ORDER PREPARED BY THE COURT

ELEANOR REUTHER, DEVIN REUTHER, and KIMBERLY REUTHER Plaintiffs, v. TKF PROPERTY MANAGEMENT AND CONSTRUCTION SERVICES, LLC, INLOM LLC, JOSEPHINE KUTCHENRIDER, RICHIE EPIFANIA, CONCEPT ENGINEERING CONSULTANTS, P.A., JOHN J. PLOSKONKA, DAVISON EASTMAN, MUNOZ PAONE, P.A., EDWARD EASTMAN, ROGER KUTCHENRIDER, ASHLEY EPIFANIA, JOHN DOES 1-10, JANE DOES 1-10, XYZ 1-10 Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY, LAW DIVISION DOCKET NO.: MON-L-1620-24 CIVIL ACTION **ORDER**

FILED
OCT 25 2024
CHAD N. CAGAN, J.S.C.

THIS MATTER having been opened to the court by way of (i) Plaintiffs' Eleanor Reuther, Devin Reuther, and Kimberly Reuther ("Plaintiffs") notice of motion for summary judgment as to liability against defendants Inlom LLC, Josephine Kutchenrider, Richie Epifania, Roger Kutchenrider, and Ashley Epifania (collectively "Inlom defendants") filed July 3, 2024, (ii) Inlom defendants' notice of motion for summary judgment against plaintiffs filed July 12, 2024, (iii) Plaintiffs' notice of motion to dismiss the counterclaims of defendant TKF Property Management and Construction Services LLC ("TKF") filed August 1, 2024, and (iv) Defendant TKF's notice of cross-motion for summary judgment on its counterclaims against plaintiffs filed August 20, 2024, and Bruce Vargo, Esq., appearing, on behalf of plaintiffs, and Eric P. Leboueuf, Esq., appearing, on behalf of the Inlom defendants, and Robert James Scibetti, Jr., Esq, appearing, on behalf of defendant TKF, and the court having considered the parties' pleadings, and the court

having heard oral argument on September 13, 2024, and for the reasons stated in the court's Statement of Reasons attached hereto, and for good cause having been shown:

IT IS ON THIS 25th DAY OF OCTOBER 2024 ORDERED:

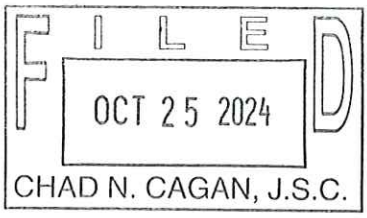
1. Plaintiffs' notice of motion for summary judgment as to liability against the Inlom defendants shall be, and is hereby, **DENIED without prejudice**.
2. Inlom defendants' notice of motion for summary judgment against plaintiffs shall be, and is hereby, **GRANTED in part and DENIED in part**. Inlom defendants' request to dismiss plaintiffs' complaint is **GRANTED.** Plaintiffs' complaint against the Inlom defendants shall be, and is hereby, dismissed with prejudice. The Inlom defendants' request for an award of attorney's fees and sanctions under the frivolous litigation statute, N.J.S.A. 2A:15-59.1, is **DENIED without prejudice**.
3. Plaintiffs' notice of motion to dismiss the counterclaims of TKF shall be, and is hereby, **DENIED without prejudice**.
4. Defendant TKF's notice of cross-motion for summary judgment on its counterclaims against plaintiffs shall be, and is hereby, **DENIED without prejudice**.
5. A copy of this order shall be served on the parties via ecourts.

HON. CHAD N. CAGAN, J.S.C.

See Attached Statement of Reasons

NOT TO BE PUBLISHED WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

ELEANOR REUTHER, DEVIN REUTHER, and KIMBERLY REUTHER Plaintiffs, v. TKF PROPERTY MANAGEMENT AND CONSTRUCTION SERVICES, LLC, INLOM LLC, JOSEPHINE KUTCHENRIDER, RICHIE EPIFANIA, CONCEPT ENGINEERING CONSULTANTS, P.A., JOHN J. PLOSKONKA, DAVISON EASTMAN, MUNOZ PAONE, P.A., EDWARD EASTMAN, ROGER KUTCHENRIDER, ASHLEY EPIFANIA, JOHN DOES 1-10, JANE DOES 1-10, XYZ 1-10 Defendants.	:	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY, LAW DIVISION DOCKET NO.: MON-L-1620-24 CIVIL ACTION **STATEMENT OF REASONS**



Decided: October 25, 2024

Bruce D. Vargo, Esq., appearing, on behalf of plaintiffs Eleanor Reuther, Devin Reuther and Kimberly Reuther

Eric P. LeBoeuf, Esq., appearing, on behalf of defendants Roger Kutchenrider, Ashley Epifania, Inlom LLC, Josephine Kutchenrider, and Richie Epifania

Robert James Scibetti, Jr., Esq, appearing, on behalf of defendant TKF Property Management and Construction Service, LLC

CAGAN, J.S.C.

This matter comes before the court by way of (i) plaintiffs', Eleanor Reuther, Devin Reuther, and Kimberly Reuther ("plaintiffs") notice of motion for summary judgment as to liability against defendants Inlom LLC, Josephine Kutchenrider, Richie Epifania, Roger Kutchenrider, and

Ashley Epifania (collectively "Inlom defendants") filed July 3, 2024,[1] (ii) Inlom defendants' notice of motion for summary judgment against plaintiffs filed July 12, 2024, (iii) Plaintiffs' notice of motion to dismiss the counterclaims of defendant TKF Property Management and Construction Services LLC ("TKF") filed August 1, 2024, and (iv) Defendant TKF's notice of cross-motion for summary judgment on its counterclaims against plaintiffs filed August 20, 2024.

PROCEDURAL HISTORY

The relevant procedural history is as follows:

On September 12, 2023 plaintiffs filed a second amended complaint alleging the following: count one, preliminary injunction; count two, specific performance; count three, breach of purchase agreement; count four, breach of purchase agreement; count five, breach of duty of good faith & fair dealing; count six, fraud/misrepresentation; count seven, conspiracy to commit a tort; count eight, aiding the commission of a tort; and count nine, negligence.

On October 17, 2023 defendant TKF filed an answer to second amended complaint, affirmative defenses, crossclaims, and counterclaims. Defendants filed the following counterclaims: count one, slander of title; and count two, tortious interference.

On October 26, 2023 the Inlom defendants filed an answer to second amended complaint, cross claims, counterclaims, affirmative defenses.

On May 6, 2024 the Hon. Clarkson S. Fisher, Jr., P.J.A.D. (t/a, retired on recall) entered an order, revised May 24, 2024, with attached Rider, ("Judge Fisher decision") granting defendant TKF's motion for summary judgment and denying plaintiffs' cross-motion for summary judgment.

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[1] Plaintiffs' July 3, 2024 motion also sought summary judgment as to liability against defendants Concept Engineering Consultants, P.A., John J. Ploskonka, Davis Eastman, Munoz Paone, P.A., and Edward Eastman. These defendants were subsequently dismissed by stipulation.

Judge Fisher further ordered that "the second amended complaint, insofar as it asserts claims and seeks relief against TKF Property Management and Construction Services LLC, including plaintiffs' demand for specific performance, be and hereby is dismissed with prejudice." Judge Fisher further ordered that "the notice of lis pendens recorded by plaintiffs on the property in question be and hereby is discharged and cancelled of record."

On May 13, 2024 the Hon. David F. Bauman, P.J.Ch. entered a *sua sponte* order transferring the matter to the law division due to the resolution of all equitable issues by Judge Fisher's decision.

The instant motions ensued.

BACKGROUND

Judge Fisher's decision set forth a comprehensive background of this matter, and held in part:

> ... Plaintiffs Eleanor and Daniel Reuther owned undeveloped property in Manalapan (hereafter Lot 2) that abutted property on Clayton Lane (Lot 3) in Manalapan owned by their son, Devin, and his wife, Kimberly, who live in the home situated on Lot 3. The elder Reuthers allowed their son and his wife to use a driveway and walkway on lot 2; they never deeded that portion of lot 2 to Devin and Kimberly, nor did they formalize the creation of an easement in their favor over the northeast corner of Lot 2.
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> The elder Reuthers entered into a contract in 2011, later amended in 2012, by which they agreed to sell Lot 2 to Inlom LLC, which intended to subdivide Lot 2 into multiple buildable lots. Their contract considered the fact that the younger Reuthers were using the northeast corner of Lot 2 in the manner described above and provided in paragraph 10 that the contract is
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> > contingent upon final subdivision/variance approval by the appropriate Board of Manalapan Township approving a minimum of a three (3) lot subdivision. Said application shall also provide for annexing the northeast corner of the property to Lot 3 as reflected

> on the red lined tax map attached which new property line shall be at the driveway setback.

The contract also imposed "a condition" about

> their subdivision application to request permission to reconfigure the lot line of the adjoining [Lot 3] that is owned by [the younger Reuthers]. The new lot line shall be drawn in such a way that the driveway and walkway on Lot 3 to conform to applicable set back requirements and, to the greatest extent possible shall be relatively straight line from the approximate edge of the driveway towards Clayton Lane.

But the contract also provided that "[i]n the event…reconfiguring the lot line of Lot 3 causes the Buyer not to be able to obtain approval for 3 buildable lots as part of the subdivision then the parties agree that instead of reconfiguring the lot line, the Buyers will retain ownership of the land in question but will grant an easement to the owner of Lot 3 such that the driveway and walkway may remain in their current condition and the owner of Lot 3 has an absolute right to use the driveway and walkway without any interference." In short, Inlom purchased all of Lot 2, as to which it would seek subdivision approval, and agreed to reconfigure the boundary line with Lot 3 to allow for the annexation by Lot 3 of the northeast corner, but that contingency was subject to the outcome of the subdivision application. Moreover, the parties recognized that if subdivision approval did not allow for annexation, Inlom would grant Lot 3 an easement over the northeast corner of Lot 2.

The parties also contemplated the possibility of Inlom obtaining subdivision approval for four buildable lots. Compensation for the purchase called for Inlom's execution of a note and mortgage on the property in the elder Reuthers' favor. If the subdivision yielded four lots, Inlom would pay the elder Reuthers an additional $71,250. It stretches credulity to believe that approval of four subdivided lots would allow for a change in the boundary line with Lot 3 that would allow the latter to annex the northeast corner. And, indeed, that is what resulted. Four lots were approved and the fourth-Lot 2.04-was burdened by an easement in Lot 3's favor.

The younger Reuthers received the subdivision application because their property was within 200 feet of the property in question; they never posed an objection to the application, whether about the easement or otherwise. In October 2018, the board granted the

subdivision application, thereby allowing for the creation of four buildable lots on Lot 2 and an easement on Lot 2.04 in favor of the younger Reuthers.

In January 2020, at the time of the completion of the transaction, the elder Reuthers obtained from Inlom a "fourth lot" premium of $71,250, which Inlom paid. And, with the final payment for all four lots, the elder Reuthers executed and recorded a discharge of their mortgage on Lot 2 in January 2020. Not a discouraging word was uttered about the subdivision of Lot 2 into four lots or, as was then known, that Lot 3 would only obtain an easement over, rather than ownership of, the northeast corner of Lot 2.04. In short, plaintiffs accepted the additional purchase price of $71,250 considering there was a fourth knowing that Lot 3 only obtained an easement.

Approximately thirty-one months after that transaction, plaintiffs filed this action, alleging a breach of the contract and seeking specific performance of that part of the contract quoted above that called for the annexation of the northeast corner of Lot 2.04 by Lot 3. ...

... the court focuses on the contract's term and the actions or inactions of both the elder and younger Reuthers in considering whether their claims are precluded as a matter of law or equity. It is clear from the contractual provisions quoted earlier in this opinion that the original parties to the contract recognized that the desire to create multiple buildable lots out of Lot 2 was subject to governmental approval. The obvious, overriding intent underlying the contract was that whether Lot 3 was given outright ownership of the northeast corner where Lot 3's walkway and driveway were located or whether Lot 3 obtained an easement was dependent on what the subdivision application yielded. And the possibility that four subdivided lots would be approved was also contemplated... Again, the contract referred to approval of "a minimum of a three (3) lot subdivision" and that, "in the event...the application produces four (4) buildable lots, then the purchase price shall increase by an additional $71,250[,]" ...

... What transpired up to and including January 2020 is that Inlom conveyed the consideration required for a 4-lot approval and that the elder Reuthers accepted that money and recognized that Lot 3 would obtain an easement and not a reconfiguration of its boundary with Lot 2.04. As TKF points out as well, plaintiff Daniel Reuther acknowledged the fact that his son would receive an easement for his driveway in handwritten notes...

For these reasons, the court finds that TKF is entitled to the entry of summary judgment on the claim of plaintiffs that TKF breached the contract and on the claim that plaintiffs are entitled to specific performance because there is nothing in the contract so clear or definite as would allow for such a drastic remedy. See Barry M. Dechtman, Inc. v. Sidpaul Corp., 89 N.J. 547, 552 (1982); Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599 (App. Div. 2005).

Other reasons compel the rejection of the request for specific performance. The record reveals no dispute that the elder Reuthers and their counsel knew or should have known that Manalapan had approved four buildable lots and that Lot 2.04, which abuts Lot 3, would be burdened by an easement; that is, that the boundary line would not be reconfigured to provide Lot 3 with the northeast corner, and - with that knowledge - they accepted a purchase price reflective of a four-lot subdivision. The time to complain was then, not now. So, whether viewed under equitable estoppel principles, see West Jersey Title Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958) (recognizing that "one may not take a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation 'would not be responsive to demands of justice and good conscience'"), waiver, see Knorr v. Smeal, 178 N.J. 169, 177 (2003) (recognizing that waiver is a "voluntary and intentional relinquishment of a known right"), or laches, see County of Morris v. Fauver, 153 N.J. 80, 105 (1998) (defined as barring a claim "where there is unexplainable and inexcusable delay in enforcing a known right whereby prejudice has resulted to the other party because of such delay"). In all these instances, or any one alone, a court may - and in this case the court will - withhold the equitable remedy of specific performance because, in essence, the plaintiffs were silent when conscience required them to speak. As noted, the elder Reuthers took Inlom's money based on its receipt of approval of a four-lot subdivision knowing that Lot 3 was only obtaining an easement. No action was taken either by the elder Reuthers or their son and daughter-in-law, who claim they are the third-party beneficiaries of the contract, for more than two and a half years. Their silence-whether viewed as triggering waiver, estoppel, or laches principles - precludes the remedy of specific performance. And, although not greatly illuminated by the motion record, TKF was apparently building on Lot 2.04 when the suit was filed and the notice of lis pendens imposed. TKF claims that this caused it to lose a buyer for the property. This type of hardship which has allegedly been caused and which would continue otherwise is yet another reason to withhold a decree of specific performance. See Stehr v. Sawyer, 40 N.J. 352, 357 (1963) (recognizing that specific performance should not issue if its consequences are "harsh or

> oppressive"). The imposition of a notice of lis pendens in the face of TKF's construction on Lot 2.04 has already had harsh consequences, since TKF lost its buyer as a result. An order of specific performance could very well have the effect of precluding TKF's ability to ever convey the property.
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> For these reasons, the first and second counts of the second amended complaint, which appear to be the only counts asserted against TKF, are dismissed with prejudice only insofar as they seek relief from TKF.

(Judge Fisher decision at 3-11)

ANALYSIS

A motion for summary judgment is governed by Rule 4:46-2 of the New Jersey Court Rules. The rule provides that summary judgment shall be "rendered forthwith 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." R. 4:46-2.

The case of Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) sets forth the standard for a trial court to apply when determining whether an alleged disputed issue should be considered "genuine" for purposes of Rule 4:46-2. The Brill court stated that:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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.

[142 N.J. at 540.]

The Brill court further clarifies that, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a

'genuine' issue of material fact for purposes of [Rule] 4:46-2." Ibid. Rather, when the evidence "is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

I. Cross-Motions between Plaintiffs and Inlom Defendants

Plaintiffs argue that they are entitled to summary judgment as to liability against the Inlom defendants because they did not fulfill their contractual obligations. Plaintiffs contend the contract obligated them to include with their subdivision application a request to annex the exempt parcel portion of Lot 2, the northeast corner of Lot 2, to Lot 3, citing the following language,

> The within Contract is contingent upon final subdivision/variance approval by the appropriate Board of Manalapan Township approving a minimum of a three (3) lot subdivision. Said application shall also provide for annexing the northeast corner of the property to Lot 3 as reflected on the red lined tax map attached which new property line shall be at the driveway setback.

Plaintiffs argue the application did not provide for the annexation.

Plaintiffs also rely on paragraph 10 of the contract that also required that "[i]f the [subdivision] application is approved, [Inlom] agrees that during the construction of improvements, [Inlom], at his sole cost and expense, will extend water and sewer service for Lot 3 owned by Devin and Kimberly Reuther." Plaintiffs argue this also did not occur.

Additionally, plaintiffs argue Richie Epifania and Josephine Kutchenrider, two principals of Inlom, executed a "Personal Guaranty" Addendum to the contract wherein Inlom was formally substituted into the contract as the buyer with Richie Epifania and Josephine Kutchenrider agreeing to "personally guaranty the contract and the performance thereof." Plaintiffs argue that the application made no mention of the obligation to annex the exempt parcel and only requested approval for an access easement for Lot 3.

Plaintiffs argue that the Inlom defendants not only breached the contract with the Reuthers, but also profited from that breach by selling the exempt parcel portion that they did not purchase.

The Inlom defendants argue that the law of the case doctrine requires that summary judgment must be entered in their favor and that plaintiffs' claim of breach of the purchase agreement must be dismissed. The Inlom defendants assert that plaintiffs did not seek reconsideration or file an appeal of Judge Fisher's decision. The Inlom defendants contend Judge Fisher's decision is a definitive ruling that the plaintiff is attempting to relitigate without following proper law or procedure. The Inlom defendants contend Judge Fisher held extensive oral argument and reviewed an enormous amount of documents filed by the Plaintiffs and other defendants and came to the conclusions reached in his decision. The Inlom defendants contend plaintiffs' entire argument boils down to one salient argument – the Inlom defendants breached the original contract with Eleanor and Daniel Reuther by failing to deed part of the lot to Devin and Kimberly Reuther, instead creating an easement. The Inlom defendants argue Judge Fisher has already heard that exact argument and denied it.

The Inlom defendants cites the following findings by Judge Fisher,

> Even if it could be assumed that there was a reasonable expectation from the contract's terms that approval of four lots would obligate Inlom to reconfigure the boundary line so as to give Lot 3 ownership of the northeast corner of Lot 2.04, which seems preposterous since the contract contemplated the possibility that annexation might not occur if there was a 3-lot approval, there is nothing about the contract that would preclude the parties to it from modifying its terms. What transpired up to and including January 2020 is that Inlom conveyed the consideration required for a 4-lot approval and that the elder Reuthers accepted that money and recognized that Lot 3 would obtain an easement and not a reconfiguration of its boundary with Lot 2.04. As TKF points out as well, plaintiff Daniel Reuther acknowledged the fact that his son would receive an easement for his driveway in handwritten notes. See Muller Certification, Exhibits P and Q."

The Inlom defendants argue that plaintiffs had every right to modify the underlying contract which they did by accepting more money for a lot with an easement.

The court will address the claims asserted in plaintiffs' second amended complaint in turn.

A. Breach of Purchase Agreement

As to counts three (breach of purchase agreement) and four (breach of purchase agreement), the Inlom defendants argue they entered into a contract with Eleanor and Daniel Reuther – not the current plaintiffs. The Inlom defendants contend there was a written contract, and all parties were represented by counsel. The Inlom defendants argue the contract was consummated by all parties, and after its consummation, the actual parties to the contract modified its terms with their respective counsel and all parties complied with that modification.

The Inlom defendants argue that plaintiffs were paid handsomely for a property that had an easement that they knew about, had notice of, and admitted to. The Inlom defendants argue that plaintiffs accepted the money and discharged their mortgage as to the entire property.

In reply, plaintiffs argue the law of the case doctrine does not apply. Plaintiffs argue the law of the case doctrine is only triggered when one court is faced with ruling on the merits by a different and co-equal court on an identical issue. Plaintiffs argue Judge Fisher faced the question of whether TKF, a third party and non-party to the contract between plaintiffs and the Inlom defendants could be compelled to transfer the parcel at issue. Plaintiffs argue that Judge Fisher's ruling focused on the time between TKF's purchase of the property and the filing of the complaint. Plaintiffs argue that Judge Fisher's ruling is not identical in any way to the issues between plaintiffs and the Inlom defendants. Plaintiffs contend they do not seek specific performance against the Inlom defendants but rather seek monetary damages as a result of their failure to request the

annexation as contractually obligated and for their failure to connect the home on Lot 3 to the Manalapan sewer and water utilities as contractually required.

Plaintiffs argue that the Inlom defendants did not fulfill their contractual obligation, specifically, to include with their subdivision application a request to annex the exempt parcel portion of Lot 2, the northeast corner of Lot 2 to Lot 3, which according to plaintiffs did not occur. Plaintiff also argues that the Inlom defendants did not extend water and sewer service for Lot 3.

To prevail on a claim for breach of contract, a party must prove: (1) the parties formed a contract; (2) the plaintiff "did what the contract required [it] to do"; (3) the defendant "did not do what the contract required [it] to do"; and (4) the defendant's "breach, or failure to do what the contract required, caused a loss to the plaintiff." Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016).

"In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain." Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). "Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). "If the terms of a contract are clear, [courts] must enforce the contract as written . . . ." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999). However, interpretation of a contract should not be decided on summary judgment when "there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation." Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000).

The law-of-the-case doctrine "is a non-binding rule intended to 'prevent relitigation of a previously resolved issue'" in the same case. State v. K.P.S., 221 N.J. 266, 276 (2015) (quoting

Lombardi v. Masso, 207 N.J. 517, 538, 25 A.3d 1080 (2011) (other citations omitted)); see also Arizona v. California, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."). "[T]he 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." State v. Reldan, 100 N.J. 187, 208 (1985) (O'Hern, J., dissenting) (internal quotation marks omitted). Law of the case is a discretionary rule that calls on one court "to balance the value of judicial deference for the rulings of a coordinate [court] against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" K.P.S., 221 N.J. at 276 (quoting Lombardi, 207 N.J. at 538-39) (other citations omitted)). "The law of the case doctrine 'is only triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue. Lawson v. Dewar, 468 N.J. 128, 135 (App. Div. 2021) (quoting Lombardi, 207 N.J. at 539).

Here, Judge Fisher's decision unequivocally included a comprehensive examination of the identical transactional and related documents at issue here. The court finds unpersuasive Plaintiffs' argument that Judge Fisher's decision is limited to addressing the claim for specific performance against TKF. While Judge Fisher's decision did, in fact, only dismiss the specific performance count against TKF, Judge Fisher thoroughly analyzed the entire history of this matter inclusive of the dealings between Plaintiffs and the Inlom defendants.

In his decision Judge Fisher made findings that directly speak to the claims against the Inlom defendants. Judge Fisher quoted paragraph 10 of the contract that called for annexation by Lot 3, relied on by Plaintiffs here. Judge Fisher held in part, "In short, Inlom purchased all of Lot 2, as to which it would seek subdivision approval, and agreed to reconfigure the boundary line with Lot 3 to allow for the annexation by Lot 3 of the northeast corner, but that contingency was

subject to the outcome of the subdivision application. Moreover, the parties recognized that if subdivision approval did not allow for annexation, Inlom would grant Lot 3 an easement over the northeast corner of Lot 2." (Judge Fisher decision at 4) Judge Fisher further held in part,

> The parties also contemplated the possibility of Inlom obtaining subdivision approval for four buildable lots. Compensation for the purchase called for Inlom's execution of a note and mortgage on the property in the elder Reuthers' favor. If the subdivision yielded four lots, Inlom would pay the elder Reuthers an additional $71,250. It stretches credulity to believe that approval of four subdivided lots would allow for a change in the boundary line with Lot 3 that would allow the latter to annex the northeast corner. And, indeed, that is what resulted. Four lots were approved and the fourth-Lot 2.04-was burdened by an easement in Lot 3's favor.
>
> The younger Reuthers received the subdivision application because their property was within 200 feet of the property in question; they never posed an objection to the application, whether about the easement or otherwise. In October 2018, the board granted the subdivision application, thereby allowing for the creation of four buildable lots on Lot 2 and an easement on Lot 2.04 in favor of the younger Reuthers.
>
> In January 2020, at the time of the completion of the transaction, the elder Reuthers obtained from Inlom a "fourth lot" premium of $71,250, which Inlom paid. And, with the final payment for all four lots, the elder Reuthers executed and recorded a discharge of their mortgage on Lot 2 in January 2020. Not a discouraging word was uttered about the subdivision of Lot 2 into four lots or, as was then known, that Lot 3 would only obtain an easement over, rather than ownership of, the northeast corner of Lot 2.04. In short, plaintiffs accepted the additional purchase price of $71,250 considering there was a fourth knowing that Lot 3 only obtained an easement.
>
> Approximately thirty-one months after that transaction, plaintiffs filed this action, alleging a breach of the contract and seeking specific performance of that part of the contract quoted above that called for the annexation of the northeast corner of Lot 2.04 by Lot 3. ...
>
> ... the court focuses on the contract's terms and the actions or inactions of both the elder and younger Reuthers in considering whether their claims are precluded as a matter of law or equity. It is clear from the contractual provisions quoted earlier in this opinion

> that the original parties to the contract recognized that the desire to create multiple buildable lots out of Lot 2 was subject to governmental approval. The obvious, overriding intent underlying the contract was that whether Lot 3 was given outright ownership of the northeast corner where Lot 3's walkway and driveway were located or whether Lot 3 obtained an easement was dependent on what the subdivision application yielded. And the possibility that four subdivided lots would be approved was also contemplated... Again, the contract referred to approval of "a minimum of a three (3) lot subdivision" and that, "in the event...the application produces four (4) buildable lots, then the purchase price shall increase by an additional $71,250[,]" ...
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> Id. at 5-8.

Noting "there is nothing about the contract that would preclude the parties to it from modifying its terms," Judge Fisher found:

> ... What transpired up to and including January 2020 is that Inlom conveyed the consideration required for a 4-lot approval and that the elder Reuthers accepted that money and recognized that Lot 3 would obtain an easement and not a reconfiguration of its boundary with Lot 2.04. As TKF points out as well, plaintiff Daniel Reuther acknowledged the fact that his son would receive an easement for his driveway in handwritten notes...
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> Id. at 8

In addition to finding specific performance was unwarranted because there is nothing in the contract so clear or definite as would allow for such a drastic remedy, Judge Fisher denied the relief based on the doctrines of waiver, estoppel and laches and held in part, "the elder Reuthers took Inlom's money based on its receipt of approval of a four-lot subdivision knowing that Lot 3 was only obtaining an easement. No action was taken either by the elder Reuthers or their son and daughter-in-law, who claim they are the third-party beneficiaries of the contract, for more than two and a half years." Id. at 10. Judge Fisher "focuse[d] on the contract's term and the actions or inactions of both the elder and younger Reuthers in considering whether their claims are precluded as a matter of law or equity." Id. at 7.

It is simply beyond dispute that Judge Fisher conducted an in-depth analysis and made comprehensive findings of the entire background relating to this matter, including the contract documents involving the Inlom defendants, in dismissing the specific performance count against TKF based on waiver, estoppel and laches. The Inlom defendants similarly assert in their answer to the second amended complaint the affirmative defenses of waiver, estoppel and laches. Given the fact Judge Fisher held Plaintiffs' claims were barred by waiver, estoppel and laches in this same case based on the identical record evidence, this court finds the law of the case doctrine prevents re-litigation of this previously resolved issue. State v. Reldan, 100 N.J. 187, 208 (1985) As such, this court finds Plaintiffs' claims for breach of contract are barred by waiver, estoppel and laches.

As found by Judge Fisher, in January 2020, the elder Reuthers obtained the fourth lot premises of $71,250 and discharged the mortgage on Lot 2. Plaintiff's accepted the money knowing there was only an easement. Approximately 31 months after the transaction, plaintiffs filed this action alleging breach of contract and seeking specific performance of the annexation of Lot 2.04 by Lot 3. As held by Judge Fisher, the time to complain was then, not now. Plaintiffs knew they were only getting the easement and they remained silent when conscience required them to speak.

In addition to the doctrines of waiver, estoppel and laches, the court also finds there are no questions of fact and summary judgment should be entered in favor of the Inlom defendants as a matter of law. The record evidence demonstrates that the contract was consummated by all parties, and after its consummation, the actual parties to the contract modified its terms with their respective counsel and all parties complied with that modification. The record evidence demonstrates plaintiffs knew they only obtained the easement and accepted Inlom's payment after

Inlom obtained approval for a four-lot subdivision without annexation to Lot 3. Further, Plaintiffs discharged their mortgage as to the entire property. Under these circumstances, the court finds no basis to maintain causes of action against the Inlom defendants for breach of contract for their alleged failure to submit a subdivision application that provided for annexation to Lot 3. Accordingly, summary judgment shall be granted in favor of the Inlom defendants, and count three and count four of the complaint shall be dismissed with prejudice. Plaintiffs' motion for partial summary judgment shall be denied.

B. Breach of Duty of Good Faith & Fair Dealing

As to count five (breach of duty of good faith and fair dealing), the Inlom defendants argue that they did everything regarding the property here in open public hearings, published notice of same in newspapers, agreed to pay the plaintiffs every dollar their agreement set forth and complied with every provision of the contract and the modified terms of same.

In reply, plaintiffs repeat their arguments that defendants did not fulfill their contractual obligations to the detriment of plaintiffs.

Although New Jersey recognizes an independent cause of action for breach of the covenant of good faith and fair dealing, in order to maintain such a cause of action, a plaintiff "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." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005).

Here, plaintiffs' claim shall be dismissed pursuant to the doctrines of waiver, estoppel and laches and because the record evidence does not support a claim for breach of the implied covenant of good faith and fair dealing. The court finds that the record evidence demonstrates no questions of material fact that the Inlom defendants did not do anything that had the effect of destroying or

injuring the right of plaintiffs to receive the fruits of the contract. To the contrary, the Inlom defendants paid Plaintiffs $71,250 for the fourth lot, which payment was accepted by plaintiffs. Therefore, the Inlom defendants are entitled to summary judgment, and count five of the complaint shall be dismissed with prejudice. Plaintiffs' motion for partial summary judgment shall be denied.

C. Fraud/Misrepresentation

As to count six (fraud/misrepresentation), the Inlom defendants argue that the plaintiffs cannot show any misrepresentations on behalf of the Inlom defendants. The Inlom defendants contend that plaintiffs will not be able to prove that Inlom knowingly made false statements with the intent to deceive given the public nature of this matter. The Inlom defendants argue plaintiffs were given specific notice of exactly what Inlom was going to do with the property and they raised no objection. The Inlom defendants contend plaintiffs cannot demonstrate detrimental reliance on any representations of Inlom defendants. The Inlom defendants argue the parties who sold the property to the Inlom defendants are deceased. Further, the plaintiffs are third party beneficiaries of the contract and there were no statements of any kind made to them by Inlom. Further, again, they were given the specific opportunity to cure any detrimental reliance when they were provided notice of the land use plan and application and did nothing.

The Inlom defendants also contend plaintiffs' claim based on the argument that plaintiffs' property was not connected with the water sewer system as contemplated in the original contract, is without merit. The Inlom defendants rely on correspondence from defendant Ploskonka, an engineer, where he puts in writing that he approached the plaintiffs to conduct such hookup, and the plaintiffs refused to do so. The Inlom defendants argue that refusal defeats any argument that somehow these defendants committed fraud.

Plaintiffs argue the Inlom defendants made misrepresentations to the elder Reuthers including they would submit an application that included a request for the annexation of the exempt parcel, and they would connect Lot 3 to the Manalapan sewer and water utilities.

To establish common-law fraud plaintiffs must show "(1) a material representation of a past or present fact; (2) knowledge by the defendants of its falsity; (3) intention that it be relied upon; (4) reasonable reliance by the other person; and (5) resulting damages." Carroll v. Cellco P'ship, 313 N.J. Super. 488, 502 (App. Div. 1998); Jewish Center of Sussex County v. Whale, 86 N.J. 619, 624 (1981). Moreover, when a fraud claim is based on an alleged omission, rather than an affirmative representation, the claim cannot lie absent a fiduciary or special relationship between the parties. N.J. Econ. Dev. Authority v. Pavonia Restaurant, Inc., 319 N.J. Super. 435, 446 (App. Div. 1998). Plaintiff's reliance on the misrepresentation is essential to establishing fraud. Axelrod v. CBS Pubs., 185 N.J. Super. 359, 372 (App. Div. 1982). Fraud is never presumed; it must be established by clear and convincing evidence. Baldasarre v. Butler, 254 N.J. Super. 502, 521 (App. Div. 1992) (rev'd in part on other grounds).

"A cause of action for negligent misrepresentation may exist when a party negligently provides false information." Karu v. Feldman, 119 N.J. 135, 146 (1990). A "negligent misrepresentation constitutes '[a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance.'" McClellan v. Feit, 376 N.J. Super. 305, 317 (App. Div. 2005 (quoting H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 334 (1983)).

For reasons expressed above, the court finds plaintiffs' claims for fraud and misrepresentation are barred by waiver, estoppel and laches. In addition the court finds there are no questions of fact and summary judgment must be granted as a matter of law. The record

evidence demonstrates plaintiffs knew they only obtained the easement and accepted Inlom's payment after Inlom obtained approval for a four-lot subdivision without annexation to Lot 3. Therefore, the Inlom defendants are entitled to summary judgment, and count six of the complaint shall be dismissed with prejudice. Plaintiffs' motion for partial summary judgment shall be denied.

D. Civil Conspiracy

As to counts seven (conspiracy to commit a tort) and eight (aiding the commission of a tort), the Inlom defendants argue that with no breach of contract, and in the face of Judge Fisher's decision, the contract was amended after the alleged conspiracy took place with full knowledge of all parties to the underlying contract and whom all had legal counsel.

Plaintiffs' brief did not oppose Inlom defendant's request to dismiss counts seven and eight.

"In New Jersey, a civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005) (internal citations omitted). The essence of a civil conspiracy claim is not the unlawful agreement, "'but the underlying wrong which, absent the conspiracy, would give a right of action.'" Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364-65 (App. Div. 1993)(quoting Bd. of Educ. v. Hoek, 38 N.J. 213, 238 (1962)). The nature of a conspiracy dictates that a plaintiff is not required to provide direct evidence of an agreement between conspirators, but merely evidence that is circumstantial. Morgan, 268 N.J. Super. at 365. The ultimate question of "'whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can 'infer from the circumstances [that

the alleged conspirators] had a meeting of the minds and thus reached an understanding' to achieve the conspiracy's objectives.'" Id. (quoting Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd on other grounds, 446 U.S. 754 (1980)).

A plaintiff "need not prove that each participant in a conspiracy knew "'the exact limits of the illegal plan or the identity of all participants.'" Id. (quoting Hampton, 600 F.2d at 621). The participants to a conspiracy "'must share the general conspiratorial objective, but . . . need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result.'" Id. (quoting Hampton, 600 F.2d at 621). Thus, a plaintiff must merely establish that there was "'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'" Id. (quoting Hampton, 600 F.2d at 621).

Here, the court finds no evidence in this record to support a claim for civil conspiracy or aiding in the commission of a tort. Nor does Plaintiffs argue any record evidence to support such claims. As such, the Inlom defendants are entitled to summary judgment, and counts seven and eight of the complaint shall be dismissed with prejudice. Plaintiffs' motion for partial summary judgment shall be denied.

E. Negligence

As to count nine (negligence), the Inlom defendants argue the claim must fail for the same reasons plaintiffs' breach of contract claims fail.

Plaintiffs argue the annexation obligation and the utility connection obligation were both made to benefit the younger Reuthers. Plaintiffs contend the failure of the Inlom defendants to request the annexation and the failure to connect the younger Reuther's home to the utilities have caused the younger Reuthers harm.

"The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages." Coleman v. Martinez, 247 N.J. 319, 337 (2021) (emphasis added) (quoting Robinson v. Vivirito, 217 N.J. 199, 208 (2014)). It is well settled law of the State of New Jersey that ordinary negligence must be proven and will never be presumed; indeed, there is a presumption against it, and the burden of proving negligence is on the plaintiffs. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); Hansen v. Eagle Picher Lead Co., 8 N.J. 133, 139 (1951). To prove liability, the plaintiff must prove the defendant's actions were the proximate cause of the loss. Barr v. Francks, 70 N.J. Super. 565 (App. Div. 1961); Pisano v. S. Klein, 78 N.J. Super. 375, 391 (App. Div. 1963).

For the reasons stated earlier, the court finds plaintiffs' negligence claim is barred by waiver, estoppel and laches. In addition, the court finds there is no record evidence to support a negligence claim as a matter of law. Plaintiffs have not demonstrated that a duty was owed to plaintiffs, the Inlom breached that duty, and that the plaintiffs suffered injury proximately caused by the Inlom defendants. Again, the record evidence demonstrates plaintiffs knew they only obtained the easement and accepted Inlom's payment after Inlom obtained approval for a four-lot subdivision without annexation to Lot 3. As such, the Inlom defendants are entitled to summary judgment, and count nine of the complaint shall be dismissed with prejudice. Plaintiffs' motion for partial summary judgment shall be denied.

F. The Inlom Defendants Request for an Award of Attorney's Fees and Sanctions for Plaintiff's Frivolous Litigation

The Inlom defendants argue that plaintiffs have acted with nothing but bad faith since the outset of this matter. The Inlom defendants contend Judge Fisher addressed every single argument made by the plaintiffs in his decision. The Inlom defendants state there was no motion to reconsider

and no appeal. The Inlom defendants contend, instead, the plaintiffs come before this court, ask it to ignore Judge Fisher as if he does not exist and have the temerity to argue that they are entitled summary judgment based upon the very same arguments – word for word and document for document – that were already found to be preposterous. The Inlom defendants argue there is no other descriptor of these plaintiffs that defines them more then, frivolous. The Inlom defendants contend this case was a shake down and the plaintiff's lost.

The Inlom defendants argue litigation is considered frivolous when it is "commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury" or if the non-prevailing party "knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1) and (2).

The Inlom defendants state that after the plaintiff filed its motion, the Inlom defendants provided proper notice pursuant to R. 1:4-8 demanding the removal of same. The Inlom defendants contend not only has it not been removed, but it has also been doubled down through further actions of the Plaintiffs. The Inlom defendants argue they properly plead as an affirmative defense to the frivolous complaint, plaintiff's violation of N.J.S.A. 2A:15-59.1(b) and thus, plaintiffs have been on notice since the inception of this case that the defendants' position was that the complaint was frivolous and that defendants would seek all fees and sanctions for same.

In opposition, plaintiffs argue the chancery court previously ruled that the plaintiffs' lis pendens, which is based upon, and closely tracks, the complaint, was filed in good faith and had merit, thereby undercutting the Inlom defendants' argument, citing the September 19, 2023 Order. Plaintiffs argue the court denied TKF's motion to discharge the lis pendens and expressly ruled

that "the lawsuit states in good faith a claim in the pending lawsuit for the property. Lis Pendens proper under N.J.S.A. 2A:15-6 and Manzo v. Shawmut Bank, 291 N.J. Super. 194 (2016)." Id. Plaintiffs argue it is also significant that by ruling as the court did, it expressly rejected TKF's argument that, there was no probability of plaintiffs' success and therefore the lis pendens should be discharged citing Docket, MON-C-132-22, CHC202368302 (p.6). Plaintiffs also argue the Inlom defendants' reliance on the law of the case doctrine is misplaced. In summary, plaintiffs contend they filed a meritorious complaint with claims against multiple defendants, and lis pendens regarding the property, in good faith according to the chancery court. Accordingly, plaintiffs request the Inlom defendants' motion and request for sanctions must be denied.

N.J.S.A. 2A:15-59.1, governing frivolous litigation, states in part,

> **a.**
>
> **(1)** A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous.
>
> ...
>
> **b.** In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:
>
> **(1)** The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> **(2)** The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The court declines to find plaintiffs' complaint was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury. Nor does the court find plaintiffs knew, or should have known, the complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

In assessing if the plaintiffs' action was frivolous, the court first notes the convoluted background of this matter. (See, Judge Fisher decision at 3 "Although a bit convoluted...") Additionally, the court finds plaintiffs did not simply fabricate claims. Rather, Plaintiffs sought to enforce contractual terms entered between the parties. As noted above, plaintiffs argue the Inlom defendants did not fulfill their contractual obligations, and in particular, failed to include with their subdivision application a request to annex the exempt parcel portion of Lot 2, the northeast corner of Lot 2, to Lot 3. As held above, this court finds the breach of contract claim to be without merit as not only barred by waiver, estoppel and laches but also because the record evidence demonstrates plaintiffs knew they only obtained the easement and accepted Inlom's payment after Inlom obtained approval for a four lot subdivision without annexation to Lot 3.

Fee shifting requests under the frivolous litigation statute and R. 1:4-8 are interpreted restrictively because "the right of access to the court should not be unduly infringed upon, honest and creative advocacy should not be discouraged, and the salutary policy of the litigants bearing, in the main, their own litigation costs, should not be abandoned." Wolosky v. Fredon Tp., 472 N.J. Super. 315, 327 (App. Div. 2022) (quoting Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14, 18 (App. Div. 2002)) (other citation omitted). "Sanctions should be awarded only in exceptional cases." Wolosky, 472 N.J. Super. at 328 citing Fagas v. Scott, 251 N.J. Super. 169, 181 (Law Div. 1991)

At this time, although this court finds plaintiff's claims are unsuccessful, this court does not find the complaint was filed in bad faith. The matter has a complex background and there were contractual agreements between the parties. Moreover, no prior court in this matter has found plaintiffs complaint to have been filed in bad faith. Under the circumstances here, the court does not find, at this time, sanctions pursuant to N.J.S.A. 2A:15-59.1 to be warranted or appropriate. As such, the court denies the Inlom defendants' request for an award of attorney's fees and sanctions under the frivolous litigation statute.

II. Cross Motions between Plaintiffs and Defendant TKF

Plaintiffs move to dismiss defendant TKF's counterclaims for slander of title and tortious interference. Plaintiffs argue TKF's counterclaims are focused on plaintiffs statutorily required lis pendens. Plaintiff asserts TKF's claims are barred under the litigation privilege doctrine and should be dismissed as a matter of law pursuant to Rules 4:6-2 and 4:46.[2]

Plaintiffs argue, "Under the lis pendens statute, N.J.S.A. 2A:15-6, a claimant seeking to enforce a lien . . . upon real estate shall, after the filing of the complaint, file in the record office of the county a written notice of the pendency of the action." Wells Fargo Bank v. Leary A-0112-18, *9 (App. Div. 2019) (quoting Trus Joist Corp. v. Treetop Assocs, Inc., 97 N.J. 22, 30-31 (1984)) (emphasis added). Plaintiffs contend "The effect of the filing of a notice of lis pendens is constructive notice of a pending action concerning that real estate, and a purchaser or mortgagee takes subject to the outcome of the lawsuit." Id., quoting Trus Joist, surpa, at 31 (citing N.J.S.A. 2A:15-7) (footnote omitted). Plaintiffs contend that to comply with New Jersey statutory law, they were legally required to file the lis pendens that it filed, which essentially mimicked its earlier

[2] Plaintiff's notice of motion did not move for summary judgment pursuant to Rule 4:46 and did not include a statement of undisputed material facts as required by R. 4:46-2(a).

filed complaint. Plaintiffs' argue TKF's counterclaims that are based on the lis pendens are barred as a matter of law.

Plaintiffs also contend that TKF's counterclaims are based solely on the assertions made by Plaintiffs in the complaint and the lis pendens to which absolute immunity attaches. Plaintiffs contend there is no allegation that Plaintiff's commencement of this action was a tortious act or somehow malicious. Additionally, Plaintiffs argue that the chancery court previously ruled their claims were meritorious and the lis pendens was filed in good faith when the court denied TKF's motion to discharge the lis pendens, citing the order filed September 19, 2023 ["the lawsuit states in good faith a claim in the pending lawsuit for the property. Lis Pendens proper under N.J.S.A. 2A:15-6 and Manzo v. Shawmut Bank, 291 N.J. Super. 194 (2016)." Plaintiffs argue the law of the case doctrine requires this court respect the prior finding that plaintiffs brought a meritorious complaint. Plaintiffs further contend that TKF's counterclaims must be dismissed because TKF cannot show plaintiffs acted with malice, a required element in both counterclaims.

In its cross-motion for summary judgment on its counterclaims, TKF contends it is undisputed that plaintiffs were aware that Lot 2.04 would have an easement in favor of Lot 3's driveway. Further, plaintiffs were aware that the developer Inlom was not under a duty to deed back or return any land from Lot 2.04 to Lot 3. Additionally, Devin and Kimberly Reuther were duly noticed of the developer's application to the Manalapan Zoning Board for this subdivision and did not object at the Zoning Board meeting as noted in the November 8, 2018 Resolution. Moreover, Eleanor Reuther received additional money from the developer based on the fact that Lot 2 was successfully subdivided into four buildable lots.

TKF argues that it ultimately came to own all four subdivided lots of Lot 2 in January 2020 and began construction in Summer 2022. TKF argues that plaintiffs, with malice and dishonesty,

filed the instant meritless litigation as to their claims against Lot 2.04 claiming they were entitled to own a portion of Lot 2.04. TKF contends that plaintiffs filed their lawsuit with the specific intent to prevent TKF from building on Lot 2.04 and selling it to a potential buyer. TKF contends plaintiffs withheld facts from their attorney – which were exposed in discovery - and verified their false filing with a malice and tortious intent. TKF asserts these malicious and tortious intents were further amplified with plaintiffs filing of a lis pendens against Lot 2.04 three months after this litigation began and on the eve of their Order to Show Cause for preliminary injunctive relief being denied by the Court. TKF argues plaintiffs filing of this lawsuit and the subsequent lis pendens was nothing more than malice to prevent TKF from building and selling a home.

TKF cites to record evidence to support its contention that plaintiffs maliciously filed this lawsuit and their lis pendens without just cause or excuse. TKF contends, *inter alia*, plaintiffs knew for thirty-one months that they were only entitled to the duly filed driveway easement against Lot 2.04 in Lot 3's favor; Plaintiffs knowingly verified the underlying complaint in the instant action; plaintiffs maliciously filed this lawsuit claiming they did not know about Lot 2's subdivision until TKF's construction began and did not know that an easement had been created on Lot 2.04 in favor of Lot 3 for the driveway which is directly contradicted by the public record, Daniel Reuther's personal notes, and Reuther's receipt of payment from Inlom for Lot 2.04's creation; and plaintiffs' filings contradict their deceased relative's handwritten notes and their acceptance of the fourth lot premium.

"Generally, slander of title is defined as a false and malicious statement made in disparagement of a person's title to real or personal property, causing injury." Lone v. Brown, 199 N.J. Super. 420, 425 (App. Div. 1985) (citations omitted)

A complaint based on tortious interference must allege facts that show some protectable right -- a prospective economic or contractual relationship. Although the right need not equate with that found in an enforceable contract, there must be allegations of fact giving rise to some "reasonable expectation of economic advantage." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751 (1989) (citation omitted) "A complaint must demonstrate that a plaintiff was in "pursuit" of business. Second, the complaint must allege facts claiming that the interference was done intentionally and with "malice."" Ibid. (citations omitted)

Here, TKF contends that it had a purchaser for Lot 2.04 prior to Reuther's filing of this lawsuit and lis pendens and TKF subsequently lost that purchaser. TKF further contends it lost financing from its lender due to Reuther's filing of the lis pendens. TKF argues that all of these items were in the public record and duly filed with the Monmouth County Clerk.

Addressing privileged statements, the court in Lone held, "[i]t is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, which have some relation thereto, are absolutely privileged from slander or defamation actions, even if the statements are made with malice." Id. at 426. Finding the notices of lis pendens were absolutely privileged, the court in Lone held,

> We view the notice of lis pendens as republication of some of the essential information contained in the complaint and notice of appeal. Wendy's of So. Jersey v. Blanchard, 170 N.J. Super. 491, 495 (Ch. Div. 1979). We are also satisfied that each of the notices of lis pendens related directly to the pending judicial proceeding. Brown was making a claim which affected the specified real estate and he wanted to maintain the status quo. It would be incongruous indeed to say that the complaint and notice of appeal are privileged but the notice of lis pendens filed in the same pending judicial proceeding, designed to give notice and preserve the status quo, would not also be privileged.
>
> Thus, we hold that each of the notices of lis pendens was absolutely privileged. Similarly, other jurisdictions have found that the filing

> of the notice of lis pendens is absolutely privileged in a slander-defamation of title cause of action.

Lone, 199 N.J. Super. at 428-429 (citations omitted)

Also finding the absolute privilege precludes a claim for tortious interference, the Lone court held,

> Finally, the absolute privilege which precludes a slander cause of action also precludes a cause of action for tortious interference with contractual relation or economic advantage. "If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and *quasi*-judicial proceedings, is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label." Rainier's, 19 *N.J.* at 564, 117 *A.*2d 889.

Lone, 199, N.J. Super. at 429-430

The court in Brown v. Brown, 470 N.J. Super. 457, 466 (App. Div. 2022) addressed the Lone decision and held in part,

> Although we agree with many aspects of Lone, we disagree to the extent that decision may be viewed as suggesting the very commencement and prosecution of a suit is privileged. That is, we agree a complaint is a "part of the judicial proceedings" as Lone observed, id. at 427, 489 A.2d 1192, and we certainly agree statements contained in a complaint may be protected by the litigation privilege and insulate the pleader from claims for damages in a subsequent suit. But the commencement and prosecution of the action — if the action can be shown to be frivolous, vexatious or tortious — is not cloaked by the privilege. Indeed, accepting Lone for what it appears to hold — that one is always protected by the litigation privilege when filing an action that is later alleged to constitute a slander on title — would mean that a slander-of-title claim based on a prior suit would never be cognizable.

Regarding application of the litigation privilege to notices of lis pendens, the Brown court held,

> ...We start with the same understanding that statements contained within a notice of lis pendens are certainly protected by the litigation privilege. The very nature of a notice of lis pendens, when properly asserted, is its recitation or repetition of statements made in a complaint about the suitor's claim of "title to, interest in or lien upon" described real estate. N.J.S.A. 2A:15-7. That is, a proper notice of lis pendens is a statement or communication of what is alleged in the complaint; when it is recorded as part of, or in the course of, a judicial proceeding, and has some relation to and was intended "to achieve the objects of the litigation," Hawkins, 141 N.J. at 216, 661 A.2d 284) - elements clearly present here - it is entitled to the protection afforded by the litigation privilege.

Brown, 470 N.J. Super. at 467.

The court in Brown held the lower court erred in denying Patricia Brown's motion that sought summary judgment in her favor on all the claims, or parts of claims, insofar as they alleged damages caused by statements in, or the recording of, the notice of lis pendens. Id. at 470. The Brown court affirmed the denial of summary judgment as to the tortious interference claim because the litigation privilege protects only statements made in judicial proceedings and not the commencement of frivolous, vexations or tortious lawsuits. Ibid.

This court finds, and as held previously by another judge in this matter, plaintiffs were authorized by N.J.S.A. 2A:15-6 to record a notice of lis pendens. See, Brown at 469. The court further finds that its contents were protected by the litigation privilege. Brown, at 469-470. As held by the court in Brown, the litigation privilege protects statements made during a suit; it does not protect a litigant from suit seeking redress for injuries cause by an adversaries' very act of commencing and prosecuting the suit if that suit was frivolous, vexations or tortious. Id. at 463-464.

Here, as guided by Brown, this court finds that statements by plaintiffs during this judicial proceeding may be privileged, but the suit's commencement and prosecution is not. Id. at 465.

The court finds there are genuine issues of material fact as to whether plaintiffs' act of filing this lawsuit constituted slander of title or tortious interference with contractual relations. The court further finds there are questions of fact as to whether plaintiffs acted with malice to support such claims. As noted above, plaintiffs' complaint argued that the Inlom defendants did not fulfill their contractual obligation, specifically, to include with their subdivision application a request to annex the exempt parcel portion of Lot 2, the northeast corner of Lot 2, to Lot 3, which according to plaintiffs did not occur. After a thorough analysis of the transactions in this matter, while finding the claim for specific performance is precluded by waiver, estoppel and laches, Judge Fisher did not find Plaintiffs acted with malice, or frivolously, vexatiously, or tortiously. Succinctly, this court finds there are questions of fact that preclude summary judgment based on this record. As such, TKF's motion for summary judgment, and plaintiff's motion to dismiss (even if viewed as a motion for summary judgment) shall both be denied without prejudice.

CONCLUSION

Based on the foregoing, (i) Plaintiffs' motion for summary judgment as to liability against the Inlom defendants shall be denied without prejudice; (ii) Inlom defendants' motion for summary judgment against plaintiffs shall be granted in part and denied in part. Inlom defendants' request to dismiss plaintiffs' complaint is granted. The complaint against the Inlom defendants shall be dismissed with prejudice. The Inlom defendants' request of an award of attorney's fees and sanctions under the frivolous litigation statute, N.J.S.A. 2A:15-59.1, is denied without prejudice. (iii) Plaintiffs' motion to dismiss the counterclaims of defendant TKF shall be denied without prejudice; (iv) Defendant TKF's cross-motion for summary judgment on its counterclaims against plaintiffs shall be denied without prejudice.