NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3114-13T1

MITCHELL AND ANASTASIA
HACKERMAN,

Plaintiffs-Appellants,

v.

LaRUSSO & TOZOUR, LLC, LEWIS
J. TOZOUR, TIMOTHY J. MOORE,
and JENNIFER J. MOORE n/k/a
JENNIFER DELANZO,

Defendants-Respondents,

and

KNABB ASSOCIATES, RONALD KNABB,
AIA, MICHAEL HERFORTH t/a
FORTH-GERE HOME INSPECTION,
APEX REALTY, INC., JAMES DIPPEL,
KATHY DIPPEL, REMAX-AVALON/STONE
HARBOR and CAROLANNE HELVERSON,

Defendants.

Argued April 21, 2015 – Decided June 3, 2015

Before Judges Fisher, Accurso and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-672-10.

I. Michael Heine argued the cause for appellants (Heine Associates, P.A., attorneys; Mr. Heine, on the brief).

Michael Tafila argued the cause for respondents LaRusso & Tozour, LLC and Lewis Tozour (Leary, Bride, Tinker & Moran, P.C., attorneys for respondent LaRusso & Tozour, L.L.C.; Gilbertson & Martin, L.L.C., attorneys for LaRusso & Tozour, L.L.C. and Lewis Tozour; Mr. Tafila and Patrick F. Martin, on the joint brief).

Steven D. Scherzer argued the cause for respondent Timothy Moore (Cooper Levenson, P.A., attorneys; Mr. Scherzer, of counsel; Erika-Leigh Kelley, on the brief).

PER CURIAM

Plaintiffs Mitchell and Anastasia Hackerman purchased from defendants Timothy J. Moore and Jennifer DeLanzo (sellers) a home in Cape May. After experiencing flooding in the basement, plaintiffs sued the sellers as well as the builders of the home, defendant LaRusso and Tozour, L.L.C. (the builder corporation), and the builder's principal, defendant Lewis Tozour (the builder's principal). All defendants obtained summary judgment, and plaintiffs appeal.

We reject plaintiffs' arguments and, for the most part, affirm, concluding that no disputed issues of fact barred the way to summary judgment on plaintiffs' negligence and fraud claims against the builder's principal, or plaintiffs' fraud claim against the builder corporation; we also conclude that plaintiffs' claims against the sellers were precluded by the "as-is" terms of their contract. But we reverse the summary

judgment entered in favor of the builder corporation on plaintiffs' negligence claim and remand for further proceedings.

The record reveals that, in June 2001, the builders entered into a contract with the sellers to construct a single-family home in Cape May; the plans called for the construction of a basement. In 2003, approximately two years after sellers moved in, the basement flooded. As a result, they contracted with Mid-Atlantic Waterproofing to install in the basement two sump pumps and a sub-floor drainage system. In 2004 and 2006, Mid-Atlantic honored their warranty and returned to service a clogged drain. Sellers regularly maintained the drainage system and asserted they experienced no further flooding.

On October 8, 2008, sellers entered into a contract to sell the home to plaintiffs. Plaintiffs toured the property and prior to closing obtained a home inspection report, which acknowledged the basement was serviced by two operational sump pumps; the inspector described the basement walls, which, in his view, exhibited no elevated moisture levels, as "satisfactory."

Plaintiffs claim to have experienced basement flooding in July 2009, and they filed their complaint in this action on October 6, 2010. Discovery closed on December 27, 2012, after a sixty-day discovery extension. Two months later, plaintiffs claimed to have discovered cracks on the exterior foundation

walls and consulted Joseph Martin, Ph.D., P.E., who opined these cracks were physical manifestations of a deteriorating foundation caused by basement flooding. On March 19, 2013, plaintiffs served all defendants with supplemental responses to discovery, including Martin's report and photographs of the foundation cracks. On June 21, 2013, the judge granted a motion to bar these supplemental discovery responses.

Prior to these rulings, plaintiffs' counsel learned of the judge's blindness and wrote to him on June 5, 2013, seeking recusal because the judge would be unable to examine the basement photographs. That request was denied.

By this time, the builders had moved for summary judgment and consented to a one-week extension for plaintiffs to file opposition. When plaintiffs failed to comply with the adjusted deadline, defense counsel wrote to the judge asking that the motion be granted as unopposed. The judge, however, accepted plaintiffs' late opposition and scheduled oral argument for July 12, 2013. Plaintiffs' counsel then sought adjournment of these and other pending motions beyond that new return date, citing the inconvenience of his law firm's office relocation. Although defendants consented, the judge denied the request, stating in a letter that oral argument would proceed on all motions as scheduled.

During a July 12, 2013 hearing, plaintiffs' counsel appeared telephonically and expressed for approximately twenty-five minutes his objection to the denial of his adjournment request; he then discontinued his involvement in the conference. Defense counsel briefly argued the merits of the motion, and the judge granted summary judgment in favor of the builders for reasons concisely described. The judge later provided additional reasons for granting summary judgment by way of a written opinion dated August 15, 2013.

A few days before the July 12 conference, plaintiffs formally moved to disqualify the judge pursuant to Rule 1:12-2. The judge heard argument on this application on August 2, 2013, at the conclusion of which he denied the motion. Not long after, sellers moved for and obtained summary judgment.

In this appeal, plaintiffs argue the judge erred: (1) by granting summary judgment in the builders' favor due to, among other things, a lack of privity and absence of evidence of a breach; (2) by granting summary judgment in favor of the sellers because, among other things, the home was sold "as is"; (3) in precluding the supplemental discovery responses of plaintiffs because they were provided beyond the discovery end date; (4) by failing to adjourn the July 12, 2013 motions; and (5) by refusing to recuse himself.

I

Plaintiffs contend the judge erred in granting summary judgment to the builders because triable issues of fact existed regarding their Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and negligence claims.[1] Specifically, plaintiffs argue the judge erred in determining (a) plaintiffs' consumer fraud claim was "barred by their lack of privity" with the builders, and (b) their negligence claim failed because the builder corporation did not breach its duty of care in constructing the basement; plaintiffs further assert that (c) the judge "misappl[ied] relevant case law regarding veil-piercing" in declining to hold the builder's principal individually liable on these claims.

The judge correctly granted summary judgment in favor of the builder corporation on plaintiffs' CFA claim and plaintiffs' argument to the contrary is without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E). We add only that to prevail on a CFA claim, a plaintiff must establish unlawful conduct, an ascertainable loss and a causal relationship between the two. Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007); N.J.

[1]Plaintiffs also asserted a claim of breach of contract against the builders in their complaint, but do not challenge the dismissal of this claim on appeal.

Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003). The unlawful conduct element may be established either by an affirmative act, which requires no showing of intent, or by an omission, which requires a showing of that "the defendant acted with knowledge." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994); N.J.S.A. 56:8-2.

Here, the judge correctly recognized the absence of any evidence that plaintiffs "had any contact with [the builders]," and, therefore, it could not be said that the builders had made an affirmative misrepresentation. The judge further determined that the builders had not violated the CFA through omission, as plaintiffs had submitted no proof that the builders "knowingly and intentionally concealed anything from [p]laintiffs." The judge properly dismissed the CFA claims.

On the other hand, the judge erred in granting summary judgment in favor of the builder corporation on plaintiffs' negligence claim when he concluded that no "duty owed to [p]laintiffs was breached." A legal duty may exist where a builder fails to exercise care even in the absence of privity. See Aronsohn v. Mandara, 98 N.J. 92, 105 (1984).

Reviewing the facts in the light most favorable to plaintiffs – as required, because they were the opponents of the

builder corporation's summary judgment motion, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) – we conclude that disputed issues of fact regarding the builder corporation's breach of its duty of care precluded summary judgment. The judge found dispositive the fact that the builders "obtained all necessary permits, complied with building codes, and [] passed all required inspections"; this, in fact, was corroborated by plaintiffs' home inspector's report, which stated the basement was in "satisfactory" condition and exhibited no elevated moisture levels. But the judge erred by failing to expansively indulge plaintiffs' expert's report, which opined that the builders' design of the property was "substandard" because it "did not take notice of well-documented and clearly visible site conditions, which would have led to employing customary measures to prevent water intrusion into the basement." We conclude that Martin's opinion created a genuine issue of material fact as to the builder's breach[2] and, therefore, reverse the summary

[2]We further note that although the six-year statute of limitations, N.J.S.A. 2A:14-1, had run on the sellers' flooding-based negligence claim, which began to accrue in 2003 and expired in 2009, plaintiffs' claim did not accrue until their 2008 purchase of the property, at the earliest or, more likely, the basement flooding in 2009. See Fernandi v. Strully, 35 N.J. 434, 450 (1961) (recognizing certain "'class of cases' where the period of limitations may and should fairly and justly be said to begin to run when the plaintiff knows or has any reason to know . . . of the cause of action"); see also Diamond v. N.J.
(continued)

judgment entered in favor of the builder corporation on plaintiffs' negligence claim.

We agree with the judge, however, that the evidence did not support a claim against the builder's principal. Our courts have repeatedly recognized that "a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." N.J. Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983). Thus, veil-piercing will only be employed "to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." Ibid. (citations omitted); see also Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). A "party seeking an exception to the fundamental principle that a corporation is a separate entity from its principal bears the burden of proving that the court should disregard the corporate entity." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996). Plaintiffs failed to meet this burden.

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Bell Tel. Co., 51 N.J. 594, 600-01 (1968). Although New Jersey's statute of repose would bar a claim instigated more than ten years after substantial completion of construction, Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 118 (1996), this ten-year period had not expired when plaintiffs' complaint was filed.

As the motion judge aptly concluded, there was

> no evidence before the [c]ourt to suggest that [the builder's] corporate form should be disregarded so as to hold [the builder's principal] . . . individually liable. . . . Moreover, there is no evidence before the [c]ourt to suggest [the corporation] was used to "defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law."

Having closely examined the parties' arguments, we conclude that the record amply supports the judge's conclusion. We, thus, affirm the entry of summary judgment with respect to the claims asserted against the builder's principal.

II

We also conclude, as did the judge, that there was no merit in plaintiffs' breach of contract and common law fraud claims against the sellers.

Turning first to the breach of contract claim, we recognize that contract interpretation requires a reading of the governing document "as a whole in a fair and common sense manner," Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009), with its terms given "their plain and ordinary meaning," M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). In other words, "where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's

Sales and Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div.), certif. denied, 127 N.J. 548 (1991).

Historically, the common law embraced the maxim of caveat emptor to real estate contracts, but this harsh doctrine faded away in favor of justice and fair dealing. Reste Realty Corp. v. Cooper, 53 N.J. 444, 451-54 (1969). We now "recognize that purposeful concealment can be as destructive as an affirmative false statement," Correa v. Maggiore, 196 N.J. Super. 273, 281 (App. Div. 1984), and acknowledge, as a general matter, the information disparity between sellers and buyers of real estate, Weintraub v. Krobatsch, 64 N.J. 445, 455-56 (1974). Even when selling property "as is," a seller may not deliberately conceal or fail to disclose a latent condition material to the transaction. Ibid.; see also Nobrega v. Edison Glen Assocs., 327 N.J. Super. 414, 423 (App. Div. 2000), modified, 167 N.J. 520 (2001).

Here, the contract declared that "[s]eller does not make any claims or promises about the condition or value of . . . the property," that "[b]uyer has inspected the property and relies on [that] inspection," and that, to sellers' knowledge, "there are currently no major structural defects[.]" The judge properly relied on this plain language, concluding "the house was being sold as is," and that was a circumstance the court was

not free to change. We agree, as the judge determined, that a single undisclosed instance of basement flooding in 2003 did not constitute a latent defect. Plaintiffs were aware of the obvious fact that the house had a basement and that sump pumps had been installed. The "as is" contract did not require a disclosure of the basement's history or the extent to which the sump pump and drainage system was in the past triggered by weather conditions.[3] We, thus, conclude that summary judgment was properly granted on this basis, and that sellers had no duty to disclose the prior instance of basement flooding or the existence of the sub-floor drainage system under their "as is" contract.

Plaintiffs' common law fraud claim is also without merit. To establish a misrepresentation amounting to actionable fraud a plaintiff must demonstrate: "a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment."

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[3]We agree, as a general matter, with sellers' argument that there is no need to disclose a home's history of remedied past defects. When selling a home "as is," an owner is not obligated to mention to the buyer a past leaky roof or dripping faucet if those conditions were repaired in the interim. Although a seller is expected to respond honestly to inquiries, there is no independent obligation – absent an agreement to do so – for a seller to provide the buyer with the functional equivalent of "carfax" for an "as is" home sale.

Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981). Fraud is never presumed. Pearl Assurance Co. v. Watts, 69 N.J. Super. 198, 206 (App. Div. 1961). The burden rests on the claimant to prove all the elements of fraud "clearly and convincingly by direct or circumstantial evidence[;] [c]ircumstances that are merely suspicious will not support an inference of fraud." Ibid.; see also Molyneaux v. Molyneaux, 230 N.J. Super. 169, 179-80 (App. Div. 1989).

In granting summary judgment on plaintiffs' fraud claim, the judge made the following accurate observations:

> What we have here is a one-time incident occurring where there is a flood, a defect. [Sellers] corrected that. Three, four years later they go to sell the house. Are the sump pumps discussed? Sure. By [plaintiff's] own admission, [the sump pumps] . . . are discussed. . . .
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> And what this comes down to is what does the seller have to describe and what becomes a material issue. And under Brill I don't think we have a material issue of fact. We have the sump pumps being disclosed. We have the inspector hired by [plaintiffs] finding the sump pumps. We have them clearly visible. They weren't covered up. They weren't hidden. . . .
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> . . . .
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> Under Brill you need [more than a claim of a] subculture of no basements in Cape May County. . . . It's whether [sellers] went out of their way to hide [the sump pumps] . . . .

As the record reveals, the material facts were not disputed. There was no circumstantial or direct evidence to suggest sellers concealed or misrepresented the existence of the basement or drainage system. In fact, plaintiff Anastasia Hackerman conceded at her deposition that, prior to the sale: "I went [in]to the basement, . . . I saw the sump pump and I asked [defendant Moore] if he has water issues or flooding in the house." In response, defendant Moore stated the pumps were a precautionary measure. Anastasia further testified she discussed the sump pumps with plaintiffs' home inspector, whose pre-closing report also acknowledged the basement contained "[t]wo pumps[,] [b]oth operational." Finally, plaintiffs concede they were provided with information regarding maintenance of the drainage system after closing.

In applying the same standard that governed the motion judge, W.J.A. v. D.A., 210 N.J. 229, 237 (2012), we find from a close examination of the record no genuine dispute of material facts, Brill, supra, 142 N.J. at 528-29. Plaintiffs knew all the material circumstances regarding the basement prior to closing. The judge properly dismissed plaintiffs' fraud claim.

III

Plaintiffs argue the judge erred, by way of his June 21, 2013 order, in barring plaintiffs' supplemental discovery

responses that were served beyond the discovery end-date. We will not intervene in such a matter absent an abuse of discretion. Bender v. Adelson, 187 N.J. 411, 428 (2006). When a party moving for a discovery extension fails to show "'due diligence,' Rule 4:17-7, or 'exceptional circumstances,' Rule 4:24-1(c)," our courts have found "no reason to upset the trial court's exercise of discretion." Ibid. Our hesitancy in intervening in such matters is further enhanced where, as here, the proposed late discovery will "jeopardize[e] the arbitration or trial date." Ponden v. Ponden, 374 N.J. Super. 1, 10 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005); R. 4:24-1(c).

In barring plaintiffs' supplemental discovery "[i]n the interest of fairness to all parties," the judge determined that the new information did not constitute newly-discovered evidence because "[p]laintiffs' initial [c]omplaint alleged the 'deterioration and compromise of the useful life of footings and foundation walls.'" The motion judge also noted that reopening discovery to allow the adverse parties "to properly investigate and respond" would result in "further delay" of the scheduled trial date.

In these circumstances, and the fact that the amendment was proposed approximately two-and-one-half-years after the filing of the complaint, the motion judge appropriately exercised his

discretion in declining to allow plaintiffs' discovery responses to be amended with the photographs and expert report. Bender, supra, 187 N.J. at 428.

IV

Plaintiffs also argue the judge erred in denying their request for an adjournment of the builders' summary judgment motion. We disagree.

We will intervene in such matters only when there has been an abuse of discretion causing prejudice to the aggrieved party. Allegro v. Afton Vill. Corp., 9 N.J. 156, 161 (1952); Rocco v. N.J. Transit Rail Operations, Inc., 330 N.J. Super. 320, 343-44 (App. Div. 2000). Here, in denying plaintiffs' request, the judge correctly noted "the matter [wa]s three years old," concluding that, "[i]n the interest of judicial efficiency" and a desire to prevent "any further adjournments of the trial," he would not allow the continued "logistical burdens" of plaintiffs' counsel's office relocation[4] – cited by counsel as

[4]Counsel had previously offered this same excuse in May 2013 when obtaining a one-week extension of the time to file opposition to builders' summary judgment motions. Although plaintiffs' counsel suggested he could not prepare for the July 12, 2013 hearing for the same reason, he apparently did have the time and resources to file a motion to recuse the judge within the same period of time. The experienced judge was entitled to view this later request with skepticism.

the reason for the adjournment request — to further delay disposition of the motions.

Moreover, the issues had been fully briefed and plaintiff would not have been permitted to raise new issues on the return date. And the record reveals that during the July 12, 2013 hearing, plaintiffs' counsel appeared telephonically and was permitted to complain about the denial of the adjournment for twenty-five minutes; despite being provided the convenience of appearing by telephone, plaintiffs' counsel unilaterally chose not to participate further. To the extent plaintiffs did not receive the benefit of their attorney's oral argument on the merits, it was through no fault of the motion judge.

V

We lastly turn to plaintiffs' arguments concerning the denial of their recusal motion. Specifically, plaintiffs assert the motion judge erred in failing to recuse himself because his blindness precluded him from viewing photographs depicting the condition of the basement floor. We find no abuse of discretion in his denial of this request. State v. McCabe, 201 N.J. 34, 45-46 (2010).

In deciding defendants' motions for summary judgment, the judge did not sit as trier of fact, but simply considered whether, as a matter of law, "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." R. 4:46-2(c); Brill, supra, 142 N.J. at 528-29. Stated differently, although the circumstances may have impeded the judge's ability to act as factfinder, he did not assume this role at the summary judgment stage. The judge acknowledged this important distinction, stating:

> The issue of pictures, as I ruled, is a non-issue in this case. If this was a bench trial I think you might stand somewhat of an argument, but it's not a bench trial and it's a jury trial. And as a practical matter I'm not the judge that's going to be presiding because [the case is] going to be transferred back to Cape May as per request of counsel.

This conclusion is consistent with a prior adjudication regarding this same judge's denial of a recusal motion when he was an administrative law judge. State v. Hall, 94 N.J.A.R.2d 14 (Div. of Motor Vehicles).[5] In an opinion affirming the judge's denial of the recusal request, Justice LaVecchia (then

[5]In Hall, an action concerning the suspension of a driver's license, the State sought to prove the petitioner's careless driving was the cause of a fatal motor vehicle accident. Id. at 18. As a result, the State requested the judge's recusal based on his inability to view: (1) a videotape reconstruction of an automobile accident; (2) photographs of the scene; and (3) a diagram of the accident contained in a police report. Id. at 15.

the Director of the Office of Administrative Law) held that because the "critical" or "direct" evidence in that case consisted of lay and expert testimony, the judge's inability to view the demonstrative visual evidence did not require his recusal. Id. at 17-18.[6]

To the extent plaintiffs' arguments may also suggest that the judge erred in failing to recuse himself because of some alleged animus harbored toward plaintiffs or their counsel as a result of the filing of the motion for recusal, we find this contention to have insufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

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[6]We would further observe that even if the judge erred in failing to recuse himself it caused no prejudice. In reviewing summary judgment, this court employs the same standards that governed the motion judge. W.J.A., supra, 210 N.J. at 237. If we were to assume, against all evidence to the contrary, that the judge possessed some animus toward plaintiffs or their attorney, it could have no impact on this court's review of summary judgment because we are obligated to examine the moving and opposing papers and to apply the principles outlined in Rule 4:46 and Brill.