SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4161-19

CHRISTOPHER KEMP and the Estate of NUNZIO CONSALVO,

Plaintiffs-Appellants,

v.

THE ESTATE OF MARIJANE BRANDAU, PATRICK LEWIS, in both his individual capacity and as executor of the Estate of MARIJANE BRANDAU, SCOTT STOGNER, in both his individual capacity and as executor of the Estate of MARIJANE BRANDAU, GRACE M. ROONEY, REAL ESTATE CONSULTANTS, LLC, d/b/a REALTY EXECUTIVES EXCEPTIONAL REALTORS POMPTON PLAINS,

Defendants-Respondents,

and

CAVEAT EMPTOR HOME INSPECTORS, LLC,

Defendant,

and

GRACE M. ROONEY, REAL ESTATE CONSULTANTS, LLC, d/b/a REALTY EXECUTIVES EXCEPTIONAL REALTORS POMPTON PLAINS,

Third-Party Plaintiffs-Respondents,

v.

COLDWELL BANKER RESIDENTIAL BROKERAGE and DONNA NELSON,

Third-Party Defendants-Respondents.

Argued December 8, 2021 – Decided April 21, 2022

Before Judges Gilson, Gooden Brown, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1998-18.

Joshua M. Lurie argued the cause for appellants (Lurie Strupinsky, LLP, attorneys; Joshua M. Lurie, on the briefs).

Jeffrey Arons argued the cause for respondents the Estate of Marijane Brandau, Patrick Lewis, and Scott Stogner (Arons & Arons, LLC, attorneys; Jeffrey Arons, on the brief).

Martin J. McAndrew argued the cause for respondents Grace M. Rooney and Real Estate Consultants, LLC d/b/a Realty Executives Exceptional Realtors Pompton Plains (O'Connor Kimball, LLP, attorneys; Martin J. McAndrew and Michael S. Soule, on the brief).

PER CURIAM

In this "as-is" residential-property-sale case, plaintiffs Christopher Kemp[1] and the Estate of Nunzio Consalvo[2] appeal orders granting the summary-judgment motions of defendants the Estate of Marijane Brandau, Patrick Lewis, and Scott Stogner[3] (the Estate defendants) and defendants Grace M. Rooney and Real Estate Consultants, LLC (the Real Estate defendants). We affirm.

I.

We glean these facts from the summary-judgment record, viewing them in the light most favorable to plaintiffs, the parties opposing summary judgment.

[1] We use their last name when referring to plaintiff Christopher Kemp and his wife Kris Consalvo-Kemp collectively and their first names when referencing them individually for ease of reading and with no disrespect.

[2] In the amended complaint, filed on September 13, 2019, plaintiffs substituted the Estate of Nunzio Consalvo for Nunzio Consalvo.

[3] Plaintiffs sued Lewis and Stogner in their individual capacities and as executors of the Estate of Marijane Brandau.

See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

A.

In 2015, the Kemps wanted to purchase a "fixer-upper" house, which was "structurally sound but outdated that [they] could update . . . ." At that time, Christopher worked in general construction and was employed as a foreman by Vento Tile, responsible for overseeing and performing demolition, interior framing, insulation, drywall, and roofing work. Real estate agent Donna Nelson of Coldwell Banker Residential Brokerage assisted them in their search.

The Kemps saw on Zillow a property located in Butler Township listed for sale for $400,000. Marijane Brandau had owned the property. After Brandau died testate on October 22, 2016, the property became an asset of her estate. Her sons, defendants Lewis and Stogner, were appointed executors of her will. The property was listed for sale by defendant Real Estate Consultants, LLC, and its affiliated real estate agent defendant Rooney.

Christopher attended an "open house" event at the property in November 2016. During that initial visit, he met and spoke with Rooney, who described herself as Brandau's "close personal friend[]." At the open house, Christopher made several observations about the house. In the right ground-floor bedroom,

he identified water damage that had caused a three foot by three foot "[g]iant wet stain on the wall" with softened sheetrock wet to the touch. Additionally, he saw "obvious animal stains," mold, and signs the hardwood flooring and tiles needed to be replaced. According to Christopher, Rooney attributed the damage to the right ground-floor bedroom wall to the house having an insufficient number of downspouts. She informed him she had received a $2,500 estimate to repair the right ground-floor bedroom wall and opined the entire house could be renovated for approximately $15,000. Christopher did not believe Rooney's assessment was accurate; based on his professional experience and research, he believed the renovation would be more expensive. In a certification submitted in opposition to the Real Estate defendants' motion for summary judgment, Christopher certified Rooney's belief that "updates would total about $15,000.00 . . . was preposterous." Because Christopher felt the property was overpriced for its condition, the Kemps did not make an offer to purchase it.

Several months later, the list price of the property was reduced to $345,000. Kris, her father Nunzio Consalvo, and her mother attended another open house at the property in March 2017. At the open house, Kris discussed with Rooney and other attendees some issues regarding the house. When Kris asked about water stains around a living room skylight, Rooney said the skylight

just needed to be resealed and she was looking into having that work done. She attributed water stains, a hole in the wall, and a recently patched hole in the ceiling of the right ground-floor bedroom to "water from downspouts." She stated a hole in the garage's ceiling was caused by a leaky pipe and told attendees at the open house she had received "estimates and everything was minor."

The Kemps returned to the property with Nelson on March 6, 2017. Christopher found the house to be in "[a]bout the same" condition as he had seen before. He noticed the house had no open walls.

B.

The next day, Christopher, as a buyer, signed an "as-is" sales contract to purchase the property for $346,000. Consalvo, as a buyer, and Lewis and Stogner, on behalf of Brandau's estate, which was the seller, signed it the following day. In the contract, the buyers

> acknowledge[d] that the [p]roperty is being sold in an "as is" condition and that this [c]ontract is entered into based upon the knowledge of [the buyers] as to the value of the land and whatever buildings are upon the [p]roperty, and not on any representation made by [s]eller, [b]rokers or their agents as to character or quality of the [p]roperty.

Under the contract's terms, the brokers and salespersons were described as having had "no special training, knowledge or experience with regard to

discovering and/or evaluating physical defects," including "structural defects, . . . and other types of insect infestation or damage caused by such infestation." A section of the contract entitled "ADDITIONAL CONTRACTUAL PROVISIONS" contained the following language: "[p]roperty sold strictly 'as is' with the exception of structural and wood pest infestation."

The buyers had the right to have the property "inspected and evaluated by 'qualified inspectors' . . . for the purpose of determining the existence of any physical defects or environmental conditions." If the inspector reported "any physical defects or environmental conditions (other than radon or woodboring insects)," the seller had to notify the buyers in writing within seven days of receipt of the report that it would "correct or cure any of the defects set forth" in the report. If the seller failed to agree to cure or correct the defects or if "the environmental condition at the [p]roperty . . . is incurable and of such significance as to unreasonably endanger the health of [the buyers]," the buyers had "the right to void this [c]ontract by notifying [the s]eller in writing within seven (7) calendar days." If the buyers did not void the contract in that time period, they "waived" their "right to cancel this [c]ontract and this [c]ontract shall remain in full force," with the seller being "under no obligation to correct or cure any of the defects set forth in the inspections."

The contract also gave the buyers the "right to have the [p]roperty inspected by a licensed exterminating company of [the buyers'] choice, for the purpose of determining if the [p]roperty is free from infestation and damage from termites or other wood destroying insects." If the exterminating company's report indicated "infestation or damage" and the cost to cure the infestation or to repair and treat the property exceeded one percent of the purchase price, the buyers or the sellers had the right to "void" the contract within seven days of delivery of the report. If the buyers and seller did not agree about who would pay those costs and neither side timely voided the contract, the buyers would "be deemed to have waived [their] right to terminate this [c]ontract and will bear the cost to cure."

On March 24, 2017, the Kemps retained Caveat Emptor Home Inspectors (Caveat) to "perform a visual inspection of the home/building . . . ." At the time of the inspection, the hole in the right ground-floor bedroom wall was closed but, according to Kris, "[y]ou could see it was fresh." Kris was told by either her attorney or Nelson that the issues surrounding the hole had been fixed.

In a report dated March 26, 2017, Caveat identified multiple "defective" aspects of the home, which "need[ed] immediate repair or replacement" and were "unable to perform [their] intended function." Caveat found the ceiling

and walls in the foyer to be defective with evidence of past or present water staining. Caveat described a skylight as being "[d]efective," noting "[m]oisture stains" on the surrounding drywall and "[w]ater leakage." Caveat stated "[foyer s]kylight [l]eaking roof. Moisture present. Replace roof." Caveat recommended a "qualified roofing contractor" be retained "to evaluate and estimate repairs."

In the right ground-floor bedroom, Caveat found the ceiling to be defective, identifying evidence of past or present water staining and "[p]oor workmanship on [the] patch" on the ceiling. Caveat described the walls as defective and found "[e]vidence of past or present water leakage," cracks, and "[p]oor workmanship" on the wall patch. In the left ground-floor bedroom, Caveat labelled the ceiling defective, finding mold and evidence of past or present water staining, and the walls defective, with a recommendation to "[p]aint [e]xposed PVC pipe," "[e]nclose in sheetrock," and "[e]xtend downspouts away from [the] house." Additionally, Caveat stated a double-hung window was missing.

Caveat found the garage ceiling was defective due to "[s]heetrock [h]oles" and the garage walls were defective because of "[e]xposed framing." Caveat identified "[w]ood carpenter bee damage" on the fascia on the exterior of the

house, stating the fascia "[n]eed[ed] to be replaced." Caveat also marked as defective other areas where it had found wood rot, including the soffits, the railing on the front steps, and in the laundry-room walls. Caveat also found water stains on the sheathing in the attic and water damage under the kitchen counter with mold present. Caveat opined the deck was built below acceptable building standards and was not safe. Caveat recommended a qualified roofer be retained to provide estimates on repairs to gutters, which were missing aluminum, and a plumber be retained to give estimates on repairs regarding "[s]ervice [l]ine: [c]opper [l]eaking."

Although the contract gave the buyers the right to have the property inspected by a licensed exterminating company, they did not exercise that right, even though the Kemps had "a wood-boring inspection" performed on another property they had considered purchasing. When asked if she and her husband had intended to get a wood-boring insect inspection of this property, Kris, who was responsible for arranging the inspector and setting up appointments related to the purchase of the property, testified she "thought it was all part of it" and had no understanding of why it would not have been done.

The Kemps read the Caveat report. Given the multiple defects Caveat identified in its report, plaintiffs had a contractual right to void the contract.

Instead of exercising that right, the Kemps, based on Caveat's report and Christopher's opinion of the property, authorized their real-estate lawyer to seek a price reduction or a credit. At the closing on May 19, 2017, the buyers received a $7,500 credit.

C.

Christopher planned to do significant work on the house, including a two-story addition with a new foundation, new hardwood floors upstairs, a master bathroom, and a "complete redo" of the kitchen. Demolition work on the house began soon after the closing. Within a week, the demolition work revealed rotted support beams, a carpenter-ant nest, and water and insect damage. Kris told Nelson and their real-estate attorney about those findings but did not advise Rooney, Lewis, Stogner, or anyone else about them. Although the Kemps believed then they had some claim against defendants, they made no effort at that time to contact defendants or advise them of the issues they had discovered with the house. According to Kris, the Kemps retained an attorney in early June.

On June 20, 2017, Lewis made an unscheduled visit to the property to say hello and wish the Kemps "good peace and health." Kris was at the property and invited him into the house. She showed and described to him the work they had done on the house. Without disclosing it to Lewis, she recorded a portion

of their conversation. She told him about the smell from the animals, the ants, and the water damage. When she asked him if he knew anything about it, Lewis denied having knowledge and told her he had left the house when he was eighteen-years old. Lewis also denied knowing of any recent attempts by Brandau to repair the property. He stated Brandau had told him "she was having some problems with the house," but "[they] had no money." At his deposition, when asked to describe the "problems" with the house his mother had disclosed to him, Lewis responded, "She couldn't afford it. She was having trouble making payments for the house . . . that's specifically what I meant. . . . my mom never went over any of this stuff. She just said, 'I'm having trouble making the note.' The property taxes were killing her." He denied having any discussions about or knowledge of the condition of the property before his mother's death.

When Kris asked him about the water "pouring into" a wall in one of the bedrooms, Lewis told her the bedroom had been his brother Timothy's bedroom and indicated he knew nothing about it. He told Kris Timothy had told him about the ceiling coming down one time and that he had no idea what his brother was doing. At his deposition, he testified that conversation with his brother had taken place "years and years and years ago" and that he did not know why the ceiling had come down or whether any repairs had been made.

When Kris told him they were making more repairs than they had anticipated, Lewis stated,

> That's what we were worried about . . . we were worried about opening up a can of worms [be]cause we had people coming in here and they were just like this could be a worst case scenario and we were just like then don't even bother . . . Let's just sell it.

At his deposition, when asked what people had come to the house, Lewis testified it was "some handyman my mom hired" who had come to the house after his mother's death. He had no contact with the handyman. Rooney had contact with the handyman and told Lewis's sister-in-law she had "an estimate for work." Lewis did not see the estimate or know what it was.

In a letter dated that same day, an attorney on behalf of the Kemps informed Stogner his clients had "advise[d him] of multiple misrepresentations with respect to the sale of the [p]roperty, including massive structural issues which were intentionally covered and hidden, and a massive insect infestation which was, apparently the cause of at least some of these structural issues." He also stated the "matter" was being investigated further "potentially [to] prepare to initiate litigation."

D.

Plaintiffs filed a lawsuit nearly nine months later, on March 19, 2018. Plaintiffs sued the Estate defendants for negligent misrepresentation, negligence, common law fraud, unjust enrichment, and recission of the contract; and the Real Estate defendants for violating the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, common law fraud, negligence, breach of the covenant of good faith and fair dealing, and unjust enrichment. Plaintiffs sought compensatory and punitive damages from defendants and treble damages from the Real Estate defendants. In sum, plaintiffs asserted both groups of defendants knew or should have known about and disclosed significant defects in the property. Plaintiffs also sued Caveat but later resolved and dismissed their claims against Caveat. The parties thereafter engaged in discovery, deposing several witnesses.

At his deposition, Christopher testified he had based a "pretty good portion" of his decision to purchase the property on Rooney's representation she had a $2,500 estimate to repair the right ground-floor bedroom wall. He testified Rooney had "led [them] to believe . . . that any other work that was to be done was merely cosmetic." Christopher acknowledged, however, that he had never seen the estimate; Rooney had never indicated she had construction experience;

and he had believed the repairs would cost more than she had indicated. Christopher also testified he believed Rooney had known and concealed that the water stains in the bedroom were "more extensive than some sheetrock and insulation." He conceded that allegation was just an assumption based on Rooney's friendship with Brandau and that he was not personally aware of any facts establishing Rooney knew the water stains were more extensive than what she had told them. Christopher also conceded he did not know if Rooney knew about the presence of carpenter ants, the damage caused by the ants, or the structural condition of the house around the fireplace. He acknowledged he had not had any discussions with Rooney about the fireplace, the heater, heating or sewer vent pipes, or the roof. He also acknowledged he had not communicated with Lewis or Stogner prior to the sale of the property and that his belief they had concealed defects was based solely on the statements Lewis had made to Kris.

When asked during her deposition if she had any "facts . . . demonstrating . . . Rooney knew of conditions with the property that she did not tell you about," Kris responded, "I don't want to say facts." She referenced her "assumption," which was based on a "piece of plywood that was put up," that "you can't be that blind to knowing what's behind it" and that Rooney "was friends of the family."

Kris conceded she did not have any facts that Rooney knew about the rotted support beams in front of the fireplace, the live ant nest, or the water infiltration near the front door in the skylight. Kris also inferred the Estate defendants' liability from Lewis's statements and the Estate's ownership of the property, opining "[i]f they own the house, they're responsible for what goes on in it."

During her deposition, Rooney testified she had performed a visual inspection of the property the day she listed the property for sale. When asked whether she had seen "any damage to the property," she identified a sunken-in pool cover, leaning decks, and a hole in the right ground-floor bedroom from which she could see "an exposed beam that looked like black decay with water dripping on it." When Rooney asked Brandau if she knew what had caused the presence of the water, Brandau "said that her gutters were clogged." Rooney also testified Nelson had requested a copy of the $2,500 estimate after the Caveat inspection. When she was unable to reach the person who had prepared that estimate, she asked John Kee to prepare an estimate. When she had his estimate, she contacted Nelson, who told her to "forget about it" because Christopher "[was] a contractor, he'll get his own estimates." Nelson testified she had asked Rooney for copies of estimates but that the Kemps "were also investigating their own estimates for work."

Stogner testified he had known of an open wall in a downstairs bedroom and boarded-up window but did not know the cause of those conditions. He also knew Brandau lacked the funds to make repairs. According to Stogner, he and Rooney had only general discussions regarding the property's condition. He recalled "[t]he house needed work. It was quite obvious." Accordingly, they agreed the property would be sold "as is."

An expert witness retained by the Real Estate defendants visited the property on November 14, 2019, to conduct an engineering site inspection. In his report, the witness stated he had been "unable to make a proper inspection because [p]laintiffs had completed nearly all of the work and closed up everything without allowing an inspection to be made . . . while the work was underway." The expert could only "see completed work," "view the layout of the complete house," and "view some non-specific pieces of rotted lumber from unknown locations." Plaintiffs did not retain an expert to rebut those assertions. Instead, they produced an undated letter from one of their contractors explaining the work performed at the property.

E.

The Real Estate defendants and the Estate defendants moved for summary judgment. After hearing oral argument, the trial court entered orders granting

the Estate defendants' motion and placed its decision on the record. The trial court found it undisputed that the Estate defendants had not made "any material misrepresentation of a presently existing or past fact" and that plaintiffs had made "no showing" the Estate defendants "had knowledge or belief of any kind of falsity." Accordingly, the trial court held plaintiffs had failed to establish any element of common law fraud. The court rejected plaintiffs' assertion that Lewis's post-transaction statements established fraud, finding his statements "woefully inadequate to show even a material misrepresentation." Recognizing it was undisputed that plaintiffs had purchased the property pursuant to a contract, the trial court rejected plaintiffs' tort-based and unjust-enrichment claims. Finally, the court held plaintiffs' recission claim was "folly" because plaintiffs had renovated the property and made it their own.

The trial court subsequently issued a written decision and order granting the Real Estate defendants' motion. The court found plaintiffs had based their CFA claims on Rooney telling them: (1) the defects regarding the first-floor bedroom, skylight, and garage were minor and required only cosmetic repairs; and (2) she was "close friends" with Brandau, from which they assumed she would have had knowledge of other hidden defects, such as insect, water, and structural damage, she failed to disclose. The court reasoned, however, that

neither of those statements proved Rooney intentionally concealed or omitted material facts. Additionally, plaintiffs could not prove Rooney's statements were affirmative misrepresentations in light of Caveat's report detailing the defects in the property and Christopher's testimony that based on his professional experience, he knew the cost of repairs would exceed Rooney's estimate. The court therefore found plaintiffs failed to establish any violation of the CFA.

The court rejected plaintiffs' common-law-fraud claim because, in addition to being unable to prove Rooney had known about or concealed defects, plaintiffs could not prove they reasonably relied on her purported misrepresentations given Caveat's report and Christopher's testimony that he did not believe her estimates were accurate.

The trial court found plaintiffs' negligence claim failed for two reasons. First, plaintiffs had failed to provide expert testimony establishing the standard of care applicable to a licensed real estate agent. Second, plaintiffs had failed to provide expert testimony necessary to conclude their damages were proximately caused by the Real Estate defendants' conduct.

The trial court held plaintiffs could not establish a breach of the covenant of good faith and fair dealing because the parties never had a contract.

Additionally, it was undisputed plaintiffs never conferred a benefit upon Rooney and never expected payment from her. Plaintiffs, therefore, could not succeed on a claim of unjust enrichment. The trial court found plaintiffs had failed to produce clear and convincing evidence Rooney had behaved recklessly or maliciously, precluding an award of punitive damages. Finally, the court determined plaintiffs had spoliated evidence by making repairs without notifying defendants and had impeded defendants' ability to mount a defense. The court reasoned plaintiffs' spoliating conduct also warranted the dismissal of their complaint against the Real Estate defendants.

On appeal, plaintiffs argue the trial court failed to consider binding legal authority, ignored material factual disputes that should have precluded summary judgment, effectively immunized the Estate defendants, erred in finding plaintiffs had not demonstrated Rooney had affirmatively misrepresented or materially omitted something, improperly decided the reasonable-reliance issue, wrongly required expert testimony on a negligence claim, improperly sanctioned plaintiffs for spoliation, and erred in dismissing plaintiffs' punitive-damages claim. Unpersuaded by plaintiffs' arguments, we affirm.

II.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

An allegation is not enough to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in its favor." Invs. Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018), aff'd and modified by 243 N.J. 25 (2020); see also Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 279-80 (App. Div. 2017) (explaining that "bare

conclusions" lacking "support in affidavits" are "insufficient to defeat [a] summary judgment motion"). When determining if a genuine issue of material fact exists, the judge must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)); see also Petro-Lubricant Testing Lab'ys, Inc. v. Adelman, 233 N.J 236, 257 (2018). We do not defer to the trial court's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

A. The Estate Defendants

As to the Estate defendants, plaintiffs pleaded five causes of action: negligent misrepresentation, negligence, common law fraud, unjust enrichment, and recission of the contract.[4] First, we set forth the elements of plaintiffs' claims. Then, given the contractual relationship between plaintiffs and the Estate defendants, we consider whether plaintiffs' tort claims are barred by the economic loss doctrine.

[4] Plaintiffs' counsel advised us during oral argument plaintiffs were not pursuing their rescission claim.

"Negligence is 'conduct which falls below a standard recognized by the law as essential to the protection of others from unreasonable risks of harm.'" Franco v. Fairleigh Dickinson Univ., 467 N.J. Super. 8, 25 (App. Div. 2021) (quoting Marshall v. Klebanov, 378 N.J. Super. 371, 378 (App. Div. 2005)). "To establish a claim of negligence, a plaintiff must show that there was a legal duty, the duty was breached, the breach proximately caused a foreseeable injury, and plaintiff suffered damages." Id. at 24-25. In their negligence count, plaintiffs allege the Estate defendants had a "duty to review" the condition of the property and advise them of any condition "they knew, or reasonably should have known, which would impact the decision to purchase the [p]roperty."

Negligent misrepresentation is "[a]n incorrect statement, negligently made and justifiably relied upon, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance." H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983); see also Singer v. Beach Trading Co., 379 N.J. Super. 63, 73-74 (App. Div. 2005). To sustain a cause of action based on negligent misrepresentation, a plaintiff must establish the defendant negligently made an incorrect statement of a past or existing fact, that the plaintiff justifiably relied on it and that his or her reliance caused a loss or injury. Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000) (finding that the

"element of reliance is the same for fraud and negligent misrepresentation"). In their negligent-misrepresentation count, plaintiffs allege the Estate defendants had a "duty to provide true information" and that the information provided regarding the property "contained false information."

To establish common law fraud, a plaintiff must first prove "a material misrepresentation of a presently existing or past fact," Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997), or, in the alternative, the "[d]eliberate suppression of a material fact that should [have been] disclosed," N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc., 319 N.J. Super. 435, 446 (App. Div. 1998). A plaintiff must also establish "(2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari, 148 N.J. at 610. "[F]raud is never presumed, but must be established by clear and convincing evidence." Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003). In their common-law-fraud count, plaintiffs allege the Estate defendants knew or should have known about "major issues with the structure of the house" and sold the house "without disclosure of issues related to the structural integrity of the house" and "willfully and purposefully kept such information away" from plaintiffs.

"[U]njust enrichment is an equitable remedy [available] only when there was no express contract providing for remuneration . . . ." Caputo v. Nice-Pak Prods., Inc., 300 N.J. Super. 498, 507 (App. Div. 1997). Unjust enrichment "is the basis for a claim of quasi-contractual liability." Nat'l Amusements, Inc. v. N.J. Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div. 1994); see also Goldsmith v. Camden Cnty. Surrogate's Off., 408 N.J. Super. 376, 382 (App. Div. 2009). It is not "an independent tort cause of action." Castro v. NYT Television, 370 N.J. Super. 282, 299 (App. Div. 2004). To establish unjust enrichment, a plaintiff must show that "defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." Ibid. Plaintiffs base their unjust enrichment claim on the Estate defendants' alleged misrepresentation of the property and assert allowing the Estate defendants to retain the funds plaintiffs paid to purchase the property would be unjust.

New Jersey's economic loss doctrine precludes tort liability when the relationship between the parties is based solely on a contract. See Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002) ("a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law"); Spring Motors Distribs. Inc. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985) ("economic losses . . . are better resolved under principles of contract law . . . [which] are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement"); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995) (finding a plaintiff is prohibited "from recovering in tort economic losses to which their entitlement flows only from a contract"). The doctrine "functions to eliminate recovery on 'a contract claim in tort claim clothing.'" G&F Graphic Servs., Inc. v. Graphic Innovators, Inc., 18 F. Supp. 3d 583, 588-89 (D.N.J. 2014) (quoting SRC Constr. Corp. v. Atl. City Hous. Auth., 935 F. Supp. 2d 796, 801 (D.N.J. 2013)).

The economic loss doctrine, however, does not apply to fraud-in-the-inducement claims. Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 563-64 (D.N.J. 2002). Fraud in the inducement is fraud that induces another party to enter a contract. Walid v. Yolanda for Irene Couture,

425 N.J. Super. 171, 186 (App. Div. 2012). Thus, the economic loss doctrine does not apply to fraud-in-the-inducement claims because a party fraudulently induced to enter a contract is not bound by that contract's terms, and, effectively, no contractual relationship exists.

The sale of real estate involves an "independent duty imposed by law." Saltiel, 170 N.J. at 316. Specifically, in the sale of real estate, a seller has a duty to disclose "on-site defective conditions if those conditions [are] known to [the seller] and unknown and not readily observable by the buyer."[5] Strawn v. Canuso, 140 N.J. 43, 59 (1995). "[T]he nondisclosure must be significant." Correa v. Maggiore, 196 N.J. Super. 273, 281 (App. Div. 1984). A seller's duty to disclose does not apply to "[m]inor conditions which ordinary sellers and purchasers would reasonably disregard as of little or no materiality in the transaction . . . ." Weintraub v. Krobatsch, 64 N.J. 445, 455 (1974).

Even when selling property "as is," a seller may not deliberately conceal or fail to disclose a known latent condition material to the transaction. Id. at 453, 455-56. Generally, when the term "as is" is used in connection with the sale of real estate, it means the purchaser is "acquiring real property in its present

[5] That is a seller's duty. Plaintiffs provide no support for the assertion in their complaint that the Estate defendants had a "duty to review" the condition of the property, especially in an "as is" sale.

state or condition." K. Woodmere Assocs., L.P. v. Menk Corp., 316 N.J. Super. 306, 316 (App. Div. 1998). "The term implies real property is taken with whatever faults it may possess, and that the [seller] is released of any obligation to reimburse purchaser for losses or damages resulting from the condition of the property conveyed." Id. at 317. However, the "as is" principle assumes the seller has satisfied its duty to disclose all known latent defects that are not readily observable by the purchaser.

Though perhaps inartfully pleaded, each of plaintiffs' claims against the Estate defendants boils down to allegations the Estate defendants did not tell them about the presence of and damage by carpenter ants and water, thereby breaching their duty to disclose known latent conditions material to the transaction and fraudulently inducing plaintiffs into entering the contract by failing to disclose those conditions. Those allegations – breach of an independent duty and fraudulent inducement – take plaintiffs' claims outside of the economic loss doctrine.

The problem with plaintiffs' claims is that, as found by the trial judge, they are not supported in the record. The Estate defendants had a duty to disclose conditions they knew about and that were unknown and not readily observable by plaintiffs. The record is devoid of any evidence Brandau, Lewis,

or Stogner knew about the carpenter-ant infestation. The presence of water and the water damage in the house was observed by the Kemps each time they went to the house before the closing and detailed at great length in Caveat's report, which plaintiffs received, read, and relied on in negotiating a credit before the closing. Timothy may have told one of his brothers about his bedroom ceiling coming down years before, but Caveat advised plaintiffs in its report that the ceilings in both ground-floor bedrooms were defective and had evidence of "past or present water staining." We agree with the trial court that Lewis's comment they "were worried about opening up a can of worms" is inadequate to show a material misrepresentation or that the Estate defendants had knowledge of a latent condition unknown or unobservable by plaintiffs. Instead, his comment reflected that, as Stogner testified and as clearly revealed in the Caveat report, "[t]he house needed work . . . [which] was quite obvious." Plaintiffs failed to demonstrate a genuine issue of material fact that the Estate defendants made any misrepresentation to them or withheld from them information about a latent condition the Estate defendants knew about and that was not known or readily observable by plaintiffs. Accordingly, the trial court appropriately granted the Estate defendants' motion for summary judgment.

In affirming the trial court's grant of summary judgment in favor of the Estate defendants, we reject plaintiffs' assertion that the trial court was somehow granting immunity to the Estate defendants. Instead, the trial court simply found plaintiffs had not met the standard to defeat the Estate defendants' motion for summary judgment. We also reject plaintiffs' assertion the trial court was biased. That the court asked counsel questions about the contract during argument and considered potentially applicable legal arguments not raised by counsel is not evidence of bias. It is evidence the court was doing its job.

B. The Real Estate Defendants

As to the Real Estate defendants, plaintiffs pleaded causes of actions based on common law fraud, negligence, unjust enrichment, violation of the implied covenant of good faith and fair dealing, violations of the CFA, and punitive damages.[6] As with their claims regarding the Estate defendants, plaintiffs' claims regarding the Real Estate defendants are premised on alleged misrepresentations or omissions concerning the presence of and damage by carpenter ants and water. Specifically, plaintiffs assert Rooney told Christopher during the open house he attended that the damage to the right ground-floor

[6] Plaintiffs did not appeal the trial court's grant of summary judgment to the Real Estate defendants on plaintiffs' unjust-enrichment and good-faith-and-fair-dealing claims.

bedroom wall was caused by the house having an insufficient number of downspouts and that she had obtained a $2,500 estimate to repair that wall and opined the house could be renovated for approximately $15,000. Christopher did not believe her assessment was accurate and believed the renovation would be more expensive. Plaintiffs also assert that during the open house Kris attended with her parents, Rooney said the skylight, which had obvious water stains around it, just needed to be resealed; she was looking into having that work done; she attributed water stains, a hole in the wall, and a patched hole in the ceiling of the right ground-floor bedroom to "water from downspouts"; she stated a hole in the garage's ceiling was caused by a leaky pipe; and she said she had received "estimates and everything was minor." Plaintiffs assert Rooney knew more about the condition of the house than she had disclosed based on her representation that she and Brandau had been good friends.

1. The Common Law Fraud Claim

The trial court correctly found plaintiffs' common-law-fraud claim failed because plaintiffs did not raise a genuine issue of material fact as to whether the Real Estate defendants knew about the carpenter ants or the damage they had caused, knew about the extent of the water damage, or knew that any representation made by Rooney was false. To support their assertion Rooney

knew more about the carpenter-ant and water damage than she had disclosed, plaintiffs rely on her friendship with Brandau. They assume Brandau knew about that damage and assume Brandau would have disclosed it to Rooney. The problem with their argument is that it takes more than assumptions to defeat a motion for summary judgment. See Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) ("Competent opposition [to a summary-judgment motion] requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" (quoting Merchs. Express Money Ord. Co. v. Sun Nat 'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005))).

Plaintiffs point to the estimate Rooney obtained from Kee to support their claim Rooney had more knowledge than she disclosed. However, it is undisputed Rooney obtained that estimate after she had made the alleged misrepresentations and after the Caveat report had been issued; plaintiffs knew Rooney had obtained estimates; and they chose to proceed to closing without receiving a copy of the estimates.

Plaintiffs also fault Rooney for not disclosing that during her visual inspection of the property, she had noticed a hole in the right ground-floor bedroom that revealed water damage Brandau had attributed to her clogged gutters. However, Kris testified that during the open house she had attended

with her parents, water stains, a hole in the wall, and a patched hole in the ceiling of the right ground-floor bedroom were visible and that Rooney disclosed, as Brandau had told her, that the water stains and holes were the result of "water from downspouts."

Plaintiffs also failed to provide sufficient evidence demonstrating they had reasonably relied on any of Rooney's statements. In fact, the evidence they submitted demonstrates they could not have reasonably relied on those statements. Christopher certified that Rooney's belief that "updates would total about $15,000.00 . . . was preposterous" and testified he disbelieved Rooney's $2,500 repair assessment, notwithstanding her reference to a written estimate. Christopher testified that in electing to negotiate a price reduction or credit for the purchase of the house, he relied on the Caveat report and Rooney's statement she had an estimate for $2500 to repair one bedroom wall. His own disbelief of the accuracy of that estimate demonstrates that any such reliance on Rooney's statement was unreasonable. "Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations." Mosior v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984); accord Hinton v. Meyers, 416 N.J. Super. 141, 150 (App. Div. 2010). Moreover, the Caveat report, which plaintiffs read and relied on before the closing,

contradicted at length any idea that repairs to the house would be "cosmetic" or "minor." As the trial court concluded, plaintiffs cannot prove they reasonably relied on Rooney's alleged misstatements and the trial court appropriately granted the Real Estate defendants' motion for summary judgment as to plaintiffs' common-law-fraud claim.

2. The CFA Claims

To prevail on a CFA claim, a plaintiff must establish unlawful conduct, an ascertainable loss, and a causal relationship between the two. D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013). Each element is "without any question, a prerequisite to suit." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009). The unlawful-conduct element may be established either by an affirmative act, which requires no showing of intent, or by an omission, which requires a showing that "the defendant acted with knowledge, and intent is an essential element of the fraud." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994); N.J.S.A. 56:8-2.

A CFA violation by omission "requires proof that the offending conduct occurred knowingly and with an intent that others rely on" it. Chattin v. Cape May Greene, Inc., 124 N.J. 520, 522 (1991). "Under the CFA, a real estate broker representing a seller may be liable for non-disclosure of a defective

condition if the condition was known to the broker but not readily observable to the buyer." Mango v. Pierce-Coombs, 370 N.J. Super. 239, 254 (App. Div. 2004). "To prove consumer fraud, a plaintiff must show that the realtor intentionally concealed the information about the defect with the intention that its client would rely on the concealment, and that the information was material to the transaction." Ibid.

An affirmative misrepresentation is "one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." Ji v. Palmer, 333 N.J. Super. 451, 462 (App. Div. 2000) (quoting Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535 (App. Div. 1996), aff'd, 148 N.J. 582 (1997)). "A practice can be unlawful even if no person was in fact misled or deceived thereby." Cox, 138 N.J. at 17. "The capacity to mislead is the prime ingredient of all types of consumer fraud." Ibid. Finally, an ascertainable loss under the CFA must be quantifiable or measurable. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005).

Plaintiffs failed to establish a violation by omission of the CFA for the same reasons they failed to establish fraud by omission. They provided no proof, only assumptions, that Rooney knew more than she had disclosed. They failed to establish a genuine issue of fact that Rooney knowingly and

intentionally failed to disclose to them material information about the property that was not readily observable to them. See Mango, 370 N.J. Super. at 254.

The trial court correctly found Rooney's alleged misrepresentations did not rise to a violation of the CFA. The alleged statements did not have the capacity to mislead and were not material to the transaction. Christopher did not believe her statements. And with the knowledge from the Caveat report of the extensive water damage to the house and related necessary repairs, plaintiffs bought it anyway.

3. The Negligence Claim

The trial court correctly found plaintiffs' failure to serve an expert report was fatal to their negligence claim against the Real Estate defendants. A plaintiff does not need an expert witness to establish the applicable standard of care in cases in which a jury "is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961)); see also State v. J.L.G., 234 N.J. 265, 305 (2018) ("[E]xpert testimony is not appropriate to explain what a jury can understand by itself."). In cases in which "the 'jury is not competent to supply the standard by which to measure the defendant's conduct,' . . . the plaintiff must

instead 'establish the requisite standard of care and [the defendant's] deviation from that standard [by] present[ing] reliable expert testimony on the subject.'" Davis, 219 N.J. at 407 (alterations in original) (first quoting Sanzari, 34 N.J. at 134-35; and then quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 42 (App. Div. 1996)). Our Supreme Court has explained "when deciding whether expert testimony is necessary, a court properly considers 'whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable.'" Ibid. (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)); see also Hayes v. Delamotte, 231 N.J. 373, 390 (2018) ("[E]xpert testimony 'concern[s] a subject matter that is beyond the ken of the average juror.'" (quoting State v. Kelly, 97 N.J. 178, 208 (1984))).

The obligations of a seller's realtor to a buyer and the applicable standard of care under those circumstances is beyond the ken of an average juror, and an expert witness was needed to establish the standard of care. "[T]he average realtor licensed in New Jersey . . . has devoted special study and experience in the field of real estate sales." Farrell v. Janik, 225 N.J. Super. 282, 289 (Law Div. 1988). Our Supreme Court held "the responsibilities and functions of real-estate brokers with respect to open-house tours" was a subject matter requiring

expert testimony. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444 (1993). Without the aid of an expert witness, the jury would have been left improperly to speculate. Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001). Accordingly, the trial court correctly granted the Real Estate defendants summary judgment on plaintiffs' negligence claim.

4. Spoliation

As part of their summary-judgment motion, the Real Estate defendants asserted plaintiffs in renovating the house had destroyed relevant evidence and argued plaintiffs' claims should be dismissed as a sanction for that spoliation. The trial court agreed, finding plaintiffs had failed to preserve evidence even though they knew soon after they had begun their demolition efforts they had a claim against defendants, and that plaintiffs' failure to preserve evidence prejudiced defendants' ability to defend themselves. The trial court held plaintiffs' spoliation of evidence rendered it "impossible to know now whether the costs [p]laintiffs are claiming derive from the alleged defects or from the improvements on the [p]roperty" and "impossible for the [d]efendants to adequately defend the claims against them."

We recently summarized the law on spoliation of evidence:

> Spoliation refers to "the hiding or destroying of litigation evidence, generally by an adverse party."

> Rosenblit [v. Zimmerman], 166 N.J. [391,] 401 [(2001)]. The duty to preserve evidence "arises where there is: (1) pending or probable litigation involving the [opposing party]; (2) knowledge by the [spoliator] of the existence or likelihood of litigation; (3) foreseeability of harm to the [opposing party], or in other words, discarding the evidence would be prejudicial to [the opposing party]; and (4) evidence relevant to the litigation." Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 366 (App. Div. 1998) (quoting Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 250 (Law Div. 1993)); see also State v. Cullen, 424 N.J. Super. 566, 587 (App. Div. 2012). "[T]he duty to preserve evidence is not boundless." Hirsch, 266 N.J. Super. at 251. "A potential spoliator need do only what is reasonable under the circumstances." Ibid. (citation omitted).
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> [Lanzo v. Cyprus Amax Mins. Co., 467 N.J. Super. 476, 520 (App. Div. 2021).]

Because dismissal with prejudice is "the ultimate sanction," it should be imposed "only sparingly." Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 274 (2010) (quoting Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995)). "It will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Ibid. (quoting Zaccardi v. Becker, 88 N.J. 245, 253 (1982)).

We agree with the trial judge that dismissal is the appropriate sanction in light of plaintiffs' blatant and extensive spoliation of evidence when they were under a clear duty to preserve evidence. Plaintiffs retained counsel and sent a

letter to Stogner memorializing their intent to sue soon after Lewis's visit. Nevertheless, they continued with their demolition and renovation efforts, destroying evidence critical to assessing causation and their damage claim without notifying defendants or giving them the opportunity to examine the property. Any duty to mitigate plaintiffs may have had does not excuse their failure to preserve evidence or to allow defendants to inspect the property before the destruction of that evidence. Because "no lesser sanction will suffice to erase the prejudice suffered" by defendants, we also affirm this aspect of the trial court's decision. Ibid. (quoting Zaccardi, 88 N.J. at 253).

We do not reach the parties' arguments regarding damages given our affirmance of the other aspects of the trial court's decisions.

Affirmed.