Alliance Healthcare, Inc. v. Jersey City Bergen, LLC

Superior Court of New Jersey, Chancery Division, Hudson County

October 18, 2016, Decided; October 18, 2016, Filed

Docket No. HUD-C-87-15 Civil Action

Reporter
2016 N.J. Super. Unpub. LEXIS 2304 *

Alliance Healthcare, Inc. d/b/a Horizon Health Center, Plaintiff, v. Jersey City Bergen, LLC, Seaview Capital Partners, LLC, Defendant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Core Terms

mortgage, option contract, default, parties, option agreement, Consumer, lease, option to purchase, mortgagor, entity, specific performance, escrow agent, Defendants', terms, void, documents, mortgagee, payoff, unconscionable, negotiations, declare, properties, terminate, escrow, event of default, unenforceable, attorneys', order to show cause, summary judgment, purchase option

Counsel: **[*1]** LAW OFFICES OF MICHAEL PASQUALE, LLC, Attorney for Plaintiff Alliance Healthcare, Inc., (Michael Pasquale, Esq. appearing).

SILLS CUMMIS & GROSS, Attorney for Defendants Jersey City Bergen, LLC and Seaview Capital Partners, LLC, (Thomas Della Croce, Esq. and Jason L. Jurkevich, Esq. appearing).

Judges: Hon. Barry P. Sarkisian, P.J.Ch.

Opinion by: Barry P. Sarkisian

Opinion

SARKISIAN, P.J.Ch.

Types of Motion: (1) Order to Show Cause seeking Temporary Restraints and (2) Defendant's Cross Motion for summary judgment

Introduction

This matter comes before the Court for summary disposition in this action arising from the relationship between the parties arising from various documents executed in furtherance of a loan from Defendants to the Plaintiff for "short" money in the amount of $2.1 million dollars.

Plaintiff's order to show cause seeks an order: (1) enjoining and restraining Defendants from refusing to discharge a mortgage dated May 2, 2016 between Defendant Jersey City Bergen LLC ("JCB") and Plaintiff Alliance Healthcare, Inc. ("Alliance") (mortgage encumbers Alliance's property located at 706-708, 710, and 712-714 Bergen Avenue and 311 Fairmount Avenue, Jersey City); and (2) declaring an Option to Purchase, the Commercial **[*2]** Lease, the Collateral Mortgage, UCC filings, and all related agreements concerning the sale and lease of the Property between Alliance and JCB per se unconscionable, void and unenforceable.

Defendants, in opposition to this order to show cause, have filed a cross-motion for summary judgment, that seeks an order that would: (1) deny Plaintiff's application for mandatory injunctive and declaratory relief; (2) grant defendants' cross-motion for summary judgment on defendants' counterclaims for specific performance and breach of contract; (3) dismiss count 2 of Plaintiff's complaint (Declaratory Judgment); (4) dismiss count 4 of Plaintiff's complaint (New Jersey Consumer Fraud Act); and (5) award Defendants' reasonable attorneys' fees and costs.

Plaintiff entered into a sale/leaseback agreement with Defendants on May 2, 2016. Under the terms the agreement,

Defendants provided an initial $2,100,000.00 through a one-year note and mortgage to Plaintiff, with Defendants having the option to purchase the property by July 1, 2016. The mortgage was structured to secure Defendant Seaview's deposit until Seaview exercised the purchase option, or until Plaintiff returned Seaview's deposit.

This dispute **[*3]** arose when Plaintiff attempted in May, a few weeks after the documents in question had been executed, to pay off the $2,100,000.00 early, but was rejected by Defendants, because Plaintiff had violated the Purchase Option of the sale/leaseback agreement by attempting to sell the property to a third party.

On June 16, 2016, this Court entertained Plaintiff's order to show cause and imposed the following temporary restraints against the Defendants, their employees and agents and any third parties:

> A. The funds totaling $2,095,748.24 paid to defendants on June 2, 2016 by Alliance pursuant to JCB's May 31, 2016 payoff instructions for the May 2, 2016 Note securing the Mortgage of even date, shall remain in the attorney trust account of defendants' counsel, and no part of those funds shall be transferred, deducted, or used for any purpose, pending further Order of the Court; and
>
> B. A standstill is hereby imposed as to all deadlines and/or timeframes set forth in the purported Option to Purchase signed by the parties on May 2, 2016, until further Order of the Court, and during such standstill the defendants shall not attempt to alter, perform work at, or physically enter the Property or Alliance's **[*4]** property located at 301 Fairmount Avenue, Jersey City, New Jersey; and

The parties engaged in extensive expedited discovery between the TRO hearing date and the return date of September 30, 2016.

Arguments

Plaintiff

Plaintiff argues here that specific enforcement enjoining Defendant JCB from refusing Alliance's right to have the Mortgage discharged is required. Alliance also seeks a declaration that the option and related documents are void, unenforceable and per se unconscionable. Plaintiff argues that where an option to purchase real property is entered into simultaneously with a mortgage of the same property, the option is absolutely void and unenforceable citing *Humble Oil Co. v. Doerr, 123 N.J. Super. 530, 544, 303 A.2d 898 (Ch. Div. 1973)*.

Defendants

Defendants oppose Plaintiff's application for injunctive and declaratory relief, and cross-motions for summary judgment (1) granting its claims for specific performance of the Purchase Option, breach of contract, and reasonable attorneys' fees, and (2) dismissing Plaintiff's claims for declaratory judgment and the *Consumer Fraud Act*.

Defendants argue that the "undisputed facts" establish that the sale leaseback transaction was freely and fairly negotiated by two (2) parties of roughly equal bargaining power and represented **[*5]** by experienced real estate attorneys. Defendants state that the basic terms of the proposed deal were circulated in a term sheet that Alliance had the opportunity to, and did, read and comment on and that counsel for both parties exchanged multiple rounds of agreement drafts.

Further, Defendants state that the transaction was not a "conventional mortgage loan," but was rather a "creatively structured transaction" that gave Seaview the right to purchase the Properties, which it wanted to do and still wants to do, while enabling Alliance to avoid a default under its Debtor-in-Possession loan. Defendants argue that there is no blanket prohibition under modern law of entering into a mortgage simultaneously with a purchase option, as the law requires the Court to consider the circumstances of the transaction as a whole and determine whether the essence of the transaction was an "equitable mortgage." Similarly, Defendants argue that both parties involved in the transaction were sophisticated business entities represented by experienced counsel, and this is not a basis to invalidate the Purchase Option.

Summary of the Facts

Plaintiff Alliance Healthcare, Inc. d/b/a Horizon Health Center is a **[*6]** New Jersey, non-profit corporation located at 714 Bergen Avenue, Jersey City, NJ ("Property") (Compl. ¶ 5; Cintron Cert. ¶ 2). Plaintiff also owns a property located at 706-708, 710, 712-714, and 719-721 Bergen Avenue and 311 Fairmount Avenue, Jersey City, NJ (Compl ¶ 5).

Defendant Jersey City Bergen, LLC ("JCB") is a New Jersey limited liability company located at 128 Main Avenue, Passaic, New Jersey (Compl. ¶ 2). Defendant JCB was formed on April 28, 2016, by representatives of Defendant Seaview Capital Partners, LLC (Compl. ¶ 3; Mann Cert. ¶ 40).

Plaintiff recently emerged from Chapter 11 Bankruptcy and needed approximately $2,000,000.00 in financing to pay off a loan by April 30, 2016 (Compl. ¶ 8; Cintron Cert. ¶ 6; Mann Cert. ¶ 7). After attempting to look for new loans and a financing deal fell through, Plaintiff, headed by CEO Marilyn

Cintron, entered into discussions with Josh Mann, Esq. of Seaview for a loan (Compl. ¶¶ 9-10; Cintron Cert. ¶ 6; Mann ¶ 14). While Plaintiff had approached Seaview for funding, it was determined that the loan would be provided by Defendant JCB, a new entity created by Defendant Seaview for the transaction (see Compl. ¶ 13; Cintron Cert. Ex. A; Mann **[*7]** Cert. ¶ 40).

Negotiations for the deal took place between April 22, 2016 and May, 2, 2016, when the loan documents were signed. (D's SJ Brief, SOF, pg. 10-11). These negotiations led to an agreement on April 25, 2016 which allow Alliance to pay off its DIP Lender loan on May 1, 2016 and also to give Seaview time to perform due diligence was to secure payment to the DIP Lender with a one-year note secured by a mortgage and security agreement while granting Seaview an option to purchase the properties. (D's SJ Brief, SOF, pg. 12). The DIP lender loan was held by Estate Capital.

A term sheet containing the terms for the proposed transaction was circulated on April 25, 2016, at 5:58 P.M. to all the parties. (Term Sheet, Exhibit D, Mann Certification (SJ Motion); D's SJ Brief, SOF, pg. 13). To secure the funds needed to pay off the DIP Loan and avoid a default, a short term mortgage would be placed on the properties and 301 Fairmount as a first lien in exchange for a loan of $2,000,000 to pay off the current DIP lien holder (Exhibit D, Mann Cert. ¶ 1). Further a new entity created by Seaview, Jersey City Bergen LLC, would have a separate purchase option to purchase the properties for $2.8 **[*8]** million. (Ex. D, Mann Cert. ¶ 3). At the closing of title, after a reasonable due diligence period, Seaview would discharge the $2 million mortgage and pay Alliance an additional $240,000 in cash, at which time Alliance would hold a $560,000 mortgage for a term not to exceed eighteen (18) months. (*Id.*). The term sheet further provided for a commercial lease, with Alliance as a tenant that would be responsible for all costs and expenses associated with the Properties, including taxes, repairs and maintenance, insurance and other fees. (Ex. D, Mann Cert. ¶ 4(a)). The lease would have a $12.50 per square foot initial lease rate, which would be followed by a rate of $20 per square foot starting in January 2017, with annual 3% increases. The initial lease term would be ten (10) years, with an option for Alliance to extend the lease term for an additional five (5) years. (Ex. C, Ex. D at ¶ 4(a) and (c), Mann Cert.). Further, to secure Alliance's performance under the commercial lease, Seaview would take a standard lien pursuant to *Section 9 of the UCC* on Alliance's receivables and equipment. (Ex. D at ¶ 4(g)). In the event of a default by Alliance under the lease, the $560,000 mortgage, if still outstanding, **[*9]** would be subject to immediate discharge by court order. (Ex. D at ¶ 6). Finally, the term sheet also provided that Alliance would be responsible for all of Seaview's reasonable attorneys' fees and other costs of litigation in the event of a default by Alliance resulting in legal action to enforce the agreement. (Ex. D at ¶ 5). Alliance decided to proceed with the transaction late in the day on April 25 or early in the day on April 26. (D's Brief, SOF, pg. 16).

Accordingly, Alliance, through counsel Cynthia Brooks-Bullock of Archer & Greiner, and Defendant, through counsel Josh M. Mann, proceeded to exchange draft agreements from April 27 to April 28, 2016. (D's Brief, SOF, pg. 17-20). Further discussions were held between the parties up until closing on May 2, 2016 to alter the agreements.

On May 2, 2016, the parties signed the loan documents (Compl. ¶ 16; Mann Cert. ¶ 80). Plaintiff received $2,100,000.00 the mortgage and note, which was secured by the Property (Compl. ¶¶ 14, 16, 19).

The Note (attached as Exhibit A to Plaintiff's order to show cause with temporary restraints), under the subsection titled "Prepayment," provides that "[t]he Debt may be prepaid in accordance with the terms **[*10]** of the Note or other document or instrument evidencing the Debt or any part thereof." (Ex. A, Cintron Cert., pg. 7). Further, under the subsection titled "Severability," "[i]n case any one or more of the covenants, agreements, terms or provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions contained herein shall be *in no way affected*, prejudiced or disturbed hereby." (Ex A., Cintron Cert. pg 8)(emphasis added).

The Mortgage (attached as Exhibit B to Cintron Cert. in Plaintiff's order to show cause), under the subsection titled "Prepayment," provides: "The Debt may be prepaid in accordance with the terms of the Note or other document or instrument evidencing the Debt or any part thereof." (Ex B, Cintron Cert. pg. 9-10).

The Parties also signed an option contract on May 2, 2016, giving Defendants the option to purchase the properties for $2,800,000, in exchange for $10.00 and other good and valuable consideration. (Ex. D, Cintron Cert. pg. 1) The Option provided that Defendants "may exercise its Option at any time between the Effective Date (May 2, 2016) and July 1, 2016." (Id.). **[*11]** The Option also provided that Plaintiff "shall not enter into any written or oral leases after the Effective date and before the closing without the express written permission of [Defendants] . . . [and] shall not enter into any written or oral contracts of sale, options to purchase or rights of first refusal with respect to the Property between the Effective Date and Closing." (Ex. D, at 3). A violation of this provision "shall be deemed to be a default by such Party

whose representation is no longer true and accurate or by the Party failing to comply with any such covenant." (Ex. D, at 6). In the event of default by Plaintiff, under Section 13.2 of the Option, the Defendants would be permitted to seek specific performance of the agreement *or* to terminate the agreement and "declare any *other related agreements* to be in default." (Ex. D, at 11)(emphasis added).

Separately executed on May 2, 2016 was a $300,000 "Collateral" Mortgage on the 301 Fairmount Avenue property, given to JCB by Alliance, however, this was solely for collateral and no money was given to Plaintiff under the agreement (Compl. ¶ 27). Also executed was a note and security agreement in the amount of $560,000.00 as a mortgage given **[*12]** to Plaintiff from Defendants, which would be paid to Plaintiff upon the exercise of the purchase option (Pl. Ex. G).

The Mortgage was recorded with the Hudson County, Register of Deeds, in Book 18727 at Page 640 1/42, on May 3, 2016. (P's Reply Brief, p. 8).

Defendants allege that in Mid-May, Alliance had begun negotiations with a different entity owned by Rafael' Levy, the principal of the former DIP Lender Estate Capital. On May 24, 2016, Ms. Cintron, of Alliance, sought and received Board approval to pursue a sale leaseback transaction with the entity controlled by Levy because it had preferable terms. (D's Brief, pg. 30-31; Jerkevich Cert., Ex 2 (Cintron Dep 285-290)). Ms. Cintron, through her new counsel Nicholas Cherami, Esq., communicated with Levy's counsel between May 27 and June 1, 2016 to finalize the purchase and sale agreement between Alliance and McGinley, the entity owned by Levy. Alliance and McGinley signed a Purchase and Sale Agreement on June 1, 2016.

On May 27, 2016, Plaintiff advised Defendants of its intent to prepay the entire sum owed under the Note and secured by the Mortgage, as allowed under the prepayment clause (Compl. ¶ 25; Cintron Cert. ¶ 22; Ex. H). Defendants **[*13]** stated that the total amount due was $2,094,352.00, and that interest would begin to accrue on June 1, 2016, at the per diem rate of $698.12 (OTSC Cintron Cert. ¶ 23; Ex. I).

On June 2, 2016, Alliance provided Defendants with $2,095,748.24, representing the total payoff plus two (2) days interest (OTSC Cintron Cert. ¶ 24, Ex. J).

On June 3, 2016, Defendants rejected the payoff, stating that Plaintiff had breached Section 3.3 of the Option Agreement by attempting to sell the Property to a third-party (the funds for the payoff came from the third party entity owned by Mr. Levy, to which Plaintiff had reached an agreement to sell the Property). (OTSC Cintron Cert. ¶ 25, Ex. H pg. 2; OTSC Mann Cert. ¶ 102). Defendants also stated that the payoff amount had been transferred to Defendants counsel's escrow account, and that interest would continue to accrue on the payoff amount. (OTSC Cintron Cert. ¶ 25; Ex. H pg. 2).

On June 6, 2016, Seaview's counsel provided written notice to Alliance of Seaview's decision to exercise the Purchase Option. (D's Brief, SOF, p.33).

Discussion

Validity of the Option Contract

Plaintiff argues that the Purchase Option held by Defendants is not valid, as it is void under the **[*14]** law. Plaintiff asserts that where an option to purchase real property is entered into simultaneously with a mortgage of the same property, the option is absolutely void, citing *Humble Oil & Refining Co. v. Doerr, 123 N.J. Super. 530, 549, 303 A.2d 898 (Ch. Div. 1973)*.

In *Humble*, the property owner, Josephine Rokita Doerr and her husband, Victor Rokita secured a loan for the purpose of expanding a garage facility which they owned. *Id. at 535*. The owners secured a $30,000.00 loan but before completion of the transaction, a Humble Oil representative offered better terms through Humble Oil's contacts. *id. at 535-36*. Eventually a loan was entered into with National State Bank for $35,000 at a lower interest rate using a two-party lease between Humble Oil, Doerr and the operating entity running the garage for a fifteen-year period. *Id. at 536-37*. This lease granted a fixed purchase price option to Humble Oil whereby it could purchase the property at any time during the lease. *Id.* Doerr then assigned the lease to National State Bank as collateral security. *Id. at 537*. The rent due from Humble Oil was in the amount to pay the principal and interest to the Bank and the rental amount collected by Humble Oil under its lease to the operating company was in the amount to be paid by Humble Oil under its lease with Doerr. *Id.* In that **[*15]** case, the court determined that Humble Oil's lease served as an equitable mortgage with Humble Oil as the mortgagee and the fixed purchase price option served as a clog on the equity of redemption because Humble Oil was never to enter possession of the property, run the business, or invest any funds into the premises. *Id. at 552-553*.

Specifically, the court noted that "it is well settled that an option to buy the property for a fixed sum cannot be taken contemporaneously by the mortgagee." *Id. at 546*. The court noted that "an option to purchase, if exercised, indubitably does stop a mortgagor from redemption." *Id. at 549*. The reason for this rule favoring mortgage debtors, the court noted, was that "their necessities often drive them to make

ruinous concessions in order to raise money." *Id. at 547*. Accordingly, the court noted that the rule is so strong "that it is applied to hold such options absolutely void and unenforceable *regardless of whether there is actual oppression in the specific case*." *Id. at 548* (emphasis added).

Additionally, the court provided a slightly different rule in regards to situations in which a mortgage was entered into and then the parties subsequently entered into an option contract, noting that "it is also the **[*16]** law that although a mortgagor can at a later date, after the original mortgage transaction, surrender his equity of redemption to the mortgagee and enter into an option or agreement to sell, it must be a fair bargain for an independent and adequate consideration." *Id. at 549*. "[A]ny contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously and is carefully scrutinized in a court of equity. The sale and conveyance of the equity of redemption to the mortgagee must be fair, frank, honest, and without fraud, undue influence, oppression of unconscionable advantage of the mortgagor's poverty, distress or fears of the position of the mortgagee." *Id.*

However, Defendant asserts that this rule seemingly barring option contracts entered alongside a mortgage transaction is no longer good law, and that the law of the *Restatement (Third) of Property (Mortgages) § 3.1* should apply. *Section 3.1 of the Restatement* provides:

> (a) From the time the full obligation secured by a mortgage becomes due and payable until the mortgage is foreclosed, a mortgagor has the right to redeem the real estate from the mortgage under the principles of *§ 6.4*.
>
> (b) Any agreement in or *created contemporaneously with a mortgage* that impairs the mortgagor's right described in *Subsection (a)* of this **[*17]** section is ineffective.
>
> (c) An agreement in or created contemporaneously with a mortgage that confers on the mortgagee an interest in mortgagor's real estate does not violate this section *unless its effectiveness is expressly dependent on mortgagor default*.

(Emphasis added).

The comments to the Restatement indicate that *Subsection (c)* "recognizes that it is appropriate to insulate loan transactions from the clogging rule where the mortgagee acquires an interest in mortgagor's real estate to enhance the return on its investment rather than to provide a remedy for mortgagor default. *Comment b to § 3.1*. The comments further note that "it is preferable to reject the rigid position that all mortgagee attempts to enforce such options are invalid. *This Restatement validates options and contract rights of acquisition by the mortgagee unless their enforcement is expressly dependent on mortgagor default*." *Comment d to § 3.1* (emphasis added). While the Restatement (Third) of Property: Mortgages has not been formally adopted in New Jersey, the Appellate Division, in an unreported case, has cited *Section 3.1*, at issue here, favorably. *See Mercer Cty. Improvement Auth. v. Trenton Studios Inc., Docket No. A-2475-06T3, 2008 N.J. Super. Unpub. LEXIS 1116 (App. Div. Aug. 21, 2008)*. In that case, the Appellate Division held **[*18]** that a forfeiture provision in a Redevelopment Agreement between an Improvement Authority and movie production facility, which provided that the Authority could declare a termination of title and all of the defendant's rights in the event of default, and that such title would revert back to the Improvement Authority, did not "clog the equity of redemption because the Project [did] not offend the basic policy behind that doctrine." *Id.* at 30.

The balance of equities involving the option contract in this case favor the Defendants. In this case, the Mortgage, Note, Option Agreement, and other agreements, were negotiated between sophisticated business entities, separately represented by experienced and knowledgeable counsel. Further, the Option Contract was specifically negotiated for benefit of the bargain between the sophisticated parties. The negotiations in this case were complicated by the fact that Alliance, as a distressed party, had a looming deadline to pay off its DIP lender (May 1, 2016), which would have made it impossible for the Defendants to perform the needed due diligence while also protecting its ability to retrieve its deposit in the event Seaview did not exercise its option. **[*19]** Accordingly, the parties agreed that the only way to achieve this goal and pay off the DIP loan on time was to secure the payment to the DIP lender with a one-year note secured by a mortgage and security agreement while granting Seaview an option to purchase the properties. This led to the Option agreement and one-year mortgage and note being included in the deal between the parties.

Although the *Humble* opinion does provide that option contracts may clog the equitable guarantees of redemption for conventional mortgages, the instant case is clearly distinguishable from the facts present in *Humble*. As an initial note, the court in *Humble* noted that its holding that the option contract clogged the mortgagor's equity of redemption applied "[i]n the circumstances of this case." *Humble, supra, 123 N.J. Super. at 534*. First, in the present case, unlike *Humble*, the parties were incredibly sophisticated business entities represented by experienced counsel, whereas in *Humble* the mortgagor was entirely unsophisticated and unrepresented by counsel. Further, the option contract in *Humble* put the mortgagee "in the fortunate position where it had nothing to lose and much to gain — it was not obliged to do anything but it could exercise the **[*20]** option if the value of the property increased sufficiently over the option price to make it

financially worthwhile to do so." *Id. at 555*. The option contract here was part of a sale-leaseback transaction that distinguishes it from the "conventional mortgage" at issue in *Humble*. The contracts involved in this case were high-risk contracts, in which Defendants were forced to exercise the option contract *before* any payments by the Plaintiff, which had just emerged from bankruptcy, became due.

Here, the option contract was entered into as an added layer of consideration for the Defendants to give this high-risk distressed loan, especially considering the short-time period involved. As the comments to *§ 3.1 of the Restatement* indicate, "it is appropriate to insulate loan transactions from the clogging rule where the mortgagee acquires an interest in mortgagor's real estate to enhance the return on its investment rather than to provide a remedy for mortgagor default." *Comment b to § 3.1*. Such a situation is present here, where the Option Contract, entered into as a separate, but contemporaneous and related agreement to the Mortgage, Note and other agreements, served as a chance for the Defendants to safeguard their investment, rather than to **[*21]** provide a remedy in the event of default. It is notable, then, that the option to purchase the properties expired on July 1, 2016, the same day that the first payment under the Mortgage was due, meaning that the option was in no way tied to any potential mortgagor default.

Accordingly, here, the Option contract is valid, and the Court chooses not to apply *Humble*, which the Court finds distinguishable from the instant case.

Unconscionability of the Agreements

Alternatively, Plaintiff argues that the contracts cannot be enforced because they were unconscionable in that the terms of the option and lease "shock the conscience." Plaintiff states that under the terms of the agreements, if Alliance is seven (7) days late with a rent payment, Alliance would be subject to: (1) eviction; (2) acceleration of all rents under the Lease; (3) loss of the $560,000 component of the purchase price being held by Defendants and extinguishment of the Seller's mortgage in that amount; and (4) eviction from the 301 Fairmount Avenue property and foreclosure of the $300,000 collateral mortgage held by Defendants. Plaintiff states that these penalties amount to a liability exposure of over $1,000,000 in the event **[*22]** of a default, which shocks the conscience.

Here, the terms of the agreement are not unconscionable. The contracts were freely negotiated between two sophisticated parties represented by counsel and reflect the fact that Defendants extended a high-risk distressed loan to the Plaintiff, at the Plaintiff's request. Here, nothing in the agreement is so disproportionate to the high-risk inherent to this type of loan so as to shock the conscious and require the contract to be void for unconscionability.

Effect of Default under Option Agreement on the Option Agreement

Here, the Plaintiff entered into a sale-leaseback agreement with a separate entity on June 1, 2016. Under the Option to Purchase Agreement, Plaintiff was forbidden from entering "into any written or oral contracts of sale, options to purchase or rights of first refusal with respect to the Property" during the option period. (Option Agreement, Ex. D Cintron Cert, pg. 3). Accordingly, the Plaintiff did, in fact, default under the terms of the agreement, as a violation of that provision "shall be deemed to be a default by such Party whose representation is no longer true and accurate or by the Party failing to comply with any such **[*23]** covenant." *Id.* at 6.

Under Section 13.2 of the Option Contract, in the event of default of the provisions of the Option Contract, Defendants are permitted to seek specific performance of the agreement or to terminate the agreement and "declare any other related agreements to be in default." *Id.* at 11. Therefore, here, the Defendants had the option of either seeking specific performance of the agreement, or to terminate the option and declare any other related agreements to be in default. It is not indicated what the "related agreements" are.

In any event, Defendants here seeks specific performance of the Option Contract, which it exercised on June 6, 2016, three (3) days after Defendants rejected Plaintiff's attempt to pay off the loan in full because Plaintiff had breached the Option Agreement by selling the Property to a third party. Under the Option Contract, Defendants are entitled to specific performance of the contract based on Plaintiff's breach of the option, and therefore, summary judgment is granted for the Defendants' counterclaims for specific performance and breach of contract, given the previously established validity of the option.

Effect of Default on the Plaintiff's Ability to Redeem the Mortgage ***[*24]***

Under Section 13.2 of the Option Contract, in the event of default of the provisions of the Option Contract, Defendants are permitted to seek specific performance of the agreement or to terminate the agreement and "declare any other related agreements to be in default." *Id.* at 11. Therefore, here, the Defendants had the option of either seeking specific performance of the agreement, or to terminate the option and declare any other related agreements to be in default. It is not indicated what the "related agreements" are.

Again, Defendants here seeks specific performance of the

option contract, which it exercised on June 6, 2016, three (3) days after Defendants rejected Plaintiff's attempt to pay off the loan in full because Plaintiff had breached the Option Agreement by selling the Property to a third party. Therefore, because the Defendants are seeking specific performance, under the Option Contract, any related agreements would not be voided by the breach of the option agreement.

Further, there is nothing in the Mortgage or Note that would prevent the Plaintiff from paying the mortgage before it became due (during the option period). The Mortgage and Note both have identical subsections titled "Prepayment," **[*25]** which provide that "[t]he Debt may be prepaid in accordance with the terms of the Note or other document or instrument evidencing the debt or any part thereof." (Note, Ex. A, Cintron Cert, p. 7; Mortgage, Ex. B, Cintron Cert. p. 9-10). Likewise, the Option Contract has no provision barring the prepayment of the Mortgage during the Option period. Simply put, prepayment by the Plaintiff does not bar Defendants from exercising their rights under the Option Agreement.

Plaintiff argues in its reply brief and during oral argument that the Defendants breached Section 18.4 of the Option Agreement by filing a Notice of Settlement prepared for them by the Escrow Agent, as well as the Notice of Lis Pendens filed by its counsel. Section 18.4 of the Option Agreement provides:

> The parties agree that neither this Agreement nor any memorandum or notice hereof shall be recorded. If Buyer records this agreement, or a notice or memorandum hereof, Seller may, at its sole option, declare this Agreement terminated, in which event Buyer shall be deemed to have defaulted in its obligations hereunder.

Plaintiff at oral argument declared the option to be terminated when it filed its order to show cause on June 7, 2016. After oral argument, **[*26]** Plaintiff submitted a letter to the Court explaining that it also sent a letter to Defendants on June 7, 2016 in which Plaintiff allegedly told Defendants that the option was unenforceable. However, a reading of Plaintiff's June 7, 2016 letter indicates that the June 7 letter provided Plaintiff considered the Option Agreement and related closing documents to be "*per se* unconscionable, void and unenforceable," for the same reasons espoused in its order to show cause relating to the *Humble Oil* decision. Notably, the letter does not cite section 18.4 of the Option.

The Court's evaluation of the validity of this argument by the Plaintiff requires a close review of the parties' undisputed actions over a short timeline as follows:

On May 24, 2016, Ms. Cintron, the CEO of Plaintiff Alliance, sought and received Board approval to pursue a sale-leaseback agreement with an entity owned by Rafael Levy, the principal of Plaintiff's former DIP lender, Estate Capital, with whom Ms. Cintron had started to negotiate a purchase contract several days earlier. (Defendants' Statement of Facts, ¶ 67-68; Cintron Deposition at 285:10-286:18, Jurkevich Cert., Ex. 2).

On May 27, 2016, the Defendants received an email from **[*27]** Nicholas Cherami, Esq., stating that he was representing the Plaintiff and that the Plaintiff was requesting payoff by seeking to prepay the Note in its entirety. (Mann Cert., Ex. BBB; Mann Cert. ¶ 112). The Defendants state that, at that time, they intended to accept the payoff and also pursue the Purchase Option. (Mann Cert. ¶ 115).

On June 1, 2016, the Defendants filed a Notice of Settlement as to the Option agreement. (Mann Cert. ¶ 116; Notice of Settlement attached as Mann Cert., Ex. CCC). The Notice of Settlement was filed by Corrine R. Perry, as agent for Riverside Abstract, the escrow agent selected by the parties, and states that "NOTICE is hereby given of an Option to purchase between the parties hereto" the Plaintiff's properties. (Mann Cert., Ex. CCC; Mann Cert. ¶ 116).

Also on June 1, 2016, the Plaintiff signed a Purchase and Sale Agreement with McGinley, the entity owned by Mr. Levy, after several days of negotiations. (Defendants' Statement of Facts, ¶ 67-68; Cintron Deposition at 286:19-24, Jurkevich Cert., Ex. 2).

On June 2, 2016, the Defendants received a call from Mr. Cherami, who stated that he was trying to wire the 'Defendants the payoff money, and also that he was **[*28]** acting as a closing attorney in connection with a contract for sale entered into by Alliance. (Mann Cert. ¶ 117-118). Mr. Cherami also said that the money to be used by Alliance to pay off the Mortgage held by the Defendants was from the deposit for a contract of sale for the Plaintiff's properties that Alliance had executed previously. (Mann Cert. ¶ 119).

On June 3, 2016, the Defendants rejected the payoff by letter to Plaintiff. (Mann Cert. ¶ 121; Letter attached as Mann Cert., Ex. DDD). The letter stated that it served as a "formal Notice of Default and a rejection of the payoff attempted to be made by [Plaintiff]." (Mann Cert., Ex. DDD). The letter further states that Plaintiff violated the Option Agreement by entering into the sale contract with the third party, which was prohibited under Section 3.3 of the Option. *Id.* The letter goes on to say that:

> Please be advised that the Option Agreement, regardless of the effectiveness or non-effectiveness

> of the payoff, remains valid and enforceable pursuant to the terms thereof and Buyer specifically retains any and all rights it may have under the Option Agreement as well as it may have as Lender under the Loan.
>
> *Id.*
>
> On June 6, 2016, Defendants, by **[*29]** letter to Plaintiff, exercised the Option Agreement. (Mann Cert. ¶ 121-122; Letter attached as Mann Cert. Ex. EEE).
>
> On June 7, 2016, Plaintiff filed its Order to Show Cause and also sent a letter to Defendants in which Plaintiff told Defendants that the option was unenforceable as being "*per se* unconscionable, void and unenforceable."

Here, assuming *arguendo* that Defendants' filing of the Notice of Settlement of the Option Agreement on June 1, 2016 was a breach of the Option, Plaintiff also breached the Option by agreeing to enter into a sale-leaseback agreement with the entity owned by Mr. Levy on June 1, 2016. Plaintiff's breach of the contract was much more significant than that of Defendants.

"It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance." *Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285, 723 A.2d 976 (App. Div. 1998)*. A material breach has been described as such:

> If, however, during the course of performance one party fails to perform "essential obligations under the contract," he may be considered to have committed a material breach and the other party may elect to terminate. Where a contract calls for a series of acts over a long term, **[*30]** a material breach may arise upon a single occurrence or consistent recurrences which tend to "defeat the purpose of the contract." In applying the test of materiality to such contracts a court should evaluate "the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated."

Medivox Productions v. Hoffmann-LaRoche, Inc., 107 N.J. Super. 47, 58-59, 256 A.2d 803 (Law Div. 1969) (internal citations omitted).

"[W]hether a breach is material is a question of fact." *Farnsworth on Contracts* § 8.16. New Jersey courts have applied the *Restatement (Second) of Contracts § 241* in determining whether a breach is material and minor, which applies the following criteria:

> a. the extent to which the injured party will be deprived of the benefit which he/she reasonably expected;
> b. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> d. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> e. the extent to which the behavior of the party failing to perform or to offer to **[*31]** perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 at 237 (1981).

Here, an application of those factors indicates that Plaintiff's breach of the Option Agreement was material, and Defendants' breach was merely minor. By agreeing to sell the property to the third party, Plaintiff effectively eliminated the purpose of the Option Contract: to provide Defendants an option to purchase and receive title to the land. However, Defendants' breach, the filing of the Notice of Settlement, is significantly less egregious, and Plaintiff suffered no loss because of the breach. In fact, Plaintiff has not claimed that the filing of the Notice of Settlement caused it any damage. Accordingly, Plaintiff's breach of the Option was material, and principals of equity dictate the Option contract be enforceable against the Plaintiff.

2. Plaintiff's Conflict of Interest Argument

Plaintiff argues that conflicts of interest existed that should void the Option Contract under the second rule from the *Humble* case, which applies when an option is taken subsequent to a mortgage being entered into and requires the court to look with "close scrutiny" at the fairness of the deal. Here, Plaintiff asserts that **[*32]** the "undisclosed" conflicts of interest indicate, along with the unconscionability of the deal's terms, that the Option Contract must be voided under this rule.

First, Plaintiff points to the fact that the escrow agent selected by the Defendants has shared ownership with Defendant Jersey City Bergen. Specifically, Plaintiff states that Bird Equities LLC, one of the twelve (12) members of Jersey City Bergen, is an investment company owned and controlled by Shaul Greenwald, Esq., who is also the owner and Chief Executive Officer of Riverside Abstract, LLC, the escrow agent. (Plaintiff's Reply Brief, page 23). Likewise, Riverside Abstract's head of business development, Sam Parnes,

controls Sambay Properties, LLC, which is also a member of Jersey City Bergen. Other members of Jersey City Bergen have also deposited monies directly with Riverside and became members. Plaintiff states that these conflicts were hidden by the Defendants in their drafting of the Escrow Agreement and thus the escrow agent did not fully disclose material facts, as required of a fiduciary.

In response, Defendants admit that two (2) members of Jersey City Bergen have an ownership interest in Riverside Abstract, but **[*33]** argued at oral argument that there have been no allegations that the escrow agent breached any fiduciary duties owed to either party and that the escrow agent does not have to be a stranger to the deal. Specifically, here, the escrow agent was only charged with holding and safekeeping five (5) documents: the two mortgages and their respective notes, and the lease. The escrow agent was not tasked in the Escrow Agreement with holding any funds.

New Jersey courts have held that "[g]enerally speaking, when a deed is delivered by the grantor to a stranger, to be delivered to the grantee on the performance of some condition, it is considered an escrow." *Adm'rs of White v. Williams, 3 N.J. Eq. 376, 383 (Ch. 1836)*. However, courts do not enforce a strict definition of "stranger" in terms of the requirements for an escrow agent. As one court noted:

> [T]he word "stranger" "as used in the definitions of escrow, means a stranger to the instrument, not a party to it, or a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depositary to both parties without involving a breach of duty to either." 19 Am. Jur., Escrow, § 14. And the rule which has been generally adopted by the courts of this country **[*34]** is: "if the agent's or attorney's relation to his principal is such that his acting as custodian of the deed or paper is not antagonistic to his principal's interests, and the paper was put in his hands not as a delivery but as an escrow, such general agent or attorney of the grantee, obligee, or payee of an instrument is not incapacitated from acting as depositary of the instrument, but becomes the agent of both parties for the purpose of the escrow." 19 Am. Jur., Escrow, § 15.

Levin v. Nedelman, 141 N.J. Eq. 23, 30, 55 A.2d 826 (Ch. 1947), *reversed on other grounds* *142 N.J. Eq. 769, 61 A.2d 76 (1948)*.

Here, the conflicts of interest would not prevent the escrow agent from safekeeping the documents and acting as an agent to both Plaintiff and Defendants. Likewise, Plaintiff's argument that if they had known the conflicts involving the escrow agent they would not have gone through with the deal is questionable. This transaction occurred on the eve of Plaintiff's DIP loan being due, which presented an imminent threat to Plaintiff's business and its ability to care for its patients. It would not have been reasonable to call off the entire deal and default under the DIP loan simply because there was a slight conflict involving the party who would be holding the documents involved in the **[*35]** transaction.

Second, Plaintiff argues that there is a conflict involving Michael Osso and his company, Navalla Capital Group, LLC, that was not disclosed to Plaintiff. Alliance hired and paid Mr. Osso to perform financial consulting services and to obtain financing for Plaintiff. However, Mr. Osso also was under contract with the Defendants to find a sale-leaseback agreement for the Defendants, for which Mr. Osso would receive $56,000 upon closing of the property. Mr. Osso is not licensed as a real estate agent or realtor.

However, as noted by the Defendants, Section 14.1 of the Option agreement recognizes that the Buyer has a relationship with Navalla Capital, for which Defendants would be paying Navalla pursuant to a "separate consulting agreement." This Option agreement, as set out in the parties' papers and at oral argument, went through many revisions, as Defendants argued at oral argument that forty-six (46) drafts of the various documents were exchanged throughout the negotiations, and it is reasonable to assume that the Plaintiff would have been notified by the wording of that section that the Defendants also had contracted with Mr. Osso. Further, any issues relating to Mr. Osso's lack of **[*36]** licensing or unauthorized practice of realty would not impact the validity of the agreement.

3. Plaintiff's Citation to the "Parade of Horribles" That Might Result from the Option Contract

Plaintiff argues that the terms from the Option, Lease, Seller Mortgage and Collateral Mortgage are patently unfair. Default, under the Mortgage, is defined as failing to make payments under the Note, failing to materially perform or comply with any of the conditions in the Note, Security Agreement, or Mortgage, or the occurrence of enumerated events in those three agreements. Upon the default, the Mortgagee can take possession of the property and also accelerate the debt. The Security Agreement, dated May 2, 2016, allows Defendants to file a security interest against Plaintiff's: (1) accounts (but not accounts receivable); (2) cash; (3) inventory; (4) equipment; (5) deposit accounts; (6) letter of credit rights; (7) awards in pending and/or settled litigations; and (8) membership interests in other corporate entities.

Under the Commercial Lease, which would be triggered with

the exercise of the Option, the Defendants would be granted a lien on all of Plaintiff's property, not including receivables, **[*37]** to secure payment of rent. In the event of default beyond a grace period to cure, under Section 6.02 of the Lease, the Defendants would have the right to take possession of any furniture, fixtures or other personal property of Plaintiff found on the premises and to sell at a public or private sale. Under Section 16.02 of the lease, in the event of default, the Defendants may evict Plaintiff and tenant will be liable for all basic rent payable under the lease and all costs. Further, default under the lease would cause the extinguishment and automatic satisfaction of the Seller Mortgage. The Plaintiff "acknowledge[d] and concur[red] that such a remedy is fair and reasonable due to the risks incurred by Landlord in the greater transaction." (Section 16.02).

However, none of these events are triggered by default under the Option Contract. Under the Option Contract a default by Plaintiff would allow the Defendants to either seek specific performance of the Option or to terminate the Option and declare any other related agreements to be in default. (Section 13.2 of the Option Agreement, Cintron Cert. Ex. D). Here, Defendants have chosen to seek specific performance, so it cannot declare the other related agreements to be in default at this present time. Accordingly, **[*38]** here, execution of the Option Contract here would not result in any automatic default under the correlated agreements. Any such default under those agreements would be contingent on future failures by Plaintiff to perform as required by those agreements.

Accordingly, the scenarios identified by Plaintiff's counsel during oral argument are not ripe for adjudication at this time. Because New Jersey courts are not limited by the case or controversy requirement of Article III of the United States. Constitution, New Jersey courts have "more freedom to decide cases than their federal counterparts, which are limited by constitutionally based ripeness principles." *Garden State Equality v. Dow, 434 N.J. Super. 163, 189, 82 A.3d 336 (Ch. Div. 2013)*. However, "courts should not render advisory opinions or exercise jurisdiction in the abstract." *State v. Abeskaron, 326 N.J. Super. 110, 117, 740 A.2d 690 (App. Div. 1999)*. In *Garden State Equality*, the court described the ripeness doctrine as such:

> To determine if a case is ripe for judicial review, the court must evaluate: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties caused by withholding court consideration. As to whether an issue is fit for judicial review, courts must first determine "whether review would require additional factual development." A case is fit for review if the "issues in dispute are purely **[*39]** legal, and thus, appropriate for judicial resolution without developing additional facts." A declaratory judgment claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are "future, contingent, and uncertain." With respect to the "hardship" prong of the ripeness analysis, courts can assume jurisdiction over a claim only if there is a "real and immediate" threat of enforcement or harm that would affect the plaintiff.

Garden State Equality, supra, 434 N.J. Super. at 189 (internal citations omitted).

Here, Plaintiff's request to adjudicate the enforceability of the documents related to the Option agreement and initial mortgage fails both prongs of this test. First, the Court's review would require additional fact development, as Plaintiff has not yet defaulted under any of the related agreements beyond the Option, and thus those facts are contingent and uncertain. Further, there is no "real and immediate" threat of enforcement or harm that would affect the Plaintiff. While Plaintiff at oral argument pointed to a "parade of horribles" that would occur if the Defendants were permitted to enforce the Option, there is no threat of immediate enforcement as the Plaintiff has yet to default under those **[*40]** documents and the Defendants maintain that they have no interest in forcing its tenant out. Accordingly, there is no threat of enforcement, and the issue is not ripe for determination at this time.

Consumer Fraud Act Count of Plaintiff's Complaint

Finally, Defendants move for summary judgment on Plaintiff's Consumer Fraud Act claim, arguing that it does not apply to the sale-leaseback transaction at issue in this case. The CFA prohibits the use of "unconscionable commercial practice, deception, fraud, false pretenses, misrepresentation, or the knowing concealment, suppression or omission of any material fact...in connection with the sale or advertisement of any merchandise or real estate. *N.J.S.A. 56:8-2*. To state a claim under the CFA, a plaintiff must demonstrate: (1) an unlawful practice by the defendant, (2) an ascertainable loss, and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss. *N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13, 842 A.2d 174 (App. Div. 2003)*. "The entire thrust of the [CFA] is pointed to products and services sold to consumers in the popular sense." *Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F.Supp. 2d 557, 561 (D.N.J. 2002)*.

Here, Plaintiff alleges that the CFA was violated because Defendants failed to disclose that the escrow agent selected by the defendants, and which **[*41]** entered into the Escrow Agreement with the parties, shared common ownership with the Defendants. The escrow agent prepared the Notice of Settlement in response to Plaintiff requesting a payoff

statement from Defendants on June 1, 2016 in order to pay the mortgage in full. Plaintiff states that Defendants' omission of its conflict of interest with the escrow agent violated the CFA.

The Consumer Fraud Act is intended to protect consumers who purchase "goods or services generally sold to the public at large.'" *Arc Networks, Inc. v. Gold Phone Card Co., 333 N.J. Super. 587, 756 A.2d 636 (Law Div. 2000)*. "[T]he entire thrust of the Consumer Fraud Act is pointed to products and services sold to consumers in the popular sense. Such consumers purchase products from retail sellers of merchandise consisting of personal property of all kinds or contract for services of various types brought to their attention by advertising or other sales techniques." *Neveroski v. Blair, 141 N.J. Super. 365, 378, 358 A.2d 473 (App. Div. 1976)*. For example, the Consumer Fraud Act has been expanded to encompass "the offering, sale, or provision of *consumer* credit" and the collecting and enforcing of a consumer loan. *Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577, 25 A.3d 1103 (2011)* (quoting *Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 265, 696 A.2d 546 (1997))* (emphasis added). The Consumer Fraud Act may also be applicable where a corporation is the victim of the fraud, as "[g]iven the broad scope of the Act and its liberal **[*42]** construction, so long as the disputed contract involves goods or services *generally sold to the public at large*, the mere fact that a corporation purchases the goods for use in its business does not preclude invocation of the Act and its regulations." *Marascio v. Campanella, 298 N.J. Super. 491, 499, 689 A.2d 852 (App. Div. 1997)* (emphasis added).

Here, the sale-leaseback transaction, and the many documents and agreements related to that transaction, cannot be considered to fall under the Consumer Fraud Act, even despite the liberality of the Act. Unlike a consumer mortgage, which would, for example, fall under the Consumer Fraud Act, the sale-leaseback and related mortgages here were not of the kind "generally sold to the public at large" and were not consumer loans. The agreements in place in this case arose from days of negotiation between two sophisticated business entities represented by counsel, and did not arise from a general offer of sale to the public. Indeed, Alliance Healthcare cannot be considered a "consumer[] in the popular sense" here, as expanding the Consumer Fraud Act in such a manner would expand liability to countless complex commercial transactions far removed from the average consumer. *See Neveroski, supra, 141 N.J. Super. at 378*. Accordingly, Plaintiff's arguments that the agreements **[*43]** should be subject to the Consumer Fraud Act are entirely without merit.

Motion for Attorneys' Fees

Defendant also moves for summary judgment on its claim for attorneys' fees. Under Section 13.2 of the Option Contract, "[u]pon default, [Alliance] shall be liable to [Defendants] for reasonable out-of-pocket expenses in connection with this transaction and the termination thereof from the effective date forward, including costs associated with its due diligence investigations and reasonable attorneys' fees and expert costs in connection with the enforcement of this provision and the Agreement." Accordingly, Defendants are entitled to its reasonable attorneys' fees, which shall be the subject of a separate motion to be filed by the Defendants.

Conclusion

For the aforementioned reasons, the Court: (1) grants Plaintiff's request for an order enjoining Defendants from refusing to discharge the May 2, 2016 Mortgage; (2) denies Plaintiff's request for an order declaring the Option to Purchase, Commercial Lease, Collateral Mortgage, UCC filings, and all related agreements concerning the sale and lease per se unconscionable, void, and unenforceable; (3) grants Defendants' cross motion for summary judgment on Defendants' **[*44]** counterclaims for specific performance of the Option Agreement; (4) grants Defendants' cross motion for summary judgment dismissing Count 2 of Plaintiff's Complaint (seeking a declaratory judgment that the Option Contract is void) and Count 4 of Plaintiff's Complaint (NJ Consumer Fraud Act); and (5) Defendants' request for an award of reasonable attorneys' fees and costs which shall be the subject of a separate motion to be filed by the Defendants within 10 days of the order accompanying this decision.

The Court, on its own motion, dismisses Count 3 of Plaintiff's complaint which alleges a breach of implied covenant of good faith and fair dealing based upon the actions of the Defendants in not discharging the subject mortgage, as the Court in its decision has ordered that the subject mortgage be discharged and the tendered funds submitted by the Plaintiff, now in escrow, be accepted by the Defendants in full payment. Furthermore, the actions of the Defendants and Plaintiff in the short time frame presented here do not lead to any actionable claim under this theory.

The order accompanying this decision is a final dispositive order of this action.

/s/ Barry P. Sarkisian

Hon. Barry P. Sarkisian, **[*45]** P.J.Ch.

End of Document