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Please reply to Hackensack

July 8, 2013

VIA HAND DELIVERY

Honorable Barry Sarkisian , J.S.C.
Superior Court of New Jersey
Hudson County Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

Re: Vazquez v. Rios, et al.
Docket No.: HUD-L-636-13
Defendants' Motion for Summary Judgment
Return Date: July 12, 2013

Dear Judge Sarkisian:

Our firm represents the defendants Elba Rios ("Rios"), Jareau Almeyda and Marissa Morales (collectively the "Defendants") in connection with the above referenced matter. Defendants have filed a motion for summary judgment returnable before the Court on July 12, 2013. Defendants' respectfully submit this reply Letter Memorandum in further support of their motion, and in reply to the opposition filed by plaintiff Carlos Vazquez ("Vazquez").

INTRODUCTORY COMMENTS

Vazquez attempts to manufacture a genuine issue of material fact by raising a variety of "red herrings" in the form of parol evidence despite the existence of an integration or merger clause in the parties' real estate contract ("Contract") confirming it represents their entire agreement. Defendants maintain that this case is ripe for summary judgment dismissing the entire Complaint notwithstanding plaintiff's plea to engage in pretrial discovery, or because of his convenient "after the fact" attempt to avoid application of the 6-year statute of limitations

for fraud by claiming he was defrauded in 2010 when he and Rios's personal relationship ended and he vacated the house. No rational jury could conclude that plaintiff breached her Contract with Vazquez, or that he has suffered any measure of damages, or that he was defrauded by entering into the Contract providing for his receipt of monthly installment payments over a 5-year period. In point of fact, Vazquez continued accepting the Contract installment payments for approximately 22 months after their relationship had ended.

If the Court declines to dismiss the Complaint in its entirety, then alternatively the Court should grant partial summary judgment to Rios by dismissing Count I of the Complaint (breach of contract), Count II (fraudulent transfer predicated on breach of contract), and Count IV (unjust enrichment) for the reasons expressed in Defendants' opening brief. By Vazquez's own admissions, an enforceable Contract exists between him and Rios that entitled him to receive $25,000 for transferring his interest in the residential property ("Property") to Rios. It is undisputed that: (i) Rios paid Vazquez every single dime due under the Contract in the form of monthly installment checks with each containing some specific reference to the Property,[1] (ii) and Vazquez endorsed and accepted every payment without ever issuing Rios a single complaint about a payment being untimely or being for an incorrect amount.

These "red herrings" incorporated in Vazquez's sham Certification include numerous statements neatly and conveniently tailored to be viewed in hindsight through the eyes of what a "reasonable creditor" would have done under these circumstances, all designed to

[1] The memo portion of Rios' installment checks to Vazquez contains several different references to the Property. Some checks say "House Payment 36-49 Street", while other checks say "36-49 Street", "36-49 Street House", or "Consideration 36-49 Street". See cancelled checks attached as Exhibit 5 to Rios Aff.

manufacturer a genuine issue of material fact to escape summary judgment based on the terms of the very same Contract Vazquez brazenly seeks to enforce despite irrefutable evidence that no breach occurred; to wit:

- Vazquez's resort to wordsmithing by repeatedly labeling the Contract as a "Purported Contract" notwithstanding that his Complaint seeks damages by asserting breach of the very same Contract.[2]

- With the benefit of hindsight, complaining about minor details or discrepancies with the Contract's terms (after receiving a good "spoon feeding" by his present counsel, albeit more than 6 years after the parties made the agreement), notwithstanding in the same breath conceding that he voluntarily signed the Contract back in 2006 with the benefit of advice received from an attorney;

- With the benefit of hindsight, complaining about provisions he says should have been included in the Contract such as an interest rate, allowance of attorney's fees upon default, and a specific closing date;

- With the benefit of hindsight, complaining about $70,000 he claims to have advanced post-Contract for repairs and maintenance by referencing American Express statements totaling only approximately $8,000 for an account also bearing the corporate name of Rav, Inc.;

- With the benefit of hindsight, complaining about being deprived of the rental income generated from the Property;

- With the benefit of hindsight, alleging that no creditor would accept the installment payment terms provided by the Contract, or accept sporadic payments that were otherwise late, and/or for lesser amounts than required;

- Conveniently claiming that Rios "could easily have cherry picked" the checks attached to her Certification totaling $25,050 which she maintains constitutes payment in full pursuant to the Contract, but which he disclaims on the theory

[2] Vazquez devotes two (2) pages of his Certification addressing why the Contract should be considered a "purported contract" rather than an actual contract. Yet, he does not dispute signing the Contract after hiring an attorney, and has failed to provide any competent proofs that Rios breached the Contract.

that these payments were given to him as part of Rios' contribution toward the household expenses while they were living together.[3]

- With the benefit of hindsight, attempting to avoid the Contract's effect by claiming the existence of an undisclosed agreement not mentioned in the Contract entitling him to receive the Property back from Rios.

- Claiming he cannot recover his personal records from the Property because of Rios's alleged refusal.

- Claiming there was a fraudulent transfer of the Property despite him receiving payment of the entire $25,000 purchase price.[4]

- Notwithstanding receiving the entire $25,000 Contract proceeds and thus suffering no damages, alleging that defendants perpetrated a fraudulent transfer of the Property.

The Court should disregard Vazquez's attempt to manufacture a genuine issue of material fact by resorting to rhetorical questions based on what a reasonable creditor would have done. This motion is premised on the actual transaction that occurred between the parties. Based on this motion record, the case is ripe for summary judgment.

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[3] In paragraph 28 of his Certification, Vazquez states that his relationship with Rios ended in "early 2010." In paragraph 19 of his Complaint, Vazquez states that his relationship with Rios terminated on or about January 16, 2010. The schedule of payments and corresponding checks annexed to the Rios Affidavit reflect that after January 2010 she made 22 additional installment payments to Vazquez, many of which are in the demonization of $400 **(the monthly Contract installment amount)** or multiples thereof; i.e., $200, and $800. Why would Rios continue paying Vazquez for "household contributions" into October 2011 when, by Vazquez's admission, their relationship terminated 22 month earlier in January 2010 and he vacated the Property? His Certification is obviously a blatant sham!

[4] Since Rios has paid Vazquez the full $25,000 Contract consideration, there is no basis for Vazquez to allege a fraudulent conveyance.

SUPPLEMENTAL LEGAL ARGUMENT

POINT I

THE COURT SHOULD TREAT THE PLAINTIFF'S REPLY CERTIFICATION UNDER THE SHAM AFFIDAVIT DOCTRINE, AND REQUIRE PLAINTIFF TO REIMBURSE DEFENDANTS FOR THEIR REASONABLE ATTORNEYS' FEES

Aside from being irrelevant, the overwhelming majority of Vazquez's statements in his Certification is contradictory and at odds with previous statements made in his Complaint. For example, in the Complaint he says Rios is liable to him for breach of contract. But in opposing summary judgment, he labels the Contract a "Purported Contract" and points to alleged deficiencies he says he doesn't understand. Not only does the doctrine of judicial estoppel prevent Vazquez from asserting inconsistent positions in the same litigation,[5] but the sham affidavit doctrine likewise serves to bar him from presenting false statements intended for the purpose of manufacturing a genuine issue of material fact to defeat summary judgment. The Court should reject Vazquez's Certification as a sham affidavit.

In Shelcusky v. Garjulio, 172 N.J. 185, 199-200 (2002), the Court explained the sham affidavit doctrine as the "practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." In such a situation, the alleged factual dispute is perceived as a sham,

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[5] Judicial estoppel, an "'extraordinary remedy,'" applies only when a party "'advocates a position contrary to a position it successfully asserted in the same or a prior proceeding.'" Ali v. Rutgers, 166 N.J. 280, 288 (2000) (quoting Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001)). "[A] party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513 (3rd Cir. 1953). Inconsistent assertions typically undermine the integrity of the judicial process when a party is "playing fast and loose with the courts" to gain an advantage in litigation. Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996).

and the sham affidavit is not an impediment to a grant of summary judgment. Id. The essence of the sham affidavit doctrine is that a sham affidavit is a recent fabrication, created for the sole purpose of defeating summary judgment. Id. at 194. Where plaintiff's contradiction is unexplained and unqualified, he/she cannot create an issue of fact for the purpose of defeating summary judgment simply by raising arguments contracting his/her own prior statements and representations. Carroll v. Jersey City Transit, 366 N.J. Super. 380, 388 (App. Div. 2004)(citing Mosior v. Ins. Co. of N. Am.,193 N.J. Super. 190, 195 (App. Div. 1984)). See also MEMO v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005), certif. granted, 183 N.J. 592 (2005)(summary judgment cannot be resisted by speculation of "fanciful arguments nor disputes as to irrelevant facts...."). The sham affidavit doctrine is also reflected in R. 4:46-5, which provides the Court with authority to impose sanctions against the party whose affidavit is deemed to have been filed in bad faith or to cause delay.[6]

Surely, Vazquez will argue that the sham affidavit doctrine should not apply because he has yet to give any deposition testimony in this case. However, the sham affidavit doctrine is not limited to application involving inconsistencies with prior deposition testimony. Its use has been applied to other statements made to alter facts previously asserted, including statements made in documents that pre-existed the litigation itself. See Mosior v. Insurance Company of

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[6] R. 4:46-5 states:

> If the court is satisfied, at any time, that any of the affidavits submitted pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses resulting from the filing of the affidavits, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

North America, 193 N.J. Super. at 195 (Court applied sham affidavit doctrine to reject a plaintiff's opposition to summary judgment on statute of limitations grounds where he originally had submitted proof of loss on an insurance claim stating that he was totally disabled in 1972, but then in response to summary judgment claimed the disability actually arose in 1983).

Vazquez's Complaint is premised entirely on the Contract itself. Not only does he seek to enforce the Contract by alleging Rios has breached it, he bases his fraud claim entirely on the allegation that Rios had no intention of fulfilling the Contract when they signed it. Specifically, Counts I and II of Plaintiff's Complaint seek damages related to "breach of contract." In Count I, Vazquez states as follows:

25. "Rios has failed to make all payments due on the Contract and is in default."

26. "Rios is liable to Vazquez for all amounts due and outstanding on the Contract."

See Exhibit 1 to Reiser Cert. (Emphasis added).

Count II of the Complaint which encompasses a claim for fraudulent conveyance is predicated on Rios's alleged default of the Contract; to wit:

27. "Having defaulted on an installment contract of sale as to the Property . . . ."

* * *

29. "Almeyda and Morales were aware of the Contract and the circumstances surrounding the conveyance of the Property. . . ."

Id. (Emphasis added).

In addition, Count III of the Complaint which sounds in some type of fraud is premised on Vazquez's pleading the existence of a contract regarding the Property; to wit:

33. "Rios had no intention of paying Vazquez any money for the Property despite the terms of the Contract."

Id. (Emphasis added). In other words, plaintiff's fraud claim is entirely co-dependent on the existence of the underlying Contract that he falsely claims Rios had no intention of paying.

The Court should treat Vazquez's Certification as a sham and grant summary judgment in Defendants' favor. No rationale fact finder could accept the statements made by Vazquez's Certification. He signed a contract using an attorney and received its full benefits over a 5 year period. His expression of "sour grapes" or "buyer's remorse" many years later is self-evident but cannot defeat summary judgment. If the Court elects to award Defendants reasonable attorney's fees as a result of Vazquez's filing of a sham affidavit in violation of R. 4:46-5, Defendants will submit an affidavit of services as required by R. 4:42-9.

POINT II

THE PAROL EVIDENCE RULE IN COMBINATION WITH THE CONTRACT'S INTEGRATION CLAUSE BARS PLAINTIFF'S ATTEMPTS TO INTRODUCE EVIDENCE OF ALLEGED PRIOR AGREEMENTS FOR THE PURPOSE OF ALTERING THE TERMS OF THEIR DEFINITIVE CONTRACT

In paragraph 31 of his reply Certification, Vazquez suggests that some other agreement existed between him and Rios, to wit: "Ultimately, after Rios ended our relationship and then forced me out of the Property alleging that she was the sole owner, all I asked was that she recognize our agreement and return to me the monetary value of my interest in the Property. When she refused, I had little choice but to commence the present suit." Ibid. (Emphasis supplied).

As demonstrated herein Vazquez cannot use parol evidence in an attempt to vary the terms of the Contract or create a genuine issue of material fact to avoid summary judgment.

Paragraph 8a of the Contract contains an integration or merger clause which states in pertinent part, "[T]his Contract represents the entire agreement between the parties regarding the purchase and sale of the property, and may not be amended except in writing and signed by the parties or their duly authorized representatives." Exhibit 2 to Rios Aff. (Emphasis added). In addition, the following sentence appears immediately above the Contract signature blocks: "All parties agree that this contract shall supercede [sic] all other contracts including those of RAV, Inc., . . . and all others not specified here, prior to the date of this contract." Id.

The instance case concerns the interpretation of a simple real estate contract. Our Appellate Division has held contract interpretation ". . . is usually a legal question for the court, suitable for" disposition on summary judgment, unless there is "ambiguity or the need for parol evidence in aid of interpretation." Driscoll Constr. Co. v. State of N.J., Dep't of Transp., 371 N.J. Super. 304, 313-14 (App. Div. 2004) (quotations and internal quotation marks omitted); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). See also Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000) "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (citing Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996), cert. den., 149 N.J. 35 (1997)). "If the terms of a contract are clear, we must enforce the contract as written and not make a better contract for either party." Ibid.

"In general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006); accord Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 573 (App. Div. 1991); Ocean

Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 378 (App. Div. 1960). Where there is a fully integrated writing, the parol evidence rule applies:

> The general rule is clear that a parol agreement which is in terms contradictory of the express words of a contemporaneous or subsequent written contract, properly interpreted, necessarily is ineffectual and evidence of it inadmissible, whether the parol agreement be called collateral or not. Men are usually bound by the import of documents signed by them and which they had the ability and opportunity to read.

Winoka Village, Inc. v. Tate, 16 N.J. Super. 330, 333 (App. Div. 1951) (internal quotation marks, quotation and citation omitted). This tenet is especially true when the contract itself contains an integration clause. Harker v. McKissock, 12 N.J. 310, 321-322 (1953)("The essence of voluntary integration is the intentional reduction of the act to a single memorial; and where such is the case the law deems the writing to be the sole and indisputable repository of the intention of the parties."). But see Filmlife, 251 N.J. Super. at 573 (extrinsic evidence to prove fraud in the inducement "is admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or 'to prosecute a separate action predicated on the fraud.'").[7]

In the instant case, application of the parol evidence rule bars the plaintiff's attempts to circumvent the Contract by relying upon statements intended to alter or vary the Contract's interpretation and plain meaning. For all of his machinations, Vazquez concedes he signed the Contract. He doesn't allege duress or claim there was unequal bargaining power between himself and Rios, who were boyfriend and girlfriend at that time. Nor has Vazquez produced

[7] As noted infra in Point IV of this Letter Memorandum, Vazquez cannot sustain a prima facie claim for fraud in the inducement of contract because he does not allege a material misrepresentation of a presently existing or past fact but rather bases the claim on the occurrence of a future event – the termination of their personal relationship approximately 3 ½ years after they entered into the Contract.

evidence of, nor has he suggested the existence of, a writing that amends the parties' Contract. Instead, with the benefit of hindsight he complains the Contract should not be viewed as an arm's length agreement and suggests the existence of some other agreement allegedly requiring Rios to pay him additional value for a property interest he transferred more than 6 years ago. The Court should summarily reject this 11th hour attempt to escape from the Contract's intended consequence – that Vazquez surrendered his interest in the Property to Rios for $25,000 and received payment in full.

As previously noted, Vazquez simultaneously tries to discredit the existence of a valid and binding Contract between them while seeking damages for its breach. Vazquez cannot have his cake and eat it too. When compared to the Complaint, plaintiff's Certification is fraught with contradictions and reflects him speaking out of both sides of his mouth. At no point in his responding Certification does Vazquez dispute that he voluntarily entered into an agreement with Rios, and that all of the basic elements of a contractual agreement exist; e.g., offer, acceptance, and consideration. No one put a gun to Vazquez's head demanding that he sign the Contract. It is not this Court's function to rewrite a better contract than the one these parties bargained for, but rather to interpret the Contract based on the ordinary meaning of its terms, which are clear and unambiguous.

Since Vazquez has failed to meet his burden of demonstrating the existence of a genuine issue of material fact regarding the existence of the Contract or that it was breached by Defendants, he cannot recover under a breach of contract theory. Consequently, Counts I and II of the Complaint should be dismissed as a matter of law.

POINT III

BY ACKNOWLEDING THE EXISTENCE OF A WRITTEN CONTRACT BETWEEN THEM, PLAINTIFF HAS FAILED TO DEMONSTRATE A COGNIZABLE CLAIM FOR UNJUST ENRICHMENT

Similarly, there can be no claim of unjust enrichment by Vazquez since he acknowledges the existence of a contractual agreement. In point of fact, in his opposition Brief plaintiff does not cite to a single case to rebut the principle of law highlighted in Defendants' opening Brief; namely, that a plaintiff is prohibited from seeking to recover under a quasi-contract theory when there exists a valid contract between the parties. See Ramon v. Budget Rent-A-Car Sys., 2007 U.S. Dist. LEXIS 11665 (D.N.J. February 20, 2007). See also Moser v. Milner Hotels, Inc., 6 N.J. 278 (1951); Winslow v. Corporate Express, Inc., 364 N.J. Super. 128 (App. Div. 2003)(Court held there was no basis or need to pursue a claim of unjust enrichment based on the existence of an express contract).

In paragraph 26 of his Certification, Vazquez acknowledges receipt of the contractual consideration of $25,000 but then attempts to avoid its application by claiming that Rios defaulted due to untimely payments and accrued late charges that he never demanded nor sought to collect. Whether Rios defaulted or not is irrelevant. The bottom line is that Vazquez concedes that he signed the Contract, and therefore no claim for unjust enrichment exists. Accordingly, the Court should dismiss Count IV of the Complaint.

POINT IV

PLAINTIFF'S FRAUD CLAIM SHOULD BE CONSTRUED AS FRAUD IN THE INDUCEMENT OF CONTRACT, AND SUMMARY JUDGMENT IS APPROPRIATE BECAUSE AT THE TIME OF CONTRACT RIOS MADE NO MISREPRESENTATION OF A PRESENTLY EXISTING OR PAST FACT

In an attempt to backpedal from the allegations set forth in paragraph 33 of plaintiff's Complaint – that Rios had no intention of paying him any money for the Property despite the existence of the Contract - in paragraph 28 of his sham Certification Vazquez conveniently claims he did not realize that Rios had misrepresented her intentions and mislead him until she terminated their relationship in early 2010. He further claims that after ending their relationship Rios refused to compensate him for his interest in the Property, essentially asking this Court to ignore the fact that he previously surrendered his interest some 4 years earlier and ultimately received the bargained for consideration of $25,000 reflected in the Contract and Deed.

In a Hail Mary, Vazquez asserts that his fraud claim is not barred by the 6 year statute of limitations because he didn't discover the fraud until "early 2010." See Lopez v. Swyer, 62 N.J. 267 (explaining discovery rule and its purpose to avoid strict application of a statute of limitations by holding that a claim accrues only when the plaintiff either actually knows, or in the exercise of reasonable diligence, should have discovered the basis of an actionable claim). Here though, Vazquez's fraud claim is inexplicably entangled with the parties' Contract. He himself admits the same in paragraph 33 of his Complaint by alleging that Rios had no intention of paying him despite the existence of their Contract. As Rios's Affidavit demonstrates, however, she paid him in full!

Nevertheless, it appears from his reply Certification that in Court IV of his Complaint Vazquez is asserting a claim for fraudulent inducement of contract. In order for Vazquez to establish a claim for fraudulent inducement, he must prove the following five elements: (1) a material representation of a presently existing or past fact; (2) made with knowledge of its falsity; and (3) with the intention that the other party rely thereon; (4) resulting in reliance by that party; (5) to his detriment. Jewish Crt. of Sussex County v. Whale, 86 N.J. 619, 624 (1981)). (Emphasis added).

However, Vazquez does not rest his fraudulent misrepresentation claim on a presently existing or past fact that was known to Rios at the time the parties contracted, but rather premises the claim on a future event that would occur some 3 ½ years later – the termination of their personal relationship. The discovery rule has no application here. This is not a medical malpractice action where the patient didn't learn of the doctor's surgical error 2 years past the date of the operation. Vazquez assumed the risk of purchasing real estate with Rios's son; the chance that he and Rios could break-up existed when he first took co-ownership of the Property. He further assumed the risks of transferring his interest in the Property to Vazquez, and making whatever contributions he claims to have made post Contract with Rios. In the meantime though, he gladly opened up his wallet and pocketed the benefits of the bargain he contracted for - $25,000 in installment payments from Rios, and continued doing so for approximately 22 months following their breakup in "early 2010".

Independent of the statute of limitations bar, the fraud claim is facially deficient because Vazquez cannot possibly establish that he was fraudulently induced into signing the

Contract based on a "presently existing or past fact". Hence, it is appropriate to grant summary judgment dismissing Count IV of the Complaint sounding in fraud.

POINT V

ALTERNATIVELY, PLAINTIFF'S FRAUD CLAIM IS BARRED BY THE ECONOMIC LOSS DOCTRINE BECAUSE HIS ALLEGED DAMAGES STEM FROM THE PARTIES' REAL ESTATE CONTRACT

Additionally, Vazquez's fraud claim is barred by the economic loss doctrine which "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 618 (3rd Cir. 1995). The economic loss doctrine provides that if the factual foundation for the cause of action is contractual in nature, than in that event, the parties are foreclosed from pursuing tort claims which are based upon the same facts. The reason the economic loss doctrine was enacted was to prevent creative pleading which only prolongs simple breach of contract cases where parties have attempted to plead claims founded in tort.

In New Jersey, the economic loss doctrine was first recognized by the New Jersey Supreme Court in Spring Motors Distribs. Inc. v. Ford Motor Co., 98 N.J. 555 (1985), and thereafter was affirmed in Alloway v. General Marine Indus. L.P., 149 N.J. 620, 627 (1997). In both Spring Motors and Alloway, the New Jersey Supreme Court held that the remedies available in the Uniform Commercial Code are more appropriate than fraud remedies for disputes arising out of business transactions between persons in a distributive chain that result in purely "economic losses." 98 N.J at 571; 149 N.J. at 627. More recently, the New Jersey Supreme Court has emphasized that the economic loss doctrine operates to prevent plaintiffs

from resorting to tort law where a plaintiff "simply [seeks] to enhance the benefit of the bargain she contracted for." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 315 (2002).

Federal courts interpreting New Jersey law typically use the economic loss doctrine to bar claims alleging a "'failure of the promisor to do what he has promised.'" See e.g., Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F. Supp.2d 557, 563 (D.N.J. 2002) (quoting LoBosco v. Kure Eng'g Ltd., 891 F.Supp. 1020, 1032 (D.N.J. 1995)). As one New Jersey district court recently explained, "...the reason for foreclosing a tort claim is not simply because a contract claim exists, but rather, that the tort claim is not really a tort claim at all; it is a contract claim in tort claim clothing." SRC Constr. Corp. v. Atl. City Hous. Auth., 2013 U.S. Dist. LEXIS 47301, *12 (D.N.J. Apr. 2, 2013)

In Emerson Radio Corp. v. Orion Sales, Inc., 2000 WL 49361, at *7 (D.N.J. 2000), aff'd in part, rev'd in part on other grounds, 253 F.3d 159 (3rd Cir. 2001), the court stated that the "critical issue" with regard to economic loss "is whether the allegedly tortious conduct is extraneous to the contract. The court in Emerson Radio explained that "an act that is in breach of a specific contractual undertaking would not be extrinsic, but an act that breaches some other duty would be." Id.

"Fraud claims can proceed alongside breach of contract claims where there exists fraud in the inducement of a contract or an analogous situation based on pre-contractual misrepresentations." Barton v. RCI, LLC, No. 10-3657, 2011 WL 3022238, *7 (D.N.J. July 22, 2011). Specifically, "a plaintiff may be permitted to proceed with tort claims sounding fraud in the inducement so long as the underlying allegations involve misrepresentations unrelated to the performance of the contract, but rather precede the actual commencement of the

agreement." Chen v. HD Dimension Corp., No. 10-863, 2010 WL 4721514, *8 (D.N.J. Nov. 15, 2010). (Emphasis added).

Based on the 4 corners of the plaintiff's Complaint, Vazquez alleges that Rios entered into the Contract with no intention of fulfilling its purposes. Complaint, at ¶33 annexed as Exhibit 1 to Reiser Cert. In other words, Vazquez's fraud claim involves alleged misrepresentations related to Rios's supposed non-performance of the Contract. Therefore, the economic loss doctrine precludes his fraud claim because the alleged misrepresentations are indeed related to Rios's performance of the Contract. Application of the economic loss doctrine as a bar to plaintiff's fraud claim is further buttressed by the merger clause appearing in paragraph 8a of the Contract stating that it represents their entire agreement.

CONCLUSION

The Court should grant summary judgment in Defendants' favor by dismissing the Complaint in its entirety, as there are no genuine issues of material fact that preclude this relief. With his sham Certification, Vazquez has not met his burden to defeat summary judgment.

Alternatively, if the Court concludes that Count III of the Complaint sounding in fraud is not ripe for summary judgment, then at a minimum the Court should dismiss the remaining counts for breach of contract (Count I), fraudulent transfer predicated on breach of contract (Count II), and unjust enrichment (Count IV).

Thank you for Your Honor's assistance in this matter.

Respectfully submitted,

Glenn R. Reiser

Cc: Barry Friedman, Esq. (w/encl.)(Via Fax, Email & Regular Mail)