NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2578-11T3

NEERAJ GUPTA,

Plaintiff-Appellant/
Cross-Respondent,

v.

IVAN LEUNG AND ADELINE LEUNG,

Defendants-Respondents/
Cross-Appellants.

Argued: October 24, 2012 - Decided: December 5, 2012

Before Judges Axelrad, Sapp-Peterson and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5581-09.

Steven Menaker argued the cause for appellant/cross-respondent (Chasan Leyner & Lamparello, PC, attorneys; Mr. Menaker, of counsel and on the briefs; Reka Bala, on the briefs).

David Weiss argued the cause for respondents/cross-appellants (Weiss & Weiss, LLC and Buckley Law Group, P.A., attorneys; Michael Weiss, of counsel and on the joint briefs; Alan R. Levy, on the joint briefs).

PER CURIAM

The seller appeals from the Law Division's summary judgment dismissal of his breach-of-contract claim against the buyers for

failing to attend a residential real estate closing. The buyers cross-appeal from the subsequent summary judgment dismissal of their counterclaim alleging breach of contract, fraud, and violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20. We affirm.

I.

In November 2009, plaintiff Neeraj Gupta filed a complaint against defendants, Ivan and Adeline Leung, alleging they breached a real estate sales contract by failing to attend the closing. Defendants filed an answer and counterclaim alleging breach of contract, fraud, and violation of the CFA. Plaintiff filed an answer to the counterclaim.

In August 2011, defendants filed a motion for summary judgment to dismiss plaintiff's complaint and compel the return of their deposit. Following oral argument on October 6, 2011, Judge Christine Farrington granted defendants' motion, dismissing plaintiff's complaint and directing return of the deposit, memorialized in an order of the same date.

Plaintiff filed a motion to stay the trial of defendants' counterclaim, and on October 26, 2011, moved for leave to appeal the October 6 order. By letter of November 9, 2011, Judge Farrington issued a written decision amplifying her prior oral opinion pursuant to Rule 2:5-1(b). On November 18, 2011, Judge

Farrington stayed the trial of the counterclaim and order directing the return of defendants' deposit pending the resolution of plaintiff's motion for leave to appeal. By order of November 21, 2011, we denied that motion.

On December 16, 2011, plaintiff moved for summary judgment to dismiss defendants' counterclaim. Following oral argument, by order of January 20, 2012, Judge Hector R. Velazquez granted plaintiff's motion. His findings and conclusions were set forth on the record on January 23, 2012.

Plaintiff appealed the October 6, 2011 order dismissing his complaint. Defendants filed a cross-appeal of the January 20, 2012 order dismissing their counterclaim.

II.

The property in dispute is a newly constructed home located on Knollwood Drive in Watchung owned by plaintiff. When plaintiff purchased the lot in 2005, there was a pre-existing sewer easement transversing the rear portion of the yard. Around 2007, plaintiff constructed a single-family home on the property. In early June 2009, plaintiff obtained a revocable license from the Borough of Watchung (Borough) that permitted him to install a drainage pipe within the easement. Plaintiff also constructed a wooden deck that encroached upon the sewer

easement, although he was apparently unaware of the encroachment at that time.

On June 21, 2009, plaintiff entered into a contract for the sale of the property to defendants for $1,850,000. The contract provided for a deposit of $185,000. The agreement also contained a standard clause requiring plaintiff to deliver at closing, "on or about August 28, 2009," a Bargain and Sale Deed with Covenants as to Grantor's Acts.

The parties' attorneys made modifications to the agreement during the attorney review period. The August 28, 2009 date was not modified. The addendum required plaintiff to deliver a final certificate of occupancy (CO) at closing. Plaintiff's attorney also proposed, and defendants' attorney accepted, the following provision permitting defendants to cancel the agreement if issuance of the CO were delayed more than forty-five days beyond the closing date.[1] In paragraph 21, the parties agreed on the following terms, in pertinent part:

> Under no circumstances whatsoever, shall seller be liable for any damage due to any delay in completion or closing of title, including, but not limited to, expenses incurred by buyer for the storage of household goods or temporary lodging and shelter. However, in the event the delay in issuance of the Certificate of Occupancy extends beyond forty-five (45) days from the

[1] The original term was ninety days.

> estimated completion date stated in the paragraph entitled "Closing of Title and Possession" the purchaser shall have the right within ten (10) days of the aforesaid extended date to receive a refund of all deposit monies without interest and upon the payment of same, this agreement shall become null and void and neither party shall have any rights against the other.

Anticipating the closing would take place as scheduled, defendants sold their home. Defendants, however, learned on August 27, 2009, they would not be closing on the property the next day because a CO had not been issued. As they were unable to move into their new home, they moved into a hotel.

By early August, defendants' attorney had received the title search. Plaintiff stated in depositions that he first learned about the deck encroachment on September 30, 2009, after he received an as-built survey. Ivan[2] stated in depositions that he first learned of the sewer easement and the deck encroachment on September 30, 2009, when he received a copy of the survey from Borough officials.

Plaintiff testified in depositions that he spoke with Borough officials about obtaining a revocable license to allow the deck encroachment to remain and obtaining a temporary CO (TCO). According to plaintiff, the officials seemed favorable

[2] We refer to the first name of the respective defendant as necessary in this opinion for ease of reference and mean no disrespect.

to granting a revocable license, but advised that if for any reason the Borough did not approve the license, he would be responsible for making whatever unidentified adjustments were necessary.

On October 6, 2009, plaintiff's attorney sent defendants' attorney a letter, advising the seller would have the CO by "tomorrow" and "would like to close title on Friday, October 9, 2009." The next day, October 7, plaintiff's attorney sent an e-mail confirming a voicemail message from defendants' attorney indicating that defendants' attorney could not close on Friday, and the office was closed on Monday, Columbus Day. "They said they wanted to close on October 20th. Also, the message indicated that the buyers' lender required 5 days from the issuance of the CO to review and close the loan."

Also on October 7, 2009, plaintiff's attorney wrote to defendants' attorney, informing her that the Borough "was set to issue the TCO for the subject closing" but Adeline "created issues and concerns" with officials "by stating that she did not want [plaintiff] to be issued a TCO" although the contract provided "that a TCO would be acceptable for closing." Plaintiff's attorney posited that defendants' interference caused delay in the issuance of the CO or TCO and thus "the time frame for the delivery shall be extended."

The next day, plaintiff's attorney notified defendants' attorney that the seller would have the CO by October 9, and would like to close title that day. On October 14, 2009, defendants' attorney informed plaintiff's attorney by letter that the seller had not yet obtained the CO, it was past the forty-five day deadline that ended on October 12, and defendants reserved "the right to cancel this transaction unless we can reach a new agreement."

Two days later, on October 16, 2009, plaintiff's attorney wrote to defendants' attorney advising that defendants "were at Borough Hall this morning lobbying the public officials concerning the subject property." Plaintiff's attorney claimed the seller "now has no choice but to submit revised plans for the deck, re-construct the deck, complete the grading, submit revised as-built plans and obtain a final CO in order for this transaction to close."

By letter of October 20, 2009, defendants' attorney informed plaintiff's attorney that because the CO had not yet been issued, defendants were exercising their right to cancel the contract pursuant to Paragraph 21 of the addendum. Plaintiff's attorney promptly responded that defendants had no legal right to do so because they had tortiously interfered with the contract.

On October 22, 2009, plaintiff, who had rebuilt the deck to eliminate the encroachment, received the CO. His attorney sent defendants' attorney a "time of the essence" notice on October 23, 2009, with a copy of the CO, scheduling the closing for November 2, 2009. Defendants did not attend the closing.

Plaintiff filed suit and defendants filed a counterclaim, seeking $188,976 in damages for the housing costs they suffered in anticipating a timely closing. Defendants additionally claimed fraud and a violation of the CFA, alleging plaintiff withheld information about the sewer easement, revocable license, and encroachment during the entire transaction.

III.

In granting summary judgment to defendants dismissing plaintiff's complaint, Judge Farrington explained that the contract "unequivocally provided that if plaintiff failed to obtain the CO beyond forty-five days after the closing date, which was August 28, 2009, [d]efendants had the unequivocal right within ten days to rescind the agreement making the contract null and void, and receive a refund of the deposit without interest." The forty-five day extended deadline was October 12, 2009, and pursuant to Paragraph 21 of the addendum, when plaintiff had not received the CO by that date, defendants had the unilateral right to cancel the contract within the ten-

day window. The judge found defendants "rightfully cancelled the Contract in accordance with that time-frame" as they cancelled the contract on October 20, 2009. The judge further found no evidence defendants breached their duty of good faith and fair dealing or tortiously interfered with the contract in seeking information about the property from Borough officials.

In granting summary judgment in favor of plaintiff and dismissing defendants' counterclaim, Judge Velazquez first dismissed the breach of contract claim because the contract expressly barred the damages sought by defendants. He found Paragraph 21 of the addendum stated "in clear and unambiguous words" that claims for storage of household goods or temporary lodging and shelter were barred."

With respect to the common law fraud claim, the judge found that, in the context of real estate transactions, defendants would have to show plaintiff "fraudulently concealed information" that was "not readily observable to the purchaser." He thus found plaintiff did not have an obligation of disclosure where the information could have been discoverable by defendants' attorney. Judge Velazquez explained:

> In this case there is no evidence that the plaintiff knowingly concealed the existence of the revocable license or deck encroachment or that he [made] any attempt to defraud the buyers. While it is true that he was aware of the license, he was not

> aware of the deck encroachment until after the contract was actually executed and then only after the survey was provided to him some time in September of 2009 . . . three months after the execution of the contract between the parties.

The judge further found that the contract required a title search and survey, which would be reviewed by defendants' attorney. Moreover, he found defendants did not satisfy the "justifiable reliance" element of a fraud claim because the contract should have put them on notice that they should rely on their attorney to review the title search and survey for any title issues.

Considering the CFA count, Judge Velazquez found the record devoid of evidence that plaintiff "knowingly or intentionally concealed the existence of the license or the deck encroachment." For the same reasons as the common law fraud claim, the judge dismissed the CFA claim.

IV.

On appeal, plaintiff argues:

> THE TRIAL COURT'S ORDER SHOULD BE REVERSED BECAUSE THE COURT MISAPPLIED FUNDAMENTAL PRINCIPLES GOVERNING CONSIDERATION OF A MOTION FOR SUMMARY JUDGMENT.
>
> > A. FACTUAL DISPUTES INVOLVING WHETHER "TIME OF THE ESSENCE" NOTICE WAS REQUIRED TO CANCEL THE CONTRACT PRECLUDED SUMMARY JUDGMENT.

B. FACTUAL DISPUTES INVOLVING WHETHER THE SEWER EASEMENT, REVOCABLE LICENSE OR DECK ENCROACHMENT RENDERED TITLE UNMARKETABLE PRECLUDED SUMMARY JUDGMENT.

C. FACTUAL DISPUTES INVOLVING WHETHER DEFENDANTS FORFEITED ANY RIGHT TO RESCIND THE CONTRACT BECAUSE THEY BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING PRECLUDED SUMMARY JUDGMENT.

D. FACTUAL DISPUTES INVOLVING PLAINTIFF'S CANDOR TO DEFENDANTS PRECLUDED SUMMARY JUDGMENT.

Defendants argue the following on their cross-appeal:

JUDGE VELAZQUEZ'S DECISION [SHOULD BE] REVERSED.

A. PLAINTIFF'S SUMMARY JUDGMENT MOTION WAS UNTIMELY AND PROCEDURALLY DEFECTIVE.

B. THE "LAW OF THE CASE" HELD THAT SUFFICIENT EVIDENCE EXISTED WHICH SUPPORTED THAT PLAINTIFF VIOLATED THE [CFA].

C. JUDGE VELAZQUEZ'S FACTUAL FINDINGS ARE UNSUPPORTED BY THE RECORD BELOW AND ARE NOT ENTITLED TO ANY DEFERENCE.

D. JUDGE VELAZQUEZ MADE MISTAKES OF LAW REGARDING A SELLER'S DISCLOSURE OBLIGATIONS.

E. THE CONTRACT DOES NOT PRECLUDE CFA REMEDIES.

Based on our review of the record and applicable law, we are not persuaded by any of these arguments and affirm.

Summary judgment is granted when "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(c). To determine whether there is a genuine issue of fact, a judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"If 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. Thus, "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. (internal quotation marks and citation omitted).

When reviewing the grant of summary judgment, we apply the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We first decide whether there was

a genuine issue of fact, and if there was not, we decide whether the trial court's ruling on the law was correct. Ibid. Additionally, "[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). The legal conclusions of the trial court are reviewed de novo, without any special deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiff first contends Judge Farrington failed to recognize that the contract identified the closing date to be an estimated date, that the attorneys who drafted it did not believe the contract made time of the essence, and that defendants' conduct indicated they did not consider October 12, 2009, to be a firm closing date. Plaintiff thus argues that absent clear language making time of the essence, and considering the factual disputes regarding whether the closing date was a firm one, the trial court should have deferred to a trier of fact to assess whether defendants tried to cancel the contract without first issuing a time of the essence notice. We disagree.

"A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009). "If the terms of a contract are clear, they are to be enforced as written." Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 187 (App. Div. 2008) (citing Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998)). On the other hand, "[w]here a contract is ambiguous, courts will consider the parties' practical construction of the contract as evidence of their intention and as controlling weight in determining a contract's interpretation[.]" Fauver, supra, 153 N.J. at 103.

Here, the parties' sales contract included a clause that unequivocally gave defendants the right to cancel the contract if plaintiff had not obtained a CO by October 12, 2009. Regardless of a time of the essence clause, the contract independently provided in paragraph 21 that if the issuance of a CO were to extend beyond forty-five days from the "estimated completion date," defendants would have the right to receive a refund and declare the agreement null and void within ten days. The estimated date of closing was written into the contract as August 28, 2009, and forty-five days after that date was October 12, 2009. Therefore, defendants could have cancelled the

contract up until October 22, 2009, and they did cancel two days before the deadline, on October 20, 2009.

Judge Farrington correctly read the sales agreement in a plain and ordinary manner, concluding that it unequivocally provided that because a CO was not issued by October 12, the right afforded to defendants in paragraph 21 to cancel the contract was triggered, and they exercised that right to declare the contract null and void within ten days. It is undisputed that a CO was not issued until October 22, 2009, after defendants had already cancelled the contract. As the terms of the contract are clear and unambiguous, the contract should be enforced as written.

Moreover, all the facts that plaintiff claims are disputed, even viewed in plaintiff's favor, would not require the reversal of summary judgment. Paragraph 21 pinpoints a specific date by reference. Whether the August 28, 2009 closing date was "estimated" does not change the meaning of paragraph 21 because it refers to a deadline of forty-five days from the "estimated" date. Moreover, the intent of the parties in drafting the contract is also not material because the contract is clear and should be interpreted based on the language as written. It is also immaterial as to whether the parties considered October 12 to be a "firm" closing date based on the clear, unambiguous

cancellation language of the agreement timely invoked by defendants.

Plaintiff's reliance on Paradiso v. Mazejy, 3 N.J. 110, 114-15 (1949) is misplaced. It is of no moment the Paradiso Court was not convinced by the buyer's attempt to make the contract one of "time of the essence" as that sales agreement contained no cancellation clause such that the parties here had in paragraph 21. Thus, even in the absence of a formal time of the essence clause, when a party has the right to cancel by a certain date in a contract, the deadline may be the "essence of the contract[.]" Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 155-56 (App. Div. 1990).

Plaintiff next argues the court had no factual basis for concluding the sewer easement, revocable license, or deck encroachment rendered title unmarketable. Since defendants' right to cancel the contract when the CO was not timely issued pursuant to paragraph 21 of the contract did not depend on plaintiff's ability to convey marketable title, this issue is irrelevant to summary judgment dismissal of plaintiff's complaint.

According to plaintiff, defendants refused to close with a TCO and repeatedly petitioned the Borough to deny plaintiff the TCO, constituting "deliberate, repeated, actual interference

with the certification process, in contravention of the explicit terms of the contract and in derogation of Defendants' implicit contractual obligations." Plaintiff further contends defense counsel's failure to respond to his attorney's efforts to close on October 9, 2009, her voicemail message that defendants could not close that day or on October l2 and needed five days from the issuance of the CO to close the loan, and defendants' advice to the Borough that they were in "no hurry to close," all demonstrated that defendants "sabotaged" plaintiff's efforts for a more timely closing. Plaintiff urges that this conduct requires assessment by a trier of fact. We are also not persuaded that plaintiff raised a debatable issue that defendants' conduct breached their covenant of good faith and fair dealing and prevented plaintiff from closing title before October 12, 2009.

"[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing[,]" which requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]" Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (internal quotation marks and citation omitted). See also Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997).

"Proof of 'bad motive or intention' is vital to an action for breach of the covenant." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005) (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001)). Accordingly, "[t]he party claiming a breach of the covenant of good faith and fair dealing must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Brunswick Hills Racquet Club, supra, 182 N.J. at 225 (internal quotation marks and citations omitted).

Even with all favorable inferences, the scant proofs presented by plaintiff of defendants' contact with Borough officials respecting the TCO and resolution of the deck issue fall short of "concrete evidence from which a reasonable juror could return a verdict in his favor" for tortious interference with contract. Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998). Plaintiff did not inform defendants of the deck encroachment; they learned about it from Borough officials when they were given the as-built survey. It is thus understandable that defendants were concerned about this issue and made inquiry of Borough representatives.

No evidence was presented from Borough employees or officials that such discussions impeded the issuance of a TCO or CO to plaintiff. Moreover, defendants' attorney promptly advised plaintiff's attorney the reason her client would not be available for closing on October 9 or 12, 2009 and why a five-day window was required for preparation of the mortgage documents. From a logistical perspective, this conduct was not unreasonable, particularly considering the estimated closing date was August 28, 2009; nevertheless, it is immaterial because plaintiff was not able to deliver the TCO or CO by those dates.

Furthermore, the record shows that defendants continued to make numerous efforts to complete the transaction despite plaintiff's inability to timely obtain a CO. They did not simply cancel the contract on October 12, 2009, the first day of the ten-day window provided in Paragraph 21. In good faith, defendants waited until the eighth day of the ten-day window to cancel the contract.

We are also convinced the judge's fleeting findings and comments respecting plaintiff's candor and his obligation as an attorney had no impact on her legal decision granting summary judgment. Defendants were contractually entitled to rescind the contract under paragraph 21 and plaintiff has offered no competent evidence or persuasive argument to alter that result.

We turn now to defendants' cross-appeal. We discern no abuse of discretion in the timing of the plaintiff's motion and no prejudice to defendants in Judge Velazquez permitting it to proceed.

The judge dismissed count two of the counterclaim asserting breach of contract and seeking damages for household expenses and storage costs based on the language of Paragraph 21 which expressly barred consequential damages for "storage of household goods or temporary lodging and shelter." At oral argument on the summary judgment motion, defense counsel implicitly appeared to abandon the claim in that form, and has not pursued it on appeal. Defendants' arguments on appeal focus on their common law and CFA claims.

Defendants contend Judge Farrington's finding that "plaintiff did withhold the information regarding the revocable license" constituted the "law of the case" and should have been respected by Judge Velazquez. Defendants further argue that, as a result, a prima facie case for a CFA violation would have been demonstrated, and summary judgment would have been inappropriate. We are not so persuaded.

Although only a non-binding rule, the "law of the case doctrine teaches us that a legal decision made in a particular matter 'should be respected by all other lower or equal courts

during the pendency of that case.'" Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting Lanzet v. Greenberg, 126 N.J. 168 (1991)). "'A hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding judge to balance the value of judicial deference for the rulings of a coordinate judge against those factors that bear on the pursuit of justice and, particularly, the search for truth.'" Lombardi, supra, 207 N.J. at 538-39 (quoting Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998)). The law of the case doctrine does not require "a judge to slavishly follow an erroneous or uncertain interlocutory ruling." Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356 (App. Div. 2004), certif. denied, 182 N.J. 427 (2005).

In the context of defendants' alternative argument before Judge Farrington that plaintiff's attempt to obtain a revocable license to permit the deck to infringe on the easement "was an unreasonable interference [with the contract] because it would have obliged [] defendants at their own cost to remove and reroute the drainage line, . . . [a]n application of which [plaintiff] did not advise defendants prior to making," the judge made the singular comment that plaintiff "did withhold the information regarding the revocable license." She did not, as Judge Velasquez was required to do, consider or address any of

the elements necessary to sustain a cause of action for common law fraud or under the CFA, namely, whether plaintiff owed a legal duty to inform defendants of easements or encroachments of record, whether he withheld information with an intent, whether defendants relied upon the absence of information, and whether the failure to inform was the proximate cause of defendants' claimed damages.

Accordingly, to the extent Judge Farrington's comment can even be considered a factual finding, it was not preclusive of the legal issue before Judge Velazquez. See Higgins v. Swiecicki, 315 N.J. Super. 488, 492 (App. Div. 1998) (noting that the "law of the case" doctrine has "no barring effect" where the second judge is faced with "additional proofs" or new facts).

"[T]he elements necessary to prove fraudulent concealment on the part of a seller in a real estate action are: the deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser, with the buyer relying upon the seller to his detriment." N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 503 (1983). Proof of fraud must be by clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990).

Similarly, an actionable claim under the CFA arises for "the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression, or omission." N.J.S.A. 56:8-2. Judge Velazquez found defendants failed to make a threshold showing for either common law fraud or a CFA claim that plaintiff deliberately concealed material facts. He thus dismissed counts three and four as a matter of law.

Defendants contend this ruling is unsupported or directly contradicted by the evidentiary record. They urge that plaintiff's bad faith conduct is demonstrated by his failure to inform them: (1) about the deck encroachment upon learning about it on September 30, 2009; (2) of their potential responsibility for the removal of the deck had the revocable license been issued by the Borough; and (3) about his unilateral decision to reconfigure the existing deck.

We are satisfied the judge's findings with respect to his dismissal of the common law fraud and CFA counts are supported in the record. The judge found plaintiff did not knowingly conceal the existence of the revocable license or the deck encroachment. See Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 602 (App. Div. 1990), aff'd, 124 N.J. 520 (1991) (holding that the burden to prove an omission was knowingly made

with intent to defraud is upon the aggrieved party). Nor was the judge convinced defendants had raised a debatable issue of detrimental reliance, in view of their contractual obligation to make a reasonable and diligent search of title records that would disclose liens and claims affecting the property, see Berman v. Gurwicz, 178 N.J. Super. 611, 620-21 (Ch. Div. 1981), aff'd o.b., 189 N.J. Super. 49 (App. Div.), certif. denied, 94 N.J. 549 (1983), and reliance on the expertise of their real estate attorney, see DSK Enterprises, Inc. v. United Jersey Bank, 189 N.J. Super. 242 (App. Div.), certif. denied, 94 N.J. 598 (1983).

Weintraub v. Krobatsch, 64 N.J. 445, 455-56 (1974) is factually inapposite, as there the Court imposed an obligation on a seller of real estate to disclose the existence of roach infestation unknown to the buyers, namely, a latent condition material to the contract that the seller attempted to deliberately conceal. The drainage line encroachment with the revocable license that plaintiff had secured before defendants executed the contract was recorded and evident to defendants' attorney in early August when she received the title report. There is no evidence plaintiff was aware of the deck encroachment until he received the as-built survey on September 30, 2009. Although he did not inform defendants, Ivan learned

the same day when he received a copy of the survey from Borough officials.

Additionally, plaintiff's failure to advise defendants of his discussions with Borough representatives about a revocable license pertaining to the deck encroachment does not in and of itself constitute fraudulent concealment. In depositions he related his discussions and the fact that if the TCO were granted he would be responsible for any adjustments. The record does not demonstrate that plaintiff was clandestinely planning to shift the cost of removing or reconfiguring the deck to defendants. Rather, plaintiff was searching for ways to obtain a TCO in order to execute the contract.

Moreover, plaintiff's attorney did advise defense counsel by letter of October 16, 2009, that plaintiff was planning to "submit revised plans for the deck, re-construct the deck, complete the grading, submit revised as-built plans and obtain a final CO in order for this transaction to close. . . . [and] proceeding in this manner on an expedited basis," which he claimed were necessitated by defendants' conversations with Borough officials.

Affirmed.