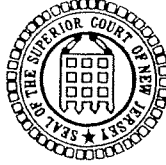


SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
FRANK M. CIUFFANI
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

LETTER OPINION

May 21, 2008

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FILED

MAY 21 2008

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Re: Jack Whitman, et al v. Harold D. Herbert, et al
Docket Number: C-252-07

Gentlemen:

The Court has carefully considered the excellent written submissions and oral arguments of the moving parties, and makes the following findings of fact and conclusions of law.

Findings of Fact

1. On or about May 1, 2002, Plaintiff Jack Whitman, Defendant William J. Herbert and Defendant Harold D. Herbert filed lawsuits against each other in Superior Court,



Somerset County, which were consolidated in one action entitled Whitman v. Herbert, et al, Docket No SOM-C-12027-02, consolidated with SOM-C-12008.

2. The parties hereto participated in a mediation with the Honorable Alvin Weiss related to a consolidated lawsuit.
3. On the final day of the mediation, July 22, 2004, a document was prepared entitled "Settlement Agreement." The parties did not sign the document.
4. A true copy of the Settlement Agreement is annexed as Exhibit A to the Whitman Certification.
5. Under the terms of the Settlement Agreement, the Plaintiffs agreed to transfer to the Herberts their ownership interests in property located on Cranbury Road, Monroe Township, which included a parcel known by the parties as the "Dallenbach Cranbury Road Property" and a parcel known by the parties as the "Individually Owned Cranbury Road Property" (together, the "Cranbury Road Properties")
6. The Plaintiffs also agreed to transfer to the Herberts their interests in several businesses that had been jointly-owned by Plaintiffs and the Defendants, namely, Dallenbach Sand Co., Inc., East Mill Associates, L.P., Whitherb Associates, Inc., Herbert Materials, Inc. and Industrial Developing & Leasing Corp.
7. In exchange, the Herberts agreed to, among other things: (a) pay the Whitman family "a total of \$11.0 million on a installment sale basis" (the "installment payments"); (b) pay the Whitman family interest "on the Whitmans' loans to Dallenbach, the principal amount of which loans total \$609,400, at a rate of 5% per annum, from September 1, 2000, through the date of payment thereof"; and (c) to transfer to the Whitman family their ownership interests in three other jointly-owned family businesses: Edgeboro Disposal, Inc., Edgeboro, Inc. and Brunswick Service Co., Inc.

8. The parties further agreed that "[t]he Whitman family shall not receive any further payments."
9. In addition, the parties agreed that the Herberts' installment payments would be due and secured as follows: 1) the first installment payment of \$1.7 million shall be paid at the closing of the North End Property; 2) the remaining \$9.3 million installment payment (plus interest on the Whitman Loans, as set forth above) shall be paid when the Dallenbach Cranbury Road Property and the Individually Owned Cranbury Property are sold; 3) the Herberts and Dallenbach shall execute a first mortgage on the Dallenbach and the Individually Owned Cranbury Road Properties to secure the \$9.3 million balance plus the aforementioned interest on the Whitman loan; and 4) the parties agree to make any necessary adjustments to the timing, sequence and mechanics of stock transfer to ensure that the parties can cover any tax liability based upon actual cash received in the year. Toward that end, the purchase price paid to each seller under this agreement shall be paid in such a manner as to qualify as an installment sale under the Internal Revenue Code.
10. After July 22, 2004, the Herberts rejected Mr. Whitman's requests for proposed terms requiring the Herberts to either pay interest on the unpaid balance or to undertake "best efforts" to sell the Cranbury Road Properties.
11. The Settlement Agreement does not contain any express terms which require the Herberts to pay interest on the unpaid balance.
12. The Settlement Agreement does not contain any express terms stating that the Herberts must take "diligent and sustained efforts" to sell the Cranbury Road Properties.

13. The Settlement Agreement provides: “The remaining \$9.3 million installment payment (plus interest on the Whitman Loans, as set forth above) shall be paid when the Dallenbach Cranbury Road Property and the Individually Owned Cranbury Road Property are sold.”
14. The Settlement Agreement as written contains no date by which the Dallenbach Cranbury Road Property and the Individually Owned Cranbury Road Property must be sold.
15. The Settlement Agreement as written contains no date by which the \$11 million cash consideration must be paid.
16. By e-mail dated November 16, 2004, Whitman’s counsel forwarded a proposed modification to the Settlement Agreement that states, in relevant part, that “[t]he Herberts shall use reasonable best efforts to expeditiously attempt to locate a buyer for and sell both the Dallenbach Cranbury Road Property and the Individually Owned Cranbury Road Property.”
17. Two weeks later, Whitman’s counsel forwarded a separate memo entitled “Outline of Settlement Agreement Issues,” that states, in relevant part, that “[s]ince the Herberts will be gaining the value of the appreciation on the [Cranbury Road] property, we need a provision in the agreement to ensure that the Herberts take appropriate steps to timely sell the property” and that “we require a provision whereby the unpaid balance would be accruing interest at the prime rate compounded annually after a certain period of time if the property is unsold.”
18. The Herberts rejected each of these proposed modifications to the Settlement Agreement.

19. By notice of motion dated December 1, 2004, the Herberts moved to enforce the Settlement Agreement and for an order specifically excluding the modifications sought by Whitman, i.e. a term providing for interest and requiring the Herberts to use “best efforts” to sell the property as expeditiously as possible.
20. The Herberts explained their position as follows:
- The other objectionable changes [i.e. the proposed Whitman modification for interest and a best efforts clause] substantively change the deal, because they either (1) potentially cost them additional monies (in interest, if Cranbury Road fails to close within two years, through no fault of their own, or in potential landfill liability without an indemnification); or (2) lead them down the path of future litigation with Whitman (in the form of a ‘best efforts’ clause with associated reporting and enforcement mechanisms).
21. By notice of cross-motion dated December 30, 2004, Whitman opposed the Herberts’ motion to enforce the Settlement Agreement and in the alternative, cross-moved the Court for an Order declaring the Herberts in breach of the Agreement.
22. In his cross-motion, Whitman sought inclusion in the Settlement Agreement of, among other things, a provision for interest, a tax penalty such that the Herberts would be responsible for paying any tax penalty when they sold the Properties and a “best efforts” clause requiring the Herberts to expeditiously sell the Cranbury Road.
23. Whitman also sought a provision that would require the Herberts to disclose all efforts undertaken to market and sell the Cranbury Road Properties.
24. In reply, the Herberts opposed the interest, tax penalty and best efforts modifications to the Settlement Agreement on the ground that such provisions had been rejected

during negotiations and were nothing but “an absolute recipe for disaster, inviting nothing but further litigation.”

25. By Decision and Order dated January 11, 2005, the Court granted the Herberts’ motion to enforce the Settlement Agreement, denied Whitman’s cross-motion and did not include in the Settlement Agreement the interest, tax penalty and “best efforts” provisions sought by Whitman or any other provisions (even though the parties had agreed to same after July 22, 2004).
26. A true copy of Judge Williams’ Order enforcing the document entitled “Settlement Agreement” is annexed as Exhibit E to the Whitman Certification.
27. A true copy of the transcript of Judge Williams’s Decision holding that the Settlement Agreement is an enforceable agreement is annexed as Exhibit G to the Whitman Certification.
28. In her Decision, among other things, Judge Williams said the following: “The Court concludes that there is no clear and convincing proof to vacate, that the essential elements of what would be sold, transferred and amounts of compensation were agreed upon. It appears that mechanics were not totally fleshed out.”
29. The Court found that the agreement reached by the parties regarding the amount of payment was limited to the following terms:

The Whitman family shall be paid a total of 11.0 million dollars on an installment sale basis. In addition, the Whitman family shall be paid interest on the Whitman’s loans, (sic) principle amount totaling \$609,400, to Dallenbach at a rate of five percent per annum from September 1, 2000, through the date of payment thereof. The principal of the Whitman loans is included in the 11.0 million dollar payment price. The Whitman family shall not receive any other payments. The

Whitman family shall divide the monies among them in any manner to which they can agree. In the event the Whitman family cannot agree on an allocation, such disagreement shall have no effect on this agreement.

30. Moreover, the Court held that the agreement reached by the parties regarding the timing and security of payment was limited to the following terms:

The first installment payment of 1.7 million dollars shall be paid at the closing of the North End Property. The remaining 9.3 million dollar installment payment plus interest as set forth above, shall be paid when the Dallenbach Cranbury Road Property and the [I]ndividually [O]wned Cranbury Road Properties are sold. The Herberts and Dallenbach shall execute a first mortgage on the Dallenbach and the Individually Owned Cranbury Road Properties to secure the 9.3 million dollar balance and the interest on the Whitman loan. The parties shall make any necessary adjustments to the timing, sequence and mechanics of stock transfer to ensure that the parties can cover any tax liability based upon the actual cash received in the year. The purchase price to each seller shall be paid in such a manner as to qualify as an installment sale under the Internal Revenue Code.

31. The Court further found that “the [Settlement] Agreement shall not now be altered for the benefit of one party and to the detriment of the other because there is no basis of fraud or other circumstances upon which reconstruction is made necessary.”

32. The Whitmans assert the following cause of action against the Herberts in their Second Amended Complaint (the “Current Litigation”):

First Count/Breach of Contract: “It was understood by the parties that Defendants would undertake diligent and sustained efforts to sell both the [the Cranbury Road

Properties] *** [and] Defendants' failure to sell the properties and pay the consideration due to Plaintiffs for the transfer of their ownership interests constitutes a breach of the Settlement Agreement.”

33. The Whitmans assert the following cause of action in their Second Amended Complaint.

Second Count/Breach of the Implied Covenant of Good Faith and Fair Dealing:
“The implied covenant [of good faith and fair dealing] required Defendants to act in a manner that would ensure that Plaintiffs would receive the consideration due them under the Settlement Agreement within a reasonable period of time *** [and] Defendants have failed and refused to sell the Properties.”

34. The Whitmans assert the following cause of action in their Second Amended Complaint:

Third Count/Declaratory Judgment: “Now that three and one-half years have passed since the Settlement Agreement was entered, a dispute has arisen as to whether defendants are required to market the [Cranbury Road Properties], and when defendants should be required to market these properties *** [and] [t]his court should determine the appropriate terms and conditions by which the Defendants should fulfill their obligation under the Settlement Agreement to pay Plaintiffs the monies due to them.”

35. The Whitmans assert the following cause of action in their Second Amended Complaint:

Fourth Count/Reformation: “There was a mutual mistake of fact at the time the Settlement Agreement was executed, whereby the parties believed that the

Properties could and would be sold within a reasonable time after the parties entered into the Settlement Agreement *** [and as a result] [t]he Settlement Agreement should be reformed to include additional provisions stating that (i) the \$9.15 million debt may be satisfied from any and all assets and profits of the businesses now owned entirely by Defendants as a result of Plaintiffs transfer of their interests*** (ii) Defendants are required to proceed to market and sell the [Cranbury Road Properties] so that the debt to Plaintiffs will be promptly paid, and (iii) Plaintiffs are entitled to interest on the total amount secured by the Mortgages from the date of the Settlement Agreement to the date the debt is paid.”

36. The Whitmans assert the following cause of action in their Second Amended Complaint:

Fifth Count/Breach of Mortgages: “Both the Cranbury Road Mortgage and the Dallenbach Mortgage contain express provisions limiting Defendants’ use of the respective Properties *** Defendants have breached each of the above covenants *** [and] [t]he breach of each of the above covenants constitutes a default under the Mortgages.”

37. The Whitmans filed and served their Second Amended Complaint on or about January 31, 2008.

38. The Herberts subsequently filed and served answers that interposed the affirmative defense of collateral estoppel.

39. On January 24, 2008, Plaintiffs served written discovery (interrogatories and requests for production of documents) on Defendants. To date, Defendants have not responded to the discovery requests.
40. More than three years and seven months have passed subsequent to July 22, 2004, the date of the Settlement Agreement.
41. The Cranbury Road Properties have not been sold. The \$9.15 million, plus interest at 5% on the loans having a principal amount of \$609,400.00, is still due and owing to the Whitman Family under the Settlement Agreement.

Parties' Legal Arguments

Plaintiffs argue that partial summary judgment should be granted in favor of Plaintiffs on the Third Count of their Second Amended Complaint declaring that Defendants are required to perform their obligations under the Settlement Agreement "within a reasonable period of time." Plaintiffs argue that to give the Settlement Agreement business efficacy, this Court should hold that an implied covenant exists and require Defendants to complete their performance within a reasonable period of time. Plaintiffs argue that: 1) where a contract lacks a time for performance, a reasonable time is implied; and 2) a reasonable time for performance should be implied in the parties' July 22, 2004 Settlement Agreement.

Plaintiffs state that when a contract embodies all of the essential terms, including conditions precedent, but does not contain a time for performance, a reasonable time for performance of the conditions will be implied. *See Glazer v. Klughaupt*, 116 N.J.L. 507 (E. & A. 1936); *Lean v. Leeds*, 92 N.J. Eq. 455, 456 (E. & A. 1921). Plaintiffs cite *Lean v. Leeds* and state that the facts in that case are similar to the facts at hand. In that case, a

portion of the purchase price of land was paid at the time the contract was executed, but the contract did not specify a time for the final payment and delivery of the deed. Lean at 456. In rejecting the argument that the contract should be supplemented by a stipulation of the parties that the final payment should be made and the deed delivered after a title company had passed on the title, the court stated, “The only element ordinarily embodied in such contracts which is absent in this is the element of time for final payment and final delivery of the deed, but that element is not essential, so far as the express terms of the written contract is concerned, because in its absence a reasonable time will be implied.” Id.

Plaintiffs also cite Glazer v. Klughaupt, *supra*, 116 N.J.L. 507, a case in which plaintiff (a secretary) and defendant (an attorney) entered into a contract whereby plaintiff agreed to render secretarial services. The parties agreed that defendant would retain a portion of plaintiff’s weekly earnings until the happening of an event – their marriage. However, no provision for time of performance (payment of the withheld wages) was contained in the contract. Defendant ultimately decided not to get married and refused to pay the withheld wages, which resulted in the law suit. Though the trial court dismissed plaintiff’s complaint, on appeal, the Supreme Court held, “[t]here being no provision for a definite time, the law presumes that it was the intention of the parties that the contingency upon which the payment of the accumulated earnings depended would happen within a reasonable time.” Id. at 509. The Court went on to hold that since the obligation to make payment was absolute, the contract required payment upon the happening of the marriage, or the lapse of a reasonable time for its occurrence. Id. at 510.

Plaintiffs additionally cite several other cases, all of which stand for the proposition that when a contract does not state a time limit, a reasonable time will be implied. See Becker v. Sunrise at Elkridge, 226 N.J. Super. 119 (App. Div. 1988); Kilarjian v. Vastola, 379 N.J. Super. 277 (Ch. 2004); Mango v. Pierce-Coombs, 370 N.J. Super. 239 (App. Div. 2004); Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 155 (App. Div. 1990); Feighner v. Sauter, 259 N.J. Super. 583 (App. Div. 1992); Aboczky v. Stier, 126 N.J.L. 109 (Sup. Ct. 1941).

Plaintiffs argue that Defendants should be required to perform their obligations under the Settlement Agreement within a reasonable time. Plaintiffs note that Judge Williams had found that the Settlement Agreement was enforceable because it contained the essential terms, but that mechanisms for the implementation of the Agreement were missing. Plaintiffs submit that the Settlement Agreement did not contain a deadline for payment of the \$9.15 million cash consideration as performance was tied to a future event. Plaintiffs contend that the facts here are analogous to those in Lean v. Leeds, Ridge Chevrolet-Oldsmobile, and Glazer v. Klughaupt because in all the cases, performance was tied to a future event. In accordance with New Jersey case law, Plaintiffs argue that Defendants must be required to complete their obligations under the Settlement Agreement within a reasonable period of time.

Defendants assert that Plaintiffs' motion for partial summary judgment must be denied in all respects. Defendants move for summary judgment on all five counts of Plaintiffs' Second Amended Complaint. The arguments they make in support of their motion are essentially the same as the arguments that they make in opposition to Plaintiffs' motion for partial summary judgment.

Defendants state that the doctrine of collateral estoppel “is a branch of the broader law of *res judicata* which bars relitigation of any issue actually determined in a prior action generally between the same parties and their privies involving a different claim or cause of action.” Monek v. Borough of South River, 354 N.J. Super. 442, 453 (App. Div. 2002). To foreclose relitigation of an issue based on collateral estoppel, the party asserting the bar must show that: 1) the issue to be precluded is identical to the issue decided in the prior proceeding; 2) the issue was actually litigated in the prior proceeding; 3) the court in the prior proceeding issued a final judgment on the merits; 4) the determination of the issue was essential to the prior judgment; and 5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. First Union Nat’l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007). Additionally, “[e]ven where these requirements are met, the doctrine, which has its roots in equity, will not be applied when it is unfair to do so.” Pace v. Kuchinsky, 347 N.J. Super. 202, 215 (App. Div. 2002). Defendants argue that applying these standards, Plaintiffs’ motion should be barred under the doctrine of collateral estoppel.

Defendants state that the first and second collateral estoppel elements require that the issue to be precluded be “identical to the issue decided” and “actually litigated” in the prior proceeding. First Union, *supra*, 190 N.J. 342, 352; Restatement (Second) of Judgments, § 27. In deciding the identity of issues for issue preclusion purposes, the second court should consider “whether there is substantial overlap of evidence or argument in the second proceeding; whether the evidence involves application of the same rule of law; whether discovery in the first proceeding could have encompassed discovery in the second; and whether the claims asserted in the two actions are closely

related.” First Union at 353, *citing* Restatement (Second) of Judgments, § 27, comment c. Also, “[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated[.]” Restatement (Second) of Judgments, § 27, comment d.

Here, Defendants argue that the issues raised in Plaintiffs’ motion are identical to the issues decided by Judge Williams in the Prior Litigation. Moreover, Defendants assert that in addition to the issues being identical, substantial overlap exists in the arguments and evidence at issue in the two lawsuits. Moreover, Defendants also contend that the claims asserted by Plaintiffs in this Current Litigation will require the Court to apply the same legal principles of contract enforcement and interpretation employed by Judge Williams in the Prior Litigation. Thus, it is argued that given the identity of issues and the substantial overlap in evidence and argument between the Prior and Current Litigations, the issues raised in Plaintiffs’ motion satisfy the first and second collateral estoppel elements.

The third and fourth collateral estoppel elements require that the court in the prior proceeding issue “a final judgment on the merits” and that “the determination of the issue was essential to the prior judgment.” First Union at 352; Restatement (Second) of Judgments, § 27. A “final judgment” for issue preclusion purposes “includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.” In re Docteroff, 133 F.3d 210, 216 (3d Cir. 1997), *quoting* Restatement (Second) of Judgments, § 13. In determining whether the prior adjudication was sufficiently firm to be accorded conclusive effect, the second court should consider “whether the parties were fully heard, whether a reasoned opinion was filed, and whether

that decision could have been, or actually was, appealed.” In re Brown, 951 F.2d 564, 569 (3d Cir. 1991), *citing* Restatement (Second) of Judgments, § 13, comment g.

Here, Defendants argue that Judge Williams’ decision and order was a final judgment on the merits regarding the amount, timing and security of payments under the Settlement Agreement. Also, all parties were represented by counsel, submitted extensive evidence and argument in support of their positions, and each side had a full and fair opportunity to be heard regarding which terms the parties had agreed upon in the settlement. Moreover, Judge Williams issued a detailed decision. For these reasons, Defendants contend that the issues raised in Plaintiffs’ motion satisfy the third and fourth collateral estoppel elements.

The fifth and final collateral estoppel element requires that “the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.” First Union at 352. Defendants state that it is undisputed that Jack Whitman, Harold Herbert, William Herbert and Dallenbach Sand Company were all parties in the Prior Litigation and are now parties in the Current Litigation. With regard to Mrs. Whitman, Defendants state that though she was not a party to the Prior Litigation, she was nevertheless a party to the Settlement Agreement and in privity with her husband’s interests during the Prior Litigation. Defendants submit that “[p]rivity generally involves a party to earlier litigation so identified in interest with a party to later litigation that they represent the same legal right.” E.I.B. v. J.R.B., 259 N.J. Super. 99, 102 (App. Div. 1992).

Here, Defendants contend that the interests of Mr. Whitman and Mrs. Whitman could not be more closely aligned because Mr. Whitman represented all of the Whitman

family interests in the Settlement Agreement during the Prior Litigation. As such, Defendants posit that the fifth and final collateral estoppel element is satisfied.

Defendants state that “[i]n all cases in which collateral estoppel is sought to be invoked, the court must, in the exercise of its discretion, weigh economy against fairness.” Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002). Defendants argue that the balance of equities favors application of the doctrine of collateral estoppel to bar re-litigation of the amount, timing and security of payments under the Settlement Agreement. Defendants submit that it would be fundamentally unfair to put the Herberts through the expense, harassment and uncertainty of relitigating these issues again three years after Judge Williams rendered her decision. On the other hand, Defendants posit that there is nothing unfair about precluding Plaintiffs’ claims given that they had a full and fair opportunity to litigate the issues before Judge Williams. Accordingly, Defendants request that Plaintiffs’ motion be denied in its entirety.

Defendants state that if even if this Court declines to apply the doctrine of collateral estoppel, it must deny Plaintiffs’ motion under longstanding rules governing contract enforcement and interpretation. Defendants assert that this Court has no authority to re-write the contract to add new terms that the parties never agreed to at the bargaining table, and that this Court must enforce the Settlement Agreement as written. More specifically, Defendants argue that: 1) the Court lacks authority to imply the “reasonable time” provision sought by Plaintiffs since the Herberts rejected Plaintiffs’ prior attempts to insert analogous provisions into the Settlement Agreement; and 2) Mr. Whitman, a sophisticated businessman and real estate developer, should be held to the terms he negotiated with the assistance of Judge Weiss and seasoned legal counsel.

Defendants state that the parties in this case expressly agreed that the remaining balance of the installment payments shall be paid when the Cranbury Road Properties are sold, and that the Herberts rejected all of Plaintiffs' attempts to place further conditions and restrictions on the timing of payments under the Settlement Agreement. As such, Defendants contend that there is no basis for this Court to read the "reasonable time" provision sought by Plaintiffs into the Settlement Agreement.

Defendants submit that courts will imply contractual terms "only when they are 'necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to specifically express them because of sheer inadvertence or because the term was too obvious to need express.'" Toll Brothers, Inc. v. Board of Chosen Freeholders, County of Burlington, 388 N.J. Super. 103, 128 (App. Div. 2006), quoting Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965). Conversely, Defendants assert that if the parties have considered and failed to reach agreement on a proposed term, there is no basis for implication and the Court must enforce the contract as written by the parties. See P. Ballantine & Sons v. Gulka, 117 N.J.L. 84, 85 (1936); Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 559-60 (App. Div. 2007).

Defendants state that two recent decisions illustrate why it would be improper for the Court to imply the "reasonable time" provision sought by Plaintiffs into the Settlement Agreement. Defendants cite Pacifico v. Pacifico, 190 N.J. 258, 262 (2007), a case in which the Supreme Court rejected the trial court's decision to imply a 2003 valuation date into the settlement agreement. The Court found that the authority to imply a "reasonable" term extends only to "cases in which the parties failed to agree upon an issue, generally because they did not anticipate that it would arise or merely overlooked

it.” Id. at 266. In that case, since both parties contended that they had a clear understanding when they signed the settlement agreement regarding the buy out value to be ascribed to the house, the Court concluded that the facts did not present a “missing term” case and that the trial judge erred by implying a valuation date into the settlement agreement. Id. at 266-67.

Defendants also cite Impink ex rel. Baldi v. Reynes, *supra*, 396 N.J. Super. at 558, a case in which the parties agreed to settle a personal injury matter for \$300,000 “cash” despite plaintiffs’ demand during negotiations that the sum be paid out through a structured settlement. The plaintiffs subsequently moved for and were granted an order requiring the defendants’ insurance carrier to pay the net proceeds from the settlement directly into a structured settlement for the benefit of the infant-plaintiff. Id. at 559. However, the Appellate Court held that the trial court had impermissibly changed the settlement from a lump sum cash payment to a structured settlement because “[t]he contract was clear and unambiguous and the court was changing a bargained-for term.” Id. at 560. On remand, the trial court was to determine whether the settlement agreement entered into by the parties was fair and reasonable. Id. at 564.

Defendants argue that as in Pacifico and Reynes, the “reasonable time” term that the Plaintiffs ask the Court to read into the Settlement Agreement is not one that the parties intended and left out only through sheer inadvertence or because it was too obvious to express. With regard to the cases cited by Plaintiffs supporting their contention that a “reasonable time” provision should be implied, Defendants argue that those cases are readily distinguishable from this case because the facts in those cases show that the parties had left out a missing term through sheer inadvertence or because it

was too obvious to express. As such, Defendants contend that there is no basis for the Court to re-write the Settlement Agreement to include the “reasonable time” provision sought by Plaintiffs. Defendants further note that Pacifico and Reynes are in accord with a number of other decisions that have declined to imply “reasonable” terms where the parties intentionally omitted such terms from their contract.” *See, e.g., Ernst v. Ernst*, 8 A.D.3d 331 (2d Dept. 2004); Solomon v. United States Healthcare Systems of Pennsylvania, Inc., 797 A.2d 346 (Pa. Super. 2002); Gluckman v. Holzman, 53 A.2d 246 (Del Ch. 1947).

With regard to Plaintiffs’ reliance on Judge Williams’ statement in her decision that “[i]t appears that the mechanics were not totally fleshed out,” Defendant states she was clearly referring to the parties’ agreement “to make any necessary adjustments to the timing, sequence and mechanics of the stock transfer to ensure that the parties can cover any tax liability based upon the actual cash received in the year.” However, with regard to the timing of the payments, Judge Williams found that the parties agreed that “[t]he remaining \$9.3 million dollar installment payment, plus interest as set forth above, shall be paid when the Dallenbach Cranbury Road Property and the Individually Owned Cranbury Properties are sold.” As such, Defendants argue that the parties had fully fleshed out all the mechanics to their agreement regarding the timing of payments.

Defendants assert that where, as here, the terms of a contract are clear and unambiguous, the Court has no authority to re-write the contract to add new terms that the parties never agreed to at the bargaining table. *See Marchak v. Claridge Commons, Inc.*, 134 N.J. 275 (1993); Brunswick Hills Raquet Club, Inc. v. Route 18 Shopping Center Associates, 182 N.J. 210 (2005). Defendants state that “[w]hen the terms of a

contract are clear, the court must enforce them as written.” East Brunswick Sewerage Auth. v. East Mill Assoc., Inc. and Jack Whitman, 365 N.J. Super. 120, 125 (App. Div. 2004); *see also* Karl’s Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487 (App. Div. 1991). Also, Defendants claim that the Court has no right “to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently.” Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987).

Defendants argue that the rule that contracts must be enforced as written applies with even greater force where, as here, the subject matter involves business and real estate interests and the contract was negotiated between sophisticated, counseled businessmen negotiating at arm’s length. *See, e.g.*, Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 168 (3d Cir. 2001). Defendant asserts that since the agreement is clear and unambiguous on its face, and since the parties are experienced business men and real estate developers who negotiated the Settlement Agreement at arm’s length with the assistance of Judge Weiss and legal counsel, this Court should enforce the Settlement Agreement and deny Plaintiffs’ motion.

Plaintiffs assert that while the parties have been involved in prior litigation, the issues raised in Plaintiffs’ Second Amended Complaint, and the relief sought in Plaintiffs’ motion for partial summary judgment, were not raised or actually litigated previously and are not identical to any issues addressed by Judge Williams. In sum, Plaintiffs argue that: 1) the issues raised by Plaintiffs were not raised prior and could not have been raised before because they are predicated on Defendants’ breach and the passage of almost four years subsequent to the Settlement Agreement; 2) the issues now

raised were not previously resolved; and 3) no other equitable doctrines bar Plaintiffs' claims.

As to the first argument, Plaintiffs state that issue preclusion is not appropriate if the party against whom preclusion is sought demonstrates that either he "did not have an adequate opportunity or incentive to obtain a full and fair adjudication" of the issues in question in the prior proceeding, or there are "other circumstances [that] justify affording [plaintiff] an opportunity to relitigate the issue." Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002). Here, Plaintiffs claim that the claims raised in the Second Amended Complaint are based upon breaches that occurred subsequent to the entry of the Settlement Agreement. As such, Plaintiffs contend that Judge Williams did not and could not have addressed those issues.

As to the second argument, Plaintiffs assert that they do not contend that a "best efforts" provision or an interest provision is contained in the Settlement Agreement. Rather, they contend that Defendants have breached the Settlement Agreement and ask that the Court fashion an appropriate remedy, which may now, after almost four years, include a directive that Defendants act promptly, or which may include a provision whereby Defendant would pay interest while Plaintiffs wait for the promised payment.

As to the third argument, Plaintiffs argue that no other equitable doctrines bar their claims. They contend that the doctrines of waiver and equitable estoppel do not bar their claims because the claims are based on Defendants' alleged breaches of the Settlement Agreement subsequent to the motions and argument before Judge Williams. As such, Plaintiffs assert they cannot be deemed to have "intentionally relinquished a known right," when the issue had not even arisen as of the date of the motions. Plaintiffs

also argue that the entire controversy doctrine does not apply in this situation, since the claims could not have been brought as the causes of action had not accrued at the time the parties were before Judge Williams.

In addition, Defendants argue that even if the Court finds that the Doctrine of Collateral Estoppel does not bar the current litigation, it must nevertheless dismiss the First and Fourth Counts of the second amended complaint because the settlement agreement must be enforced as negotiated and written by the parties. Defendants argue that the Fifth Count should be dismissed pursuant to Rule 4:6-2(e) for failure to state a claim because Defendants argue that Whitman's damages claim for "breach of mortgage" is not cognizable as a matter of law and the remedy for breach of a mortgage is foreclosure, which remedy is currently being pursued in a foreclosure action which Plaintiffs have already commenced. Defendants argue that the First Count (Breach of Express Contract) must be dismissed because the settlement agreement does not contain the purported terms that Plaintiffs assert were breached by the Herberts. Defendants argue that Plaintiffs First Count must be dismissed because the settlement agreement does not contain any express terms that require the Herberts to either "undertake diligent and sustained efforts" to sell the Cranbury Road properties (Paragraph 16 of the First Count of the second amended complaint) or to sell the properties and pay the Whitmans "within a reasonable period of time". Simply stated, Defendants argue that a party cannot breach a contractual term that does not exist. In response, Plaintiffs argue that Herberts breached the settlement agreement by breaching the mortgages required by the agreement.

In addition Plaintiffs argue that the First Count should not be dismissed because Defendants have breached the implied covenant of good faith and fair dealing and the

implied covenant that they will render the promised performance within a reasonable period of time. Defendants argue that the Second Count of the complaint, breach of the implied covenant of good faith and fair dealing, must be dismissed because the implied covenant cannot override the express, bargained for terms related to the timing of payments under the settlement agreement. Paragraph 3 of the Second Count of the complaint alleges:

“The implied covenant required Defendants to act in a manner that would insure that Plaintiffs would receive the consideration due them under the settlement agreement within a reasonable period of time.”

Defendants argue that they had previously rejected Plaintiffs attempts to impose analogous, express restrictions in the agreement, and as such an implied covenant cannot override the express bargained for terms relating to timing of payments. In addition Defendants argue that Plaintiffs inability to “allege”, let alone prove, that the Herberts’ failure to sell was malicious mandates dismissal of their breach of the implied covenant of good faith and fair dealing claim. Defendants argue, relying on Wilson v. Amerada Hess, 168 N.J. 236 (2001) for the proposition that “without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance”.

In response Plaintiffs argue that although implied provisions do not override express terms, “a party’s performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term” (Wilson, 168 N.J. at 244, citing Sons of Thunder, Inc. 148 N.J. at 419). Plaintiffs rely upon Seidenberg v. Summit Bank, 348 N.J. Super 343 (App. Div. 2002) where the Appellate Division stated at 257 of its Opinion the following:

“The implied covenant of good faith and fair dealing has been applied in three general ways, each largely unaffected by the parol evidence rule. First, the covenant permits the inclusion of terms and conditions which have not been expressly set forth in the written contract. The earlier cases, such as Bak-alum, 69 N.J. at 129-30, and Onderdonk, 85 N.J. 171 provide examples of the imposition of absent terms and conditions. The covenant acts in such instances to include terms ‘the parties must have intended... because they are necessary to give business efficacy’ to the contract. New Jersey Bank v. Paladino, 77 N.J. 33 (1978), see also N.J. Packet, Inc.v. New Jersey Department of Transportation, 335 N.J. Super 130 (App. Div. 2000) certif. granted, 167 N.J. 635 (2001). Second, the covenant has been utilized to provide redress for the bad faith performance of an agreement even when the defendant has not breached any express term, as in Sons of Thunder. And third, the covenant has been held in more recent cases to permit inquiry into a party’s exercise of discretion expressly granted by a contract’s terms. See Wilson v. Amerada Hess, 168 N.J. 236 (2001).”

Plaintiffs argue that the guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a contract may not unreasonably frustrate its purpose; thus, a defendant may not exercise discretion under the literal terms of the contract to thwart a plaintiff’s expectation or the contract’s purpose. They argue that the implied covenant of good faith and fair dealing also addresses the situation where the contract does not provide a term necessary to fulfill the party’s expectations. A determination of what constitutes good faith, Plaintiffs argue, is a factual sensitive analysis.

The Fourth Count of the second amended complaint (reformation) alleges in Paragraph 5 as follows:

“There was a mutual mistake of fact at the time the settlement agreement was executed, whereby the parties believed that the properties could and would be sold within a reasonable time after the parties entered into the settlement agreement.”

Defendants argue that the Whitmans’ claim for reformation must be dismissed because they seek reformation as a vehicle by which to impose “significant new terms

upon the Herberts that were previously rejected during negotiations”. Defendants further argue that Plaintiffs offer nothing to indicate that the Herberts shared in their purported “mistake” regarding the timing of payments under the settlement agreement. In response, Plaintiffs argue that “at the very least there is a factual issue as to whether there was a mutual mistake regarding when the properties could and would be sold.”

Finally Defendants move to dismiss the Fifth Count which alleges damages for “breach of mortgage”. In essence Defendants argue there is no such thing as a non-foreclosure action for “breach of mortgage”. The only remedy available to Plaintiffs is the institution of a foreclosure action, which Plaintiffs have already commenced. If a covenant contained in a mortgage is materially breached, the proper remedy is foreclosure. Pennsylvania Co. v. Broadway-Stevens Co., 105 N.J. Eq. 494, 496 (Ch. 1930). The only remedies provided for in the mortgage are foreclosure, deficiency judgment “after application of all amounts received”, and “other rights and remedies provided in this mortgage or available at law or in equity”. In response, Plaintiffs argue that the mortgages were expressly drafted and executed pursuant to, and as part of the settlement agreement between the parties. The mortgages state the breach of the settlement agreement is a default under the mortgages. Because the settlement agreement and mortgages are related in this way, Plaintiffs argue there should be no bar to Plaintiffs claim for damages for default under the mortgages in conjunction with their claims for damages for breach of the settlement agreement.

Finally, Plaintiffs argue that “it is not logical to conclude that Plaintiffs are barred from suing for damages in the event of a violation of the use restriction of the mortgages, which has occurred in this case”.

Plaintiffs move to strike the Answer of Defendants William J. Herbert, Harold D. Herbert and Dallenbach Sand Company for failure to respond to their discovery requests. In support of the motion, Plaintiffs' counsel David T. Shivas has submitted a certification that supports the following:

- By letter dated January 24, 2008, his office served:
 - Dallenbach with Plaintiffs' Request for Production of Documents.
 - William J. Herbert with Plaintiffs' First Set of Interrogatories
 - William J. Herbert with Plaintiffs' First Request for Production of Documents.
- By letter dated January 24, 2008, his office served Harold D. Herbert with:
 - Plaintiffs' First Set of Interrogatories
 - Plaintiffs' Request for Production of Documents.
- By letters dated March 5, 2008, he contacted Defendants' counsel and advised that their discovery responses were overdue.
- To date, Defendants have not produced: 1) any documents responsive to the Requests for Production of Documents; or 2) responses to interrogatories.
- Plaintiffs are not delinquent in any discovery obligations owed to Defendants.

Plaintiffs submit that attorneys' fees are appropriate under R. 4:23-5(a).

Defendant William J. Herbert submits a letter brief in opposition to Plaintiffs' motion. Incorporating some of the arguments from the summary judgment cross-motion, counsel argues that the claims made in this case should be dismissed. Counsel posits that it is inappropriate for a litigant to file these specious claims and then insist on discovery

while the Defendants wait for their court date to have them dismissed. This was basis of Defendants' objection to responding to Plaintiffs' discovery requests.

With regard to Defendants' refusal to provide discovery responses, counsel concedes that there is no rule staying discovery while a motion for summary judgment is pending. However, in referring to Defendants' summary judgment motion, he argues that the facts of this case justify their withholding of discovery responses. Counsel requests that if Plaintiffs' claims are not dismissed, that Defendants be allowed three (3) weeks to provide responses to Plaintiffs' discovery requests.

Defendant Harold Herbert submits a letter brief in opposition to Plaintiffs' motion. Counsel certifies the following:

- By letter dated March 5, 2008, David T. Shivas, counsel for Plaintiffs, advised that he would file a motion to compel discovery if discovery responses were not provided within a week.
- On March 11, 2008, Counsel responded to David T. Shivas and advised that given the procedural posture of this cases, it made sense to defer the significant expense and burden of responding to Plaintiffs' discovery requests temporarily since the pending (summary judgment) motions may eliminate the need for all or part of the discovery requested.

Counsel states that instead of conferring on this issue, Mr. Shivas filed this motion to strike the answer. He asserts that Plaintiffs' motion is premature under R. 4:17-4 since the sixty-day response period for Plaintiffs' interrogatories has not yet expired. Furthermore, Counsel contends that under R. 4:18-1, when Plaintiffs had filed this motion, the fifty-day response period for responding to document demands served

contemporaneously with a complaint had not yet expired. Accordingly, Counsel argues that this motion should be denied as premature.

Counsel also states that this Court has power to control and schedule discovery, and that R. 4:10-3 permits the Court for good cause to make any order to protect a party from undue burden and expense, including “[t]hat the discovery may be had only on specified terms and conditions, including a designation of the time and place[.]” Counsel submits that this Court should exercise this power by temporarily deferring discovery until resolution of the parties’ motions for summary judgment. In the event that this Court rules in favor of Plaintiffs, Counsel requests that Defendant be granted three weeks to respond.

In reply to Defendants’ opposition papers, Plaintiffs have submitted a reply brief through their counsel, David T. Shivas. Counsel asserts that Defendants offer no legal support for their contention that they should not be compelled to provide discovery response simply because there are summary judgment motions pending. Counsel argues that the discovery requests are closely tailored and are relevant to Plaintiffs’ claims for breach of contract, breach of the covenant of good faith and fair dealing, and for a declaration seeking to add a provision to the Agreement. Counsel further submits that the pending summary judgment motions will not resolve all the claims in this matter.

As to Harold Herbert’s statement of applicable time periods for discovery, Counsel submits the statement is inaccurate. He states that Plaintiffs’ document demands were required to be submitted by February 29, 2008 and that the fifty-day period under R. 4:18-1 had already expired at the time this motion was filed. However, the answers to interrogatories were due by March 25, 2008.

Conclusions of Law

There are no disputed issues of material fact which would prevent this Court from deciding Defendant's motion for summary judgment directed to the First, Third, Fourth, and Fifth Counts of the second amended complaint. The Court will first address Defendants' argument that the First, Third and Fourth Counts should be dismissed and that the Court should deny Plaintiffs' motion for summary judgment on collateral estoppel grounds.

Defendants argue that Judge Williams decided the amount, timing and security of payments under the Settlement Agreement. In order for collateral estoppel to apply, the issues need only have a high degree of similarity. In order to determine similarity of issues for collateral estoppel purposes, the Court should consider "whether there is a substantial overlap of evidence or argument in the second proceeding; whether the evidence involves application of the same rule of law; whether discovery in the first proceeding could have encompassed discovery in the second; and whether the claims asserted in the two actions are closely related". First Union National Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 353 (2007).

In addition to the issues to be precluded needing to have "a high degree of similarity," the party asserting the bar must also show that the issue was actually litigated in the prior proceeding, i.e., the Court in the prior proceeding issued a final judgment on the merits; the determination of the issue was essential to the prior judgment, and the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. First Union National Bank, 190 N.J. at 352.

In connection with the last element, it is undisputed that Jack Whitman, Harold Herbert, William Herbert, and Dallenbach Sand Company were all parties in the prior litigation resolved by Judge Williams, and are now parties in the current litigation. Although Mrs. Whitman was not a party to the prior litigation, she was nevertheless a party to the settlement agreement and in privity with her husband's interest during the prior litigation. The Court finds that the interest of Mr. and Mrs. Whitman could not be more closely aligned because Mr. Whitman represented all of the Whitman family interest in the settlement agreement during the prior litigation. Accordingly, this Court finds that the fifth element for collateral estoppel has been satisfied by Defendants.

The third and fourth collateral estoppel elements require that the Court, in the prior proceeding, issue a "final judgment on the merits" and that "the determination of the issue was essential to the prior judgment." In determining whether the prior adjudication was sufficiently firm to be accorded conclusive effect, the Court should consider "whether the parties were fully heard, whether a reasoned opinion was filed, and whether that decision could have been or actually was appealed." In re: Brown, 951 F.2d 564, 569 (3rd Cir. 1991), *citing* Restatement (Second) of Judgments, § 13, comment g.

Defendants have cited to three decisions which this Court finds are analogous to the circumstances presented to the Court in this case. In Culver v. Insurance Company of North America, 115 N.J. 451 (1989), in the first action (the subrogation action) INA filed a motion to enforce the distribution agreement that it had entered into with the Culvers. The Culvers opposed INA's motion and cross-moved for a different allocation of the settlement proceeds. In the first action, Mrs. Culver filed a certification in which she

alleged that the distribution agreement should be set aside on the grounds that it was procured through INA's fraud. The Law Division granted INA's motion and entered an Order of Distribution in accordance with the distribution agreement.

Four months later the Culvers filed the second action in the Law Division alleging that their consent to the distribution agreement was illegally obtained, that INA had made misrepresentations to them, and that they were entitled to a "just and equitable" settlement. The Law Division granted INA's motion for summary judgment. The Appellate Division reversed and the Supreme Court held that the doctrine of res judicata precluded the second action and mandated dismissal of the Culver's complaint.

In East/West Venture v. Borough of Fort Lee, 286 N.J. Super 311 (App. Div. 1996), the developer, East/West Venture, Fort Lee, Fort Lee's Planning Board, and Bergen County sought Court approval of their settlement agreement resolving a Mount Laurel litigation. During the ensuing "fairness hearing" Edgewater Boro opposed the settlement agreement and argued that the high rise building called for by the agreement was incompatible with the adjacent low rise and low density residential issues in Edgewater. Notwithstanding Edgewater's objections, the Law Division granted East/West's application to approve the settlement agreement and entered an order which was deemed a final judgment with respect to all issues covered by the settlement agreement. On appeal, the Appellate Division held that since the substantive zoning and planning issues raised by the settlement agreement were "fully and fairly" litigated during the "fairness hearing" between Edgewater and the parties to the settlement, Edgewater "should be collaterally estopped from re-litigating those issues in any subsequent

challenge to the amendment to the master plan and the zoning ordinance Fort Lee adopts”.

In the Family Law context, in Incremona v. Incremona, FM-03-6016 (008) (Appellate Division March 19, 2008) the parties had entered into a property settlement agreement which addressed Defendant’s obligation to pay “child support” and “additional child support.” The trial court granted Defendant’s motion to terminate the child support obligations under the property settlement agreement, to compel Plaintiff to reimburse Defendant for all “child support” and “additional child support” received, and to compel Plaintiff to pay child support to Defendant. Approximately one year later, the motion Judge in a subsequent proceeding granted Plaintiff’s motion to enforce the terms of the property settlement agreement, and compel Defendant to pay, in addition to alimony, an amount equal to twenty percent (20%) of all income actually distributed to him from his family trust and partnerships. On appeal, the Appellate Division held that the Plaintiff was collaterally estopped from re-litigating the issue of “additional child support” in the property settlement agreement. The Appellate Division found that in resolving the motion to terminate, the prior Judge expressly framed the issue before him as among other issues “terminating Defendant’s obligation to pay ‘child support’ and ‘additional child support.’” The Appellate Division further found that the order terminating “additional child support” was a final judgment. Accordingly, the Appellate Division reversed the order granting Plaintiff’s motion to enforce as barred by the doctrine of collateral estoppel.

Here, Judge Williams’ decision and order was a final judgment on the merits. All parties were represented by counsel, submitted extensive evidence and argument in

support of their positions, and each side had a full and fair opportunity to be heard regarding which terms the parties had agreed upon in the settlement. Judge Williams also issued a detailed decision setting forth her reasoning as to why the settlement agreement must be enforced and on what terms. Thus, the Court finds that the third and fourth collateral estoppel elements have been satisfied.

The Court will next address the first two elements in the collateral estoppel analysis. The Court finds that the issues involved in the motions before Judge Williams in the prior litigation and the first four counts of the Second Amended Complaint filed by the Whitmans are highly similar. For example, Plaintiff's request that the Court imply a "best efforts" clause in the prior litigation is virtually identical to the current request for a term requiring the Herberts to use "diligent and sustained efforts" to sell the Cranbury Road properties. Similarly, Plaintiff's request in the prior litigation that the Court imply a term requiring the Herberts to pay any interest imputed by the IRS if the Cranbury Road properties are not sold within two (2) years is closely related, if not highly similar, to their current request for damages related to the Herberts' failure to sell the properties "within a reasonable period of time." There is a substantial overlap in the evidence and arguments between the prior and current litigations since the Whitmans used the same arguments and evidence to request the "diligent and sustained efforts," "reasonable time," and interest provisions in the current litigation that they used before Judge Williams in the prior litigation. For example, just as they did in the prior litigation, the Whitmans submit certifications to this Court for Mr. Whitman and Arthur Plesak, Esquire, rehashing the same story of what they believe to have occurred at the 2004 mediation and arguing as before, that the settlement agreement should not be enforced as written. In addition, just as they did in the prior litigation, the Whitmans submit a certification to this Court

from the accounting firm of Wilkins and Guttplan to show the enforcement of the settlement agreement as written would be harsh and unprofitable to the Whitmans. Accordingly this Court finds that the first two elements of the collateral estoppel analysis have been satisfied.

The Whitmans previously requested that Judge Williams incorporate “best efforts,” tax penalty, and other enforcement mechanisms into the settlement agreement that relate to the timing of payments under the settlement agreement. Judge Williams rejected these arguments and instead held simply that “the remaining \$9.3 million installment payment plus interest as set forth above, shall be paid when the Dallenbach Cranbury Road Property and the individually owned Cranbury Road Properties are sold.” Thus, the Whitmans previously raised and Judge Williams decided the scope of the parties’ agreement regarding the timing of payments under the settlement agreement. Similarly, the Whitmans now seek a determination that “Plaintiffs are entitled to interest on the total amount secured by the mortgages from the date of the settlement agreement to the date the debt is paid.” The Whitmans previously moved to insert and conform the interest and mortgage security provisions into the settlement agreement. Furthermore Mr. Whitman took the position that he was entitled to interest on the unpaid balance. Judge Williams previously found that the interest term was not part of the settlement agreement.

Judge Williams found that “The Herberts and Dallenbachs shall execute a first mortgage on the Dallenbach and the individually owned Cranbury Road Properties to secure the \$9.3 Million balance and the interest on the Whitman loan.” Accordingly the Whitmans raised and Judge Williams decided the scope of the parties’ agreement

regarding the amount, timing and security of payments under the settlement agreement. This Court finds that the parties previously litigated and Judge Williams decided the terms of the parties' agreement regarding the amount, timing, and security of payments under the settlement agreement. The claims alleged in the First, Third, and Fourth Counts of the Second Amended Complaint all relate to the amount, timing, and security of payments under the settlement agreement, and assert purported "terms" that are not within the settlement agreement as previously construed by Judge Williams. This Court finds that the parties fully and fairly litigated, and Judge Williams decided the scope of the parties' agreement regarding the amount, timing, and security of payments under the settlement agreement in the prior litigation. Accordingly, the First, Third, and Fourth Counts of the Second Amended Complaint are dismissed pursuant to the doctrine of collateral estoppel.

Even if this Court were to find that the doctrine of collateral estoppel does not bar these claims, this Court nevertheless dismisses the First, Third, Fourth, and Fifth Counts of the Second Amended Complaint for the following reasons.

The First Count, breach of express contract, must be dismissed because the settlement agreement does not contain the purported terms that Plaintiffs assert were breached by Defendants.

The Fourth Count, "reformation" must be dismissed because Plaintiffs have failed to provide any evidence to substantiate their allegation that there was a mutual mistake of fact at the time the settlement agreement was executed, whereby the parties believed that the properties could and would be sold within a reasonable time after the parties entered into the settlement agreement. This Court finds that the remedy of reformation is

inapplicable because Plaintiffs do not seek to correct a mere scrivener's error or to otherwise conform the settlement agreement to the parties understanding. Instead, Plaintiffs claim for reformation is being used as a tool by which to impose terms on the Herberts that were previously rejected during negotiations. As a result, Plaintiffs' Fourth Count must be dismissed.

Plaintiffs' Fifth Count, which alleges "breach of mortgage" must be dismissed as well. This claim as set forth in this count is not recognizable as a matter of law. The remedy for breach of a mortgage is foreclosure, which remedy is currently being pursued by Plaintiffs in a previously filed foreclosure action.

The Third Count of the Second Amended Complaint (Declaratory Judgment) alleges in Paragraph Two as follows:

"Judge Williams, in her ruling that the July 22, 2004 settlement agreement should be enforced, recognized that the agreement contained the "essential" terms of the parties' agreement but that the "mechanisms" for implementing this settlement had not been fully worked out by the parties."

Plaintiffs contend that "this Court should determine the appropriate terms and mechanisms by which the Defendants should fulfill their obligation under the settlement agreement to pay Plaintiffs the monies due to them. This court should then declare those terms to be part of the agreement." In further support of their argument Plaintiffs argue that where a contract lacks a time for performance, a reasonable time is implied. Plaintiffs rely heavily on Aboczky v. Stier, 126 N.J.L. 109 (Sup. Ct. 1941), for the proposition that when a contract has no date for performance, the extrinsic evidence of a prior agreement with a specific date by which performance must be completed is not admissible, because it will contradict the writing; however, the Court will imply a

reasonable time by which performance must be completed. In Aboczky, plaintiff and defendant entered into a contract for the purchase of land, but no date for performance by either side was specified. Prior to the execution of the contract in Aboczky, the parties signed a memorandum agreement with a specified date for performance. In reversing the lower Court's ruling allowing the memorandum into evidence, the Appellate Court held the evidence varying the writing is not admissible and the contract as written "calls for performance by implication within a reasonable time." The Court found that "there being no time fixed for the performance of the contract the law is settled that by implication a reasonable time was intended." This Court observes that the defendant in the Aboczky case denied breaching the contract and contended that "he was ready, able, and willing to perform within a reasonable time." Clearly, this case is distinguishable from the Aboczky case, where the defendant never argued that he did not have to perform within a reasonable period of time. This Court finds that not only is Aboczky distinguishable, but the other cases relied upon by Plaintiffs for the proposition that a reasonable time for performance should be implied in the July 22, 2004 Settlement Agreement are also distinguishable. In Pacifico v. Pacifico, 190 N.J. 258 (2007), our Supreme Court stated at page 56:

"As a general rule, Courts should enforce contracts as the parties intended. Similarly, it is a basic rule of contractual interpretation that a Court must discern and implement the common intention of the parties. The Court's role is to consider what is written in the context of the circumstances at the time of drafting, and to apply a rational meaning in keeping with the 'expressed general purpose'. That is the backdrop for our inquiry.

James argues that the Trial Judge was initially correct in supplying the 2003 valuation date, which James characterizes as a 'missing' term. However this is not a missing term case. Indeed, the Restatement Second of Contract, Section 204 provides 'When the parties to a bargain sufficiently defined to be a contract *have not agreed* with respect to a term which is essential to a determination of their rights and duties, a term

which is reasonable in the circumstances is supplied by the Court.’ *Restatement (Second) of Contracts*, Section 204 (1981) (Emphasis added). As that section and its commentary reveal, it is intended to be applied in cases in which the parties failed to agree regarding an issue, generally because they did not anticipate that it would arise or merely overlooked it.”

Restatement Second of Contract, Section 204 provides as follows:

“When the parties to a bargain sufficiently defined to be a contract *have not agreed* with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the Court.”

Judge Williams found that the Herberts were successful in proving that a contract existed. Judge Williams found that the “parties agreed to the essential terms of the settlement, freely, with advice of counsel, and without fraud or duress.” She found that the agreement includes the terms as set forth in the unsigned written settlement agreement including a provision entitled “Timing and Security of Payments[.]” Judge Williams found at Page 16 of her Decision that

“The first installment payment of \$1.7 Million shall be paid at the closing of the North End Property. The remaining \$9.3 Million installment payment plus interest as set forth above, shall be paid when the Dallenbach Cranbury Property and the individually owned Cranbury Road Properties are sold. The Herberts and Dallenbachs shall execute a first mortgage on the Dallenbach and the individually owned Cranbury Road Properties to secure the \$9.3 Million balance and the interest on the Whitman loan. The parties shall make any necessary adjustments to the timing, sequence and mechanics of stock transfer to insure that the parties can cover any tax liability based upon the actual cash received in the year. The purchase price to each seller shall be paid in such manner as to qualify as an installment sale under the Internal Revenue Code.”

While it is true that Judge Williams at Page 12 of her Decision stated “It appears that *mechanics* were not totally fleshed out[.]” this Court finds that Judge Williams was referring to the parties’ agreement in Paragraph 4d of the settlement agreement to “...make any necessary adjustments to the timing, sequence and *mechanics of the stock*

transfer to insure the parties can cover any tax liability based upon the actual cash received in the year.” (emphasis added).

Like Pacifico, this Court finds that this is not a “missing essential term” case. If Judge Williams thought that an essential term was not included in the July 22, 2004 agreement she would not have enforced the settlement. She found that the parties had agreed to the essential terms of the settlement agreement including a provision that dealt with timing and security of payments. The timing of the payment is when the properties are sold. The Herberts after the mediation process, rejected Whitman’s efforts to impose “enforcement mechanisms” on the Herbert’s business judgment regarding the sale of the Cranbury properties. This is not a case where the parties did not anticipate that an issue would arise or merely overlooked it. Furthermore, this Court should imply contractual terms “only when they are ‘necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to specifically express them because of their sheer inadvertence or because the term was too obvious to need expression’.” Toll Bros., Inc. v. Board of Chosen Freeholders, County of Burlington, 388 N.J. Super. 103, 128 (App. Div. 2006), reversed on other grounds, --N.J.--,2008 (WL833160) March 31, 2008, *quoting* Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965).

In sum, the Court lacks authority to imply the “reasonable time provision” sought by Plaintiffs. This is not a missing term case. This is not a situation where the parties did not anticipate that the issue would arise or that they merely overlooked it. This is not a case where the term was too obvious to need expression. Herbert specifically rejected analogous “best efforts,” tax penalty (i.e. a two-year deadline for switching implied

interest on their mortgage from Whitmans to the Herberts) and other enforcement terms related to timing of payments under the settlement agreement. This Court concludes as a matter of law that Count Three of the Second Amended Complaint must be dismissed. As a result of dismissing Count Three, the Court denies Plaintiffs Motion for Partial Summary Judgment which is directed to Count Three of the Plaintiffs' Second Amended Complaint, which in essence sought an order from this Court inserting by implication the phrase "within a reasonable period of time" into the settlement agreement.

Finally, the Court considers Defendant's Motion to Dismiss by way of Summary Judgment Count Two of the Second Amended Complaint which alleges breach of the implied covenant of good faith and fair dealing. Paragraph Three in Count Two reads as follows:

"The implied covenant required Defendants to act in a manner that would insure that Plaintiffs would receive the consideration due them under the settlement agreement within a reasonable period of time."

Paragraph Four of the Second Amended Complaint reads as follows:

"The implied covenant of good faith and fair dealing required Defendants to sell the Dallenbach and the Cranbury Road Properties so that the Plaintiffs could receive the fruits of the contract."

The law is absolutely clear that there is an implied covenant of good faith and fair dealing in every contract. It is also clear, that Judge Williams' decision in January 2005, enforcing the settlement has no bearing whatsoever on whether Defendants have or have not subsequent to that decision breached the implied covenant of good faith and fair dealing. The Court has already found that as a matter of law it cannot imply under the circumstances of this case "within a reasonable period of time" into the agreement. However, the Court does not read Count Two of the Second Amended Complaint to be

limited to that relief. Count Two broadly stated and liberally construed alleges breach of the implied covenant of good faith and fair dealing. It is more than three and a half years since the settlement was arrived at, and the Whitmans have still not been paid. Discovery was promptly served in January 2008 on Defendants, and Defendants have chosen not to respond to same. The determination of whether a party has breached an implied covenant of good faith and fair dealing, as the Court observed in the Wilson case, is a fact sensitive analysis. The Court in Wilson noted that their prior decisions concerning the implied covenant did not involve contracts that “vested unilateral discretion to set a price in one party”. The Court ultimately held that at Page 251 that “a party exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract.”

The Court went on to say that “the test must recognize the mutuality of expectation and enforce a party’s contractual right to exercise discretion in setting prices based on its own reasonable beliefs concerning business strategy. In that setting, an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract absent improper motive ... without bad motive or intention discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance.”

The Court, in Wilson, went on to ask whether Plaintiffs had a full opportunity to show bad motive on Hess’s part before Hess was granted Summary Judgment. The Court in connection with the elements of “bad motive” observed that it is established through

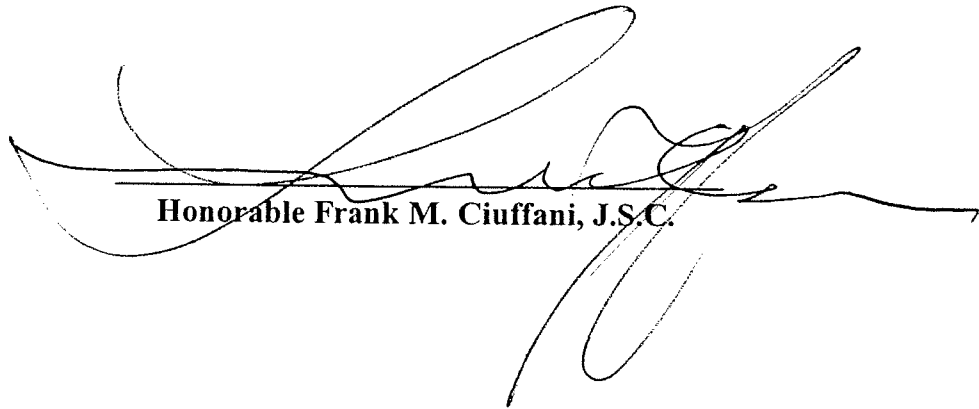
“circumstantial evidence.” The Court observed that “[i]t has been recognized that one’s state of mind is seldom capable of direct proof and ordinarily must be inferred from the circumstances properly presented and capable of being considered by the Court.” The Court observed, “[t]his Court has approved the observation that ‘what a person’s intentions were need not be proved from what he said, but they may be inferred from all that he did and said, and all the surrounding circumstances of the situation under investigation.’” In conclusion, the Court held as follows:

“We cannot say, without the benefit of that discovery they were denied, that Plaintiffs’ contentions are meritless and that Defendant is entitled to summary judgment. If the discovery Plaintiffs seek demonstrates that Hess knew from the operations of its own coop stations and the distress stations that its DTW pricing rendered it impossible for Plaintiffs to meet their operating expenses and perform profitably, and unless Hess provides an explanation for its pricing that is not arbitrary, capricious or unreasonable, then Plaintiffs will have established a jury question on their claim for breach of the implied covenant of good faith and fair dealing. Accordingly, we remand the matter to the Trial Court for that additional discovery.”

In this case, without the benefit of discovery, the Court cannot find that Plaintiffs’ contentions are meritless and that Defendants are entitled to summary judgment. Although this Court finds that Defendants were given discretion regarding their business decisions in connection with the sale of the Cranbury Properties, the Court finds that their discretion is not “unfettered”. Discretion will ultimately be judged by their obligations under the implied covenant of good faith and fair dealing. Clearly, this case factually is different from Wilson. The Supreme Court established in Wilson a test that took into account Hess’s contractual right to exercise discretion in setting prices based on “its own reasonable beliefs concerning business strategy.” This Court finds that if the Herberts exercise their discretionary authority in connection with the sale of the Cranbury Properties arbitrarily, unreasonably or capriciously, with the objective of preventing the

Whitmans from receiving their reasonably expected fruits under the contract, they will have breached the implied covenant of good faith and fair dealing.

Accordingly, this Court denies the Herberts' Motion for Summary Judgment as to Count Two of the Complaint. With respect to the Whitmans' Discovery Motion the Court denies their application to strike the Herberts' Answer and Separate Defenses, but hereby directs that the Herberts respond to the discovery request(s) previously served within three (3) weeks of receipt of this Court's Order. Counsel for Harold Herbert is hereby directed to submit a proposed form of order under the five day rule.



Honorable Frank M. Ciuffani, J.S.C.