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SHANNON PORTER and WESLEY MAK, *Wife and Husband* Plaintiffs, Vs: PILLAR TO POST HOME INSPECTIONS, BRIAN EISENBRAUN, BRAUN HOME INSPECTIONS, LLC, GEORGE SPETZ, ROBERT F. CONNOLLY, GINA MARIE TALLARICO f/k/a GINA MARIE CONNOLLY, EXP REALTY and ALEXSANDR PRITSKER, ULSTER CONSTRUCTION INC., BRENDAN McELDUFF. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO: MON-L-3108-23 Civil Action **ORDER**

THIS MATTER, having been opened to the Court by Defendants Robert F. Connolly, Ulster Construction Inc. and Brendan McElduff (collectively the "**Connolly Defendants**"), (Linda A. Turteltaub, Esq., The Turteltaub Law Firm LLC appearing) for an Order Dismissing the Verified Complaint against the Connolly Defendants filed by the Plaintiffs, Shannon Porter and Wesley Mak ("**Plaintiffs**") (F.R. "Chip" Dunne, III, Esq., Dunne, Dunne & Cohen, LLC appearing) and all parties having been provided notice and an opportunity to be heard, and this Court having considered the submissions of the parties, and oral argument, and for good cause shown, it is:

IT IS on this 19th day of January 2024:

ORDERED that the Connolly Defendants' motion to dismiss is **GRANTED, in part**. All causes of action against the Connolly Defendants are dismissed without prejudice; and

IT IS FURTHER ORDERED that Plaintiffs' motion to amend is **DENIED, without prejudice;**

IT IS FURTHER ORDERED that a copy of this Order is to be served upon all attorneys or parties of record not served via eCourts within 7 days of the date of receipt by the attorney for the Connolly Defendants.

/s/ *Gregory L. Acquaviva*
HON. GREGORY L. ACQUAVIVA, J.S.C.

Statement of Reasons

This litigation arises from the "as is" sale of a residential property. For the reasons set forth herein: (1) the Connolly Defendants' motion to dismiss is granted in part, as causes of action against them are dismissed without prejudice; and (2) Plaintiffs' motion to amend is denied without prejudice.

Background

According to the complaint, the residential real estate at issue is located at 13 Longfellow Terrace, Morganville (Property). The sale was "as is" and was closed on October 17, 2022. Plaintiffs purchased the Property from Defendants Robert F. Connolly and Gina Marie Tallarico f/k/a Gina Maire Connolly (Sellers).

The transaction commenced in August 2022 and was subject to attorney review. Plaintiffs – the Property's purchasers – hired Pillar to Post (Pillar) (owned by Brian Eisenbraun) inspect the home. George Spetz inspected the home in September 2022. Defendants Alexsandr Pritsker of Defendant EXP Realty referred Plaintiffs to Pillar. Defendant Brian Eisenbraun owns Pillar.

Pillar's report – attached to the complaint – identified myriad conditions that needed repair, including conditions related to the deck. Section 3.8 of Pillar's report stated that the deck was sagging and pulling away from the house. Photos were included. Pillar recommended "a qualified contractor evaluate and repair the deck structure as needed to ensure stability and safety."

Accordingly, the Sellers retained Ulster Construction, Inc. – owned by Brendan McElduff – to repair the deck. The Sellers reported the repairs to Plaintiffs. Plaintiffs did not conduct a subsequent inspection nor view the repairs.

The real estate contract provided in Paragraph 16(D) that the Property was "sold in an 'as is'" and "not on any representation made by Seller[s], Brokers or their agents as to the character or quality of the Property." (Emphases added).

Paragraph 16(D) further empowered Plaintiffs "to have the dwelling and all other aspects of the Property, inspected and evaluated," which they did by retaining Pillar.

Paragraph 16(E) provided Sellers an opportunity to cure any physical defects identified by the inspector. If not corrected, "Buyer shall then have the right to void this [c]ontract."

Paragraph 23 stated that the Sellers did "not guarantee the continuing condition of the premises as set forth in this Section after the Closing."

In Spring 2023, Plaintiffs desired to update a bathroom and hired Vito's Custom Designs LLC. While walking through the Property, Vito DeLeonibus noticed how the floor joists of the deck joined the home's wall.

Based on DeLeonibus' visual observations, Plaintiffs engaged Reme and Associates, LLC to review Pillar's home inspection. Reme observed defects in the deck. Importantly, however, Reme's report, attached to the complaint, was "based

on observation of the visible surfaces and structures at the time of the inspection." (Emphasis added).

This litigation follows. Although less than clear, the court gleans the following causes of action against various defendants:

(1) Breach of contract against Sellers;

(2) Negligence against Sellers, Ulster, and McElduff;

(3) Unjust enrichment against Sellers and Pillar

(4) Negligence against EXP Realty, Pritsker, Eisenbraun, Braun Home Inspections, and Spetz.

Notably, the complaint's imprecision was identified in the Connolly Defendants' moving papers but was not clarified in Plaintiffs' opposition.

Motion to Dismiss

Generally

The issue before a court on a motion to dismiss is "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In deciding a motion pursuant to Rule 4:6-2(e), the court "must accept as true all factual assertions in the complaint . . . [and] accord[s] to the non-moving party every reasonable inference from those facts." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). The Court examines the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be

gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Green v. Morgan Properties, 215 N.J. 431, 452 (2013).

Though the court must take "a generous and hospitable approach" "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 286 (App. Div. 2014).

An order granting a motion to dismiss under Rule 4:6-2(e) should usually be without prejudice, so that the plaintiff may have an opportunity to re-plead, if able, to state a viable cause of action. Nostrame v. Santiago 213 N.J. 109, 128 (2013); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009).

Breach of Contract

In Count I, Plaintiffs contend Sellers breached the real estate contract. Sellers are the only defendants expressly referenced in Count One and, thus, the court can only glean that the breach of contract count applies only to Sellers.

It is indisputable that a seller of real property has an affirmative duty to disclose any known latent defective condition that is material to the transaction. Weintraub v. Krobatsch, 64 N.J. 445, 449 (1974); Correa v. Maggiore, 196 N.J. Super. 273, 281 (App. Div. 1984). A seller "is not only liable to a buyer for [] affirmative and intentional misrepresentations to a buyer, but [] is also liable for

mere nondisclosure to the buyer of defects known [] and unknown and unobservable to the buyer." Weintraub, 64 N.J. at 454.

Put simply, where a contract, as here, is "as is," a seller may be subject to liability where the seller fails to disclose or conceals material defects actually or constructively known and not readily apparent to the buyer.

Here, the Pillar report and, more important, the Reme report demonstrate beyond peradventure that any defect with respect to the deck was anything but latent. The Pillar report identified the issue, recommend the retaining of a professional, and included photographs – photographs which clearly demonstrate that the defect was not latent.

The Reme report expressly states that its analysis was based solely on a visual inspection. Again, the issue was anything but latent.

As discussed further infra, Plaintiffs now seek to circumvent the non-latent nature of the defect by contending that the Sellers (and arguably others) committed fraud. Because the motion to amend is both procedurally and substantively deficient, such contention cannot save this cause of action at this juncture.

Negligence

Next, in Count II, Plaintiffs allege negligence against the Sellers, Ulster, and McElduff.

First as to the Sellers, this cause of action must fail.

Under New Jersey's economic loss doctrine, tort liability may not attach where the relationship between the parties is based solely on contract – as here. 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) (observing economic loss better resolved under contract law). The doctrine "eliminate[s] 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) (quotation omitted).[1]

The sale of real estate involves an "independent duty imposed by law." Saltiel, 170 N.J. at 316. As noted previously, 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 to the buyer." Strawn v. Canuso, 140 N.J. 43, 59 (1995) (emphasis added).

Here, and again, any defect regarding the deck was readily visible, as clearly demonstrated by the photographs attached to the Pillar report and Reme's express statements in its reports. Thus, because the alleged defect was "readily

[1] The economic loss doctrine 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). The complaint does not assert such a claim nor does it appear in the motion to amend.

observable," the Sellers did not, as a matter of law, violate any duty imposed by law vis-à-vis a real estate transaction.

Because Plaintiffs cannot avail themselves of that "independent duty" carveout, Plaintiffs' negligence claim against Seller falls squarely in the heartland of the economic loss doctrine, as stated in Saltiel. Plaintiffs' negligence cause of action is little more than a wolf in a contract claim's clothing and, accordingly, must fail.

Second, turning to the negligence cause of action against Ulster and McElduff, movant asserts that the Supreme Court's decision in Aronsohn v. Mandara, 98 N.J. 92 (1984) precludes recovery as matter of law. This court agrees.

There, the purchasers of a home – the Aronsohns – sought relief against, among others, the Mandara Masonry Corporation which performed certain allegedly defective work constructing a patio for the prior owners. The Court concluded that any lack of privity between the Aronsohns and the contractor did not, necessarily, preclude recovery in a contract or tort context. Nevertheless, in remanding the matter for further proceedings, the Court expressly held that where "a defective condition had been readily apparent or discoverable upon a reasonable inspection before or at the time plaintiffs took title, then recovery for the defective condition would not be appropriate." Id. at 108. Accordingly, there, recovery for

the alleged "lack of weepholes" related to the patio was "not well founded" because the defect "was readily apparent on a visual inspection."

Here, as in Aronsohn and as discussed supra, the alleged defect was readily apparent on a visual inspection, as demonstrated by the photographs in the Pillar report and the express statements in the Reme report. Accordingly, relief under a negligence theory against Ulster and McElduff is precluded by Aronsohn.

Unjust Enrichment

In Count III, Plaintiffs assert an unjust enrichment theory against "Defendants [who] wrongfully accepted money from the Plaintiffs." Although less than clear, because Ulster and McElduff did not accept money from the Plaintiffs, the court shall only address this issue as to the Sellers.

It is well-settled that an unjust enrichment claim, a plaintiff "must show both that defendant received a benefit and that the retention of that benefit would be unjust." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007) (quotation omitted). In addition, the doctrine requires a plaintiff to demonstrate defendant's failure to remunerate what was owed "enriched defendant beyond its contractual rights." Ibid. (quotation omitted; emphasis added). It is equally well-settled that where an express contract governs the parties' relationship, unjust enrichment is not an available remedy. Suburban Transfer Serv., Inc. v. Beech Holdings, Inc., 716 F.2d 220, 226-27 (3d Cir. 1983). Therefore, when "bound by their agreement, [then]

there is no ground for implying a promise as long as a valid unrescinded contract governs the rights of the parties." Id at 227. (citations omitted).

Here, a contract exists between Plaintiffs and Sellers. That contract and contract law controls the remedies, if any. Accordingly, unjust enrichment is an improper theory to obtain relief.

Count IV

As best as the court can glean, Count IV asserts that Pillar, Spetz, and Eisenbraun performed the inspection in an unreasonable manner. Count IV further contends that EXP Realty and Pritsker acted negligently in recommending Pillar and its agents to perform the inspection.

Because this count does not implicate the Connolly Defendants, relief cannot be obtained against them. To the extent the Connolly Defendants are included in this negligence cause of action, the foregoing analysis applies, and the matter is dismissed without prejudice as to them.

Motion to Amend

Rule 4:9-1 provides that a movant "shall have annexed thereto a copy of the proposed amended pleading." (Emphasis added). This provision was based on the pre-rule admonition of Grobart v. Society for Establishing Useful Manufacturers, that applications to amend be definite, categorical, and "preferably . . . in writing." 2 N.J. 136, 146 (1949); accord Lippman v. Hydro-Space Technology, Inc., 77 N.J.

Super. 497, 511 (App. Div. 1962). The rule's provision is mandatory and, because same was not complied with, the motion to amend must be denied, albeit without prejudice to a procedurally proper application.

As to substance, without consent from the adversary, amendments are only permitted "by leave of court which shall be freely given in the interest of justice." Leave is to be freely granted, typically, without consideration of the ultimate merits of the amendment. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-01 (2006). This broad power should be liberally exercised at any stage of the proceedings, unless undue prejudice would result or amendment would be futile. Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010).

Another layer here is Rule 4:5-8(a) which requires fraud be pled with "particulars of the wrong, with dates and items . . . insofar as practicable." That proscription is mandatory.

Here, Plaintiffs' brief indicates that fraud is sought to be added to the complaint. But, not only is no amended complaint provided, but Plaintiffs further fail to provide any certification or other factual evidentiary support. Rather, the entirety of Plaintiffs' contention is premised on vague, generalized assertions in a legal brief. Such is insufficient.

What's more, even if same were sufficient as a procedural mechanism, no particulars are provided. The court – and the defendants – are left to speculate as

to who said what to whom when or, alternatively, what were the material omissions, as well as how and when should they have been communicated. As such, this court is unable to determine whether the sought after amendments could satisfy Rule 4:5-8 and the court is hamstrung in conducting the futility analysis.

Thus, because the motion to amend is procedurally deficient, the request to amend must be denied, albeit without prejudice. See Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988) (observing where fraud pleading does not include specificity, pleader should be afforded opportunity to amend).

Gina Tallarico

Tallarico did not file a motion to dismiss. Rather, Tallarico's counsel – who is different from the Connolly Defendants' counsel – filed a letter joining the arguments and requesting the same result vis-à-vis Tallarico. Such is improper.

Rule 1:6-2(a) requires relief to be requested by motion – not letter. Accordingly, the court is unable to grant Tallarico her requested relief in view of her failure to file a dispositive motion.