STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Docket No. CUM-24-14

ALRIG USA ACQUISITIONS LLC
Appellant/Plaintiff

v.

MBD REALTY LLC
Appellee/Defendant

On Appeal from the Cumberland County Superior Court

BRIEF FOR APPELLEE MBD REALTY LLC

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INTRODUCTION

The Superior Court correctly dismissed the two-count Complaint of Appellant Alrig USA Acquisitions LLC ("Alrig") claiming that Appellee MBD Realty LLC ("MBD"): (i) breached the parties' real estate purchase and sale contract (the "P/S") when MBD refused to return Alrig's nonrefundable earnest money deposits when Alrig terminated; and (ii) fraudulently concealed information about the City of Portland's intentions to pursue a nearby roadway project that Alrig cited as the basis for termination pursuant to P/S Section 16.

Dismissal of Alrig's breach of contract claim should be affirmed because Alrig had no contractual right to a refund of its earnest money deposit after the parties mutually agreed to amend their contract and establish that all of Alrig's deposited funds were thereafter "deemed nonrefundable … except in the event of a default by Seller pursuant to Section 12(b) of the Agreement." *See* A.42. The Amendment's plain language leaves no doubt that this revision to the P/S eliminated Alrig's right to obtain a deposit refund for Alrig's later termination pursuant to P/S Section 16, not Section 12(b).

Dismissal of Alrig's fraudulent concealment claim should be affirmed because Alrig has failed to plead the action's required elements of active concealment of the truth and justifiable reliance. Alrig's Complaint cannot show that MBD took any "steps to conceal" material information, as required to establish the "active concealment" theory Alrig asserts. Even then, Alrig's fraud

claim fails because Alrig cannot demonstrate that it justifiably relied upon any MBD's nondisclosure where the P/S included agreement that MBD would not provide any representations about the subject property.

APPELLEE'S SUPPLEMENTAL STATEMENT OF THE FACTS

Appellee MBD provides this limited statement of facts to supplement incomplete statements of fact set forth in the Blue Brief:

A. The June 24 Amendment

On June 24, 2022, the parties executed an instrument formally amending the terms of their pending P/S (the "June 24 Amendment"). A.42-44.

The June 24 Amendment encompassed four distinct matters that the Parties intended to revise throughout the original P/S:

(i) Striking Alrig's rights to terminate the contract based upon its due diligence or title review contingencies in P/S Sections 5(b) and 6;

(ii) Requiring Alrig to pay $100,000 in additional earnest money deposits, with $50,000 paid by June 26, 2022 and $50,000 paid on September 1, 2022;

(iii) Striking Alrig's rights to receive refund of its deposited funds should Alrig exercise any right of termination other than a termination pursuant to Section 12(b) if MBD defaulted; and

(iv) Rescheduling the closing to occur in November 2022.

A.42.

The complete June 24 Amendment was omitted from Alrig's Complaint, but was considered by the Superior Court as a document central to the Complaint that has merged into the pleadings. *See* A.7 (citing *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43). The June 24 Amendment is properly before the Court here because Alrig does not contend on appeal that the Superior Court's review and incorporation of the June 24 Amendment was in error.

B. Facts alleged regarding MBD's nondisclosure

Alrig's Complaint alleges, *inter alia*, the following facts:

In August 2022, Alrig discovered through a meeting with the City of Portland that a neighborhood roadway redevelopment project impacting the subject Property was being planned. A.15 ¶¶ 20, 25-26. The neighborhood roadway project "included construction of a 'roundabout' at the Property," and construction of the roundabout "would amount to a 'taking' of a portion of the Property." A.15 ¶¶ 21-22.

Meanwhile, "MBD … was aware that the City of Portland intended to redevelop the Libbytown neighborhood," and became so aware "[p]rior to and leading up to execution of the P/S Agreement." *Id.* ¶ 19. MBD did not disclose its awareness of the neighborhood redevelopment project and/or roundabout

before signing the P/S , or before signing the June 24 Amendment. A.15 ¶ 23-24.[1]

The executed P/S provided that Alrig would not expect or rely upon MBD's representations or omissions. *See* A.21-22. In P/S Section 8(a), Alrig agreed that, unless otherwise stated in the contract, MBD "has not made and does not make any representations or warranties with respect to the Property." A.21. Additionally, Alrig acknowledged through P/S Section 8(b) that the Property would be "conveyed in its 'as-is' 'where-is' condition without representation or warranty," and that Alrig acted "solely in reliance on and as a result of [Alrig's] own investigation and efforts." *Id.* P/S Section 8(b) additionally provided that Alrig bore "sole risk, cost and expense" for its own due diligence efforts, including "the risk that [Alrig's] inspection and investigations, examinations and inspections may not reveal any or all adverse or existing conditions, aspects or attributes about the Property." *Id.*

C. Alrig's termination of the P/S

Alrig ultimately terminated the parties' P/S on September 9, 2022. A.15 ¶ 27. Alrig terminated the contract pursuant to P/S Section 16, relating to casualty and condemnation. *Id.* ¶ 28. Alrig does not allege that MBD was in default, or that P/S Section 12(b) was relevant to its termination. Blue Br. 2 n.1

[1] The Complaint includes no allegation that MBD was aware that Portland's intended Libbytown project included the potential for a taking of the Property. *See* A.15¶¶ 19-27; A.16-17 ¶¶ 41-47.

ARGUMENT

I. Alrig fails to state a claim for breach of contract because the parties amended their contract to make the full deposit nonrefundable.

Alrig's breach of contract claim was correctly dismissed because Alrig had no contractual right to any refund of its earnest money deposit after the parties mutually agreed to amend their contract and establish that Alrig's deposited funds were thereafter "deemed nonrefundable … except in the event of a default by Seller pursuant to Section 12(b) of the Agreement." *See* A.42.

Alrig concedes its termination was not pursuant to Section 12(b), but nonetheless contends that the June 24 Amendment did not apply because it was ambiguous in scope and not subject to the Court's construction as a matter of law. This re-interpretation of the June 24 Amendment's intent should be rejected—and the Superior Court's dismissal of the breach of contract claim affirmed—because the Amendment's terms plainly encompass a waiver of any right to a refund of the deposit refund in the event of a Section 16 termination.

A. The Amendment's plain language rendering the deposit non-refundable encompassed a Section 16 termination.

The construction of an unambiguous written contract is a question of law. *Willis Realty Assocs. v. Cimino Const. Co.*, 623 A.2d 1287, 1288 (Me. 1993). The Court interprets such contract provisions according to the plain meaning of their terms. *Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 2019 ME 175, ¶ 34, 222 A.3d 613.

Here, the June 24 Amendment's plain language encompassed and applied to the Section 16 provisions that Alrig relied upon to terminate the P/S in September 2022. The June 24 Amendment's relevant provision states in full:

> Effective as of the date hereof, the Deposit, including any Extension Payments, the First Additional Deposit and the Second Additional Deposit, shall be deemed nonrefundable (but applicable against the Purchase Price at Closing), except in the event of a default by Seller pursuant to Section 12(b) of the Agreement.

A.42 ¶ 2.

Alrig concedes that no Section 12(b) seller's default occurred because "MBD is not alleged to have defaulted," Blue Br. 2 n.1, and that Alrig in fact terminated the P/S pursuant to Section 16. A.15 ¶ 28.

The June 24 Amendment's language plainly means that the Amendment overrode each and every section of the P/S—except for Section 12(b)—that originally had entitled Alrig to receive a refund of its deposited funds upon early termination. The drafters contemplated what sections of the contract they wanted to except, and included only Section 12(b). The Amendment's omission of P/S Section 16 from its exceptions list means that P/S Section 16 was not excepted from the Amendment's reach.

Applying this unmistakable language, Alrig was not entitled to any refund of its deposit upon its termination *unless* MBD breached pursuant to Section 12(b)'s definition. No Section 12(b) breach or termination occurred. MBD

therefore has no contractual duty to refund Alrig's "nonrefundable" deposit funds, and Alrig's Complaint fails to state a claim for breach of contract.

B. The June 24 Amendment's language is not reasonably susceptible to different interpretations.

Contract language is considered ambiguous only if it is "reasonably susceptible to different interpretations." *Acadia Ins. Co. v. Buck Const. Co.*, 2000 ME 154, ¶ 9, 756 A.2d 515.

Alrig argues on appeal that the June 24 Amendment is subject to a broader interpretation because Alrig had intended the Amendment to include more exceptions to preserve its right to a deposit refund if it opted to terminate the P/S for reasons other than a Section 12(b) seller's default. Blue Br. 7.

On review, such extrinsic evidence of the parties' intentions will not be considered "to explain or alter an unambiguous integrated contract." *Doe v. Lozano*, 2022 ME 33, ¶ 17, 276 A.3d 44. Instead, the Court looks "to effect the parties' intentions as reflected in the written instrument." *Handy Boat Serv., Inc. v. Prof'l Servs, Inc.*, 1998 ME 134, ¶ 7, 711 A.2d 1306. "All parts and clauses must be considered together that it may be seen if and how one clause is explained, modified, limited or controlled by the others." *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989 (quoting *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 384-85 (Me. 1989)).

Here, the parties' true intentions for the June 24 Amendment are made plain by the written instrument's structure and text. The Amendment identifies in its recitals that it seeks to accomplish several distinct purposes, stating:

> Purchaser and Seller desire to amend the Agreement pursuant to the terms of this Amendment to: (i) waive Purchaser's due diligence and title review contingencies, (ii) provide for two additional earnest money deposits; (iii) deem the Deposit nonrefundable; (iv) extend the Closing Date; and (v) such other changes as set forth herein.

A.42. The instrument is then structured to silo the distinct issues to be discussed in entirety within separate, enumerated sections. This structure illustrates the contents within each enumerated paragraph-section are intended to be distinct and different from each other. The content of one enumerated section cannot inform or alter the construction of any separate, different enumerated section.

Paragraph-section 1 redefines Alrig's rights to terminate the contract going forward by eliminating certain termination clauses. Specifically, it provides that "Purchaser hereby waives its title contingency contained in Section 5(b) of the Agreement and its due diligence contingency contained in Section 6 of the Agreement." A.42.

Paragraph-section 2, on the other hand, relates exclusively to Alrig's deposit, including an obligation to deposit additional funds and Alrig's forfeiture of the deposit funds should it cancel the contract under nearly all remaining termination clauses. A.42. Paragraph-section 1 cannot inform

construction of Paragraph-section 2 because it applies only to Alig's surviving termination clauses, which included P/S Section 16.

Paragraph-sections 3 and 4 further illustrate the June 24 Amendment's intended separation of issues. Paragraph-section 3 amends the P/S's closing date, a term applicable only if Alrig proceeded to closing without exercising any surviving right of termination, as narrowed by the Amendment's earlier provisions. Paragraph-section 4, for its part, expresses the parties' stipulation that "[e]xcept as otherwise provided in this Amendment, all other terms and conditions of the Agreement shall remain in full force and effect." *Id.*

This siloed structure of the June 24 Amendment illustrates that Paragraph-section 1's elimination of certain termination clauses cannot reasonably be construed to limit, nullify or even relate to any other provisions set forth in the Amendment because each separate issue is uncorrelatable with the next. For instance, Paragraph-section 1's elimination of certain termination clauses lends no context to interpreting Paragraph-section 2's waiver of deposit refundability, because the issue of deposit refunds was relevant only to Alrig's surviving termination clauses unaltered by Paragraph-section 1's specific excisions. Additionally, Paragraph-section 1 needed no assistance from Paragraph-section 2 because the striking of certain termination clauses similarly stuck any associated rights to a deposit refund if properly exercised.

II. Alrig fails to state a claim for fraud because it cannot establish either an active concealment of the truth or justifiable reliance.

The Court should affirm dismissal of Alrig's fraud claim because Alrig has not plead and cannot plead allegations that MBD took "steps to conceal" material information, the standard that this Court has required to maintain a fraud claim based on the "active concealment" theory Alrig asserts. *See Kezer v. Mark Stimson Assocs.*, 1999 ME 184, ¶ 25, 742 A.2d 898. Even if active concealment were established, Alrig's fraud claim still fails because Alrig cannot establish that it justifiably relied upon MBD's nondisclosure of a municipal roadway project where the contract provided that MBD would make no representations about the property.

A. No active concealment occurred where MBD took no 'steps to conceal.'

Alrig's Complaint alleges that MBD is liable for fraudulent concealment because it actively concealed some prior knowledge regarding the City of Portland's consideration of a neighborhood roadway redevelopment and roundabout project adjacent to the subject real estate. A.16-17 ¶¶ 43-51. But Alrig has failed to sufficiently plead a claim under this theory because it has not and cannot identify any particular "steps" that MBD took to conceal its purported knowledge, as Maine law requires.

No common law duty exists between sellers and buyers of commercial real estate compelling disclosure of property defects. *See Kezer*, 1999 ME 184,

¶ 15. Therefore, "it is not fraud for one party to say nothing respecting any particular aspect of the subject property for sale" unless either: (i) "a confidential or fiduciary relation exists between the parties;" or (ii) "acts to mislead the other are made." *Eaton v. Sontag*, 387 A.2d 33, 38 (Me. 1978).

This Court's subsequent decisions analyzing fraud claims that stemmed from "acts to mislead the other" later coined the term "active concealment of the truth." *See e.g.*, *Kezer* ¶ 23 ("Where there is no affirmative misrepresentation by the defendant, in order to prove fraud a plaintiff must demonstrate an active concealment of the truth or a special relationship that imposes a duty to disclose on the defendant.") (citing *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)).

Here, Alrig concedes that no confidential or fiduciary relationship existed between the parties, foreclosing any fraudulent concealment claim asserted on that basis. *See* Blue Br. 9 n.2. Alrig instead asserts that its fraudulent concealment claim against MBD rests solely upon the theory of fraud by active concealment of the truth. Blue Br. 10.

On appeal, Alrig cites *Fitzgerald v. Gamester*, 658 A.2d at 1069, for the erroneous proposition that an actionable claim for active concealment of the truth requires "nothing more" than a seller not telling the buyer a material fact that only the seller knew. Blue Br. 10-11. Alrig's interpretation misrepresents this Court's controlling precedent.

Kezer v. Mark Stimson Associates defines the elements of active concealment in no uncertain terms: "'Active concealment of the truth' connotes steps taken by a defendant to hide the true state of affairs from the plaintiff." *Id.*, 1999 ME 184, ¶ 24 (citing *Fitzgerald*, 658 A.2d at 1069) (emphasis added).

Kezer's summary of the law is consistent with that applied in *Fitzgerald*, where the Court found fraud by active concealment had occurred because that seller had taken a variety steps to hide from the buyer the fact that the property's water well was contaminated and long-abandoned. The *Fitzgerald* seller did not merely sit silently about a contaminated water supply. That seller had: (i) reconnected the contaminated well days before the closing; (ii) performed tests on the reconnected well that confirmed the water supply remained contaminated; and (iii) pressured the buyer to release the seller from liability for the malfunctioning well prior to closing. See 658 A.2d at 1068. Then, immediately after closing was completed, the seller warned the buyer "not to drink the water." *Id.*

Fitzgerald's finding that the seller's affirmative steps taken to hide the well contamination until the buyer had closed constituted active concealment of the truth was consistent with *Kezer*'s summary of the law annunciating that a viable claim for active concealment requires "steps taken by a defendant to hide the true state of affairs from the plaintiff." *Kezer*, 1999 ME 184, ¶ 24.

Kezer's holding, by contrast, demonstrated that a real estate seller's passive silence in nondisclosure of adverse facts to buyers is insufficient to establish an active concealment of the truth. *Id.* ¶¶ 24-25. In *Kezer*, the seller did not disclose to his buyers that neighbors had complained of water contamination in a nearby well, and that DEP had performed water testing in the neighborhood. *Id.* Nonetheless, the active concealment claim ultimately failed because no facts suggested that the seller "took steps to conceal" the adverse facts from the buyers. *Id.*

Kezer's statement of the law on active concealment actions has been similarly construed by the federal courts applying Maine law. For example, *Pleasantdale Condominiums, LLC v. Wakefield*, 37 F.4th 728 (1st Cir. 2022), involved a real estate buyer asserting that the Maine seller had actively concealed the fact that a portion of the subject property had been filled. In fact, the seller had covered the fill approximately 20 years prior to selling, but was silent about the fill in all of his interactions with the buyer. 37 F.4th at 735. Such facts were "entirely inadequate" to establish an active concealment because nothing showed the seller "took steps to hide the Fill from [the buyer]." *Id.* (citing *Kezer*). Applying Maine law, the First Circuit recognized: "A purchaser's ignorance of facts, without more, does not amount to active concealment." *Pleasantdale* Condominiums, 37 F.4th at 735.

Alrig's fraud claim is similarly defective. The Complaint does not allege any steps that MBD purportedly took to conceal any prior knowledge about the redevelopment project. Instead, Alrig's Complaint offers just one allegation linked to MBD, claiming that: "Prior to and leading up to the execution of the P/S Agreement, MBD (including through its real estate broker) was aware that the City of Portland intended to redevelop the Libbytown neighborhood." A.15 ¶ 19. All other allegations of the complaint allege facts in existence, such as the fact that the contemplated redevelopment "implicates a portion of the Property," A.16 ¶ 36, or that that "[c]onstruction of the roundabout would amount to a 'taking' of a portion of the Property," A.15 ¶ 21.

Even where the Court assumes all allegations as true for purposes of a motion to dismiss, Alrig's fraud claim still lands far short of the threshold required to establish the requisite active concealment of the truth. Like the seller in *Kezer*, MBD is merely accused of having prior knowledge, not taking any affirmative steps to avoid disclosure of its purported prior knowledge. Without a showing that the defendants "took steps to conceal from the [plaintiffs]," an action for fraudulent concealment must fail. *Kezer*, 1999 ME 184, ¶ 25.

B. No justifiable reliance occurred where Alrig agreed that MBD would not offer any property representations.

A viable fraud action also requires the plaintiff to establish that it justifiably relied on the defendant's omission of fact. *See Kezer* ¶ 26. Even if

Alrig could establish a claim for active concealment, Alrig's fraud claim still fails for lack of justifiable reliance because the contract expressly disclaims any representations made regarding MBD's prior knowledge of the property. *See* A. 21-22 (§8).

Justifiable reliance in an ordinary fraud claim "means that the plaintiff has justifiably relied on the misrepresentation to the plaintiff's detriment." *Kezer*, 1999 ME 184, ¶ 26. In claim for fraud by active concealment, the plaintiff must show that it "justifiably rel[ied] on the omission of the material fact." *Id.*

In *Kezer*, for example, the buyers contended that they justifiably relied upon the seller's omission of the fact that the DEP had conducted water contamination testing in the neighborhood when it closed on the purchase, despite discovering the omitted fact prior to closing. *Id.* ¶ 26. The Court held that no justifiable reliance had occurred because the buyers "could not have relied upon their lack of knowledge … as a reason for going forward with the closing." *Id.*

Here, Alrig's Complaint alleged that it justifiably relied upon MBD's omission of the neighborhood roadway project's development when it executed the P/S and the June 24 Amendment, and paid a nonrefundable deposit. A.17 ¶¶ 47-48.

But Alrig had no reasonable basis to rely upon any MBD omission regarding awareness of the City of Portland's roadway project planning, because

the P/S expressly provided that MBD would not make representations about the property, and that Alrig rely exclusively upon its independent investigations of the property. *See* A.21-22.

For instance, P/S Section 8(a) provides that, unless otherwise stated in the contract, "Seller has not made and does not make any representations or warranties with respect to the Property." A.21.[2] This provision put Alrig on notice that MBD had omitted disclosure of information relating to the property prior to Alrig's execution of the P/S (*e.g.*, "Seller has not made … any representations"), and that MBD would continue to omit such information disclosures while the P/S was pending (*e.g.*, "Seller … does not make any representations"). *Id.*

Additionally, Alrig acknowledged through P/S Section 8(b) that the Property would be "conveyed in its 'as-is' 'where-is' condition without representation or warranty," and that Alrig acted "solely in reliance on and as a result of [Alrig's] own investigation and efforts." *Id.* P/S Section 8(b) additionally provided that Alrig bore "sole risk, cost and expense" for its own due diligence efforts, including "the risk that [Alrig's] inspection and

[2] Although P/S Section 16 required MBD "to forward promptly to [Alrig] any notice of intent received pertaining to a taking of all or a portion of the Property," A.28, this provision is not at issue in this case. Alrig's Complaint does not allege that the City of Portland had issued any formal notice of intent to take the property, and does not allege that MBD breached its contractual duty to forward such notice to Alrig. Instead, Alrig merely alleges that MBD omitted disclosure of awareness that the City of Portland "intended to redevelop the Libbytown neighborhood" with a roadway improvement project. *See e.g.*, A.15 ¶¶19-24; A.17 ¶¶ 45-47.

investigations, examinations and inspections may not reveal any or all adverse or existing conditions, aspects or attributes about the Property." *Id.*

Under these terms of agreement, Alrig had no basis to reasonably expect that MBD would offer it any manner of representation regarding its knowledge about the City of Portland intent to redevelop the neighborhood's roadways. Alrig agreed that it alone was responsible for its investigations, which inherently included both the substance and the timing. A. 21. As in *Kezer*, Alrig "could not have relied upon [its] lack of knowledge" about the municipal roadway project planning "as a reason for going forward" with entering into the P/S, or entering into the June 24 Amendment. *Kezer*, 1999 ME 184, ¶ 26.

Consequently, Alrig alone is responsible for the fact that its investigations discovered the neighborhood roadway project in August 2022 after Alrig executed the June 24 Amendment rendering its deposit thereafter nonrefundable.

CONCLUSION

For the aforementioned reasons, Appellee MBD Realty LLC respectfully requests that this Court affirm the Superior Court's dismissal of Plaintiff Alrig USA Acquisitions LLC's Complaint in its entirety and with prejudice.

Dated at Portland, Maine this 31st day of May, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James G. Monteleone, as attorney for Appellee MBD Realty LLC, hereby certify that I have on this date served electronic and two paper copies of the foregoing brief upon Appellant's counsel of record at the following addresses:

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