] is usually a question of law," Capital Health Sys. v. Horizon Healthcare Servs., 446 N.J. Super. 96, 115 (App. Div. 2016), but was reversed by the Supreme Court for "exceed[ing] the limits imposed by the standard of appellate review," Capital Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 81 (2017).

Windsor v. Nierenberg, 150 N.J. 111, 132-33 (1997) (citation omitted).

"[A]ppellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Allstate Ins., 228 N.J. at 619 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We must hew to this "deferential standard" of review. D'Agostino, 216 N.J. at 182.

N2F urges us instead to exercise our original jurisdiction under Rule 2:10-5. However, original jurisdiction should be exercised "'only with great frugality'" and "not to 'weigh[] evidence anew' or 'mak[e] independent factual findings[.]'" State v. Micelli, 215 N.J. 284, 293 (2013) (alterations in original) (citations omitted). Moreover, "[t]he exercise of [original] jurisdiction is generally reserved for emergent matters implicating the public interest." Exec. Comm'n on Ethical Standards v. Salmon, 295 N.J. Super. 86, 112 (App. Div. 1996); see, e.g., Price v. Himeji, LLC, 214 N.J. 263, 294 (2013). By contrast, this is a private contract dispute. N2F cannot invoke

our original jurisdiction to avoid the trial court's findings or our deferential standard of review.

III.

Under the contract, the failure of N2F to appear at closing and purchase the ground lease was a material breach entitling Hartz to the deposited funds. Section 3.2 of the contract provides that if the closing does not occur and "[i]f [N2F] defaults in its obligation to purchase the Property . . . , the Deposit (including the interest thereon), shall be held and delivered as hereinafter provided in this Agreement in Article 13 hereof." Section 13.2 provides: "In the event the Closing and the transactions contemplated hereby do not occur as provided herein by reason of the default of [N2F], [Hartz] may terminate this Agreement," "the Deposit shall be the full, agreed and liquidated damages for [N2F's] default and failure to complete the purchase of the Property," and "[Hartz] shall have the right . . . to receive the Deposit (including the interest thereon) from the Escrow Agent."

The parties signed the contract on February 28, 2013 ("Effective Date"). Section 4.1 requires the closing to occur "not later than five (5) months after the Effective Date," namely July 28, 2013. Section 17.13 provides "[t]ime is of the essence in the performance of each of the parties' respective obligations contained herein." It also provides that

> neither [N2F] nor [Hartz] shall be entitled to terminate this Agreement for failure to close on the scheduled Closing Date unless and until the party failing to close shall have been given written notice fixing a new date for the proposed Closing, not less than ten (10) days thereafter, and such party to whom notice is given shall fail to perform on or before such rescheduled Closing Date.

Hartz invoked this "time of the essence" provision in its July 23 letter by which gave N2F written notice fixing August 12 as the rescheduled closing date. "[I]f the contract itself provides a clear understanding that time is of the essence, then it is well-settled that 'prompt performance is essential,' and the date contained in the contract for closing will be strictly enforced." Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 603 (App. Div. 2005) (quoting Paradiso v. Mazejy, 3 N.J. 110, 115 (1949)).

The trial court found N2F chose "to voluntarily breach the contract as Jonas had promised." "It was Net 2F that materially breached the contract" by not appearing to close the sale.

N2F does not dispute that it failed to attend either the original closing or the rescheduled closing under the "time of the essence" provision. Nor does it contest that such failure normally would constitute a material breach of the contract entitling Hartz to terminate the contract and receive the deposit.

Instead, N2F argues that it was relieved of its obligation to attend and consummate the purchase of the ground lease because Hartz materially breached the contract first. N2F contends such default by Hartz entitled it to terminate the agreement and receive its deposit.

If a party commits "a 'breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement.'" Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (citation omitted). "[A] breach is material if it 'goes to the essence of the contract.'" Ibid. (quoting Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (1961)). After a material breach occurs, "the non-breaching party may treat the contract as terminated and refuse to render continued performance." Goldman S. Brunswick Partners v. Stern, 265 N.J. Super. 489, 494 (App. Div. 1993) (quoting Ross, 35 N.J. at 341).

N2F claims several breaches by Hartz. Importantly, all of the alleged breaches occurred after Jonas told Milano in early July that N2F would not "come to closing." Many of the alleged breaches came after Jonas reaffirmed on August 5 that N2F "will not close by the date set forth in [Hartz's "time of the essence"] letter," a position Jonas reiterated on the day of the closing.

Based on Jonas's statements, the trial court could easily have found an anticipatory breach of the contract. Traditionally,

"[a]n anticipatory breach is a definite and unconditional declaration by a party to an executory contract -- through word or conduct -- that he will not or cannot render the agreed upon performance." Ross Sys., 35 N.J. at 340-41; see also Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 179 (App. Div. 2008). Milano testified that in their early July conversation "Jonas told me he was unequivocally not closing." Hartz sent several letters seeking N2F's assurance it would appear at closing, but N2F repeatedly said it would not. Thus, Hartz had reasonable grounds to believe N2F would breach the contract by not appearing.

Moreover, the trial court found N2F's claims of breach by Hartz were merely a "contrived pretext made up on a flagrant attempt to thwart the seller from their rightful claim to the deposit as seller was ready, willing and able to close the sale," and not material breaches. We agree.

Nevertheless, we review NSF's claims that Hartz committed a material breach, and conclude there was more than sufficient credible evidence to support the trial court's finding to the contrary.

A.

First, N2F argues Hartz committed a material breach when it failed to provide N2F with a copy of the Petry Report after the

shaking incident. N2F highlights that Jonas's August 5 letter requested "[a] detailed explanation of this recent incident" and "copies of all reports generated by structural engineers who have inspected the Property in connection with" that incident.

Ignoring any anticipatory breach by N2F, Hartz should have provided N2F with a copy of the Petry Report once N2F requested it. Section 5.1.5 of the contract provides that Hartz "shall make available to [N2F] . . . access to its books, records and files relating to the Property." Section 5.3 provides that Hartz agrees to "use reasonable efforts to cooperate with any reasonable written requests of [N2F] for additional information, if available."

Nonetheless, Hartz's breach of those sections was not material for three reasons. First, the Petry Report found the building was "structurally sound and safe for occupancy." As the trial court noted, it was not material that N2F did not receive "a report by Hartz['s] engineer that nothing was wrong, broken or damaged."

Second, on August 9, Hartz conveyed the report's conclusion in a letter and email to IDT enclosing a letter received that day from, and Hartz's response that day to, one of the building's tenants, Hyundai Merchant Marine (America), Inc. ("Hyundai"). Hyundai had expressed concern about the shaking incident. Hartz's enclosed response stated "our engineer has inspected the subject

Premises and determined that same are safe for occupancy." The letter added "[t]his conclusion has been confirmed by the local governmental construction officials."

Third, in "going hard," N2F bargained away any materiality such a report could have had. In section 8.2 of the contract, N2F "acknowledges and agrees that, except as expressly provided in this Agreement . . . having been given the opportunity to inspect the Property, [N2F] is relying solely on its own investigation of the Property and not on any information provided or to be provided by [Hartz]."[5] N2F "further acknowledges and agrees that, except as expressly provided in this Agreement, and as a material inducement to the execution and delivery of this Agreement by [Hartz], the sale of the Property as provided for herein is made on an 'AS IS, WHERE IS' CONDITION AND BASIS 'WITH ALL FAULTS.'"[6]

Section 10.2.1 provides that "any changes to the representations or warranties of [Hartz] caused by damage, destruction or condemnation of the Property shall be governed by Article XII of this Agreement." Section 10.2.4 provides that

[5] Section 5.4 similarly provides that N2F "is relying upon its own independent examination of the Property . . . and not on any statements of [Hartz]."

[6] In section 8.2, N2F also acknowledges that Hartz was not making any representations concerning the "condition of the Property." In section 8.3, N2F "waives its right to recover from" Hartz on account of "the physical condition of the Property."

"[t]he physical condition of the Property shall be substantially the same on the day of Closing as on the Effective Date, reasonable wear and tear and loss by casualty excepted (subject to the provisions of Article XII below)[.]" Thus, N2F's right to terminate the contract based on damage after the contract was signed is governed by Article XII.

Article XII, entitled "Risk of Loss," provides in Section 12.1 that "[i]f, prior to the Closing Date, all or any portion of the Property . . . is destroyed or damaged by fire or other casualty, [Hartz] shall notify [N2F] promptly." Section 12.1 then provides: "If such . . . casualty is 'Material' (as hereinafter defined), [N2F] shall have the option to terminate this Agreement" and receive its deposit back. Section 12.4 provides that "[f]or purposes of this Article XII, with respect to a casualty, the term 'Material' shall mean any casualty such that the cost of repair, as reasonably estimated by [Hartz]'s or [N2F]'s third-party engineers, is in excess of . . . $975,000."

There was no evidence the shaking incident caused or revealed damage costing more than $975,000 to repair. Hartz's third-party engineer found no damage. Neither N2F nor its engineers ever inspected the Property after the shaking incident. Under section 12.3, "[i]f the Casualty is not Material, then the Closing shall occur," and N2F has no right to terminate or refuse to appear.

Accordingly, the non-disclosure of the Petry Report was not material under the contract and provided no basis for N2F to refuse to appear for closing.

N2F also argues that by not disclosing the Petry Report, Hartz deprived it of its right to inspect the Property. Section 5.1.1 gives N2F the right to "perform inspections and tests of the Property and to perform such other analyses, inquiries and investigations as [N2F] shall deem necessary and appropriate."[7] Section 5.1 gives N2F the "reasonable right to review all aspects of the Property," section 5.1.2 gives N2F the right to interview the building's tenants, and section 5.1.4 gives N2F the right to interview the Village as ground lessor. However, in section 5.1.6, N2F "acknowledges and agrees that, notwithstanding [N2F]'s rights to evaluate and perform inspections . . . , THIS AGREEMENT IS NOT SUBJECT TO ANY PHYSICAL INSPECTION CONTINGENCIES and is limited to endeavoring a smooth and uninterrupted transition of management and control of the Property on the Closing Date."

Further, the trial court properly found no credible evidence that N2F wanted its own engineers to inspect the Property after the shaking incident. N2F was aware of the July 31 shaking incident by August 1. N2F knew by August 9 that Hyundai believed

[7] Section 5.4 served as N2F's acknowledgement it has been given those rights. It gave N2F no additional rights.

that another shaking incident occurred on August 2, that the Petry Report was "unsatisfactory to convince our employees," and that a thorough investigation was required. Moreover, nothing in Hartz's responses precluded N2F from conducting an inspection under the contract. Nonetheless, N2F made no attempt to investigate or inspect the Property before the August 12 closing.

In any event, because the contract was negotiated to give N2F no right to escape its obligations even if it had conducted an inspection, Hartz's failure to send the Petry Report was not material because it did not "'go[] to the essence of the contract.'" Roach, 228 N.J. at 174 (citation omitted). It was also immaterial under "the flexible criteria set forth in Section 241 of the Restatement (Second) of Contracts (1981)" ("Restatement"), which Roach adopted. Id. at 174-75. Those factors are:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

[Id. at 175 (quoting Restatement, § 241).]

In applying the factors, we must consider the breach in light of the entire contract, not just the particular section violated. See Restatement, § 241, cmt. b; Magnet Res., 318 N.J. Super. at 286; Neptune Research & Dev., Inc. v. Teknics Indus. Sys., Inc., 235 N.J. Super. 522, 533 (App. Div. 1989). Importantly, factors "(a) and (e) heavily favor the result here." Roach, 228 N.J. at 180 n.6.

Under factor (a), N2F was not deprived of a benefit it reasonably expected for two reasons. First, N2F could still close and receive the benefit of the contract, as the ground lease and the building were intact. As the trial court noted, the building was immediately determined safe for occupation. No tenant ever cancelled a lease, no damage to the building or its contents was ever reported, and N2F's lender "never even cared enough about the incident as to pull the loan or request more information[.]"

Second, N2F had bargained away the right to evade closing based on the Petry Report and the shaking incident. Jonas admitted that he agreed to negotiate away the right to cancel the contract in return for the right to purchase the building, and that he knew "if I didn't close Hartz would keep the deposit." N2F's expert admitted there was nothing "in the contract that would allow [N2F]

to void the contract if it was not satisfied with the various items listed in [N2F's] August 5th letter."

Factor (b) does not apply because it "is a corollary of [(a)]." Restatement, § 241, cmt. c. Under factor (c), Hartz would suffer forfeiture by losing the "time of the essence" sale if N2F was allowed to escape closing or substantially delay it. Regarding factor (d), Hartz provided N2F with the conclusion of the Petry Report, and there was no evidence of damages Hartz had to cure. Applying factor (e), as discussed below, Hartz's behavior generally comported with standards of good faith and fair dealing.

Accordingly, the trial court properly rejected N2F's claims that Hartz's failure to provide the Petry Report on request prevented it from investigating or otherwise constituted a material breach.

B.

Second, N2F claims Hartz breached the contract by not bringing certain documents to the rescheduled August 12 closing. However, as previously discussed, N2F had already proclaimed in early July, in its August 5 letter, and in its August 12 letter, that it was refusing to attend closing or to consummate the deal without substantial delay. Even ignoring any anticipatory breach by N2F, the trial court properly rejected N2F's claim.

Section 11.2 of the contract requires Hartz to "deliver or cause to be delivered" certain documents to the escrow agent at closing. N2F notes Hartz failed to bring a notice to a tenant (Hyundai) about the assignment of the ground lease to N2F, as required by section 11.2.12; and a seller's affidavit of consideration and a seller's residence certification/exemption, as required by section 11.2.11. In addition, N2F asserts Hartz was required to provide proof at closing that, as required by sections 4.2.3, 5.1.3, and 9.6, notice was given to the utilities, property managers, and service providers of the change of ownership.

However, the testimony showed the notices to tenants, utilities, property managers, and service providers normally were not sent out until after the closing. Hartz's counsel testified, and N2F's expert agreed, that the missing notices could easily have been produced at closing had it gone forward. They also agreed that because the transaction did not involve a deed but instead transferred a ground lease with less than ninety-nine years remaining, it was not legally necessary to have a seller's affidavit of consideration or a seller's residency certification/exemption. Moreover, as the trial court noted, Hartz had an estoppel letter from the Village attesting to the

validity of the ground lease. The court properly found "none of these reported deficiencies were material."

N2F argues the failure to bring the documents was material because Hartz had rescheduled the closing using the "time of the essence" provision. N2F cites cases where parties, "by their conduct, waived the right to insist upon strict enforcement of the provision making time of the essence." Salvatore v. Trace, 109 N.J. Super. 83, 95 (App. Div. 1969), aff'd o.b., 55 N.J. 362 (1970). However, in those cases, the parties either were unable to consummate the transaction on the closing date, or acquiesced in the delay. See, e.g., id. at 88-90 (finding waiver where the seller was unable to provide clear title on the closing date); Dep't of Cmty. Affairs v. Atrium Palace Syndicate, 247 N.J. Super. 511, 516 (App. Div. 1991) (finding waiver where seller was unable to provide a temporary certificate of occupancy on the closing date).

Here, the trial court found Hartz was "ready, willing, and able" to transfer the ground lease on the closing date. The curable absence of minor documents did not justify "relief of a purchaser of property who has failed to [appear and] pay at the time specified in the agreement, when the agreement distinctly and clearly provides that that time is essential." Gorrie v. Winters, 214 N.J. Super. 103, 105-08 (App. Div. 1986) (distinguishing

Salvatore and quoting Doctorman v. Schroeder, 92 N.J. Eq. 676, 676-77 (E. & A. 1921)). The trial court properly rejected N2F's "contrived closing deficiency."

C.

Finally, N2F argues Hartz breached the implied covenant of good faith and fair dealing when Hartz: failed to provide the Petry Report and other requested information about the shaking incident; sent its correspondence with Hyundai at 6:30 p.m. on the Friday before the Monday closing; and imposed a "time of the essence" closing date which it refused to postpone. However, as set forth above, Hartz conveyed the conclusion of the Petry Report to N2F; Hartz sent N2F Hyundai's letter and Hartz's response on the same day as they were received and sent, respectively; and the parties agreed to a "time of the essence" provision allowing either party to reschedule the closing date with as little as ten-days notice. Hartz's July 23 notice gave N2F twenty days to be ready for the rescheduled August 12 closing.

As the trial court properly recognized, "[e]very 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 Ctr. Assocs., 182 N.J. 210, 224 (2005). "A defendant may be liable for a breach of the covenant of good faith and fair dealing even if

it does not 'violat[e] an express term of a contract.'" Id. at 226 (quoting Sons of Thunder v. Borden, Inc., 148 N.J. 396, 423 (1997)). Indeed, "a party to a contract may breach the implied covenant of good faith and fair dealing in performing its obligations even when it exercises an express and unconditional right to terminate." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) (quoting Sons of Thunder, 148 N.J. at 422).

"Proof of 'bad motive or intention' is vital to an action for breach of the covenant." Brunswick Hills, 182 N.J. at 225 (quoting Wilson, 168 N.J. at 251). "The party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Ibid. (quoting 23 Williston on Contracts § 63:22 at 513-14 (Lord ed., 2002)). "[W]hether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact." 23 Williston, § 63:22 at 507.

The trial court found N2F made "no showing that Hartz acted with any bad motive or intention," and that there was no "violation of the covenant of good faith and fair dealing." The court found

"that Hartz substantially performed all of its obligations under the contract," and that Hartz "made a good faith effort that would have actually achieved the essential purpose of the contract for sale of the building." The court's factual findings were grounded in relevant, competent, and credible evidence and may not be disturbed.

N2F argues Hartz was retaliating against it because of Jonas's early July threat to sue Hartz if it did not delay closing. However, the trial court found that "Hartz could not accommodate N2F's request to forestall the closing" because "Hartz needed the proceeds from the sale to roll over and purchase another building in Seattle, Washington for a 1031 Exchange." It was not bad faith for Hartz to invoke its contractual right to a "time of the essence" closing to give N2F a final opportunity to carry out its contractual obligation to close. N2F cannot impugn Hartz's invocation by citing Jonas's vituperative and unjustified threats.

N2F argues Hartz engaged in "'[s]ubterfuges and evasions' in the performance of a contract [that] violate the covenant of good faith and fair dealing." Brunswick Hills, 182 N.J. at 225 (citation omitted). N2F cites Hartz's failure to disclose the Petry Report, its production of the Hyundai correspondence at 6:30 p.m., and a July 31 internal email saying Hartz would not call reporters about the shaking incident because "[w]e are supposed

to close on the building[']s sale in a week and the buyer is already very squeamish." However, the trial court did not find any of Hartz's actions were in bad faith. Moreover, Hartz disclosed the Hyundai correspondence about the shaking incident and the conclusion of the Petry Report. Hartz did not deny N2F the benefit of the bargain, namely to purchase the ground lease, and in fact repeatedly requested that N2F consummate the transaction.

The facts here bear no resemblance to the facts in Brunswick Hills. The plaintiff tenant tried to exercise its contractual option to extend its lease to a ninety-nine-year lease. Id. at 229. However, the defendant landlord secretly "preferred to watch the option die," and engaged in "a series of evasions and delays, that lulled plaintiff into believing it had exercised the lease option properly." Id. at 229, 231. "During a nineteen-month period, defendant, through its agents, engaged in a pattern of evasion, sidestepping every request by plaintiff to discuss the option and ignoring plaintiff's repeated written and verbal entreaties to move forward on closing the ninety-nine-year lease." Id. at 229.

Finally, the trial court found: "Frankly if any party had been deemed to have failed to act in good faith it would be N2F who contrived claims for breach for a right that it clearly

contracted away." N2F disputes that finding, but it was not necessary to deny N2F's claim. Even if N2F did not act in bad faith, N2F still failed to show that Hartz acted in bad faith or violated the covenant of good faith and fair dealing.

In any event, there was ample evidence that N2F acted in bad faith, as set forth above. The trial court found because Jonas wanted "to stall so that N2F could get future State of New Jersey economic tax credits," N2F used "the contrived excuse that the building occupants felt concerned one day because the building shook" and used "other legally dubious issues . . . to claim that Hartz could not close." Based on these "disingenuous contrived claims," the court could find N2F acted in bad faith.

Plaintiff's remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.