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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2527-15T3

715 PARTNERS, LLC,
A New Jersey Limited
Liability Company,

Plaintiff-Appellant,

v.

GS ASSIGNMENT, LLC,
715 GRAND REALTY LLC, and
GERARD STEIGLITZ,

Defendants-Respondents,

and

715 GRAND STREET LLC and
DIMITRI PAPAGANNAKIS,

Defendants.

Argued July 18, 2017 – Decided May 25, 2018

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2687-14.

Gary D. Grant argued the cause for appellant (Grant Law Group, LLC, attorneys; Gary D. Grant and Janet S. Del Gaizo, on the briefs).

Andrew J. Karas argued the cause for respondents (Fox Rothschild, LLP, attorneys; Andrew J. Karas, on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Plaintiff 715 Partners, LLC, appeals from a December 28, 2015 order granting summary judgment to defendants GS Assignment, LLC, Grand 715 Realty, LLC (improperly pled as 715 Grand Realty LLC), and Gerard Steiglitz (collectively "defendants").[1] We affirm.

I.

The following undisputed facts are derived from the parties' statements of material facts and the pertinent documents.

In an Agreement of Sale (Agreement) dated May 16, 2012 (the Effective Date), 715 Grand Street LLC (Seller) agreed to sell to plaintiff a property on Grand Street in Hoboken (the Property). The purchase price was $3.2 million, which plaintiff agreed to pay as follows in the Agreement's Section 2: (a) a $50,000 initial deposit within ten business days of the Effective Date; (b) a $50,000 second deposit within five business days after the expiration of the due diligence period; (c) a $150,000 third deposit within five business days after the Hoboken zoning board

[1] The other defendants, 715 Grand Street LLC and Dimitri Papagiannakis (mispled as Papagannakis), settled and are not parties on appeal.

granted final site plan approval; and (d) $2,950,000 closing payment upon closing.

Plaintiff did not have available funds to pay any of the deposits required under the Agreement. Plaintiff made the initial $50,000 deposit by borrowing the money from Edwin Torres, who had earmarked the money to pay a tax sale certificate on a Newark property.

Section 3.01 of the Agreement allowed plaintiff to survey the Property and examine the title, and to "notify Seller by the end of the 'Due Diligence Period' (as defined in Section 3.02) . . . specifying any respects in which it appears from record title or from such survey that Seller is unable to" provide marketable, insurable title "free and clear of all liens and encumbrances."

Section 3.03 of the Agreement provided:

> Purchaser shall have the right to terminate this Agreement on or prior to the end of the Due Diligence period for any or no reason, in Purchaser's sole and absolute discretion. Purchaser shall be deemed to have terminated this Agreement if Purchaser does not provide Seller with written notice prior to the end of the Due Diligence Period that Purchaser waives it[s] right to terminate this Agreement in accordance with this Section. If Purchaser terminates this Agreement, or is deemed to have terminated, as provided above, Purchaser shall immediately receive back the Deposit, and the parties hereto shall have no further obligations under this Agreement . . . .
>
> [(emphasis added).]

Section 3.02 of the Agreement defined "Due Diligence Period" as "the period of time commencing on the first day after the date of this Agreement, and expiring at 5:00 p.m. forty-five (45) business days after (and excluding) the Effective Date." As the Effective Date was May 16, the due diligence period would end at 5:00 p.m. on July 18.

On July 17, Seller agreed to extend the due diligence period until July 31. On August 1, plaintiff requested "a one day extension of the Due Diligence — until 5:00 p.m., August 2, 2012." The Seller confirmed it had extended the due diligence period until August 2. No written notice waiving the right to terminate the Agreement was sent prior to 5:00 p.m. on August 2.

On August 2, plaintiff entered into an assignment, which plaintiff terms the Flip Contract. The Flip Contract assigned plaintiff's rights under the Agreement to GS Assignments, LLC (GS), of which Steiglitz was the managing member. The Flip Contract provided GS would reimburse plaintiff for the $50,000 initial deposit, "pay[] when due the second deposit under paragraph 2(b) of the [Agreement]" and make the third deposit of $150,000. The Flip Contract also provided that GS would pay plaintiff $250,000 at the closing under the Agreement, and give it 10% of the profits from the development of the Property.

The Flip Contract had no due diligence period. Plaintiff represented that it knew of no undisclosed facts "which might have a material adverse affect on the transaction."

GS's attorney Richard W. Mackiewicz, Jr. sent an August 2 letter (Mackiewicz letter) to Seller. The letter confirmed the Agreement "has been assigned" to GS. The letter stated it was "written in connection with Section 3.03" of the Agreement. The letter referenced the purchaser's opportunity to notify Seller of issues with title during the due diligence period under Section 3.01. The letter contended there was both a mortgage on the Property and a restriction imposing a setback requirement which was uninsurable. The letter objected to the title's marketability, asked Seller to clear the title, and stated: "Assuming that the Seller is capable of clearing these title issues then the purchaser, in accordance with Section 3.03 of the Contract advises that it waives any other right to terminate the agreement."

The Mackiewicz letter said GS "will be forwarding a check" for $100,000, and asked Seller to return the initial $50,000 deposit to plaintiff. Steiglitz had the assets to cover the $100,000 and to consummate the deal. The $100,000 payment was never made.

On August 20, 2012, Seller's counsel sent a letter to plaintiff's counsel citing Sections 3.02 and 3.03 and stating:

> After the seller granted the purchaser with several extensions to the due diligence period, it ultimately expired to on or about August 2, 2012 [sic]. Having not received the required notice from the purchaser that waives its right to terminate the contract of sale, the agreement is now deemed terminated. As such, I have enclosed a check for your client's deposit. The agreement is now null and void.

In February 2013, Seller entered into a new agreement selling the Property to Grand 715 Realty, LLC (Grand), of which Steiglitz was the managing member. The purchase price was $3.5 million.

In June 2014, plaintiff filed a complaint against defendants, with counts claiming consumer fraud, common law fraud and conspiracy, breach of contract, breach of the implied duty of good faith and fair dealing, tortious interference, and unjust enrichment, and seeking a constructive trust and to pierce the LLC veil.[2] After defendants filed an answer, plaintiff moved for summary judgment. Defendants filed a cross-motion for summary judgment.

After hearing argument, the trial court issued an order and a written opinion on December 28, 2015, denying summary judgment to plaintiff, granting summary judgment to defendants, and dismissing plaintiff's claims with prejudice. In granting summary judgment on plaintiff's counts alleging breach of contract and

[2] Plaintiff's count seeking a declaratory judgment was dismissed.

breach of the implied duty, the trial court noted it was undisputed that on August 20, Seller advised plaintiff that the Agreement terminated on August 2, due to plaintiff's failure to provide written notice to Seller before the end of the due diligence period that plaintiff was waiving its rights to terminate the Agreement pursuant to Section 3.03. The court emphasized that "[e]ven after the due diligence period was extended to August 2, 2012, the Plaintiff failed to issue the waiver."

II.

Summary judgment must 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(c). The court must "consider whether the 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). "[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the benefit of all

legitimate inferences which can be deduced therefrom[.]" Id. at 535 (citation omitted).

An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). We must hew to that standard of review.

III.

On appeal, plaintiff contends there was a genuine issue of material fact regarding whether the Flip Contract was signed, and the Mackiewicz letter was delivered to Seller, before the expiration of the due diligence period at 5:00 p.m. on August 2. Plaintiff also contends the Mackiewicz letter satisfied plaintiff's obligation to produce a written waiver. Plaintiff's contentions fail because it took the opposite positions in the trial court.

Plaintiff supported its motion for summary judgment with a statement of material facts that stated "the Due diligence period in the Agreement of Sale had expired prior to the Flip Contract being signed." Also, in opposition to defendants' cross-motion for summary judgment, plaintiff filed a certification by George Daley, its managing member. Daley similarly certified that when plaintiff assigned its rights to GS, "[t]he Due Diligence period in the contract had expired."

Moreover, Daley attested that the Mackiewicz letter did not constitute a proper written waiver of the right to terminate the Agreement. Daley certified that "Steiglitz was obligated to issue a waiver thereof," but instead "Steiglitz had his attorney issue a letter creating two bogus issues why he should not be obligated to perform." Daley attested that "the issues raised were pre-textual excuses," and that "the Mackiewicz letter was just an excuse to walk away from the deal."

Likewise, in its brief opposing defendants' motion for summary judgment, plaintiff asserted that "[a]t the time of [the Flip Contract's] signing . . . the time had expired for any 'Due Diligence' as permitted in the Agreement of Sale." Plaintiff's position was that defendants had no right to raise title issues in the Mackiewicz letter because the due diligence period had already expired. Plaintiff argued: "Upon signing [the Flip Contract], it was the obligation of the Defendant to move forward to close the deal with [Seller], not to come up with excuses why it could breach both the Flip Contract and the Agreement of Sale." Plaintiff said GS's "argument that there was 'Due Diligence' left to be done is both factually bogus as well as not permitted in the Flip Contract and subjected to an expired period in the Agreement of Sale."

On appeal, however, plaintiff asserts there is a genuine issue of material fact regarding "the timing of the execution of the [Flip Contract] and service of the August 2, 2012 Mackiewicz correspondence." Plaintiff contends "there is nothing in the record to contradict the inference that the Plaintiff and Defendants GS and Steiglitz executed the [Flip Contract] before 5:00 p.m. on August 2, 2012, and that Mackiewicz drafted, signed, and delivered the August 2, 2012 letter before the due diligence period expired." Plaintiff argues the Mackiewicz letter "satisfies Plaintiff's obligation to tender a written waiver before the end of the due diligence period" and "satisfied Paragraph 3.03 of the [Agreement]." Plaintiff concludes that "[i]f Mackiewicz's letter was transmitted before 5:00 p.m. on August 2, 2012, then the [Agreement] did not 'automatically' terminate, and Plaintiff and its assigns did not breach the [Agreement]." All of plaintiff's arguments were contradicted by its position in its summary judgment proceedings.

In these circumstances, plaintiff cannot contend there was a genuine issue of material fact. First, a statement of material facts is required by rule to be "a concise statement of each material fact as to which the movant contends there is no genuine issue." R. 4:46-2(a). Thus, plaintiff's assertion in its statement of material facts that the due diligence period had

expired before the Flip Contract was signed was an assertion that there was no genuine issue concerning that fact.

Plaintiff notes that "[w]here there are cross motions for summary judgment, a party may make concessions for the purposes of his motion that do not carry over and support the motion of his adversary." O'Keeffe v. Snyder, 83 N.J. 478, 487 (1980). In O'Keeffe, the defendant moved for summary judgment on the premise that he acquired paintings by adverse possession even if they had originally been stolen, which he assumed "[f]or purposes of his motion." Id. at 486. Here, by contrast, plaintiff was not merely assuming arguendo that the due diligence period had expired, but was asserting as a fact that the due diligence period had expired to show the Mackiewicz letter was untimely.

Moreover, plaintiff's contrary assertion on appeal lacks any evidentiary support. Plaintiff concedes "[t]here is nothing in the record indicating what time the [Flip Contract] was signed or what time the August 2 . . . letter was sent out." A party opposing summary judgment "must do more than simply show that there is some 'metaphysical doubt' as to the material facts." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012) (citation omitted).

In any event, plaintiff took the same position in Daley's certification submitted in opposition to defendants' summary

judgment motion. Thus, the Daley certification similarly assured the trial court "that there is no genuine issue as to any material fact." R. 4:46-2(c).

Second, plaintiff's brief explicitly took the position that the due diligence period had expired before the Mackiewicz letter was sent.[3] Moreover, plaintiff took the position in Daley's certification and in its brief that the Mackiewicz letter was not a legitimate waiver, but a bad faith assertion of bogus title problems intended only to avoid the Agreement.

"[C]oncessions made during a summary judgment motion foreclose a contrary argument on appeal." Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 281 (App. Div. 2017), cert. denied, 232 N.J. 282 (2018). Because plaintiff conceded the due diligence period expired before the Mackiewicz letter was sent "on the motion for summary judgment, it is foreclosed from arguing the contrary on this appeal." First Am. Title Ins. Co. v. Vision Mortg. Corp., 298 N.J. Super. 138, 143 (App. Div. 1997) (precluding the plaintiff from arguing there was no fraud where it conceded

[3] That was also the unavoidable implication of plaintiff's statement of material facts and the Daley certification. It is undisputed the Mackiewicz letter was sent after the Flip Contract was signed. Indeed, the letter states the Agreement "has been assigned." Moreover, there was no reason or justification for GS, a stranger to the Agreement, to send such a letter to Seller until after GS had signed the Flip Contract assigning plaintiff's rights under the Agreement to GS.

fraud on summary judgment) (citing Misani v. Ortho Pharm. Corp., 44 N.J. 552, 555-56 (1965), and State by Van Riper v. Atl. City Elec. Co., 23 N.J. 259, 264 (1957)).

Additionally, the trial court based its summary judgment ruling on the "undisputed [fact] that the Plaintiff did not provide timely written notice to [Seller] that Plaintiff was waiving its right to terminate the [Agreement]" prior to the expiration of the due diligence period. "Because of the concession by plaintiff['s] counsel, . . . it was unnecessary to decide th[e] issues" of the timing of the Flip Contract and Mackiewicz letter. See Ji v. Palmer, 333 N.J. Super. 451, 459 (App. Div. 2000). A party "should not be permitted upon appeal to alter its interpretation of the facts upon which the issue was framed." Van Riper, 23 N.J. at 264; see Misani, 44 N.J. at 555-56.

In any event, under the invited error doctrine, "errors that '"were induced, encouraged or acquiesced in or consented to by [appellant's] counsel ordinarily are not a basis for reversal on appeal."'" State v. A.R., 213 N.J. 542, 561 (2013); Harris v. Peridot Chem. (N.J.), Inc., 313 N.J. Super. 257, 296 (App. Div. 1998). "The doctrine of invited error bars a litigant from claiming on appeal that a position it advocated and that the judge adopted at trial was error." Donofry v. Autotote Sys., Inc., 350 N.J. Super. 276, 296 (App. Div. 2001). "The invited error doctrine

. . . is particularly applicable where a party attempts to present a different theory on which to decide the case than the one advocated below." Brett v. Great Am. Rec., 144 N.J. 479, 504 (1996). Here, plaintiff sought "tactical advantage" by advancing the theory that GS had no right to submit the Mackiewicz letter raising title issues because the due diligence period had expired. See id. at 503. Plaintiff cannot "argue to the contrary on appeal." Reynolds v. Lancaster Cty. Prison, 325 N.J. Super. 298, 315 n.2 (App. Div. 1999).

IV.

Even if we could ignore plaintiff's own position in the trial court that the Mackiewicz letter was an untimely attempt to avoid the Agreement, we would reject plaintiff's contention on appeal that the letter "clearly waived the right to terminate 'for any reason or no reason' pursuant to paragraph 3.03 of the [Agreement]."

Section 3.03 of the Agreement requires a present, unconditional waiver of the right to terminate before April 2: the Purchaser must "provide the Seller with written notice prior to the end of the Due Diligence Period that Purchaser waives it[s] right to terminate this Agreement in accordance with this Section." However, the Mackiewicz letter stated it was not waiving that right at that time. Rather, after raising the existence of a

mortgage and an uninsurable restriction containing a setback requirement as issues with the title, the letter stated: "In accordance with Section 3.01 the Purchaser hereby objects to the marketability of title, provides notice of such objection and requests that Seller make a good effort to clear title." That language invoked Section 3.01(b), which requires Seller to "make a good faith effort to clear title" within thirty days. The letter then offered only a future, conditional waiver of its right to terminate: "Assuming that the Seller is capable of clearing these title issues then the purchaser, in accordance with Section 3.03 of the Contract advises that it waives any other right to terminate the agreement" (emphasis added).

That conditional future waiver did not meet the requirements of Section 3.03 for an absolute "waiver of the right to terminate" before August 2. Thus, the Mackiewicz letter could not serve as the "written notice prior to the end of the Due Diligence Period" required by Section 3.03.

Plaintiff notes that after the "Assuming" sentence, the Mackiewicz letter asserted: "Thus, the agreement is firm." However, one party's assertion in a letter cannot rewrite the requirements of the parties' Agreement.

Plaintiff argues Section 9(a) of the Agreement gave the Purchaser the "sole and exclusive discretion" to waive "(iii)

Receipt by Seller of timely written notice from Purchaser that Purchaser waives it[s] right to terminate this Agreement in accordance with this Section 3.03." However, neither plaintiff nor GS ever waived that right. To the contrary, the Mackiewicz letter reserved the right to terminate unless and until Seller was able to clear the title.

V.

Under Section 3.03, because neither plaintiff nor GS provided the requisite written notice prior to the expiration of the due diligence period, "Purchaser shall be deemed to have terminated this Agreement." Section 3.03 provided: "If Purchaser . . . is deemed to have terminated, as provided above, Purchaser shall immediately receive back the Deposit, and the parties hereto shall have no further obligations under this Agreement[.]"

Seller's August 20 letter recognized that because Seller had not "received the required notice from the purchaser that waives its right to terminate the contract of sale" before the due diligence period expired on August 2, 2012, the Agreement was "deemed terminated" and was "null and void." As Seller enclosed a check returning plaintiff's deposit, neither party had any rights or obligations under the Agreement.

Plaintiff argues Seller waived its right to terminate the Agreement because it failed to notify GS immediately if it was

rejecting the Mankiewicz letter, and because it sent its August 20 notice to plaintiff rather than GS. However, Section 3.03 did not require any action by Seller to terminate the Agreement. Instead, it stated that if the Purchaser did not provide the required timely notice, then "Purchaser shall be deemed to have terminated this Agreement." "In its normal usage the word 'deemed' means 'adjudged' or 'considered.'" Switz v. Kingsley, 69 N.J. Super. 27, 33 (Law Div. 1961), aff'd as modified, 37 N.J. 566 (1962); see Webster's II New Coll. Dictionary 301 (3d ed. 2005). Moreover, the use of the word "shall" shows the parties intended the termination to be "mandatory." See State v. Thomas, 188 N.J. 137, 150 (2006).

Under the plain meaning of Section 3.03's terms, the Agreement automatically and mandatorily terminated when the Seller did not receive a written waiver of the Purchaser's termination right before the expiration of the due diligence period. "Our task is to enforce the contract according to its terms, giving those terms 'their plain and ordinary meaning.'" GMAC Mortg., LLC v. Willoughby, 230 N.J. 172, 186 (2017) (citations omitted).

To contradict the plain language of the Agreement, plaintiff cites a certification by Papagiannakis, Seller's authorized agent. Papagiannakis certified: "At all times [Seller] was prepared to abide by the terms and conditions of the Agreement"; had the second

deposit of $50,000 "been received within a reasonable time after [August 2, Seller] would have accepted same and not declared a breach"; but "[w]hen the second deposit of $50,000 was not received on or before August 20, 2012, I authorized [Seller]'s attorney to declare the Agreement of Sale null and void."

Plaintiff argues Papagiannakis's certification shows Seller terminated because of the purchaser's failure to pay the second $50,000 deposit, and "had absolutely nothing to do with" Section 3.03's provision that: "Purchaser shall be deemed to have terminated this Agreement if Purchaser does not provide Seller with written notice prior to the end of the Due Diligence Period that Purchaser waives it[s] right to terminate this Agreement in accordance with this Section." To the contrary, the letter cited Section 3.03, quoted that language from Section 3.03, and stated the Agreement was "deemed terminated" because the Seller had "not received the required notice from the purchaser that waives its right to terminate the [Agreement]." As the trial court noted, Seller's "August 20, 2012 letter only cites the failure to waive," and says nothing about the second $50,000 deposit.

Even if Papagiannakis could rewrite that history, "[w]e cannot 'rewrite a contract for the parties better than or different from the one they wrote for themselves.'" GMAC Mortg., 230 N.J. at 186 (citation omitted). The Agreement clearly provided that

it must be deemed terminated if notice of waiver was not received by the end of the due diligence period. Moreover, we are not reviewing a dispute between plaintiff and Papagiannakis, who settled with plaintiff within days of the certification, but between plaintiff and GS, to whom plaintiff had assigned its rights under the Agreement three years earlier. Even if plaintiff and Papagiannakis could renegotiate or reinterpret the Agreement while plaintiff and Seller were the only parties to the Agreement, they cannot renegotiate or reinterpret the Agreement to the detriment of GS after any rights plaintiff had under the Agreement were assigned to GS.[4]

In any event, even if we ignore the Agreement's automatic termination on August 2, it is undisputed that neither plaintiff nor GS paid the $50,000 deposit when due, or before Seller's August 20 letter. Plaintiff argues it was GS's obligation to pay that deposit under the Flip Contract. However, an examination of the Flip Contract shows plaintiff had violated a condition precedent to that contract before GS could have any such obligation.

[4] Plaintiff argues that the assignment was permitted under Section 18(h) of the Agreement and that Seller waived any right to object to the assignment or to GS presenting the written notice. However, nothing in the August 20 letter or Papagiannakis's certification suggested that Seller objected to the assignment to GS of plaintiff's rights, or believed the Agreement was terminated due to the assignment.

VI.

As set forth above, plaintiff conceded the Flip Contract was not signed until after the Agreement's due diligence period expired. Because plaintiff failed to comply with the Agreement's requirement in Section 3.03 to provide written notice "prior to the end of the Due Diligence Period," plaintiff was "deemed to have terminated this Agreement" and the parties had "no further obligations under this Agreement." Thus, when plaintiff executed the Flip Contract to assign to GS plaintiff's rights under the Agreement, the Agreement was already terminated and plaintiff had no rights under it.

Under the express terms of the Flip Contract, that relieved GS of its obligations. "As an inducement for [GS] to enter into" the Flip Contract, plaintiff did "hereby represent, warrant and covenant" that when the Flip Contract was executed and thereafter, plaintiff "was not in breach of the [Agreement], has full rights to the [Agreement], and may freely assign the [Agreement]."[5] Moreover, the parties agreed one of the "conditions precedent to

[5] Plaintiff also represented, warranted, and covenanted that "[n]o representation, warranty or covenant of" plaintiff "contains any misstatement of a material fact or knowingly omits to state a material fact necessary to make the statements contained herein not false or misleading," and that "[t]here are no facts known to" plaintiff "which might have a material adverse [e]ffect on the transaction contemplated by" the Flip Contract.

the obligations of" GS under the Flip Contract was "[t]hat all representations and warranties made hereunder are true."

However, when plaintiff and GS executed the Flip Contract, plaintiff was in breach of the Agreement, had no rights under the Agreement, and was deemed to have terminated the Agreement, leaving nothing it could assign to GS. Plaintiff's contrary representations in the Flip Contract were not true. Thus, plaintiff failed to meet a condition precedent to any obligation of GS under the Flip Contract. That included GS's obligation under the Flip Contract to pay "when due the second deposit" under the Agreement.

A "condition precedent" is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered." Black's Law Dictionary 334 (9th ed. 2009); see Restatement (Second) Contracts, §§ 224, 225 (1981). "The parties to a contract 'may make contractual liability dependent upon the performance of a condition precedent.'" Liberty Mut. Ins. Co. v. President Container, Inc., 297 N.J. Super. 24, 34 (App. Div. 1997) (quoting Duff v. Trenton Beverage Co., 4 N.J. 595, 604 (1950)). "[G]enerally, 'no liability can arise on a promise subject to a condition precedent until the condition is met.'" Allstate

Redevelopment Corp. v. Summit Assocs., 206 N.J. Super. 318, 324 (App. Div. 1985) (quoting Duff, 4 N.J. at 604). "Moreover, because a promisor's duty does not become absolute unless and until the condition precedent occurs, the failure or non-performance of the condition is a defense to an action against the promisor for breach of its promise." 4 Williston on Contracts 4th § 38.7 (Lord ed. 2013).

The parties expressly and clearly made it a "condition precedent" of GS's obligations under the Flip Contract that plaintiff truly stated it "was not in breach of the [Agreement], has full rights to the [Agreement], and may freely assign the [Agreement]." Moreover, that condition plainly was "a material part of the agreed exchange" under the Flip Contract, whose entire purpose was to assign plaintiff's rights under the Agreement. Conley v. Guerrero, 443 N.J. Super. 62, 69 (App. Div. 2015) (citation omitted), aff'd as modified, 228 N.J. 339 (2017). Thus, under the express terms of the Flip Contract, the failure of this condition precedent relieved GS of its obligation under the Flip Contract to pay the second $50,000 deposit.

Moreover, 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. (citation omitted). Plaintiff's misstatements that it was not in breach, had full rights under the Agreement, and could freely assign the Agreement went to the essence of the Flip Contract. As the trial court ruled, plaintiff's misstatements were material breaches. Thus, GS was excused from any subsequent obligations or breaches.

Plaintiff argues an assignment of a party's rights under a contract generally "is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties." N.J.S.A. 12A:2-210(4). However, when plaintiff and GS entered into the Flip Contract, plaintiff had no rights or duties under the Agreement. As the Agreement was deemed terminated, plaintiff had "no further obligations under this Agreement." Thus, GS had no obligations either, as "an assignee can have no greater duties than [it]s assignor." Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 607 (2012).

The Agreement was deemed terminated before the second deposit became due. Moreover, the Agreement provided that once it was deemed terminated, Seller was obliged to return any deposit paid by the purchaser. Plaintiff again cites the Papagiannakis certification to argue that Seller would have accepted the second deposit until August 20. However, the Papagiannakis certification

could not change the terms of the Agreement which plaintiff was purporting to assign to GS; it certainly was incapable of changing the terms of the Flip Contract, to which neither Papagiannakis nor the Seller were parties. Once plaintiff failed to meet the condition precedent to the Flip Contract, GS was relieved of any obligations to plaintiff and acquired no obligations to Seller.

As a result, we do not determine whether GS's August 2 letter raised "virtually irrelevant" title issues or was "a flimsy excuse" to avoid making the second deposit, as plaintiff again claims on appeal. It is equally irrelevant whether the second deposit would have been due while the title issues were unresolved had the Agreement still been in force. Finally, it is irrelevant that the Property was eventually purchased by Grand, another LLC in which Steiglitz was the managing member. Once plaintiff caused the termination of the Agreement, and failed to meet the condition precedent of the Flip Contract, Seller was free to sell the Property to anyone, and Grand was free to buy it.

As plaintiff concedes, the issue in this case was "whether or not the [Agreement] was valid at the time the [Flip Contract] was executed." Because the Agreement was deemed terminated before the Flip Contract was signed, plaintiff failed to show defendants breached the Flip Contract or the implied duty of good faith and fair dealing, and those counts were properly dismissed. Plaintiff

makes no additional arguments on appeal challenging the dismissal of the other counts. See Liebling v. Garden State Indem., 337 N.J. Super. 447, 465-66 (App. Div. 2001) ("an issue not briefed . . . is deemed waived"). Therefore, we affirm the dismissal of plaintiff's complaint.[6]

Accordingly, we have no occasion to consider whether plaintiff could pierce either LLC's veil and sue Steiglitz directly. We need not reach the trial court's ruling that plaintiff materially breached the Flip Contract by failing to disclose the Torres loan, or that plaintiff's only remedy was specific performance where there was "no valid contract to be specifically performed."

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

[6] We note that the Papagiannakis certification, on which plaintiff relies, denies plaintiff's contention that Seller conspired with defendants to terminate the Agreement, and that the trial court found no evidence supporting plaintiff's claims of conspiracy, fraud, and bad faith.