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Case No.....:	003918
Year.....:	09
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A 3918-09T3

**Paul G. Sklodowsky,
Plaintiff-Appellant**

vs.

**John F. Lushis, Jr., Esq. and Tallman,
Hudders & Sorrentino, A Professional
Corporation,**

Defendants-Respondents

**Superior Court of New Jersey
Appellate Division**

Docket Number: A-3918-09T3

Civil Action

**On Appeal From An Order of the
Superior Court of New Jersey,
Law Division, Granting Defendants'
Motion to Dismiss**

Sat Below:

**Honorable Peter A. Buchsbaum,
J.S.C.**

**FILED
APPELLATE DIVISION**

SEP 17 2010

Plaintiff-Appellant's Appendix

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SUPERIOR COURT
OF NEW JERSEY**

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<p>Paul G. Sklodowsky, Plaintiff</p> <p>vs.</p> <p>John F. Lushis, Jr., Esq. and Tallman, Hudders & Sorrentino, A Professional Corporation, Defendant</p>	<p>Superior Court of New Jersey Hunterdon County - Law Division</p> <p>Docket Number: <u>L-649-09</u></p> <p>Civil Action</p> <p>Complaint and Jury Demand</p>
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Plaintiff, Paul G. Sklodowsky , residing at 23 Union Road, Frenchtown, New Jersey, complaining of the Defendants states:

**COUNT ONE
(Professional Negligence)**

1. Defendant John F. Lushis, Jr. (hereinafter Lushis) is an attorney at law of the Commonwealth of Pennsylvania. He is employed by the Defendant law firm of Tallman Hudders and Sorrentino, a Professional Corporation, with offices in Allentown, Pennsylvania. All conduct of Lushis described in this Complaint

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was taken within the scope of his employment with Tallman Hudders and Sorrentino.

2. In 2003, the Plaintiff, Paul G. Sklodowsky, (hereinafter Sklodowsky) was referred to Lushis for legal representation on the proposed sale of approximately 43 acres of land that Plaintiff owned in Kingwood Township, New Jersey. Lushis agreed to represent Sklodowsky on the sale of his real property. He advised Plaintiff that, as necessary, he would consult with members of his firm, who were admitted to the practice of law in the State of New Jersey.
3. Sklodowsky advised Lushis that he held title to the real property in his own name and that he wanted to transfer the property without the involvement of his wife with whom he was having marital difficulties. He requested Lushis to advise him what rights his wife had in the property and whether he could transfer the property without the consent of his wife. Lushis advised him that he could transfer the property without the consent of his wife but that she, as his spouse, would have an interest in the proceeds of the sale.
4. Sklodowsky relied upon the verbal and written advice and representations of Lushis concerning the rights of his wife and entered into a contract on November 11, 2003 to sell his real estate to American Developers of New Jersey, Inc. (hereinafter sometimes ADNJ).
5. Under New Jersey law, Sklodowsky could not transfer the property without the consent of his wife, as the marital residence was located on the property.

Sklodowsky's wife, Joanne Sklodowsky, was a necessary signatory to any deed of transfer in order for her husband to deliver good title to ADNJ as he had warranted in his contract of sale with ADNJ.

6. Plaintiff, upon the advice of Lushis, entered into a contract for the sale of real estate under which he agreed to deliver to ADNJ, the purchaser, good title at closing. However, Plaintiff could not deliver good title because his wife did not and would not consent to transfer her interest in the property to American Developers of New Jersey, Inc.
7. Sklodowsky was unable to consummate the sale of the approximately 43 acres of land to American Developers of New Jersey, Inc. as a result of his inability to convey good title.
8. After American Developers of New Jersey, Inc. refused to close without good title, Lushis referred Sklodowsky to Defendant, Joseph T. Nanovic, Esq. (hereinafter Nanovic) for legal representation. Joseph T. Nanovic, Esq is an attorney at law in the Commonwealth of Pennsylvania with an office in Macungie, Pennsylvania. Both Lushis and Nanovic advised Sklodowsky to file suit against American Developers of New Jersey, Inc. to recover the \$85,000.00 deposit paid into escrow by ADNJ for its purported breach of the contract of sale.
9. Sklodowsky retained Nanovic to represent him on such suit and Nanovic, who is not licensed to practice law in the State of New Jersey, engaged Defendant, Daniel J. Baurkot, Esq., (hereinafter Baurkot) to represent Sklodowsky as trial

counsel. Daniel J. Baurkot, Esq. is an attorney at law in the State of New Jersey with offices in Basking Ridge, New Jersey.

10. Baurkot instituted suit in the Superior Court of New Jersey on behalf of Sklodowsky against American Developers of New Jersey, LLC, seeking recovery of the contract deposit. ADNJ filed an Answer and Counterclaim requesting return of the deposit and compensatory damages for breach of contract. ADNJ also filed Third Party Complaints against Lushis, and his law firm, Defendant, Tallman, Hudders & Sorrentino, as well as Joanne Sklodowsky. The complete caption of the case was *Paul G. Sklodowsky, Plaintiff v. American Developers of New Jersey, Inc., Defendant/Third Party Plaintiff v. John F. Lushis, Jr., Joanne Sklodowsky, and Tallman, Hudders & Sorrentino, Third Party Defendants., Docket No. HNT-L-459-04.*
11. In its pleadings, ADNJ claimed, among other matters, that Sklodowsky and his wife, Joanne Sklodowsky, had conspired to willfully withhold their marriage and her marital status from ADNJ to the detriment and damage of ADNJ.
12. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot, Nanovic and Lushis advised Plaintiff that it was appropriate litigation strategy to not file a claim of professional negligence against Lushis and his law firm. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised Plaintiff that it was appropriate litigation strategy to refuse to waive his claim of privilege concerning his

Pa 4

confidential communications with Lushis, even though such communications would demonstrate that he had not colluded with his wife.

13. Plaintiff relied on the advice of Nanovic and Baurkot, who did not assert a claim by Sklodowsky against Lushis. They also successfully resisted requests and motions by ADNJ to obtain access to confidential communications between Lushis and Sklodowsky.

14. In February 2007, Sklodowsky suspected that his attorneys were not looking out for his best interests. Sklodowsky discharged Lushis and Baurkot and retained new counsel. When the lawsuit came on for trial before the Honorable Stephen Rubin J.S.C., in April 2007, the Plaintiff settled with ADNJ because it was likely that he could not win on his claim for the deposit, since he could not show that he could deliver good title to the property at closing as he had warranted under his contract. Additionally, he faced a charge of fraud and collusion with his wife that he could not effectively rebut without testimony concerning the advice of Lushis. Not only had the Trial Court ruled that the contract claim concerning delivery of good title at closing would be litigated but it also had ruled that the issue of whether Sklodowsky and his wife had "intentionally manipulated her right of veto to willfully frustrate the contract in violation of the covenant of good faith and fair dealing while the contract was in effect" would be litigated. Faced with a litigation catastrophe, Sklodowsky chose to reduce his losses and exposure.

15. John F. Lushis, Esq., agreed to represent Plaintiff concerning the sale of his New Jersey real estate. Defendants held themselves out to the public as attorneys with expertise in real estate and law.
16. Defendants owed to Plaintiff duties of care to properly advise and represent plaintiff in a skillful and diligent manner and to place the interests of Plaintiff over their interests.
17. Defendants, by various errors, omissions, and commissions, deviated from the applicable standards of care for legal professionals in their representation of Plaintiff. Such deviations included, but were not limited to the following:
- a. The advice of John Lushis, Esq. to Plaintiff to enter into a contract without the agreement of his spouse to join in the transaction notwithstanding her spousal rights under New Jersey law.
 - b. The unauthorized practice of law by Lushis and Nanovic in New Jersey.
 - c. The advice of Defendants to Plaintiff to pursue litigation for the return of a deposit in a real estate transaction in which Plaintiff could not deliver good title as he had represented.
 - d. The failure of Lushis to take responsibility for his negligent advise to Plaintiff and take the necessary steps to mitigate the losses of Plaintiff Caused by his negligent advice.
 - e. The billing of unnecessary and unreasonable legal fees to Plaintiff.
18. As a direct and proximate result of the negligence of the defendants, Plaintiff has suffered damages, including the payment of damages to ADNJ and attorney fees.

Wherefore, Plaintiff requests judgment against all Defendants for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper.

CERTIFICATION

Pursuant to *Rule 4:5-1* the undersigned certifies that this matter in controversy is not the subject of any other action pending in any Court of Arbitration forum, nor is any other action or Arbitration proceeding presently contemplated and all known parties have been joined in this action. However, related litigation is pending in the United States District Court for the District of Pennsylvania styled *Nanovic v Sklodowsky, et al.* Docket No.07-cv-3276.

JURY DEMAND

The Plaintiff, Paul G. Sklodowsky, demands trial by a jury on all of the triable issues of this complaint, pursuant to *Rule 1:8-2(b)* and *Rule 4:35-1(a)*.

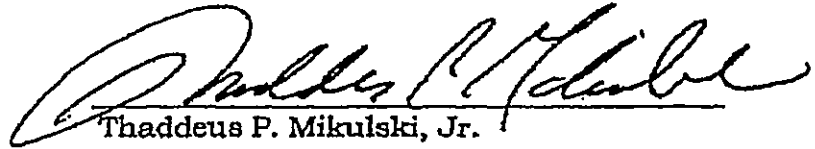
DEMAND FOR DISCOVERY OF INSURANCE COVERAGE

Pursuant to *New Jersey Court Rule 4:10-2(b)*, demand is made that Defendants, disclose to Plaintiff's attorney whether or not there are any insurance agreements or policies under which any person or firm carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in

this action or indemnify or reimburse for payments made to satisfy the judgment and provide Plaintiff's attorney with true copies of those insurance agreements or policies, including, but not limited to, any and all declaration sheets. This demand shall include and cover not only primary coverage, but also any and all excess, catastrophe and umbrella policies.

Dated:

11/3/09



Thaddeus P. Mikulski, Jr.

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PAUL G. SKLODOWSKY	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: HUNTERDON COUNTY
	:	
Plaintiff	:	No. HUN-L-649-09
	:	
v.	:	
	:	
JOHN F. LUSHIS, JR., ESQUIRE and	:	
TALLMAN, HUDDERS &	:	NOTICE OF MOTION TO DIMISS
SORRENTINO, A Professional	:	COMPLAINT
Corporation	:	
	:	Motion Returnable: February 5, 2010
Defendants	:	

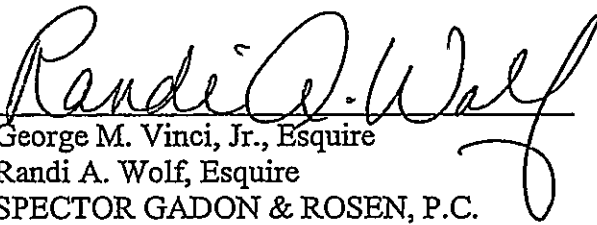
TO: Thaddeus P. Mikulski, Esquire
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Hamilton, NJ 08610
Counsel for Plaintiff

PLEASE TAKE NOTICE that on Friday, February 5, 2010 at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned attorneys, on behalf of Defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C. ("Defendants") will move before the Superior Court of New Jersey, Hunterdon County, in Flemington, New Jersey, for an Order dismissing the Plaintiff's Complaint with Prejudice, pursuant to R. 1:6-2 and R. 4:30A;

PLEASE TAKE FURTHER NOTICE that Defendants will rely upon the Brief submitted herewith, the Certification of Counsel in Support with Exhibits and argument of counsel.

Oral argument is respectfully requested.

A proposed form of Order is submitted herewith.



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Attorneys for Defendants, John F. Lushis, Jr. Esq.
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Dated: January 18, 2010

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Filed At Chambers
MAR 19 2010
Judge P. Buchsbaum

PAUL G. SKLODOWSKY

Plaintiff

v.

JOHN F. LUSHIS, JR., ESQUIRE and
TALLMAN, HUDDERS &
SORRENTINO, A Professional
Corporation

Defendants

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: HUNTERDON COUNTY

: No. HM-L-649-09

: ORDER DISMISSING COMPLAINT

THIS MATTER having been opened to the Court by Defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C., by way of Motion to Dismiss the Plaintiff's Complaint pursuant to R. 4:6-2(c) and R. 4:30A, and the Court having considered the papers filed in support of said Motion, papers filed in opposition and argument of counsel and for good cause shown;

IT IS on this 19 day of March, 2010, HEREBY

ORDERED that Defendants' Motion to Dismiss the Complaint is GRANTED;

ORDERED FURTHER that Plaintiff's Complaint in this matter is DISMISSED WITH PREJUDICE.

CERTIFIED TO BE
A TRUE COPY


PETER A. BUCHSBAUM, J.S.C. J.S.C.

SEE ATTACHED MEMO
Pa 11

3/19/10 to both
alter.

Memorandum of Decision on Motion

*NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS*

Paul G. Sklodowsky

v.

John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino,
P.C.

Docket No. HNT-L-649-09

Defendants' Motion to Dismiss
Opposed

Argued & Decided March 19, 2010
The Honorable Peter A. Buchsbaum, J.S.C.

This legal malpractice case requires consideration of the Entire Controversy Doctrine.

Facts:

In November of 2003 plaintiff Paul Sklodowsky (plaintiff) entered into an agreement to sell his marital residence and real estate to American Developers of New Jersey, LLC (American Developers). The plaintiff was represented by defendant John F. Lushis, Jr., (Lushis) a member of the firm of Tallman, Hudders & Sorrentino (THS) (collectively the defendants). Lushis holds a license to practice law in Pennsylvania only and THS' offices are in Pennsylvania. The complaint in this action alleges the plaintiff advised Lushis that he was experiencing marital difficulties and wanted to transfer the property without his wife's consent. Comp. at ¶3. The complaint further alleges the defendants reassured Lushis that he could transfer the property without his wife's consent. Id.

The closing did not occur since the plaintiff could not deliver good title since his wife did not agree to sell the marital property. Id. at ¶¶5-6. Lushis subsequently referred the plaintiff to a different attorney, Joseph T. Nanovic, Esq. Both Lushis and Nanovic advised the plaintiff to sue American Developers in order to recover the plaintiff's deposit. Id. at ¶¶8-9. A third attorney filed suit against American Developers on the plaintiff's behalf.

Procedural History:

The parties in this case have been parties in three previous civil actions.

First, the plaintiff here filed suit against American Developers on October 7, 2004. See Wolf Cert., Exh. C. The docket number in this case was HNT-L-459-4. This complaint alleged American Developers breached the contract of sale by declining to accept conveyance. On November 3, 2004 American Developers filed an answer. Id. at Exh. D. It also filed a third party complaint against Lushis alleging he intentionally withheld information from American as to the plaintiff's marital status. The third party complaint alleged a breach of a duty of good faith owed to American Developers.

By order of March 21, 2006 this Court granted summary judgment for Lushis and THS on American Developers' claims for fraud against these defendants. On July 16, 2008 the Appellate Division affirmed in an unpublished opinion. Id. at Exh. B. The Appellate Division approved this Court's finding that based on the facts involved American Developers could not have relied on Lushis and no fraud could have occurred. The Sklodowsky and American Developers settled their claims on June 13, 2007. The stipulation obligated the plaintiff to provide American Developers "with an assignment of all funds that he recovers as a result of the legal malpractice lawsuit he intends to institute against John F. Lushis, Esq ... in the event of default or nonpayment." See Id. at Exh. E, ¶2.

Second, the same plaintiff in this case filed a complaint against these same defendants and two other attorneys on October 22, 2007. See Id. at Exh. G. This complaint alleged legal malpractice against Lushis and his firm for advising the plaintiff he could transfer the property without his wife's consent. The complaint also alleged Lushis practiced law in New Jersey without authorization. On May 10, 2008 this case was automatically dismissed for failure to prosecute under R. 1:13-7.

Third, Nanovic, plaintiff's second attorney, filed a complaint against the plaintiff in federal district court in Pennsylvania. Id. at Exh. I-J. By way of a third party complaint filed on September 2, 2008, the plaintiff filed suit against Lushis and THS. This complaint included a count for legal malpractice against the defendants. By order of May 22, 2009 the Honorable James Knoll Gardner, U.S.D.J. granted the defendants'

unopposed motion to dismiss the third party complaint without prejudice.

Fourth, the plaintiff began this action on November 4, 2009. He alleges legal malpractice by the defendants based on their advice and conduct during the 2003 real estate transaction. The defendants move to dismiss under the Entire Controversy Doctrine and Pennsylvania's statute of limitations for attorney malpractice.

Defendants' Arguments:

The defendants argue the plaintiffs should have brought his malpractice claims in the first suit in 2004. They invoke *Grunwald v. Brokesh*, 131 N.J. 483, 494 (1993), as showing a cause of action for legal malpractice occurs when a plaintiff suffers damages or discovers or should have discovered the essential facts for a claim. They argue the plaintiff's claims accrued before the 2004 litigation ended based on the claims American Developers brought against him out of this real estate transaction.

They also point to the complaint as showing the cause of action accrued earlier. They note the complaint alleges the defendants advised the plaintiff his wife did not need to approve the sale. They point to the allegation the sale did not occur for this reason, and argue the plaintiff knew or should have known he possessed a claim at the time of closing. They also point to the allegation in the complaint that Lushis committed an unauthorized practice of law and argue he knew or should have known Lushis lacked a New Jersey license to practice law.

The defendants take issue with the allegation that they attempted to hide their conduct or prevent the plaintiff from asserting malpractice claims. They invoke *Vastano v. Algeier*, 178 N.J. 230, 241-243 (2003), where the Court found a plaintiff learned of the essential facts for her malpractice claim upon receipt of a file and its mention of an unmentioned settlement offer. The Court held this constituted accrual of the malpractice claim. *Id.* The defendants argue the claim accrued when the real estate litigation was pending.

Next the defendants argue dismissal would further the policies behind the Entire Controversy Doctrine because the plaintiff enjoyed an adequate opportunity to litigate his claims in prior litigations.

Lastly the defendants argue that the two year Pennsylvania statute of limitations applies and would require dismissal. They argue Pennsylvania law applies because it possesses a greater interest in this case.

Plaintiff's Arguments:

The plaintiff argues the Entire Controversy Doctrine does not apply to this action. He also argues New Jersey's six year statute of limitations applies.

The plaintiff first asserts the Court held the Entire Controversy does not apply to legal malpractice actions in *Olds v. Donnelly*, 150 N.J. 424 (1997). He asserts he settled the 2003 litigation with American Developers because he was faced with the prospect of using attorney-client communications between him and the defendant to refute the allegations of fraud.

The plaintiff also argues application of the Entire Controversy Doctrine would be unfair. He characterizes a dismissal as allowing Lushis to advise him to sue American Developers in order to mitigate his own malpractice damages. The plaintiff also asserts dismissal would not further judicial economy because American Developers pursued a different claim against the plaintiff than the one he seeks against this defendant.

Next the plaintiff argues the Entire Controversy Doctrine does not apply because his cause of action did not accrue in the 2004 litigation. He argues he did not suffer damage from the defendant's malpractice before or during the 2004 real estate litigation. He also states unfairness would result in requiring him to have asserted claims against the defendants in the 2004 litigation, since they advised him to undertake it. He concludes he did not know and should not have known about the essential facts for a claim against the defendants until after the 2004 litigation.

Lastly the plaintiff takes issue with the application of Pennsylvania's statute of limitations for legal malpractice. He argues that since the defendants allegedly practiced law in New Jersey without authorization, New Jersey possesses the greater interest in this case.

Analysis:

R. 4:30A provides that "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided," for foreclosure and summary actions. The entire controversy doctrine embodies a principle that a legal controversy should be resolved in one action. *Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 15 (1989). "[A]ll parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *Id.* The Doctrine provides that "if a party withholds a constituent claim ... and the case is tried to judgment or settled, that party risks losing the right to bring that claim later." *Kaselaan & D'Angelo Assocs. v. Soffian*, 290 N.J. Super. 293, 299 (App. Div. 1996) (citing *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 324, (1995)).

This doctrine requires the exercise of judicial discretion based on the facts of individual cases. *Highland Lakes Country Club & Cmty. Ass'n v. Nicastro*, 2009 N.J. LEXIS 1291 (Dec. 8, 2009). Its purpose is encouraging one fair resolution of disputes and the promotion of judicial economy. *Id.*

In determining whether the doctrine applies courts should ascertain whether the claims asserted arise out of the same core set of related facts. *Garvey v. Twp. of Wall*, 303 N.J. Super. 93, 100 (App. Div. 1997) (citing *DiTrollo v. Antiles*, 142 N.J. 253, 272 (1995)). If the claims do not arise out of the same set of facts, a party need not join them. *Garvey*, 303 N.J. Super. at 100 (citations omitted). The entire controversy doctrine does not prohibit a party from re-asserting a claim dismissed without prejudice where the dismissal occurred due to violation of discovery rules or where a federal court lacked jurisdiction. *Burrell v. Quaranta*, 259 N.J. Super. 243, 250 (App. Div. 1992) (citations omitted). A party against whom the entire controversy doctrine is invoked must have enjoyed a "fair and reasonable opportunity," to fully litigate their claim in the earlier action. *Id.* at 254 (citing *Cafferata v. Peyser*, 251 N.J. Super. 256, 261 (App. Div. 1991)).

In *Olds v. Donnelly*, 150 N.J. 424, 428 (1997) a plaintiff sued his former attorney who previously represented him in a medical malpractice action. The medical malpractice action was dismissed with prejudice due to the failure of the attorney to serve the summons and complaint on the defendant doctor. *Id.* at 429. In a second suit for legal malpractice, the attorney moved to dismiss based on the Entire Controversy Doctrine and argued

the plaintiff should have joined him to the initial medical malpractice action. Id. The Court held "the party-joinder requirements of the entire controversy doctrine do not extend to claims of attorney malpractice." The Court noted that "legal malpractice claims uniquely raise the specter of forcing a party in an action to sue the same lawyer who is representing that party in the action." Id. at 446. The Court reached this decision prior to the 1998 amendment revising R. 4:30A to require joinder of claims only.

Cases involving accrual for statute of limitations purposes have relied on the treatment of legal malpractice claims under the Entire Controversy Doctrine. The two are related since accrual of a claim can make the statute run while also evidencing the existence of a pending claim for purposes of the Doctrine. Thus, in *Dinizo v. Butler*, 315 N.J. Super. 317 (App. Div. 1998), the Appellate Division referenced entire controversy doctrine cases when it considered the tolling for the statute of limitations in a legal malpractice action. The plaintiffs hired the defendant attorney to represent them in a real estate transaction around 1988. Id. at 319. After they bought the property, the plaintiffs discovered deficiencies with the title and sued the sellers of the property. Id. at 319-320. This suit was dismissed in 1992. Id. at 320. In 1997 the plaintiffs filed suit against their transactional attorneys and argued the cause of action did not accrue until 1996. Id. at 320.

The Appellate Division first considered the Court's holding in *Olds*, supra, that "the entire controversy doctrine no longer compels the assertion of a legal-malpractice claim in an underlying action that gives rise to the claim." *Dinizo*, 315 N.J. Super. at 321 (quoting *Olds*, 150 N.J. at 443. This holding required only that the plaintiff did not need to join his attorney as a party in the first suit against the sellers. *Dinizo*, 315 N.J. Super. at 321. The court then determined that the remedy for a client suing in an action against third parties which arise out of his attorney's malpractice was "to have the client file the malpractice complaint and stay it pending the outcome of the underlying litigation." Id. at 322 (citing *Grunwald v. Bronkesh*, 131 N.J. 483, 499-500 (1993)). The Court did not have before it and did not address the situation as here, where the attorney had become a party to the first suit based on factual allegations of malfeasance regarding the same transaction whence comes the instant malpractice claim.

In *Grunwald v. Bronkesh*, 131 N.J. 483 (1993), the Court also considered when a cause of action accrues for legal

malpractice. The plaintiff retained the defendant attorney to negotiate an option contract for the purchase of real property owned by the plaintiff in Atlantic City. Id. at 487-488. The attorney prepared a sales agreement and option contract which Resorts International Hotel and Casino, Inc. (Resorts) signed. Id. at 488. The attorney then advised the plaintiff that by signing the sales agreement Resorts bound itself to purchasing the property. Id. Resorts never purchased the property and the plaintiff filed suit, upon his attorney's advice, alleging he lost an opportunity to develop the property. Id. A different attorney represented the plaintiff in the suit against Resorts. Id. The trial court in this first suit found the sales contract unenforceable in July of 1984. Id.

In September of 1990, the plaintiff sued his former attorney. Id. He alleged reliance on the defendant's opinion that the sales agreement was enforceable, caused him damage in not developing the property. Id. at 489. The Court held that for legal malpractice actions, a cause of action accrues "when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." Id. at 494. The Court determined a plaintiff can suffer damages through detrimental reliance on legal advice, and the damages can include attorney's fees in the underlying action. Id. (citations omitted). The Court found that the plaintiff suffered damages when Resorts refused to purchase the property and the plaintiff previously rejected an offer to purchase it. Id. at 500. The court held that the plaintiff knew or should have known about this damage after he heard the Chancery court's finding that the sales contract was unenforceable. Id.

In this case, the Court must similarly decide whether the plaintiff possessed an accrued claim in the 2004 litigation which he should have then brought against the defendants under the Entire Controversy Doctrine. The gist of the plaintiff's complaint is that the defendants wrongly advised him he could sell marital property without his wife's consent. His damages occurred when American Developers refused to close on the property for lack of good title. Similarly to *Grunwald*, 131 N.J. at 500, at this point plaintiff had knowledge that the attorney's advice that the real estate agreement bound the other party and would proceed had turned out to be erroneous and he has suffered damages from the failed closing. He also knew American Developers had sued defendants for the same conduct complained of here -- failure to advise that the contract could not close without his wife's signature.

Furthermore, the plaintiff subsequently filed suit with a different attorney. Plaintiff's complaint in paragraph 9 acknowledged retaining Nanovic in the underlying action. Legal fees paid for this action would also form the plaintiff's damages of which he long ago had knowledge.

Thus plaintiff had knowledge that the advice was wrong during the 2004 suit.

The above suggests that the plaintiff knew or should have known about the essential facts for his claim in 2004. See *Grunwald*, 131 N.J. at 494. The aborted closing occurred on September 30, 2004. Sklodowsky Cert. ¶2. The plaintiff's certification indicates that in April of 2004 Lushis advised him that he needed his wife's signature to deliver good title. Id. He states that if he had known this would never have signed the contract. Id. The plaintiff asked his attorney in the underlying litigation whether he should pursue a legal malpractice action against the Lushis. Id. at ¶4. The failure of the defendant's advice to hold true and the plaintiff's questioning regarding malpractice demonstrates he knew the essential facts of his claim against Lushis before undertaking the 2004 litigation. He also knew Lushis had been sued based on the same alleged wrong advice. Because he suffered damage and knew the facts implicating the defendants as the cause of this damage by the time of the 2004 litigation, the plaintiff's cause of action accrued then.

Since the plaintiff possessed a claim against the defendants during the underlying 2004 litigation, the Court must next consider whether to apply the Entire Controversy Doctrine. The Doctrine requires that "*Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7, 15 (1989). "[A]ll parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *Cogdell*, supra, 116 N.J. at 15. Here the defendants were parties to the 2004 litigation through the third party complaint brought by American Developers. Comp. at ¶10. The plaintiff was a party by virtue of filing the 2004 suit. Id. Thus, this is not a case involving a claim against a non-party to the original litigation.

The Court is not persuaded by the plaintiff's argument that *Olds*, supra, precludes applying the Entire Controversy Doctrine to any legal malpractice action. *Olds* mandated that in a legal malpractice action, a party need not join his or her attorney to

the underlying litigation. See *Dinizo*, 315 N.J. Super. at 321. Because the defendants were already parties to the 2004 litigation based on the same interaction involving the wife's torpedoing this closing, the Court's holding in *Olds* does not bar invoking the Doctrine here. Nor do the limitations on party joinder in R. 4:30A.

Since the plaintiff was a party to the previous litigation the Court must next consider whether it arises out of the same core set of facts. See *Garvey*, supra, 303 N.J. Super. at 100. The 2004 litigation and this case arose out of the same transaction, namely the unsuccessful closing. The plaintiff now alleges the defendants caused him damage due to their negligent representation, which led to the aborted closing. Therefore the 2004 complaint and this action arise out of the same set of facts and involve the same parties.

Lastly, the Court must consider whether it is equitable to apply the Entire Controversy Doctrine and bar the plaintiff's claims. This Doctrine exists to (1) prevent piecemeal decisions, (2) promote fairness to the parties, and (3) promote judicial efficiency. *DiTrollo v. Antiles*, 142 N.J. 253, 267 (1995).

Allowing the plaintiff to proceed in this claim would undermine all three purposes. First, it would allow the plaintiff to proceed in one action against the sellers which resulted in a summary judgment and settlement. Allowing this case to proceed would result in one case in 2004 about the underlying transaction allegedly undermined by legal malpractice and this case for the legal malpractice.

Second fairness requires dismissal of this action. The underlying transaction occurred seven years ago. The evidence indicates the plaintiff considered suing the defendants around 2004 but chose not otherwise. Allowing him to change his mind six years later would prejudice the defendants by forcing them defend a case long after the fact.

Furthermore this is the fourth action involving these parties. The plaintiff filed an action in 2007 with an identical complaint yet failed to prosecute it. This failure to prosecute resulted in dismissal. He provided no explanation for this inaction or why he filed the instant second identical action instead of seeking to vacate the dismissal for the 2007 case. In addition, the plaintiff also asserted these claims in the federal case but chose not to oppose the defendants' motion to dismiss. This failure is unexplained. The plaintiff's inactions

and choices to not aggressively pursue his claims against the defendants require a finding that fairness precludes this fourth suit on the same facts.

Lastly this action implicates the goals of judicial efficiency. This is the fourth action involving these same parties and third in New Jersey's courts. Allowing the plaintiff to bring these claims, which he considered bringing earlier, at this stage would frustrate judicial efficiency. Therefore consideration of judicial efficiency and the other policies underlying the Entire Controversy Doctrine, favor dismissal of this action.

Finally, plaintiff cannot claim that defendants hid the facts from him. He knew in April 2004 that Lushis had erred as to his wife's signature. He also specifically asked Nanovic about a malpractice claim. Thus, he certainly was aware of the claim and made a tactical decision not to pursue it. That decision does not avoid application of the Doctrine.

Therefore the Court will grant the motion to dismiss. However, the Court is not persuaded that Pennsylvania law would apply in this case involving the sale of real estate in New Jersey. In New Jersey the determination of which state's law to apply depends on "the state that has the most significant connections with the parties and the transaction." *Pfizer, Inc. v. Empls Ins.*, 154 N.J. 187, 193 (1998) (citing *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 102 (1993)). New Jersey courts consider the following factors for choice of law analysis (1) the competing interests of the states, (2) the interests of commerce between the states, (3) the parties' interests and expectations, and (4) concerns of judicial administration. *Pfizer*, 154 N.J. at 197-199.

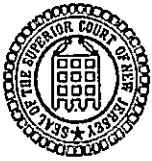
Under the first factor, New Jersey would possess a greater interest in resolving this dispute. The transaction arose out of a sale of property in New Jersey by residents of this state. Furthermore, the plaintiff's allegations include the assertion that the defendants committed unauthorized practice of law here. Given New Jersey's interest in regulating attorneys who practice here, this state possesses a greater interest in this dispute than Pennsylvania.

While the second factor, free commerce, might (or might not) favor Pennsylvania's two year statute of limitations instead of New Jersey's six year statute, the remaining factors favor applying New Jersey law. Given that the defendants gave

legal advice to a New Jersey resident for a New Jersey transaction, the parties could expect our state's law to apply. On the fourth factor, nothing suggests New Jersey law would prove more difficult to apply or that this case would prove more complex here. Given the connections between the plaintiff's allegations and this state, New Jersey law applies, and the complaint is not time-barred.

Conclusion:

Based upon the foregoing, the defendants' motion to dismiss is GRANTED, pursuant to the Entire Controversy Doctrine.



New Jersey Judiciary
 Superior Court - Appellate Division
 NOTICE OF APPEAL

Type or clearly print all information. Attach additional sheets if necessary.		ATTORNEY / LAW FIRM / PRO SE LITIGANT	
TITLE IN FULL (AS CAPTIONED BELOW): Paul G. Sklodowsky Plaintiff-Appellant		NAME Law Offices of Thaddeus P. Mikulski, Jr.	
		STREET ADDRESS 365 White Horse Avenue	
v. John F. Lushis, Jr., Esq. and Tallman, Hudders & Sorrentino, A Professional Corporation Defendants-Respondents		CITY Hamilton	STATE NJ
		ZIP 08610	PHONE NUMBER 609-581-0470
		EMAIL ADDRESS mikulski@optonline.net	

ON APPEAL FROM		
TRIAL COURT JUDGE Honorable Peter A. Buchsbaum, J.S.C.	TRIAL COURT OR STATE AGENCY Superior Court of New Jersey-Law Division	TRIAL COURT OR AGENCY NUMBER HNT-L-649-09

Notice is hereby given that Paul G. Sklodowsky appeals to the Appellate Division from a Judgment or Order entered on March 19, 2010 in the Civil Criminal or Family Part of the Superior Court or from a State Agency decision entered on _____

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) Yes No

If not, has the order been properly certified as final pursuant to R. 4:42-2? Yes No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a conviction post judgment motion post-conviction relief.

If post-conviction relief, is it the 1st 2nd other _____
specify

Is defendant incarcerated? Yes No

Was bail granted or the sentence or disposition stayed? Yes No

If in custody, name the place of confinement:

Defendant was represented below by:

Public Defender self private counsel _____
specify

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Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	Honorable Peter A. Buchsbaum, J.S.C.	May 3, 2010
Trial Court Division Manager	Mary Braunschweiger	May 3, 2010
Tax Court Administrator State Agency		
Attorney General or Attorney for other Governmental body pursuant to R. 2:5-1(a), (e) or (h)		
Other parties in this action:		

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
John F. Lushis, Jr., Esq. and Tallman, Hudders & Sorrentino	George M. Vinci, Jr., Esq. Spector Gadon & Rosen, P.C. Po Box 1001 Moorestown NJ 08057	May 3, 2010

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office Court Reporter (if applicable) Supervisor of Court Reporters Clerk of the Tax Court State Agency	John Newton	May 3, 2010	\$300.00

Exempt from submitting the transcript request form due to the following:

- No verbatim record.
- Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).
List the date(s) of the trial or hearing:
- Motion for abbreviation of transcript filed with the court or agency below. Attach copy.
- Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.

5/3/10
DATE


SIGNATURE OF ATTORNEY OR PRO SE LITIGANT



New Jersey Judiciary
 Superior Court - Appellate Division
 COURT TRANSCRIPT REQUEST

Please type or clearly print all information.

Instructions:

1. Complete all information
2. File a separate request for each court reporter or court clerk who recorded a portion of the proceeding
3. Attach the Appellate Division or Supreme Court Clerk's copy to the Notice of Appeal (R. 2:5-1(f))
4. Attach transcript fee.

PLAINTIFF(S) (1)

Paul G. Sklodowsky

v.

DEFENDANT(S)

John F. Lushis, Jr., Esq. and Tallman, Hudders
 & Sorrentino, A Professional Corporation

TRIAL COURT DOCKET NUMBER (2)

HNT-L-649-09

COUNTY / COURT (3)

Hunterdon

REQUESTING PARTY (4)

NAME

Thaddeus P. Mikulski, Jr.

EMAIL ADDRESS

mikulski@optonline.net

PHONE NUMBER

609-581-0470

ADDRESS

365 White Horse Avenue

CITY

Hamilton

STATE

NJ

ZIP

08610

TO (5)

NAME / ADDRESS (COURT REPORTER or COURT CLERK (if sound recorded))

John Newton
 Hunterdon County Justice Center
 65 Park Avenue
 Flemington NJ 08822

(6) It is hereby requested that you prepare for use on (check one) appeal non-appeal* an original and _____ copies of the following:

DATE OF PROCEEDING (7)

March 19, 2010

TYPE OF PROCEEDING (e.g., trial, sentencing, motion, etc.) (8)

Motion

NAME OF JUDGE (9)

Hon. Peter A. Buchsbaum

I agree to pay for the preparation and any copies ordered of the transcript(s) for the above date(s) pursuant to R. 2:5-3(d).

(10)
 SIGNATURE OF REQUESTING PARTY

DATE

Transcript fees are set by New Jersey Statute 2B:7-4. An additional sum or reimbursement may be required prior to or at the completion of the transcript order.

(11) DEPOSIT ATTACHED: \$ 300.00

* Only the Supervisor of Court Reporters should receive copies of non-appeal transcript requests.

CC: 1. CLERK, Appellate Division, or CLERK, Supreme Court (see INSTRUCTIONS above)

(12) 2. Supervisor of Court Reporters _____

3. Trial Court Transcript Office _____

4. Other attorneys / Pro Se parties _____

ba25

SPECTOR GADON & ROSEN, P.C.
 By: George M. Vinci, Jr., Esquire
 Randi A. Wolf, Esquire
 1000 Lenola Road, P.O. Box 1001
 Moorestown, NJ 08057
 (856) 778-8100/(856) 722-5344 (fax)
 Attorneys for Defendants

PAUL G. SKLODOWSKY	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: HUNTERDON COUNTY
	:	
Plaintiff	:	No. HUN-L-649-09
	:	
v.	:	
	:	
JOHN F. LUSHIS, JR., ESQUIRE and	:	
TALLMAN, HUDDERS &	:	CERTIFICATION OF COUNSEL IN
SORRENTINO, A Professional	:	SUPPORT OF MOTION TO DISMISS
Corporation	:	COMPLAINT
	:	
Defendants	:	

RANDI A. WOLF, ESQUIRE, of full age, hereby certifies and says as follows:

1. I am an attorney at law in good standing, duly admitted to practice before the Supreme Court of the State of New Jersey. I am an attorney with the law firm of Spector, Gadon & Rosen, P.C., counsel for Defendants in the within action, and I have personal knowledge of the matters set forth here.
2. Attached here as Exhibit A is a true and correct copy of the Complaint filed by Plaintiff in the within action.
3. Attached here as Exhibit B is a true and correct copy of the Appellate Division's unpublished opinion in the matter of Sklodowsky v. American Developers of New Jersey, Docket No. A-5085-06T2 (App. Div. July 16, 2008).

4. Attached here as Exhibit C is a true and correct copy of the Complaint filed in the matter of Sklodowsky v. American Developers et al, Docket No. HNT-L-459-04 (the "Real Estate Litigation").

5. Attached here as Exhibit D is a true and correct copy of the Answer with Counterclaim and Third Party Complaint filed in the matter of Sklodowsky v. American Developers et al, Docket No. HNT-L-459-04.

6. Attached here as Exhibit E is a true and correct copy of the Stipulation of Settlement dated June 12, 2007 in the matter of Sklodowsky v. American Developers et al, Docket No. HNT-L-459-04.

7. Attached here as Exhibit F is a true and correct copy of the Complaint filed in the matter of Sklodowsky v. Lushis et al, Docket No. HNT-L-635-07 (the "First Malpractice Action.")

8. Attached here as Exhibit G is a true and correct copy of the Docket Entries for the matter of Sklodowsky v. Lushis et al, Docket No. HNT-L-635-07.

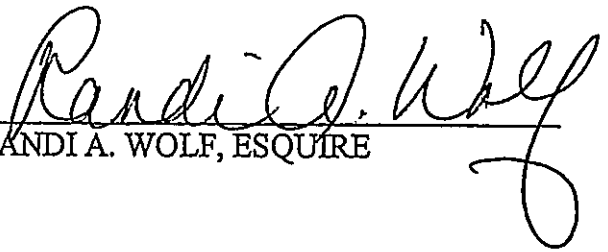
9. Attached here as Exhibit H is a true and correct copy of the Complaint filed in the United States District Court for the Eastern District of Pennsylvania in the matter of Nanovic v. Sklodowsky, et al, Civil Action No. 07-cv-3326 (the "Collections Action.")

10. Attached here as Exhibit I is a true and correct copy of the Sklodowsky's Answer, Counterclaim and Third-Party Complaint, filed in the matter of Nanovic v. Sklodowsky, et al, Civil Action No. 07-cv-3326.

11. Attached here as Exhibit J is a true and correct copy of the Order entered May 22, 2009 in the matter of Nanovic v. Sklodowsky, et al, Civil Action No. 07-cv-3326.

12. Attached here as Exhibit K is a true and correct copy of the Docket Entries for the Real Estate Litigation, Sklodowsky v. American Developers et al, Docket No. HNT-L-459-04.

I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements by me are willfully false I am subject to punishment.


RANDI A. WOLF, ESQUIRE

Dated: January 18, 2010

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5085-06T2

PAUL G. SKLODOWSKY,

Plaintiff,

v.

AMERICAN DEVELOPERS OF
NEW JERSEY,

Defendant/Third Party
Plaintiff-Appellant/
Cross-Respondent,

v.

JOHN F. LUSHIS, JR.,
TALLMAN HUDDERS & SORRENTINO,

Third-Party Defendants-
Respondents/Cross-Appellants,

and

JOANNE SKLODOWSKY,

Third-Party Defendant.

Argued April 23, 2008 - Decided July 16, 2008

Before Judges Sapp-Peterson, Messano and
King.

On appeal from the Superior Court of New
Jersey, Law Division, Hunterdon County,
Docket No. L-459-04.

John R. Lanza argued the cause for
appellant/cross-respondent American Developers

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of New Jersey (Lanza & Lanza, attorneys; Mr. Lanza, on the brief).

George M. Vinci, Jr. argued the cause for respondents/cross-appellants John F. Lushis, Jr., Tallman Hudders and Sorrentino (Spector Gadon & Rosen, P.C., attorneys; Amy B. Goldstein, on the brief).

PER CURIAM

Defendant, third-party plaintiff, American Developers of New Jersey, LLC (ADNJ), appeals 1) from the motion judge's March 21, 2006, order that granted summary judgment to third-party defendants John F. Lushis, Jr., and his law firm, Tallman Hudders & Sorrentino (THS), on ADNJ's claim of fraud; 2) from an interlocutory order of April 21, 2005, that dismissed with prejudice ADNJ's claim for negligent misrepresentation against Lushis and THS; and 3) from an interlocutory order entered on December 23, 2005, that denied ADNJ's request for discovery from plaintiff, Paul G. Sklodowsky, and Lushis, on the basis that it was subject to the attorney-client privilege. We have considered the arguments raised in light of the record and applicable legal standards. We affirm.¹

¹ As a result, we need not consider the issue raised by Lushis and THS on cross-appeal, i.e., the denial of their motion to file a fourth-party complaint.

I.

This lawsuit arose out of an aborted real estate transaction. In November 2003, ADNJ contracted to purchase some forty-two acres of land in Kingwood Township (the property) from plaintiff, the sole record owner. ADNJ tendered its initial deposit of \$35,000 and proceeded to conduct the necessary pre-development tests during the contract's 180-day due diligence period. Plaintiff retained Lushis to represent him, and ADNJ was represented by Alan Wohl.

During the due diligence period, it was revealed that an area of the property included wetlands upon which development was prohibited, and further that there was a house located in that area. There is a dispute in the record as to which party first proposed a possible solution that envisioned a "carve out" of the house and the surrounding wetlands from the sale. Nevertheless, on May 11, 2004, Lushis sent a letter to Wohl that referenced a title commitment previously furnished to ADNJ. Lushis wrote,

In reviewing the commitment, we noted that [it] indicates that a deed from "[plaintiff] and spouse, if applicable" will be required. [Plaintiff] is married; the property was purchased during the time of his marriage; and the home on the property has been used by Mr. and Mrs. Sklodowsky as their marital residence. As you know, however, the deed for the property is only in [plaintiff's] name and the Contract of Sale with [ADNJ]

only has [plaintiff] as the selling party. As I indicated, whether Mrs. Sklodowsky will execute the deed is unclear.

Although the contract contained an affirmative representation by plaintiff that "no tenants ha[d] any rights to the [p]roperty, and the conveyance and possession [would] be free of any occupancy rights of any tenants or occupancy rights of others," and further permitted ADNJ to cancel the contract and have its deposit returned, it nevertheless decided to proceed to closing. On June 9, 2004, Wohl sent a letter to Lushis and plaintiff indicating that ADNJ was waiving the due diligence contingency, setting an anticipated closing date, and remitting the additional deposit balance of \$50,000. Although ADNJ argues it did so because of the significant money it had already invested in the property, Wohl's letter did not indicate such, nor did it express any particular reservation of rights by ADNJ.

On August 30, 2004, Wohl sent Lushis a letter fixing a "time of the essence closing date" in accordance with the contract's terms for September 30, 2004. On that date, plaintiff's wife, third-party defendant Joanne Sklodowsky, failed to appear at the closing, and the parties did not consummate the sale.²

² To avoid confusion, we shall refer to Joanne Sklodowsky by her first name, and we intend no disrespect by this informality.

Plaintiff then filed suit claiming ADNJ had breached the contract. ADNJ counterclaimed alleging that plaintiff had breached the agreement and negligently misrepresented his marital status. It sought an adjustment of the purchase price based upon Joanne's retention of her marital rights to the property. In a third-party complaint, ADNJ alleged that Lushis had "fraudulently and willfully withheld" and negligently misrepresented information regarding plaintiff's marital status. ADNJ also claimed that Lushis had "violat[ed] [] his obligations as an attorney," and "violated a duty of good faith that he owed to [ADNJ]" ³ ADNJ subsequently amended its third-party complaint to name THS as a third-party defendant alleging it was vicariously liable for Lushis' conduct.

Lushis and THS moved to dismiss prior to answering. The judge granted the motion as to the negligent misrepresentation count but denied it as to ADNJ's fraud and Petrillo claim. In an extensive written opinion, the judge concluded that ADNJ's negligent misrepresentation claim must fail because, pursuant to § 5.06 of the contract, its sole remedy was limited to cancellation of the agreement absent "the breach of [a]

³ This aspect of ADNJ's complaint was subsequently referenced by all parties as a "Petrillo claim." Petrillo v. Bachenberg, 139 N.J. 472 (1995).

representation or warranty [that] was knowingly and willfully falsely made."

Lushis and THS then answered and discovery ensued, during which ADNJ moved 1) to compel plaintiff to testify regarding his communications to Lushis; and 2) to compel the production of certain documents over which Lushis had asserted a claim of privilege. Lushis and THS also moved to compel production of Wohl's file and to amend their answer and file a fourth-party complaint against Wohl and his firm. The judge granted Lushis' and THS's motion to compel discovery, denied their motion to file an amended pleading, and denied ADNJ's motion to compel. In a thorough written opinion, the judge reasoned that "information about fraud by [plaintiff] can be obtained through a less intrusive source, that avoids a breach of the [attorney-client] privilege, namely the deposition testimony of Joanne [] and [plaintiff]." He permitted ADNJ to depose plaintiff and Joanne and ask the following questions:

- (1) Whether Joanne [] advised [plaintiff] that she refused to sign the [d]eed relating to the sale of the subject property, and, if so, when the discussion took place;
- (2) Whether Joanne [] advised Lushis of any such conversation with [plaintiff] and when. [ADNJ] may not ask about the substance of any such conversation.

When discovery concluded, Lushis and THS moved for summary judgment. They argued that ADNJ could not prevail on its fraud

claim because Lushis never made a misrepresentation regarding plaintiff's marital status, did not know that Joanne would refuse to execute a deed, therefore did not misrepresent her willingness to do so, and actually disclosed plaintiff's marital status four months prior to the closing, before ADNJ tendered the additional deposit and waived its due diligence contingency. As to ADNJ's Petrillo claim, Lushis and THS argued that they did not make any representations or misrepresentations that induced ADNJ's reliance. They noted that Wohl testified in his deposition that he reviewed the title binder which disclosed a 1988 mortgage on the property indicating plaintiff was married, that he never inquired as to whether the house located on the property was a marital residence, and that he never raised a title objection pursuant to the contract.

ADNJ opposed the motion for summary judgment and cross-moved for summary judgment. It argued that Lushis and THS knew and had a duty to disclose that plaintiff was married before allowing plaintiff alone to execute the contract for sale. ADNJ also argued that it had established all the necessary elements of fraud.

In a comprehensive written opinion issued on March 10, 2006, Judge Peter A. Buschsbaum concluded that Lushis and THS

were entitled to summary judgment on ADNJ's claims.⁴ Noting that "summary judgment [was] not appropriate with respect to a number of the elements of fraud" because of disputed facts, he nevertheless concluded that "[ADNJ] ha[d] not demonstrated any reasonable reliance on non-disclosure and thus [wa]s unable to prove fraud." In sum, he concluded,

Under these circumstances, given what was made known in the title report, the physical status of the property, the hiring of [] Wohl to review title, and [ADNJ's] own reaction to the timely, formal pre-closing disclosure of the marital status, [ADNJ's] claim that it was defrauded into reasonably relying on [plaintiff's] silence about his marital status is unsustainable as a matter of law.

He rejected ADNJ's Petrillo claim "[f]or the same reason." He noted that usually, "an attorney owes [a] duty only to his client, not to the other side's client." Distinguishing the facts presented from those in Petrillo, the judge concluded "Lushis and THS made no affirmative representation concerning plaintiff's marital status whatsoever," and did nothing "to induce Wohl to discontinue his own investigation of title, such as lulling Wohl to sleep concerning [plaintiff's] marital status, i.e., by saying 'don't worry, [Joanne]'ll sign'. . . ." He entered an order denying ADNJ's cross-motion for summary

⁴ The judge also considered at the same time plaintiff's and Joanne's motion for summary judgment.

judgment, and granting Lushis' and THS's motion for summary judgment. The judge also granted plaintiff's and Joanne's motion for summary judgment as to ADNJ's fraud and misrepresentation claims made against them.⁵ ADNJ reached a settlement with plaintiff and Joanne, and subsequently filed this appeal.

II.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atlantic Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts; we then decide whether the motion judge's application of the law was correct. Id. at 230-31. In this case, while the motion record reveals certain disputed facts, there are none with respect to the critical issue of ADNJ's reasonable reliance. The judge decided the issue as a purely legal question, and therefore, we owe no particular deference to his conclusion. Id. at 231 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

⁵ ADNJ has not appealed from that portion of the judge's order.

A.

ADNJ contends that the judge erred in dismissing its Petrillo claim because he based his conclusion upon "the fact that Lushis did not issue an affirmative misrepresentation." We think this entirely misstates the basis for the judge's decision.

In Petrillo, the Supreme Court held that

[A]ttorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys' representations and the non-clients are not too remote from the attorneys to be entitled to protection. The Restatement[] [of the Law Governing Lawyers's] requirement that the lawyer invite or acquiesce in the non-client's reliance comports with our formulation that the lawyer know, or should know, of that reliance.

[Petrillo, supra, 139 N.J. at 483-84.]

However, in Lyons, Doughty & Veldhuis, P.C. v. Powers, 331 N.J. Super. 193, 196 (App. Div. 2000), we declined to extend Petrillo's reach to a situation in which the non-client failed to demonstrate reasonable reliance upon the attorney's non-disclosure. See Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 186 (App. Div.) (holding duty to non-client "inapplicable" where there was no misrepresentation and no reliance), certif. denied, 161 N.J. 335 (1999).

We note that ADNJ never asserted Lushis made a material representation about either plaintiff's marital status or the willingness of Joanne to execute a deed. Although the evidence demonstrates that Lushis likely knew at the time the contract was executed that plaintiff was married, there is no proof in the record that Lushis knew Joanne would not sign the deed until he met with her in June 2004. His deposition testimony indicated that he did not speak to her about the issue until then, and Joanne's deposition testimony revealed that she never told Lushis whether she would or would not execute the deed until then.

Judge Buchsbaum did not base his decision upon the lack of an affirmative misrepresentation from Lushis to ADNJ. Rather, he concluded, and we agree, as a matter of law ADNJ could not demonstrate it reasonably relied upon Lushis' failure to disclose plaintiff was married. ADNJ could not demonstrate that it was "lulled" by Lushis into believing Joanne was willing to execute the deed at closing. Therefore, under all the attendant circumstances, the judge correctly concluded ADNJ could not demonstrate it reasonably relied upon a misrepresentation or material omission made by Lushis. Summary judgment was appropriate on the Petrillo claim.

With respect to the dismissal of its fraud claim, ADNJ argues that questions of fact existed that foreclosed the grant of summary judgment on the issue of reliance. In particular, ADNJ contends that when Lushis finally disclosed plaintiff's marital status, in May 2004, it had already expended significant monies in pre-development activities, and therefore, its decision to proceed to closing was not evidence of any lack of reliance. Rather, it was an attempt by ADNJ to "close the deal."

To prove a common law fraud claim, ADNJ must demonstrate (1) a material misrepresentation made by Lushis of a presently existing or past fact; (2) Lushis' knowledge or belief of its falsity; (3) an intention that ADNJ rely on it; (4) reasonable reliance thereon by ADNJ; and (5) resulting damages. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). The fact that Lushis made no affirmative misrepresentation is not fatal to ADNJ's claim because, "[t]he '[d]eliberate suppression of a material fact that should be disclosed' is viewed as 'equivalent to a material misrepresentation (i.e., an affirmative misrepresentation),' which will support a common law fraud action." Winslow v. Corporate Exp., Inc., 364 N.J. Super. 128, 140 (App. Div. 2003) (quoting N.J. Econ. Dev. Auth. v. Pavonia Restaurant, Inc., 319 N.J. Super. 435, 446 (App. Div. 1998)).

We agree with Judge Buchsbaum that ADNJ cannot demonstrate reasonable reliance after Lushis' May 2004 letter, and any argument it makes regarding prior reliance is unavailing. We assume arguendo that Lushis knew plaintiff was married and failed to disclose that fact when the contract was signed. We further assume that omission was material because plaintiff represented that no tenants had "any rights to the [p]roperty" when the contract was signed.⁶ We also disregard, for the sake of argument, Wohl's admitted failure to adequately review the title report, although under section seven of the agreement, had he done so, ADNJ could have cancelled the agreement without incurring the costs it claims forced its decision to proceed to closing. Despite all of these assumptions, the undisputed facts are that ADNJ, once fully advised of the situation, decided to complete the transaction. To the extent it now claims economic concerns motivated its decision, the contract provided ADNJ the ability to recoup the losses it allegedly incurred before the May 2004 "disclosure," but it chose not to. Therefore, it proceeded to tender its second deposit, waive the due diligence contingency, and set a closing date no longer relying upon a misrepresentation made by Lushis, but rather based upon its own

⁶ Although it is less clear whether Lushis knew Joanne was residing at the property or that she had acquired marital rights to it.

business judgment. We find no basis to reverse the grant of summary judgment.

B.

ADNJ also appeals from the interlocutory order that dismissed its claim for negligent misrepresentation against Lushis and THS. It argues the judge erred in applying § 5.06 of the contract, which limited ADNJ's claim for damages to those instances in which plaintiff "knowingly and willfully falsely" breached a contract representation or warranty. ADNJ argues that the contract language applied only to plaintiff, and that the judge's reliance upon it to dismiss ADNJ's claim against Lushis and THS was error.

We affirm the dismissal of ADNJ's negligent misrepresentation claim, but for a different reason than that expressed by the motion judge. Home Properties of N.Y. v. Ocino, 341 N.J. Super. 604, 616 (App. Div. 2001). While the motion to dismiss was brought before any discovery took place, we now have the benefit of the significant discovery that followed.

In Banco Popular N. Am. v. Gandi, 184 N.J. 161, 182-86 (2005), the Supreme Court limited such a claim when brought against an attorney by a non-client to situations in which there was an actual misrepresentation made, and reliance as a result,

equating such negligent misrepresentation claims to those made in Petrillo. For the reasons expressed above, ADNJ failed to demonstrate Lushis or THS made an actual misrepresentation and that it reasonably relied upon it to its detriment.

C.

Lastly, ADNJ argues it was mistakenly denied the ability to "pierce the attorney-client privilege" between plaintiff and Lushis so as to access Lushis' file and all communications he had with plaintiff. We conclude that we need not reach the merits of the issue because ADNJ has failed to articulate how the potential discovery would have permitted it to avert summary judgment.

Judge Buchsbaum permitted ADNJ a less-intrusive way to obtain the information by deposing plaintiff and Joanne. The critical information was not whether the parties were married; rather, it was whether Lushis knew that Joanne would not cooperate in the sale of the home. The testimony adduced at plaintiff's and Joanne's depositions indicates that neither told Lushis, if indeed they ever actually spoke to each other about the issue.

ADNJ has furnished a complaint plaintiff subsequently filed in October 2007 in which he named Lushis, THS and others as defendants. However, even assuming the allegations plaintiff

now makes in the complaint were true, they perhaps support a claim of legal malpractice against Lushis regarding the advice he gave to plaintiff, but they do not support ADNJ's claims of fraud or negligent misrepresentation against Lushis and THS, and they do not serve to overcome ADNJ's failure to demonstrate reliance as we have discussed above.

Therefore, we conclude that even if the interlocutory order was entered in error, further discovery would not have resulted in ADNJ's ability to stave off the summary judgment motion or the earlier motion to dismiss.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

John M. Chesh
CLERK OF THE APPELLATE DIVISION

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2. 1/26/05

Daniel J. Baurkot, Esquire
Law Offices of Daniel J. Baurkot
28 Flintlock Court
Basking Ridge, New Jersey 07920
908-221-1200
Attorney for Plaintiff

PAUL G. SKLODOWSKY,
Plaintiff

vs

AMERICAN DEVELOPERS OF
NEW JERSEY, LLC,
Defendant.

SUPERIOR COURT OF NEW JERSEY
HUNTERDON COUNTY

LAW DIVISION

Civil Action No. H.D.T. L459-04

Plaintiff, Paul G. Sklodowsky, residing at 23 Union Road, Frenchtown, Kingwood
Township, New Jersey 08825, complaining of the Defendant alleges as follows:

1. Defendant, American Developers of New Jersey, LLC, is now and at all times
mentioned, a New Jersey limited liability company with its main place of business
located at 47 Villages Court, Hazlet, New Jersey 07730.

2. On November 1 2003, Plaintiff and Defendant entered into a written Contract
for Sale of Land to be developed (hereinafter the "Contract") of approximately 42.84
acres known as Lot 9, Block 20 on the Kingswood Township Tax Map and

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graphically shown on the survey attached as Schedule A, for a purchase price of

\$850,000.00. A true and correct copy of the Contract is attached, marked as Exhibit A, and incorporated herein by reference.

3. Settlement/closing was scheduled for September 30, 2004, at the law offices of Wohl & Goldstein, P.A., located at 73 Grove Street, Somerville, New Jersey.
4. At closing, Plaintiff tendered to defendant a sufficient deed of conveyance for the Property and was ready, willing and able to convey the Property to the Defendant on payment of the agreed upon purchase price, all in accordance with the Contract.
5. Defendant refused and continues to refuse to accept the conveyance and to pay the agreed upon purchase price.
6. Defendant has not paid the agreed upon purchase price, or any part of such price, and continues to refuse to do so.
7. By reason of Defendant's breach of the Contract, Plaintiff has suffered damages as follows: a) destruction and damage to the property caused by Defendant's field work, testing and other engineering and failure of Defendant to correct same as provided in Article 8 of the Contract; and b) liquidated damages of \$85,000.00 as provided in Articles 2.02 (a) and (b) and Article 12 of the Contract.

Therefore, Plaintiff requests judgment against Defendant for damages, together with attorneys' fees and costs of suit, and such other relief as the court deems just.

(2)

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DESIGNATION OF TRIAL COUNSEL

Pursuant to R 4:5-1 (c), Daniel J. Baurkot, Esquire, is hereby designated as trial counsel for the plaintiff, Paul G. Sklodowsky, in the above matter.

Daniel J. Baurkot

CERTIFICATION OF NO OTHER ACTIONS

Pursuant to R 4:5-1(b)(2), it is hereby stated that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of our knowledge or belief. Also, to the best of our belief, no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this pleading, we know of no other parties that should be joined in the above action. In addition, we recognize the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Dated: 10/2/04

Daniel J. Baurkot

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SCHACHTER, TROMBADORE, OFFEN
& STANTON, P.A.
45 East High Street
P.O. Box 520
Somerville, NJ 08876-0520
(908) 722-5700
Attorneys for Defendant

NOV 23 2004 13:53

PAUL G. SKLODOWSKY,
Plaintiff,

vs.

AMERICAN DEVELOPERS OF NEW
JERSEY, LLC,

Defendant Third-Party Plaintiff,

vs.

JOHN F. LUSHIS, JR. and JOANNE
SKLODOWSKY,

Third-Party Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUNTERDON COUNTY
DOCKET NO. HNT-L-469-04

Civil Action

ANSWER, COUNTERCLAIM AND
THIRD-PARTY COMPLAINT.

Defendant, American Developers of New Jersey, LLC, ("American") with an office at 47 Village Court, Hazlet, New Jersey, by way of answer to the Complaint, says that:

1. Admitted.
2. The Contract speaks for itself.
3. Admitted but the closing was scheduled pursuant to defendant's time of the essence notice.
4. Denied.

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5. Denied.

6. Admitted except that the defendant tendered payment of the purchase price but plaintiff was unable to deliver a Deed in accordance with the terms of the Contract.

7. Denied.

SEPARATE DEFENSES

1. Plaintiff was unable to deliver a Deed in accordance with the terms of the Contract and is in breach of contract.

2. Plaintiff has unclean hands.

3. Defendant is entitled to setoff for damages resulting from the breach of Contract of plaintiff.

4. Plaintiff committed fraud when entering into the Contract.

5. Plaintiff is in breach of contract.

WHEREFORE, defendant demands judgment dismissing the Complaint together with attorneys' fees and costs of suit.

COUNTERCLAIM

FIRST COUNT

1. On or about November 11, 2003, defendant-counterclaimant, American, entered into a Contract with the plaintiff, Paul G. Sklodowsky ("PGS") a copy of which is attached as Exhibit A.

2. The Contract was signed by PGS as the Seller.

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3. The plaintiff PGS, was represented at all times by John F. Lushis, Jr.
("Lushis")

4. Section 2.01 of the Contract provided, *inter alia*, as follows:

The Property shall be free of all tenancies, encumbrances and liens other than those expressly permitted ...

5. Section 3.03 of the Contract provided, *inter alia*, as follows:

Seller agrees to transfer to Buyer and Buyer agrees to accept, ownership of the Property free of all claims ... and rights of others except as otherwise provided herein.

6. Section 3.04 of the Contract provided *inter alia*, that the seller was to deliver possession and that:

Seller represents that no tenants have any rights to the Property, and that the conveyance and possession shall be free of any occupancy rights ... This representation terminates as of the date of closing.

7. Section 5.06 of the Contract provided as follows:

In the event Buyer determines that any of the representations and warranties of Section 3.04 ... shall be inaccurate as of the closing, other than as a result of such representation and warranty having been knowingly and willfully falsely made, Buyer's sole remedy shall be to cancel this Contract.

8. On information and belief, at all times relevant, PGS was married to Joanne Sklodowsky ("JS") but he knowingly, fraudulently and willfully withheld that information from American and represented that the Property would be free of any occupancy rights at closing knowing that this would not be possible unless his wife relinquished her marital occupancy rights.

9. On information and belief, Lushis was aware that PGS was married to JS but he knowingly, fraudulently and wilfully withheld that information from American and its attorney during the time the Contract was being negotiated.

10. American, in the meantime, in accordance with its due diligence obligations, under the Contract investigated the feasibility for developing the property and incurred expense in doing so.

11. The parties, through their attorneys, exchanged considerable correspondence and by letter of March 4, 2004 (Exhibit B) from Lushis, attorney for PGS, to Alan L. Wohl, the attorney for American, Lushis referred to the possible demolition of the residential dwelling located on the property. No mention was made that PGS was married although PGS now claims that at all times relevant, he was married to JS. PGS and JS now claim that the residential dwelling located on the property is their principal marital residence and that JS has marital rights under N.J.S. 3B:2B-3.

12. The marital status of PGS was first disclosed to American and its attorney by a letter of May 11, 2004 from Lushis, attorney for PGS (Exhibit C).

13. By letter of June 9, 2004 (Exhibit D) from Alan L. Wohl, attorney for American, to PGS and his attorney, Lushis, the due diligence contingency was waived provided that PGS delivered title in accordance with the terms of the Contract. An additional deposit of \$50,000 was tendered and accepted by Lushis at that time.

14. A time of the essence notice of August 12, 2004 was sent by Alan L. Wohl, attorney for American, to Lushis, attorney for PGS (Exhibit E), setting September 30, 2004 as the date of closing.

15. On September 30, 2004, American was ready, willing and able to close and tendered the balance of the purchase price. PGS tendered a Deed which was not signed by JS and which, therefore, was in violation of his agreement with American.

16. JS has refused to sign the Deed and has asserted her rights under N.J.S. 17:28-3 claiming that the principal marital residence of PGS and JS is on the property.

17. Defendant-counterclaimant, American, remains ready, willing and able to close title and to tender the balance of the purchase price but PGS is unable to deliver a Deed free of JS's occupancy rights as required by the Contract.

WHEREFORE, American Developers of New Jersey, LLC, demands judgment:

- A. Directing plaintiff, Paul G. Sklodowsky specifically to perform his agreement of November 11, 2003;
- B. Damages;
- C. Punitive damages;
- D. Attorneys' fees and costs;
- E. Such other relief as the Court deems appropriate under the circumstances.

SECOND COUNT

1. Defendant-counterclaimant, American Developers of New Jersey, LLC, repeats its allegations of the First Count of the Counterclaim as though more fully set forth herein.

2. PGS negligently failed to advise American that he was married and failure to do was tantamount to a misrepresentation on his part.

3. Defendant, American, relied on the misrepresentation in entering into the Contract, to its damage,

WHEREFORE, American Developers of New Jersey, LLC, demands judgment that:

- A. Directing plaintiff, Paul G. Sklodowsky specifically to perform his agreement of November 11, 2003;
- B. Damages;
- C. Attorneys' fees and costs;
- D. Such other relief as the Court deems appropriate under the circumstances.

THIRD COUNT

1. Defendant-counterclaimant, American Developers of New Jersey, LLC, repeats its allegations of the First and Second Counts of the Counterclaim as though more fully set forth herein.

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2. American remains ready, willing and able to close title and to tender the balance of the purchase price to PGS who is unable to deliver a Deed free of the marital and occupancy rights of JS as required by the Contract.

3. JS has been named as a third-party defendant in this action in order that her rights may be properly adjudicated.

4. American seeks judgment against PGS compelling conveyance of the property to it subject to the marital rights under N.J.S. 3B:28-3 and reducing the purchase price for the value of the marital rights of JS to the marital residence.

WHEREFORE, American Developers of New Jersey, LLC, demands judgment:

A. That defendant, Paul G. Sklodowsky be required specifically to perform his agreement of November 11, 2003;

B. That the purchase price be reduced in an amount equal to the value of the marital rights of Joanne Sklodowsky;

C. Damages;

D. Attorneys' fees and costs;

E. Such other relief as the Court deems appropriate under the circumstances.

THIRD PARTY COMPLAINT

FIRST COUNT

American Developers of New Jersey, LLC, by way of Complaint against the defendants, John F. Lushis, Jr. and Joanne Sklodowsky, says that:

1. American Developers of New Jersey, LLC ("American") repeats all of the allegations contained in the Counterclaim as though set forth herein at length.
2. Defendant, Lushis, has represented himself at all times relevant to be an attorney-at-law of the Commonwealth of Pennsylvania.
3. Defendant, Lushis, undertook to represent PGS in connection with the negotiation and execution of the Contract with American.
4. Under the terms of the Contract, Lushis is holding \$85,000 in escrow.
5. American hereby demands that Lushis release the funds to American as a result of the breach of Contract by PGS or, alternatively, that he deposit the funds into court pending the further Order of the Court.

WHEREFORE, plaintiff, American Developers of New Jersey, Inc., demands judgment against the defendant, John F. Lushis, Jr., for:

- A. An Order directing him to turn the funds which he is holding over to plaintiff; or, alternatively, depositing the funds into court;
- B. Attorneys' fees and costs of suit;
- C. Such other relief as the Court deems appropriate under the circumstances.

SECOND COUNT

1. Plaintiff repeats all of the allegations of the First Count of the Third-Party Complaint as though set forth at length herein.

2. On information and belief, Lushis at all times relevant, including during the time of the negotiation of the Contract and the entry into the Contract, knew that PGS was married to JS and fraudulently and wilfully withheld that information from American.

3. Lushis, in violation of his obligations as an attorney, intentionally withheld that information from American and its attorney.

4. After the Contract was entered into, Lushis in concert with PGS, attempted to induce American into agreeing to convey a portion of the premises or to subdivide and to allow PGS to retain a portion of the premises including the marital residence.

5. On information and belief, at all times relevant, Lushis knew that PGS would be unable to deliver possession without JS relinquishing her marital rights to the residence on the Property and that any attempted conveyance would be subject to the rights of JS. In doing so, Lushis violated a duty of good faith that he owed to plaintiff when the Contract was negotiated knowing that he would sometime in the future seek to coerce, compel or induce plaintiff to accept something less than that for which plaintiff bargained.

6. As a result of the violation of the duty of Lushis, plaintiff has been damaged.

WHEREFORE, plaintiff demands judgment against John F. Lushis, Jr., for:

- A. Compensatory damages;
- B. Punitive damages;

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- C. Attorneys' fees and costs of suit;
- D. Attorneys' fees;
- E. Such other relief as the Court deems appropriate under the circumstances.

THIRD COUNT

1. Plaintiff repeats all of the allegations of the First and Second Counts of the Third-Party Complaint as though set forth at length herein.
2. Plaintiff repeats all of the allegations of the First, Second and Third Counts of the Third-Party Complaint as though set forth at length herein.
3. On information and belief, Lushis at all times relevant, including during the time of the negotiation of the Contract and the entry into the Contract, knew that PGS was married to JS but he negligently failed to advise American of that information even though he had a duty to do so. Failure by Lushis to advise American that PGS was married was a negligent misrepresentation on which American relied in entering into the Contract.
4. Lushis breached a duty which he owed to American by failing to disclose of the marital status of PGS.

WHEREFORE, plaintiff demands judgment against John F. Lushis, Jr., for:

- A. Compensatory damages;
- B. Attorneys' fees and costs of suit;
- C. Attorneys' fees;

D. Such other relief as the Court deems appropriate under the circumstances.

FOURTH COUNT

1. Plaintiff repeats the allegations of Counts One through Three as though set forth at length herein.

2. On information and belief, JS was at all times aware of the negotiations of the Agreement entered into by PGS with American.

3. On information and belief and at all times relevant, JS colluded and conspired with PGS to withhold from American the information of her marriage and that the primary marital residence of PGS and JS was on the property.

4. JS has wilfully refused to join in the Deed to transfer and convey any rights which she may have under N.J.S. 3B:28-3.

5. As a result of the conspiracy and collusion between PGS and JS and her failure to join in the Deed, American has been damaged.

6. JS should be estopped from asserting her rights under N.J.S. 3B:28-3.

WHEREFORE, plaintiff demands judgment:

A. That defendants, PGS and JS, be required specifically to perform the Agreement of November 11, 2003.

B. Damages;

C. Punitive damages;

D. Attorneys' fees and costs;

E. Such other relief as the Court deems appropriate under the circumstances.

FIFTH COUNT

1. Plaintiff repeats its allegations to the First through Fourth Counts as though set forth at length herein.

2. JS has refused to transfer, convey or relinquish any rights which she may have under N.J.S. 3B:28-3.

3. As a result, JS has been named as a third-party defendant in this matter in order that her rights may be adjudicated by this Court.

WHEREFORE, plaintiff demands judgment:

- A. Adjudicating the rights of JS;
- B. Damages;
- C. Attorneys' fees and costs of suit;
- D. Such other relief as the Court deems appropriate under the circumstances.

CERTIFICATION OF FILING AND SERVICE

I hereby certify that the within pleading has been filed and served within the time and in the manner prescribed by the rules of court.

DESIGNATION OF TRIAL COUNSEL

RICHARD J. SCHACHTER is hereby designated as trial counsel in the within matter.

CERTIFICATION PURSUANT TO RULE 4:3-1

I certify that the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, and that Joanne Sklodowsky and John F. Lushis, Jr. should be joined in this action.

SCHACHTER, TROMBADORE, OFFEN
& STANTON, P.A.
Attorneys for Defendant-Counterclaimant
Third-Party Plaintiff, American Developers
of New Jersey, LLC

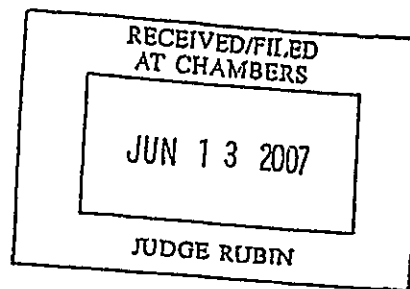
By: /s/ Richard J. Schachter
RICHARD J. SCHACHTER

Dated: November 2, 2004

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Certified to be
a true copy

NORRIS, McLAUGHLIN & MARCUS
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721 ROUTE 202-206
P.O. BOX 1018
SOMERVILLE, NEW JERSEY 08876-1018
(908) 722-0700
Attorneys for Defendant/Third-Party Plaintiff,
American Developers of New Jersey, LLC.



PAUL G. SKLODOWSKY,

Plaintiffs,

v.

AMERICAN DEVELOPERS OF
NEW JERSEY, LLC,

Defendant/Third Party Plaintiff

v.

JOHN F. LUSHIS, JR.,
JOANNE SKLODOWSKY, and
TALLMAN HUDDERS &
SORRENTINO

Third-Party Defendants

SUPERIOR COURT OF NEW JERSEY
HUNTERDON COUNTY

DOCKET NO.: HNT-L-459-04

CIVIL ACTION

STIPULATION OF SETTLEMENT
BETWEEN PLAINTIFF, PAUL G.
SKLODOWSKY, DEFENDANT/THIRD-
PARTY PLAINTIFF, AMERICAN
DEVELOPERS OF NEW JERSEY, LLC
AND THIRD-PARTY DEFENDANT,
JOANNE SKLODOWSKY

THIS MATTER, having been amicably resolved and settled by and among plaintiff, Paul G. Sklodowsky, defendant/third-party plaintiff, American Developers of New Jersey, LLC and third-party defendant, Joanne Sklodowsky, with respect to the claims asserted between said parties;

IT IS on this 12 day of JUNE, 2007,

STIPULATED by and between the parties as follows:

1. Plaintiff, Paul G. Sklodowsky and Third-Party Defendant, Joanne Sklodowsky, agree to pay Defendant/Third-Party Plaintiff, American Developers of

Page

New Jersey, LLC ("ADNJ"), \$150,000.00 in full settlement of ADNJ's claims in the above action in the following manner and according to the following terms:

- (a) to authorize the release of the \$35,000.00 and \$50,000.00 deposits paid by ADNJ on or about November 11, 2003 and June 9, 2004, for its purchase of the 23 Union Road, Kingwood Township, New Jersey property, together with any interest earned on the deposit;
- (b) \$25,000.00 on or before July 1, 2007; and
- (c) \$40,000.00 on or before August 1, 2008.

2. Plaintiff, Paul G. Sklodowsky, agrees that he will provide ADNJ with an assignment of all funds that he recovers as a result of the legal malpractice lawsuit that he intends to institute against John F. Lushis, Jr., Esq., Daniel Baurkot, Esq. and Joseph Nanovic, Esq. in the event of default or nonpayment of 1(b) and 1(c) or if a claim is settled on or before August 1, 2008.

3. ADNJ agrees that it will provide plaintiff, Paul G. Sklodowsky, with copies of the reports and tests in its possession, which had been performed or prepared by RBZ Enterprises, Inc. in connection with its engineering for the proposed subdivision of the Kingwood Township Property.

4. ADNJ agrees that it will provide plaintiff, Paul-G. Sklodowsky, if requested, with an authorization for the release of the reports and tests, which had been performed or prepared by RBZ Enterprises, Inc. in connection with its engineering for the proposed subdivision of the Kingwood Township Property.

5. Plaintiff, Paul G. Sklodowsky, and Third-Party Defendant, Joanne Sklodowsky, agree to provide ADNJ with a Mortgage and Mortgage Note for the 23

Union Road, Kingwood Township, New Jersey property to secure the payments set forth in 1(b) and 1(c) above.

6. All other claims by and among the parties are dismissed with prejudice, subject to compliance with the terms of the settlement placed on the record on April 23, 2007.

We hereby consent to the form and entry of the within Stipulation.

NORRIS, McLAUGHLIN & MARCUS
Attorneys for Defendant/Third-Party
Plaintiff, American Developers of New
Jersey, LLC

MIKULSKI & MITCHELL, LLC
Attorneys for Plaintiff, Paul G. Sklodowsky
and Third-Party Defendant, Joanne
Sklodowsky

By: _____
Richard J. Schachter, Esq.

By: 
Thaddeus P. Mikulski, Jr., Esq.

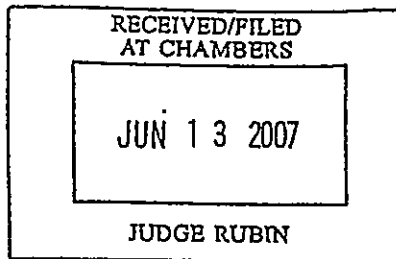
Dated:

Dated: 5/29/07


STEPHEN B. RUBIN, J.S.C.

Certified to be
a true copy

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Attorneys for Defendant/Third-Party Plaintiff,
American Developers of New Jersey, LLC.



PAUL G. SKLODOWSKY,

Plaintiffs,

v.

AMERICAN DEVELOPERS OF
NEW JERSEY, LLC,

Defendant/Third Party Plaintiff

v.

JOHN F. LUSHIS, JR.,
JOANNE SKLODOWSKY, and
TALLMAN HUDDERS &
SORRENTINO

Third-Party Defendants

SUPERIOR COURT OF NEW JERSEY
HUNTERDON COUNTY

DOCKET NO.: HNT-L-459-04

CIVIL ACTION

ORDER OF DISMISSAL

This matter was called for trial on April 23, 2007 for adjudication of the claims between Paul G. Sklodowsky and Joanne Sklodowsky and American Developers of New Jersey LLC, and a settlement between the parties was placed on the record on April 23, 2007.

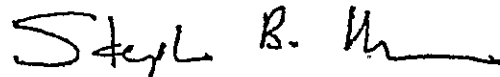
And it appearing to the Court that the terms of the settlement provide that no funds will be paid to Paul G. Sklodowsky and Joanne Sklodowsky, it is therefore

On this 13 day of JUNE, 2007;

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ORDERED that the all claims between Paul G. Sklodowsky and Joanne Sklodowsky and American Developers of New Jersey, LLC are hereby dismissed with prejudice subject to compliance with the terms of the settlement placed on the record on April 23, 2007, and it is further

ORDERED that the application for an attorney's lien upon any funds recovered by Paul G. Sklodowsky and Joanne Sklodowsky filed by their former attorneys, Daniel Baurkot, Esq. and Joseph Nanovic, Esq., be dismissed as moot as there are no funds to which any lien may attach.



Stephen J. Rubin, J.S.C.

Mikulski & Mitchell, LLC
80 Lambert Lane - Suite 150
Lambertville, New Jersey 08530
(609) 397-7667

Attorneys for Plaintiff, Paul G. Sklodowsky

<p>Paul G. Sklodowsky, Plaintiff</p> <p>vs.</p> <p>John F. Lushis, Jr., Esq. Tallman, Hudders & Sorrentino, A Professional Corporation, Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq.</p> <p>Defendant</p>	<p>Superior Court of New Jersey Hunterdon County - Law Division</p> <p>Docket Number:</p> <p>Civil Action</p> <p>Complaint and Jury Demand</p> <p><i>HNT-2-635-07</i></p>
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Plaintiff, Paul G. Sklodowsky , residing at 23 Union Road, Frenchtown, New Jersey, complaining of the Defendants states:

COUNT ONE
(Professional Negligence)

1. Defendant John F. Lushis, Jr. (hereinafter Lushis) is an attorney at law of the Commonwealth of Pennsylvania. He is employed by the Defendant law firm of Tallman Hudders and Sorrentino, a Professional Corporation, with offices in Allentown, Pennsylvania. All conduct of Lushis described in this Complaint was taken within the scope of his employment with Tallman Hudders and Sorrentino.

2. In 2003, the Plaintiff, Paul G. Sklodowsky, (hereinafter Sklodowsky) was referred to Lushis for legal representation on the proposed sale of approximately 43 acres of land that Plaintiff owned in Kingwood Township, New Jersey. Lushis agreed to represent Sklodowsky on the sale of his real property. He advised Plaintiff that, as necessary, he would consult with members of his firm, who were admitted to the practice of law in the State of New Jersey.
3. Sklodowsky advised Lushis that he held title to the real property in his own name and that he wanted to transfer the property without the involvement of his wife with whom he was having marital difficulties. He requested Lushis to advise him what rights his wife had in the property and whether he could transfer the property without the consent of his wife. Lushis advised him that he could transfer the property without the consent of his wife but that she, as his spouse, would have an interest in the proceeds of the sale.
4. Sklodowsky relied upon the verbal and written advice and representations of Lushis concerning the rights of his wife and entered into a contract on November 11, 2003 to sell his real estate to American Developers of New Jersey, Inc. (hereinafter sometimes ADNJ).
5. Under New Jersey law, Sklodowsky could not transfer the property without the consent of his wife, as the marital residence was located on the property. Sklodowsky's wife, Joanne Sklodowsky, was a necessary signatory to any deed of transfer in order for her husband to deliver good title to ADNJ as he had warranted in his contract of sale with ADNJ.

6. Plaintiff, upon the advice of Lushis, entered into a contract for the sale of real estate under which he agreed to deliver to ADNJ, the purchaser, good title at closing. However, Plaintiff could not deliver good title because his wife did not and would not consent to transfer her interest in the property to American Developers of New Jersey, Inc.
7. Sklodowsky was unable to consummate the sale of the approximately 43 acres of land to American Developers of New Jersey, Inc. as a result of his inability to convey good title.
8. After American Developers of New Jersey, Inc. refused to close without good title, Lushis referred Sklodowsky to Defendant, Joseph T. Nanovic, Esq. (hereinafter Nanovic) for legal representation. Joseph T. Nanovic, Esq. is an attorney at law in the Commonwealth of Pennsylvania with an office in Macungie, Pennsylvania. Both Lushis and Nanovic advised Sklodowsky to file suit against American Developers of New Jersey, Inc. to recover the \$85,000.00 deposit paid into escrow by ADNJ for its purported breach of the contract of sale.
9. Sklodowsky retained Nanovic to represent him on such suit and Nanovic, who is not licensed to practice law in the State of New Jersey, engaged Defendant, Daniel J. Baurkot, Esq., (hereinafter Baurkot) to represent Sklodowsky as trial counsel. Daniel J. Baurkot, Esq. is an attorney at law in the State of New Jersey with offices in Basking Ridge, New Jersey.

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10. Baurkot instituted suit in the Superior Court of New Jersey on behalf of Sklodowsky against American Developers of New Jersey, LLC, seeking recovery of the contract deposit. ADNJ filed an Answer and Counterclaim requesting return of the deposit and compensatory damages for breach of contract. ADNJ also filed Third Party Complaints against Lushis, and his law firm, Defendant, Tallman, Hudders & Sorrentino, as well as Joanne Sklodowsky. The complete caption of the case was *Paul G. Sklodowsky, Plaintiff v. American Developers of New Jersey, Inc., Defendant/Third Party Plaintiff v. John F. Lushis, Jr., Joanne Sklodowsky, and Tallman, Hudders & Sorrentino, Third Party Defendants., Docket No. HNT-L-459-04.*

11. In its pleadings, ADNJ claimed, among other matters, that Sklodowsky and his wife, Joanne Sklodowsky, had conspired to willfully withhold their marriage and her marital status from ADNJ to the detriment and damage of ADNJ.

12. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised Plaintiff that it was appropriate litigation strategy to not file a claim of professional negligence against Lushis and his law firm. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised Plaintiff that it was appropriate litigation strategy to refuse to waive his claim of privilege concerning his confidential communications with Lushis, even though such communications would demonstrate that he had not colluded with his wife.

13. Plaintiff relied on the advice of Nanovic and Baurkot, who did not assert a claim by Sklodowsky against Lushis. They also successfully resisted requests and motions by ADNJ to obtain access to confidential communications between Lushis and Sklodowsky.
14. In February 2007, Sklodowsky suspected that his attorneys were not looking out for his best interests. Sklodowsky discharged Lushis and Baurkot and retained new counsel. When the lawsuit came on for trial before the Honorable Stephen Rubin J.S.C., in April 2007, the Plaintiff settled with ADNJ because it was likely that he could not win on his claim for the deposit, since he could not show that he could deliver good title to the property at closing as he had warranted under his contract. Additionally, he faced a charge of fraud and collusion with his wife that he could not effectively rebut without testimony concerning the advice of Lushis. Not only had the Trial Court ruled that the contract claim concerning delivery of good title at closing would be litigated but it also had ruled that the issue of whether Sklodowsky and his wife had "intentionally manipulated her right of veto to willfully frustrate the contract in violation of the covenant of good faith and fair dealing while the contract was in effect" would be litigated. Faced with a litigation catastrophe, Sklodowsky chose to reduce his losses and exposure.
15. John F. Lushis, Esq., Joseph T. Nanovic and Daniel J. Baurkot, Esq. attorneys at law, agreed to represent Plaintiff concerning the sale of his real estate and

litigation related to the sale of the real estate. Defendants held themselves out to the public as attorneys with expertise real estate and litigation law.

16. Defendants owed to Plaintiff duties of care to properly advise and represent plaintiff in a skillful and diligent manner and to place the interests of Plaintiff over their interests and the interests of others.

17. Defendants, by various errors, omissions, and commissions, deviated from the applicable standards of care for legal professionals in their representation of Plaintiff. Such deviations included, but were not limited to the following:

- a. The advice of John Lushis, Esq. to Plaintiff to enter into a contract without the agreement of his spouse to join in the transaction notwithstanding her spousal rights under New Jersey law.
- b. The unauthorized practice of law by Lushis and Nanovic in New Jersey.
- c. The advice of Defendants to Plaintiff to pursue litigation for the return of a deposit in a real estate transaction in which Plaintiff could not deliver good title as he had represented.
- d. The advice of Baurkot and Nanovic to Plaintiff to refrain from assertion of a claim against Lushis for professional negligence.
- e. The advice of Baurkot and Nanovic to Plaintiff to maintain the confidentiality of his communications with Lushis.
- f. The placement by Nanovic and Baurkot of their interests and the interests of Lushis over those of Plaintiff.
- g. The billing of unnecessary and unreasonable legal fees to Plaintiff.

18. As a direct and proximate result of the negligence of the defendants, plaintiff has suffered damages, including the payment of damages to ADNJ and attorney fees.

Wherefore, Plaintiff requests judgment against all Defendants for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed to Defendants by Plaintiff.

**COUNT TWO
(Breach of Contract)**

- 19. Plaintiff repeats the allegations of Count One.
- 20. Some of the charges for legal services billed to Plaintiff by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were unnecessary and unreasonable.
- 21. Some of the charges for services billed to Plaintiff by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were charges for which they agreed they would not bill Plaintiff.
- 22. Defendant's actions constitute a breach of contract and breach of the requirement that charges for legal services must be reasonable.
- 23. As a result of Defendants' breach of contract, the Plaintiff has been damaged.

Wherefore, Plaintiff requests judgment Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed to Defendants by Plaintiff.

**COUNT THREE
(BREACH OF FIDUCIARY DUTY)**

- 24. Plaintiff repeats the allegations of Count One and Two.

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25. Joseph Nanovic, Esq., while acting as attorney for Sklodowsky, proposed in 2006 to enter into a Joint Venture Agreement with Sklodowsky concerning the sale and development of the approximate 43 acre parcel of land in Kingwood Township. Under the terms of agreement, Nanovic would obtain a \$100,000.00 line of credit secured by real estate owned by him and Sklodowsky would give a mortgage on his real property in the amount of \$100,000.00 to Nanovic to secure the payment of the \$100,000.00. A copy of the proposed agreement signed by Nanovic is attached as Exhibit A.

26. Although Sklodowsky never agreed to sign the proposed Joint Venture agreement, Nanovic obtained the \$100,000.00 line of credit from East Penn Bank. In connection with his application for the loan, he prepared a letter for the signature of Sklodowsky dated April 24, 2006 to East Penn Bank concerning his representation of Sklodowsky and the terms of payment of legal fees under his retainer agreement with Sklodowsky. This letter was prepared by Nanovic to induce East Penn Bank to give him a \$100, 000.00 line of credit.

27. Although no written joint venture agreement was signed, Nanovic undertook actions concerning the development of the land with expectation that he would be paid for his services and be entitled to share in the proceeds of land development.

28. The signed proposal presented by Nanovic to Sklodowsky for his signature and Nanovic's engagement in a business relationship violated the requirements New

Jersey Rule of Professional Conduct 1.8 as well as Pennsylvania Rule of Professional Conduct Rule 1.8.

29. After securing the line of credit, Nanovic applied some of the proceeds of the loan to attorney fees due and owing to him and Baurkot and not towards the development of the land.

30. The aforesaid actions of Nanovic constitute a breach of the fiduciary duty he owed to Plaintiff.

31. As a result of Nanovic's breach of fiduciary duty, the Plaintiff has been damaged.

Wherefore, Plaintiff requests judgment against including disgorgement of the legal fees he paid himself and Baurkot in violation of his fiduciary duty Defendant, Joseph T. Nanovic, Esq. for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including disgorgement of the legal fees he paid himself and Baurkot in violation of his fiduciary duties.

CERTIFICATION

Pursuant to *New Jersey Court Rule 4:5-1*, this matter in controversy is related to the appeal of the dismissal of a third party complaint in Paul G. Sklodowsky, Plaintiff v. American Developers of New Jersey, Inc. Defendant/Third Party Plaintiff v. John F. Lushis, Jr., Joanne Sklodowsky, and Tallman, Hudders & Sorrentino, Third Party Defendants, Docket No. HNT-L-459-04 (A-5085-06T2) I know of no other parties that should be joined in the above action or of any other related or contemplated legal proceedings.

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JURY DEMAND

The Plaintiff, Paul G. Sklodowsky, demands trial by a jury on all of the triable issues of this complaint, pursuant to *Rule 1:8-2(b)* and *Rule 4:35-1(a)*.

DEMAND FOR DISCOVERY OF INSURANCE COVERAGE

Pursuant to *New Jersey Court Rule 4:10-2(b)*, demand is made that Defendants, disclose to Plaintiff's attorney whether or not there are any insurance agreements or policies under which any person or firm carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or indemnify or reimburse for payments made to satisfy the judgment and provide Plaintiff's attorney with true copies of those insurance agreements or policies, including, but not limited to, any and all declaration sheets. This demand shall include and cover not only primary coverage, but also any and all excess, catastrophe and umbrella policies.

Mikulski & Mitchell, LLC

Dated: October 19, 2007

Thaddens P. Mikulski, Jr.

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Page: 1 Document Name: Untitled

ARM8700 ARCHIVAL MANAGEMENT INFORMATION SYSTEM DATE: 01/06/10
PAGE 0001 OF 0001 CASE DOCKET INQUIRY TIME: 14:41

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000635 07
TITLE: SKLODOWSKY VS LUSHIS
FILED: 10 22 2007 CASE TYPE: 607 PROFESS LIAB IMPOUND: N
DISP : DISMISSED DISP DATE: 05 10 2008 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY	MLT	ORDR	JDGE
			TYP AFL	F	T	STAT ID
10 22 2007	COMP JRY DEMAND	SKLODOWSKY	G PF	IND	N	Y
05 10 2008	CRT INIT TO DSM	COURT INITIATED				N Y GR

AR000029 END OF SEARCH

PF24-BACKLOAD CASE

PF7-PRIOR PF8-NEXT

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DA 76

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JOSEPH T. NANOVIC,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	No. _____
	:	
PAUL G. SKLODOWSKY,	:	
IRON PRO ERECTORS, LLC, and	:	
JOANNE SKLODOWSKY,	:	
Defendants	:	

COMPLAINT

The Parties

1. Plaintiff, Joseph T. Nanovic, is a citizen of Pennsylvania residing at 308 Windsor Place, Macungie, Lehigh County, Pennsylvania 18062.

2. Defendants, Paul G. Sklodowsky and Joanne Sklodowsky, husband and wife, are citizens of New Jersey residing at 23 Union Road, Frenchtown, Hunterdon County, New Jersey 08825.

3. Defendant, Iron Pro Erectors, LLC is a New Jersey Limited Liability Company with its main office at 23 Union Road, Frenchtown, Hunterdon County, New Jersey 08825.

Jurisdiction and Venue

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 2201 as an actual controversy exists between the Plaintiff and the Defendants; and 28 U.S.C. Section 1332 as the Plaintiff and the Defendants are citizens of different states and the amount in controversy is in excess of \$75,000.00, exclusive of interest and costs.

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5. Venue lies in this District pursuant to 28 U.S.C. 1391(a) as the Plaintiff resides at 308 Windsor Place, Macungie, Lehigh County, Pennsylvania 18062.

Controversy

6. Plaintiff was hired by Defendants to represent them in various legal and business matters. Attached as Exhibits "A", "B", and "C" respectively, copies of which are attached hereto, are the initial December 17, 2003, Agreement for Legal Services, a September 16, 2004, written agreement and an April 26, 2006 ratification of that agreement. In addition to the attached written agreements, there have been various oral agreements between the parties as to other legal and business representation for Defendants by Plaintiff and others.

7. In all these agreements, whether written or oral, Plaintiff agreed to provide legal and business representation to Defendants and Defendants agreed to pay for that legal and business representation.

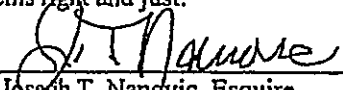
8. Plaintiff on his part has duly provided legal and business representation to Defendants.

9. Defendants have not performed their part of the agreements and have failed and neglected to pay Plaintiff for all of Plaintiff's legal and business representation.

10. By reason of such breach, Plaintiff has suffered damages exceeding \$75,000.00, exclusive of interest and costs.

WHEREFORE, Plaintiff demands judgment against defendant:

- a) In the sum of \$105,433.71; and
- b) Such other relief as this Court deems right and just.



Joseph T. Nanovic, Esquire
308 Windsor Place
Macungie, PA 18062
ID # 32421
610-966-0621
610-966-6266 (fax)
janovic@earthlink.net

Dated: 8/13/07

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH T. NANOVIC,

Plaintiff,

v.

PAUL G. SKLODOWSKY, IRON PRO
ERECTORS, LLC, and JOANNE
SKLODOWSKY

Defendants

and

PAUL G. SKLODOWSKY

Counterclaimant and
Third Party Plaintiff

v.

DANIEL J. BAURKOT, ESQ.,
JOHN F. LUSHIS, JR., ESQ. and
TALLMANN, HUDDERS &
SORRENTINO, A Professional
Corporation

Third Party Defendants

Civil Action No:
CV-07-3326

ANSWER OF DEFENDANTS
PAUL G. SKLODOWSKY,
IRON PRO ERECTORS, LLC
JOANNE SKLODOWSKY

and

COUNTERCLAIM AND
THIRD PARTY COMPLAINT
OF PAUL G. SKLODOWSKY

ANSWER of PAUL G. SKLODOWSKY, IRON PRO ERECTORS, LLC, and JOANNE SKLODOWSKY

Defendants for their answer to the Complaint state:

1. Admitted.
2. Admitted.
3. Admitted.
4. Denied.
5. Denied.
6. Admitted in part and denied in part. Defendant, Paul G. Sklodowsky, admits the authenticity of Exhibits A & B. Defendant, Paul G. Sklodowsky, denies that Exhibit C constituted ratification of any agreement. Defendant, Joanne Sklodowsky, denies that Plaintiff represented her on any legal matters. Defendant, Iron Pro Erectors, LLC, admits that Plaintiff performed services for it under the terms of Exhibit A. Without knowing the specific allegations of any alleged "oral agreements", Defendants can neither admit or deny same and therefore deny them. Defendants deny any allegations not specifically admitted.
7. Defendants incorporate their response to Paragraph Number Six (6).
Defendants deny any allegations not specifically admitted.
8. Defendants incorporate their response to Paragraph Number Six (6).
Defendants deny any allegations not specifically admitted.
9. Denied.
10. Denied.

FIRST SEPERATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPERATE DEFENSE

Plaintiff's claim is barred by his professional negligence and the professional negligence of Daniel Baurkot, Esq.

THIRD SEPERATE DEFENSE

Plaintiff's claim is barred by his breach of fiduciary duty and that of Daniel Baurkot, Esq.

FOURTH SEPERATE DEFENSE

The legal fees charged were unreasonable, unnecessary and excessive.

FIFTH SEPERATE DEFENSE

The assignment of fees by Daniel Baurkot, Esq. to Plaintiff is void or unenforceable.

SIXTH SEPERATE DEFENSE

Plaintiff cannot recover on account of his breach of contract and that of Daniel Baurkot, Esq.

SEVENTH SEPERATE DEFENSE

The quality of legal services do not justify the fees charged.

EIGHTH SEPERATE DEFENSE

The legal services performed were inadequate for the results obtained.

WHEREFORE, Defendants ask that the complaint be dismissed and they be awarded costs.

COUNTERCLAIM OF PAUL G. SKLODOWSKY

PAUL G. SKLODOWSKY by way of counterclaim against the Plaintiff and

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Counterclaim Defendant, **JOSEPH T. NANOVIC, ESQ.**, states

COUNT ONE

(Professional Negligence)

1. Third Party Defendant, John F. Lushis, Jr. (hereinafter "Lushis") is an attorney-at-law of the Commonwealth of Pennsylvania. He is employed by the Third Party Defendant Law Firm of Tallman, Hudders & Sorrentino, a Professional Corporation, with offices in Allentown, Pennsylvania. All conduct of Lushis described in this Counterclaim was taken within the scope of his employment with Tallman, Hudders & Sorrentino.
2. In 2003, the Defendant, Paul G. Sklodowsky (hereinafter "Sklodowsky") was referred to Lushis for legal representation on the proposed sale of approximately 43 acres of land that Sklodowsky owned in Kingwood Township, New Jersey. Lushis agreed to represent Sklodowsky on the sale of his real property. He advised Defendant that, as necessary, he would consult with members of his firm, who were admitted to the practice of law in the State of New Jersey.
3. Sklodowsky advised Lushis that he held title to the real property in his own name and that he wanted to transfer the property without the involvement of his wife, with whom he was having marital difficulties. He requested Lushis to advise him what rights his wife had in the property and whether he could transfer the property without the consent of his wife. Lushis advised him that he could transfer the property without the consent of his wife but that she, as his spouse, would have an interest in the proceeds of the sale.
4. Sklodowsky relied upon the verbal and written advice and representations of Lushis concerning the rights of his wife and entered into a contract on

November 11, 2003 to sell his real estate to American Developers of New Jersey, Inc. (hereinafter sometimes "ADNJ").

5. Under New Jersey law, Sklodowsky could not transfer the property without the consent of his wife, as the marital residence was located on the property. Sklodowsky's wife, Joanne Sklodowsky, was a necessary signatory to any deed of transfer in order for her husband to deliver good title to ADNJ, as he had warranted in his contract of sale with ADNJ.
6. Plaintiff, upon the advice of Lushis, entered into a contract for the sale of real estate under which he agreed to deliver to ADNJ, the purchaser, good title at closing. However, Defendant could not deliver good title because his wife did not and would not consent to transfer her interest in the property to American Developers of New Jersey, Inc.
7. Sklodowsky was unable to consummate the sale of the approximately 43 acres of land to American Developers of New Jersey, Inc. as a result of his inability to convey good title.
8. After American Developers of New Jersey, Inc. refused to close without good title, Lushis referred Sklodowsky to Plaintiff, Joseph T. Nanovic, Esq. (hereinafter "Nanovic") for legal representation. Both Lushis and Nanovic advised Sklodowsky to file suit against American Developers of New Jersey, Inc. to recover the \$85,000.00 deposit paid into escrow by ADNJ for its purported breach of the contract of sale.
9. Sklodowsky retained Nanovic to represent him on such suit, and Nanovic, who is not licensed to practice law in the State of New Jersey, engaged Third Party Defendant, Daniel J. Baurkot, Esq. (hereinafter "Baurkot") to represent

Sklodowsky as trial counsel. Daniel J. Baurkot, Esq. is an attorney-at-law in the State of New Jersey and Commonwealth of Pennsylvania with offices in Basking Ridge, New Jersey.

10. Baurkot instituted suit in the Superior Court of New Jersey on behalf of Sklodowsky against American Developers of New Jersey, LLC, seeking recovery of the contract deposit. ADNJ filed an Answer and Counterclaim requesting return of the deposit and compensatory damages for breach of contract. ADNJ also filed Third Party Complaints against Lushis and his law firm, Defendant, Tallman, Hudders & Sorrentino, as well as Joanne Sklodowsky. The complete caption of the case was *Paul G. Sklodowsky, Plaintiff v. American Developers of New Jersey, Inc., Defendant/Third Party Plaintiff v. John F. Lushis, Jr., Joanne Sklodowsky, and Tallman, Hudders & Sorrentino, Third Party Defendants., Docket No. HNT-L-459-04.*
11. In its pleadings, ADNJ claimed, among other matters, that Sklodowsky and his wife, Joanne Sklodowsky, had conspired to willfully withhold their marriage and her marital status from ADNJ to the detriment and damage of ADNJ.
12. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised that Defendant it was appropriate litigation strategy to not file a claim of professional negligence against Lushis and his law firm. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised that it Defendant was appropriate litigation strategy to refuse to waive his claim of privilege concerning his confidential communications with Lushis, even though such communications would demonstrate that he had not colluded with his wife.

13. Defendant relied on the advice of Nanovic and Baurkot, who did not assert a claim by Sklodowsky against Lushis. They also successfully resisted requests and motions by ADNJ to obtain access to confidential communications between Lushis and Sklodowsky.
14. In February 2007, Sklodowsky suspected that his attorneys were not looking out for his best interests. Sklodowsky discharged Lushis and Baurkot and retained new counsel. When the lawsuit came on for trial before the Honorable Stephen Rubin J.S.C., in April 2007, the Defendant settled with ADNJ because it was likely that he could not win on his claim for the deposit, since he could not show that he could deliver good title to the property at closing as he had warranted under his contract. Additionally, he faced a charge of fraud and collusion with his wife that he could not effectively rebut without testimony concerning the advice of Lushis. Not only had the Trial Court ruled that the contract claim concerning delivery of good title at closing would be litigated but it also had ruled that the issue of whether Sklodowsky and his wife had "intentionally manipulated her right of veto to willfully frustrate the contract in violation of the covenant of good faith and fair dealing while the contract was in effect" would be litigated. Faced with a litigation catastrophe, Sklodowsky chose to reduce his losses and exposure.
15. John F. Lushis, Esq., Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq., attorneys-at-law, agreed to represent Defendant concerning the sale of his real estate and litigation related to the sale of the real estate. These attorneys held themselves out to the public as attorneys with expertise real estate and litigation law.

16. Joseph T. Nanovic as well as John F. Lushis, Esq. and Daniel J. Baurkot, Esq., owed to duties of care to properly advise and represent Plaintiff in a skillful and diligent manner and to place the interests of Plaintiff over their interests and the interests of others.
17. John F. Lushis, Esq., Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq. by various errors, omissions, and commissions, deviated from the applicable standards of care for legal professionals in their representation of Defendant. Such deviations included, but were not limited to the following:
- a. The advice of John Lushis, Esq. to to enter into a contract without the agreement of his spouse to join Defendant in the transaction notwithstanding her spousal rights under New Jersey law.
 - b. The unauthorized practice of law by Lushis and Nanovic in New Jersey.
 - c. The advice to Defendant to pursue litigation for the return of a deposit in a real estate transaction in which Plaintiff could not deliver good title as he had represented.
 - d. The advice of Baurkot and Nanovic to Defendant to refrain from assertion of a claim against Lushis for professional negligence.
 - e. The advice of Baurkot and Nanovic to Defendant to maintain the confidentiality of his communications with Lushis.
 - f. The placement by Nanovic and Baurkot of their interests and the interests of Lushis over those of Defendant.
 - g. The billing of unnecessary and unreasonable legal fees to Defendant.

18. As a direct and proximate result of the acts and negligence of Plaintiff, Defendant, Paul G. Sklodowsky, has suffered damages, including the payment of damages to ADNJ and the need to hire counsel and incur attorney fees.

WHEREFORE, Plaintiff requests judgment against Plaintiff for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed to Defendants by Plaintiff.

COUNT TWO

(Breach of Contract)

19. Defendant, Paul G. Sklodowsky, repeats the allegations of Count One.

20. Plaintiff has asserted that part of the legal fees on which he sues are fees of Daniel J. Baurkot, Esq. rendered to defendant, Paul G. Sklodowsky, Esq. Some of the charges for legal services billed to Plaintiff by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were unnecessary and unreasonable.

21. Some of the charges for services billed to Defendant by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were charges for which they agreed they would not bill Defendant.

22. Plaintiff's actions and those of Daniel Baurkot, Esq. constitute a breach of contract and breach of the requirement that charges for legal services must be reasonable.

23. As a result of Plaintiff's breach of contract, the Defendant has been damaged.

WHEREFORE, Plaintiff requests judgment against Joseph T. Nanovic, Esq. together with attorney's fees, and costs of suit, and such other and further relief

as the court deems proper, including a declaration that no fees are owed to Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq.

COUNT THREE

(BREACH OF FIDUCIARY DUTY)

24. Defendant repeats the allegations of Count One and Two.

25. Joseph Nanovic, Esq., while acting as attorney for Sklodowsky, proposed in 2006 to enter into a Joint Venture Agreement with Sklodowsky concerning the sale and development of the approximate 43 acre parcel of land in Kingwood Township. Under the terms of agreement, Nanovic would obtain a \$100,000.00 line of credit secured by real estate owned by him and Sklodowsky would give a mortgage on his real property in the amount of \$100,000.00 to Nanovic to secure the payment of the \$100,000.00.

26. Although Sklodowsky never agreed to sign the proposed Joint Venture agreement, Nanovic obtained the \$100,000.00 line of credit from East Penn Bank. In connection with his application for the loan, he prepared a letter for the signature of Sklodowsky dated April 24, 2006 to East Penn Bank concerning his representation of Sklodowsky and the terms of payment of legal fees under his retainer agreement with Sklodowsky. This letter was prepared by Nanovic to induce East Penn Bank to give him a \$100,000.00 line of credit.

27. Although no written joint venture agreement was signed, Nanovic undertook actions concerning the development of the land with expectation that he would be paid for his services and be entitled to share in the proceeds of land development.

28. The signed proposal presented by Nanovic to Sklodowsky for his signature and Nanovic's engagement in a business relationship violated the requirements New Jersey Rule of Professional Conduct 1.8 as well as Pennsylvania Rule of Professional Conduct Rule 1.8.

29. After securing the line of credit, Nanovic applied some of the proceeds of the loan to attorney fees due and owing to him and Baurkot and not towards the development of the land.

30. The aforesaid actions of Nanovic constituted negligence and breach of the fiduciary duties he owed to Defendant.

31. As a result of Nanovic's negligence and breach of fiduciary duty, the Defendant has been damaged.

WHEREFORE, Defendant, Paul G. Sklodowsky, requests judgment against Joseph T. Nanovic, Esq including disgorgement of the legal fees he paid himself and Baurkot in violation of his fiduciary duty, and such other relief this Court deems proper.

COUNT FOUR

(Professional Negligence)

32. Defendant repeats the allegations of Count One, Two and Three.

33. Joseph Nanovic, Esq, agreed in the course of his representation of Defendant, Paul G. Sklodowsky, to seek recovery and file suit if necessary, on behalf of Paul G. Sklodowsky monies owed to him, by his son on the sale of real property by Paul G. Sklodowsky to his son.

34. Plaintiff, Joseph Nanovic, Esq failed to undertake any action on the claim that Defendant had against his son for breach of contract. As a result of the negligence of

the Plaintiff, Joseph Nanovic, Esq., who failed to act, the statute of limitations on Defendant's claim against his son lapsed, thereby preventing Defendant from recovering the sum of \$75,000.00.

35. As a direct and proximate result of the negligence of the Plaintiff, Joseph Nanovic, Esq., defendant has suffered damages.

WHEREFORE, Defendant Paul G. Sklodowsky requests judgment against Joseph Nanovic, Esq., for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed by Defendant to Plaintiff.

**THIRD PARTY COMPLAINT OF PAUL G. SKLODOWSKY
AGAINST DANIEL J. BAURKOT, ESQ., JOHN F. LUSHIS, JR., ESQ., TALLMAN
HUDDERS & SORRENTINO, A PROFESSIONAL CORPORATION,**

PAUL G. SKLODOWSKY by way of Third Party Complaint against Third Party Defendants, **DANIEL J. BAURKOT, ESQ. JOHN J. LUSHIS, JR., ESQ. AND TALLMAN, HUDDERS & SORRENTINO, A PROFESSIONAL CORPORATION,** states

COUNT ONE

(Professional Negligence)

1. Third Party Defendant, John F. Lushis, Jr. (hereinafter "Lushis") is an attorney-at-law of the Commonwealth of Pennsylvania. He is employed by the Third Party Defendant Law Firm of Tallman, Hudders & Sorrentino, a Professional Corporation, with offices in Allentown, Pennsylvania. All conduct of Lushis described in this Counterclaim was taken within the scope of his employment with Tallman, Hudders & Sorrentino.

2. In 2003, the Defendant, Paul G. Sklodowsky (hereinafter "Sklodowsky") was referred to Lushis for legal representation on the proposed sale of approximately 43 acres of land that Third Party Plaintiff owned in Kingwood Township, New Jersey. Lushis agreed to represent Sklodowsky on the sale of his real property. He advised Defendant that, as necessary, he would consult with members of his firm, who were admitted to the practice of law in the State of New Jersey.
3. Sklodowsky advised Lushis that he held title to the real property in his own name and that he wanted to transfer the property without the involvement of his wife, with whom he was having marital difficulties. He requested Lushis to advise him what rights his wife had in the property and whether he could transfer the property without the consent of his wife. Lushis advised him that he could transfer the property without the consent of his wife but that she, as his spouse, would have an interest in the proceeds of the sale.
4. Sklodowsky relied upon the verbal and written advice and representations of Lushis concerning the rights of his wife and entered into a contract on November 11, 2003 to sell his real estate to American Developers of New Jersey, Inc. (hereinafter sometimes "ADNJ").
5. Under New Jersey law, Sklodowsky could not transfer the property without the consent of his wife, as the marital residence was located on the property. Sklodowsky's wife, Joanne Sklodowsky, was a necessary signatory to any deed of transfer in order for her husband to deliver good title to ADNJ, as he had warranted in his contract of sale with ADNJ.
6. Plaintiff, upon the advice of Lushis, entered into a contract for the sale of real estate under which he agreed to deliver to ADNJ, the purchaser, good title at

closing. However, Third Party Plaintiff could not deliver good title because his wife did not and would not consent to transfer her interest in the property to American Developers of New Jersey, Inc.

7. Sklodowsky was unable to consummate the sale of the approximately 43 acres of land to American Developers of New Jersey, Inc. as a result of his inability to convey good title.
8. After American Developers of New Jersey, Inc. refused to close without good title, Lushis referred Sklodowsky to Plaintiff, Joseph T. Nanovic, Esq. (hereinafter "Nanovic") for legal representation. Both Lushis and Nanovic advised Sklodowsky to file suit against American Developers of New Jersey, Inc. to recover the \$85,000.00 deposit paid into escrow by ADNJ for its purported breach of the contract of sale.
9. Sklodowsky retained Nanovic to represent him on such suit, and Nanovic, who is not licensed to practice law in the State of New Jersey, engaged Third Party Defendant, Daniel J. Baurkot, Esq. (hereinafter "Baurkot") to represent Sklodowsky as trial counsel. Daniel J. Baurkot, Esq. is an attorney-at-law in the State of New Jersey and Commonwealth of Pennsylvania with offices in Basking Ridge, New Jersey.
10. Baurkot instituted suit in the Superior Court of New Jersey on behalf of Sklodowsky against American Developers of New Jersey, LLC, seeking recovery of the contract deposit. ADNJ filed an Answer and Counterclaim requesting return of the deposit and compensatory damages for breach of contract. ADNJ also filed Third Party Complaints against Lushis and his law firm, Defendant, Tallman, Hudders & Sorrentino, as well as Joanne Sklodowsky. The complete caption of the case was *Paul G. Sklodowsky,*

*Plaintiff v. American Developers of New Jersey, Inc., Defendant/Third Party Plaintiff
v. John F. Lushis, Jr., Joanne Sklodowsky, and Tallman, Hudders & Sorrentino, Third
Party Defendants., Docket No. HNT-L-459-04.*

11. In its pleadings, ADNJ claimed, among other matters, that Sklodowsky and his wife, Joanne Sklodowsky, had conspired to willfully withhold their marriage and her marital status from ADNJ to the detriment and damage of ADNJ.
12. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised Third Party Plaintiff that it was appropriate litigation strategy to not file a claim of professional negligence against Lushis and his law firm. Despite the affirmative claims of ADNJ against Sklodowsky, including allegations of fraud and collusion, Baurkot and Nanovic advised Third Party Plaintiff that it was appropriate litigation strategy to refuse to waive his claim of privilege concerning his confidential communications with Lushis, even though such communications would demonstrate that he had not colluded with his wife.
13. Third Party Plaintiff relied on the advice of Nanovic and Baurkot, who did not assert a claim by Sklodowsky against Lushis. They also successfully resisted requests and motions by ADNJ to obtain access to confidential communications between Lushis and Sklodowsky.
14. In February 2007, Sklodowsky suspected that his attorneys were not looking out for his best interests. Sklodowsky discharged Lushis and Baurkot and retained new counsel. When the lawsuit came on for trial before the Honorable Stephen Rubin J.S.C., in April 2007, the Third Party Plaintiff settled with ADNJ because it was likely that he could not win on his claim for the deposit, since he

could not show that he could deliver good title to the property at closing as he had warranted under his contract. Additionally, he faced a charge of fraud and collusion with his wife that he could not effectively rebut without testimony concerning the advice of Lushis. Not only had the Trial Court ruled that the contract claim concerning delivery of good title at closing would be litigated but it also had ruled that the issue of whether Sklodowsky and his wife had "intentionally manipulated her right of veto to willfully frustrate the contract in violation of the covenant of good faith and fair dealing while the contract was in effect" would be litigated. Faced with a litigation catastrophe, Sklodowsky chose to reduce his losses and exposure.

15. John F. Lushis, Esq., Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq., attorneys-at-law, agreed to represent Third Party Plaintiff concerning the sale of his real estate and litigation related to the sale of the real estate. Third Party Defendants held themselves out to the public as attorneys with expertise real estate and litigation law.

16. John F. Lushis, Esq., Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq., owed to Third Party Plaintiff duties of care to properly advise and represent Third Party Plaintiff in a skillful and diligent manner and to place the interests of Third Party Plaintiff over their interests and the interests of others.

17. John F. Lushis, Esq., Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq. by various errors, omissions, and commissions, deviated from the applicable standards of care for legal professionals in their representation of Third Party Plaintiff. Such deviations included, but were not limited to the following:

- a. The advice of John Lushis, Esq. to Third Party Plaintiff to enter into a contract without the agreement of his spouse to join in the transaction notwithstanding her spousal rights under New Jersey law.
- b. The unauthorized practice of law by Lushis and Nanovic in New Jersey.
- c. The advice of Defendants to Third Party Plaintiff to pursue litigation for the return of a deposit in a real estate transaction in which Third Party Plaintiff could not deliver good title as he had represented.
- d. The advice of Baurkot and Nanovic to Third Party Plaintiff to refrain from assertion of a claim against Lushis for professional negligence.
- e. The advice of Baurkot and Nanovic to Third Party Plaintiff to maintain the confidentiality of his communications with Lushis.
- f. The placement by Nanovic and Baurkot of their interests and the interests of Lushis over those of Third Party Plaintiff.
- g. The billing of unnecessary and unreasonable legal fees to Third Party Plaintiff.

18. As a direct and proximate result of the acts and negligence of Third Party Plaintiff Defendants, Paul G. Sklodowsky, has suffered damages, including the payment of damages to ADNJ and the need to hire counsel and incur attorney fees.

19. In addition to damages owed to Defendant, Paul G. Sklodowsky by Third Party Defendant Daniel J. Baurkot, Esq. for his negligence, Daniel J. Baurkot, Esq., is liable to Defendant, Paul G. Sklodowsky for all or part of the claim asserted by Plaintiff against him, as Plaintiff sues Sklodowsky on assignment

for the fees of Daniel Baurkot, Esq, and Daniel Baurkot's negligence defeats and/or reduces the claim for his fees upon which Plaintiff's suit is brought.

20. In addition to those damages owed to Third Party Plaintiff, Paul G. Sklodowsky by Third Party Defendant, John J. Lushis, Esq. for his negligence, John J. Lushis, Esq., is liable to Third Party Plaintiff, Paul G. Sklodowsky, for all or part of the claim asserted by Plaintiff against him since the fees Sklodowsky incurred in hiring Nanovic and Lushis were directly caused by the negligence of Lushis. Third Party Defendant Tallman, Hudders & Sorrentino, LLC is liable to Paul G. Sklodowsky for the acts of its agent, John Lushis, Esq.

WHEREFORE, Third Party Plaintiff, Paul G. Sklodowsky, requests judgment against Daniel J. Baurkot, Esq., John F. Lushis, Jr., Esq., and Tallman, Hudders and Sorrentino, for damages, together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed to Joseph T. Nanovic, Esq. and Daniel J. Baurkot, Esq. by Paul G. Sklodowsky.

COUNT TWO

(Breach of Contract)

21. Third Party Plaintiff, Paul G. Sklodowsky, repeats the allegations of Count One.

22. Plaintiff has asserted that part of the legal fees on which he sues are fees of Daniel J. Baurkot, Esq. rendered to defendant, Paul G. Sklodowsky, Esq. Some of the charges for legal services billed to Third Party Plaintiff by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were unnecessary and unreasonable.

23. Some of the charges for services billed to Third Party Plaintiff by Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq. were charges for which they agreed they would not bill Third Party Plaintiff.

24. Plaintiff's actions and those of Daniel Baurkot, Esq. constitute a breach of contract and breach of the requirement that charges for legal services must be reasonable.

25. As a result of Third Party Defendant's breach of contract, the Third Party Plaintiff has been damaged.

WHEREFORE, Third Party Plaintiff requests judgment against Joseph T. Nanovic, Esq. and Daniel Baurkot, Esq. together with attorney's fees, and costs of suit, and such other and further relief as the court deems proper, including a declaration that no fees are owed to Daniel Baurkot, Esq. and Joseph T. Nanovic, Esq.

COUNT THREE

(BREACH OF FIDUCIARY DUTY)

26. Third Party Plaintiff repeats the allegations of Count One and Two.

27. Joseph Nanovic, Esq., while acting as attorney for Sklodowsky, proposed in 2006 to enter into a Joint Venture Agreement with Sklodowsky concerning the sale and development of the approximate 43 acre parcel of land in Kingwood Township. Under the terms of agreement, Nanovic would obtain a \$100,000.00 line of credit secured by real estate owned by him and Sklodowsky would give a mortgage on his real property in the amount of \$100,000.00 to Nanovic to secure the payment of the \$100,000.00.

28. Although Sklodowsky never agreed to sign the proposed Joint Venture agreement, Nanovic obtained the \$100,000.00 line of credit from East Penn Bank. In connection with his application for the loan, he prepared a letter for the signature of Sklodowsky dated April 24, 2006 to East Penn Bank concerning his representation of Sklodowsky and the terms of payment of legal fees under his retainer agreement with Sklodowsky. This letter was prepared by Nanovic to induce East Penn Bank to give him a \$100,000.00 line of credit.

29. Although no written joint venture agreement was signed, Nanovic undertook actions concerning the development of the land with expectation that he would be paid for his services and be entitled to share in the proceeds of land development.

30. The signed proposal presented by Nanovic to Sklodowsky for his signature and Nanovic's engagement in a business relationship violated the requirements New Jersey Rule of Professional Conduct 1.8 as well as Pennsylvania Rule of Professional Conduct Rule 1.8.

31. After securing the line of credit, Nanovic applied some of the proceeds of the loan to attorney fees due and owing to him and Baurkot and not towards the development of the land.

32. The aforesaid actions of Nanovic constitute a breach of the fiduciary duty he owed to Plaintiff in which Daniel Baurkot participated and profited from.

33. As a result of Nanovic's and Baurkot's breach of fiduciary duty for the benefit of both of them, the Third Party Plaintiff has been damaged.

Wherefore, Third Party Plaintiff, Paul G. Sklodowsky, requests judgment against Third Party Defendant, Daniel Baurkot, Esq. including disgorgement of the legal fees

paid to him by Nanovic in violation of his fiduciary duty, and such other relief this Court deems proper.

JURY DEMAND

All Defendants demand trial by a jury.

Mikulski & Mitchell, LLC

Dated: September 2, 2008

/s/ Thaddeus P. Mikulski, Jr.

Thaddeus P. Mikulski, Jr.
Attorney for Paul G. Sklodowsky, Joanne
Sklodowsky, and Iron Pro Erectos, LLC

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JOSEPH T. NANOVIC,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	No. _____
	:	
PAUL G. SKLODOWSKY,	:	
IRON PRO ERECTORS, LLC, and	:	
JOANNE SKLODOWSKY,	:	
Defendants	:	

COMPLAINT

The Parties

1. Plaintiff, Joseph T. Nanovic, is a citizen of Pennsylvania residing at 308 Windsor Place, Macungie, Lehigh County, Pennsylvania 18062.
2. Defendants, Paul G. Sklodowsky and Joanne Sklodowsky, husband and wife, are citizens of New Jersey residing at 23 Union Road, Frenchtown, Hunterdon County, New Jersey 08825.
3. Defendant, Iron Pro Erectors, LLC is a New Jersey Limited Liability Company with its main office at 23 Union Road, Frenchtown, Hunterdon County, New Jersey 08825.

Jurisdiction and Venue

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 2201 as an actual controversy exists between the Plaintiff and the Defendants; and 28 U.S.C. Section 1332 as the Plaintiff and the Defendants are citizens of different states and the amount in controversy is in excess of \$75,000.00, exclusive of interest and costs.

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5. Venue lies in this District pursuant to 28 U.S.C. 1391(a) as the Plaintiff resides at 308 Windsor Place, Macungie, Lehigh County, Pennsylvania 18062.

Controversy

6. Plaintiff was hired by Defendants to represent them in various legal and business matters. Attached as Exhibits "A", "B", and "C" respectively, copies of which are attached hereto, are the initial December 17, 2003, Agreement for Legal Services, a September 16, 2004, written agreement and an April 26, 2006 ratification of that agreement. In addition to the attached written agreements, there have been various oral agreements between the parties as to other legal and business representation for Defendants by Plaintiff and others.

7. In all these agreements, whether written or oral, Plaintiff agreed to provide legal and business representation to Defendants and Defendants agreed to pay for that legal and business representation.

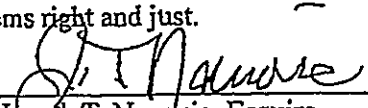
8. Plaintiff on his part has duly provided legal and business representation to Defendants.

9. Defendants have not performed their part of the agreements and have failed and neglected to pay Plaintiff for all of Plaintiff's legal and business representation.

10. By reason of such breach, Plaintiff has suffered damages exceeding \$75,000.00, exclusive of interest and costs.

WHEREFORE, Plaintiff demands judgment against defendant:

- a) In the sum of \$105,433.71; and
- b) Such other relief as this Court deems right and just.


Joseph T. Nanovic, Esquire
308 Windsor Place
Macungie, PA 18062
ID # 32421
610-966-0621
610-966-6266 (fax)
janovic@earthlink.net

Dated: 8/13/07

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH T. NANOVIC,)
) Civil Action
Plaintiff) No. 07-cv-3326
)
vs.)
)
PAUL G. SKLODOWSKY;)
IRON PRO ERECTORS, LLC; and)
JOANNE SKLODOWSKY,)
)
Defendants)
)
vs.)
)
DANIEL J. BAURKOT, ESQUIRE;)
JOHN F. LUSHIS, JR., ESQUIRE;)
TALLMAN, HUDDERS & SORRENTINO,)
A Professional Corporation,)
)
Third-Party Defendants)

O R D E R

NOW, this 22nd day of May, 2009, upon consideration of the following documents:

- (1) Motion of Third-Party Defendants, John F. Lushis and Tallman, Hudders & Sorrentino, P.C., to Dismiss the Third-Party Complaint of Third Party Defendant, Paul G. Sklodowsky Pursuant to Fed.R.Civ.P. 12(b)(6) and 14(a) ("Third-Party Defendants' Motion to Dismiss"), which motion was filed December 30, 2008;
- (2) Brief in Support of Motion of Third-Party Defendants, John F. Lushis and Tallman, Hudders & Sorrentino, P.C., to Dismiss the Third-Party Complaint of Third-Party

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Plaintiff, Paul G. Sklodowsky ("Third-Party Defendants' Brief"), which brief was filed December 30, 2008;

- (3) Response of Third Party Plaintiff, Paul G. Sklodowsky, to Motion of John F. Lushis, Jr., Esquire and Tallmann Hudders & Sorrentino to Dismiss Third Party Complaint ("Third-Party Plaintiff's Response"), which response was filed February 6, 2009; and
- (4) Reply Brief of Third-Party Defendants, John F. Lushis and Tallman, Hudders & Sorrentino, P.C., in Further Support of the Motion to Dismiss the Third-Party Complaint of Paul G. Sklodowsky,¹

IT IS ORDERED that Third-Party Defendants' Motion to Dismiss is granted as unopposed.²

¹ The Motion of Third-Party Defendants, John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, for Leave to File a Reply Brief in Further Support of Their Motion to Dismiss the Third-Party Complaint of Defendant, Paul G. Sklodowsky, With Prejudice, which motion was filed March 11, 2009, attached this reply brief. My April 30, 2009 Order granted leave to file this reply brief, which reply brief was filed May 5, 2009.

² Before resolving a motion to dismiss a third-party complaint, the district court must be certain that the third-party complaint is properly before it. See Fortunato v. May, 2009 U.S. Dist. LEXIS 20587, *16-20 (W.D.Pa. March 16, 2009); Morris v. Lenihan, 192 F.R.D. 484, 486 (E.D.Pa. 2000) (Reed, S.J.). In making this determination, I first consider whether the joinder of the third-party defendants is proper under the impleader rule. If it is, I consider whether this court has subject matter jurisdiction over the joined claims. See Moore's Federal Practice §§ 14.41[1], [3] (3d ed. 2007). Here, as discussed below, third-party plaintiff and third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C. agree that impleader was improper. Accordingly, I must dismiss Count One of the third-party complaint, which asserts claims against third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C.

Federal Rule of Civil Procedure 14(a) authorizes a defendant to serve a third-party complaint "on a nonparty who is or may be liable to it for

(Footnote 2 continued):

IT IS FURTHER ORDERED that Count One of the Third Party Complaint of Paul G. Sklodowsky Against Daniel J. Baurkot, Esq., John F. Lushis, Jr., Esq., Tallman Hudders & Sorrentino, a Professional Corporation, is dismissed without prejudice to properly refile these claims in a separate action.³

IT IS FURTHER ORDERED that third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C. are dismissed as parties to this action.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

(Continuation of footnote 2):

all or part of the claim against it." Thus, it is well-established that a defendant may bring a third-party claim pursuant to Rule 14(a) "only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. If the claim is separate or independent from the main action, impleader will be denied." Federal Deposit Insurance Corporation v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1446 (1990)). See, e.g., Morris, 192 F.R.D. at 488; Resolution Trust Corporation v. Farmer, 836 F.Supp. 1123, 1129-1130 (E.D.Pa. 1993) (Giles, J.). A third-party complaint that does not satisfy Rule 14(a) must be dismissed. See, e.g., Morris, 192 F.R.D. at 492; Cook v. Cook, 559 F.Supp. 218 (E.D.Pa. 1983) (Newcomer, J.).

Here, third-party plaintiff and third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C. agree that impleader was improper under Rule 14(a) because third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C. are not secondarily liable to third-party plaintiff Paul G. Sklodowsky on plaintiff's claim against him. See Third-Party Defendants' Brief at pages 9 and 14-15; Third-Party Plaintiff's Response at pages 1 and 2. Accordingly, I must dismiss Count One of the third-party complaint, which asserts claims against third-party defendants John F. Lushis, Jr., Esquire and Tallman, Hudders & Sorrentino, P.C.

³ It is the sense of this Order that no opinion is expressed as to whether the relevant limitations period has expired on these claims.

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ARM8700

PAGE 0001 OF 0008

ARCHIVAL MANAGEMENT INFORMATION SYSTEM
CASE DOCKET INQUIRY

DATE: 01/06/10
TIME: 14:40

VENUE: HUNTERDON

COURT: LAW CIVIL

CASE NO: HNT L 000459 04

TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC

FILED: 10 07 2004

CASE TYPE: 399 REAL PROP

IMPOUND: N

DISP : DISM W/PR

DISP DATE: 06 13 2007

BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY TYP	MLT AFL	ORDR F T	JDGE STAT ID
10 07 2004	COMPLAINT	SKLODOWSKY PAUL	G	PF	IND	Y Y
11 03 2004	ANS CNTR & 3RD	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	Y	Y
11 15 2004	COMP AMENDED	AMERICAN DEVELOPERS OF NJ	PF	OTH	N	Y
11 30 2004	SUMMONS	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N	N
12 07 2004	ANSWER	SKLODOWSKY(CNTRCLM) PAUL	G	DF	IND	N N
12 16 2004	MISC OTHER	SKLODOWSKY(CNTRCLM) PAUL	G	DF	IND	N N
12 16 2004	ANSWER	SKLODOWSKY(CNTRCLM) PAUL	G	DF	IND	N N
12 17 2004	ANS CROS CLAIM	SKLODOWSKY* JOANNE	DF	IND	N	Y
12 23 2004	SUMMONS	SKLODOWSKY* JOANNE	DF	IND	N	N
12 23 2004	SUMMONS	TALLMAN HUDDERS & S ORRENTINO*	DF	ATY	N	N

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Pa 107

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PAGE 0002 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000459 04

TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC

FILED: 10 07 2004 CASE TYPE: 399 REAL PROP

DISP ; DISM W/PR

DISP DATE: 06 13 2007

IMPOUND: N
BACKLOADED: 00 00 0000

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			TYP AFL	F T	STAT	ID
12 23 2004	SUMMONS	LUSHIS JR *	JOHN	F DF	IND N N	
02 01 2005	CONSENT ORDER	LUSHIS JR *	JOHN	F DF	IND Y N GR	PAB03
02 07 2005	MISC SUB ATTY	AMERICAN DEVELOPERS OF NJ		PF	OTH N Y	
03 30 2005	OBJECT MOTION	AMERICAN DEVELOPERS OF NJ		PF	OTH N Y	
04 13 2005	MISC OTHER	LUSHIS JR *	JOHN	F DF	IND Y N	
04 14 2005	MISC OTHER	SKLODOWSKY*	JOANNE	DF	IND N Y	
04 18 2005	ORDR MISC	COURT INITIATED			N N GR	RBR03
05 10 2005	ORDR DISMISSAL	LUSHIS JR *	JOHN	F DF	IND Y GR	RBR03
05 10 2005	ORDR MISC	AMERICAN DEVELOPERS OF NJ		PF	OTH N Y GR	RBR03
06 02 2005	ANS CROSS&JRYD	LUSHIS JR *	JOHN	F DF	IND Y Y	

PF24-BACKLOAD CASE

PF7-PRIOR PF8-NEXT

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Pa 108

Page: 1 Document Name: Untitled

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PAGE 0003 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

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TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
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08 16 2005	MISC SUB	ATTY SKLODOWSKY* JOANNE	DF	IND	N Y	
10 12 2005	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	Y Y	
10 26 2005	OBJECT MOTION	LUSHIS JR * JOHN	F DF	IND	Y N	
11 28 2005	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	Y Y	
11 28 2005	OBJECT MOTION	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
11 28 2005	MISC OTHER	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	Y Y	
12 07 2005	MISC OTHER	LUSHIS JR * JOHN	F DF	IND	Y N	
12 09 2005	MISC OTHER	LUSHIS JR * JOHN	F DF	IND	Y N	

PF24-BACKLOAD CASE PF7-PRIOR PF8-NEXT

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Pa109

Page: 1 Document Name: Untitled

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PAGE 0004 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

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TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
DISP : DISM W/PR DISP DATE: 06 13 2007 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY TYP	MLT AFL	ORDR F T	JDGE STAT ID
12 23 2005	ORDR MISC	AMERICAN DEVELOPERS OF NJ	PF	OTH	Y	GR PAB03
12 23 2005	ORD QUASH SBPNA	LUSHIS JR *	F	DF	IND Y	DN PAB03
12 23 2005	ORDR MISC	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	Y	DN PAB03
12 23 2005	ORDR MISC	LUSHIS JR *	F	DF	IND Y	GR PAB03
01 31 2006	ODR AMND ORDR	LUSHIS JR *	F	DF	IND N Y	GR PAB03
02 21 2006	MISC OTHER	LUSHIS JR *	F	DF	IND Y	N
02 24 2006	MISC OTHER	LUSHIS JR *	F	DF	IND Y	N
02 28 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N	N
02 28 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N	N
02 28 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N	N

PF24-BACKLOAD CASE PF7-PRIOR PF8-NEXT
 4-0 1 Sess-1 172.16.1.27 TSOM0034 #82/7

Pa 110

Name: Untitled

ARM8700 ARCHIVAL MANAGEMENT INFORMATION SYSTEM DATE: 01/06/10
PAGE 0005 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000459 04
TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
DISP : DISM W/PR DISP DATE: 06 13 2007 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY TYP	MLT AFL	ORDR F T	JDGE STAT ID
02 28 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N N	
02 28 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N Y	
02 28 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ	PF	OTH	N Y	
02 28 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ	PF	OTH	N Y	
02 28 2006	MISC CERTIFICTN	SKLODOWSKY PAUL	G PF	IND	N N	
02 28 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
02 28 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ	PF	OTH	N N	
02 28 2006	OBJECT MOTION	AMERICAN DEVELOPERS OF NJ	PF	OTH	N N	
02 28 2006	OBJECT MOTION	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
02 28 2006	MISC OTHER	SKLODOWSKY PAUL	G PF	IND	N N	

PF24-BACKLOAD CASE				PF7-PRIOR	PF8-NEXT
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Page: 1 Document Name: Untitled

ARM8700 ARCHIVAL MANAGEMENT INFORMATION SYSTEM DATE: 01/06/10
PAGE 0006 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000459 04
TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
DISP : DISM W/PR DISP DATE: 06 13 2007 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY	MLT	ORDR	JDGE
			TYP AFL	F T	STAT	ID
02 28 2006	OBJECT MOTION	SKLODOWSKY PAUL	G PF	IND	N N	
03 01 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ	PF	OTH	N Y	
03 03 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ	PF	OTH	N N	
03 07 2006	MISC OTHER	LUSHIS JR *	F DF	IND	Y N	
03 07 2006	OBJECT MOTION	LUSHIS JR *	F DF	IND	Y N	
03 07 2006	MISC OTHER	LUSHIS JR *	F DF	IND	Y N	
03 21 2006	ORDR SUMM JDGMT	SKLODOWSKY(CNTRCLM) PAUL	G DF	IND	Y GR	PAB03
03 21 2006	ORDR SUMM JDGMT	SKLODOWSKY* JOANNE	DF	IND	N GR	PAB03
03 21 2006	ORDR SUMM JDGMT	LUSHIS JR * JOHN	F DF	IND	Y GR	PAB03
03 21 2006	ORDR SUMM JDGMT	AMERICAN DEVELOPERS OF NJ	PF	OTH	N GR	PAB03

PF24-BACKLOAD CASE PF7-PRIOR PF8-NEXT

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Page: 1 Document Name: Untitled

ARM8700 ARCHIVAL MANAGEMENT INFORMATION SYSTEM DATE: 01/06/10
PAGE 0007 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000459 04
TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
DISP : DISM W/PR DISP DATE: 06 13 2007 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY TYP	MLT AFL	ORDR F T	JDGE STAT ID
04 04 2006	OBJECT MOTION	LUSHIS JR * JOHN	F DF	IND	Y N	
05 02 2006	OBJECT MOTION	AMERICAN DEVELOPERS OF NJ	PF	OTH	N Y	
05 02 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
05 02 2006	MISC CERTIFICTN	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
05 02 2006	MISC OTHER	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N	
05 08 2006	MISC OTHER	SKLODOWSKY PAUL	G PF	IND	N N	
05 08 2006	MISC OTHER	SKLODOWSKY PAUL	G PF	IND	Y Y	
05 09 2006	ORDR MISC	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N N GR	PAB03
05 11 2006	ODR AMND ORDR	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	N Y GR	PAB03
05 11 2006	ORDR FLAMD CMP	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH	Y Y GR	PAB03

PF24-BACKLOAD CASE

PF7-PRIOR PF8-NEXT

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TSOM0034 #52/7

Page: 1 Document Name: Untitled

ARM8700 ARCHIVAL MANAGEMENT INFORMATION SYSTEM DATE: 01/06/10
PAGE 0008 OF 0008 CASE DOCKET INQUIRY TIME: 14:40

VENUE: HUNTERDON COURT: LAW CIVIL CASE NO: HNT L 000459 04
TITLE: SKLODOWSKY VS AMERICAN DEVELOPERS NJ LLC
FILED: 10 07 2004 CASE TYPE: 399 REAL PROP IMPOUND: N
DISP : DISM W/PR DISP DATE: 06 13 2007 BACKLOADED: 00 00 0000

DATE FILED	DOCUMENT TYPE	FILING PARTY NAME	PARTY TYP	MLT AFL	ORDR F T	JDGE STAT	ID
05 11 2006	ORDR MISC	AMERICAN DEVELOPERS OF NJ	(CNTR PF	OTH Y	DN	PAB03	
07 21 2006	ORD BAR TESTMON	AMERICAN DEVELOPERS OF NJ	PF	OTH N	DN	PAB03	
03 09 2007	MISC CERTIFICTN	SKLODOWSKY PAUL	G PF	IND N N			
03 16 2007	ORDR MISC	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH Y	GR	SBR03	
04 23 2007	ORDR DISM CMPL	COURT INITIATED		N N	GR	SBR03	
06 12 2007	MISC STIP STLM	SKLODOWSKY PAUL	G PF	IND Y Y			
06 13 2007	ORDR DISMISSAL	AMERICAN DEVELOPERS OF NJ LLC	DF	OTH N N	GR	SBR03	
06 22 2007	MISC NOT APPEAL	LUSHIS JR *	JOHN	F DF	IND Y Y		
02 27 2008	MISC OTHER	LUSHIS JR *	JOHN	F DF	IND Y N		

PF24-BACKLOAD CASE				PF7-PRIOR	PF8-NEXT
4-0	1	Sess-1	172.16.1.27	TSOM0034	#§2/7

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Law Offices of Thaddeus P. Mikulski, Jr.
365 White Horse Avenue
Hamilton, New Jersey 08610
(609) 581-0470

Attorneys for Plaintiff, Paul G. Sklodowsky

Paul G. Sklodowsky,
Plaintiff

vs.

**John F. Lushis, Jr., Esq. and Tallman,
Hudders & Sorrentino, A Professional
Corporation,**
Defendant

**Superior Court of New Jersey
Hunterdon County - Law Division**

Docket Number: 649-09

Civil Action

Certification of Paul G. Sklodowsky

1. I, Paul G. Sklodowsky, am the plaintiff.
2. In 2003, I was referred to John F. Lushis, Jr, Esq. for legal representation on the proposed sale of a large tract of land that I owned in Kingwood Township, New Jersey. I advised Attorney Lushis that I held title to the real property in my own name and that I wanted to transfer the property without the involvement of my wife, Joanne Sklodowsky, with whom I was having marital difficulties. I requested John J. Lushis, Jr., Esq. to advise me of what rights my wife had in the property and whether I could transfer the property without her consent. I informed Attorney Lushis that I lived with my wife, in a house on the property. Attorney Lushis verbally advised me that I could transfer the property without the consent of my wife. He later indicated by letter of

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November 5, 2003 (attached) and verbally that my wife may have an interest in the proceeds of the sale. In reliance upon the advice John J. Lushis, Jr., Esq., I entered into a contract on November 11, 2003 in my name to sell my real estate to American Developers of New Jersey, Inc. ("ADNJ") for the sum of \$850,000. Attorney Lushis represented me from November, 2003 until an aborted real estate closing on September 30, 2004. During that time he counseled me on the transaction negotiations and progress with the buyer. In late April 2004, he advised me that my wife's signature was required to deliver good title. If I had known of this requirement I would not have signed the contract.

3. Thereafter, Attorney Lushis advised me that notwithstanding this issue, the buyer had waived its right to object to any problem with my wife's refusal to sign the deed. He also advised me that if the closing did not proceed I would have a very strong case of breach of contract against the buyer. Based on his explanation of the terms of the contract and the conduct of the buyer, I accepted his advice. He suggested that his friend Attorney Nanovic to whom he previously had referred me on another matter should file a lawsuit as he could not pursue litigation in New Jersey and he would be a witness. Attorney Nanovic also advised me that I had a strong case. In fact, I was advised by Attorney Nanovic that I had a sure winner.

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4. During the course of the litigation, I questioned Attorney Nanovic about possible legal malpractice claim against attorney Lushis. He advise me that I could file a claim after the litigation, if I did not win. However at the same time he repeatedly told me my case was very strong. He maintained this position until the court rulings in the case in March and May, 2006. He then reassured me that I could file a claim against attorney Lushis after the lawsuit ended.
5. On or about September 28, 2005 I met with At that meeting both Attorney Lushis and Attorney Nanovic reassured me about the strength of my case. At that time the issue of communications between myself and John Lushis were discussed. Attorney Lushis and attorney Nanovic advised me that it was in my best interest to not disclose the attorney client communications, because they might hurt me. Attorney Lushis also advised that his attorney in the litigation, George M. Vinci, Esq. suggested that it was appropriate for myself and him and his law firm to present a unified front in order to defeat the fraud claims asserted by the buyer both against me and Attorney Lushis. I relied upon their advice and did not question it until the court rulings in March and May 2006. In the months following those rulings I became more and more concerned about the withholding of the communications. I sought the advice of other attorneys. In February, 2007 I hired Thaddeus P. Mikulski to represent me a the trial scheduled in April, 2007.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Paul G. Sklodowsky
Paul G. Sklodowsky

02-26-10

Pa118

**TALLMAN
HUDDERS &
SORRENTINO**

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JEFFREY S. STEWART
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ROBERT G. TALLMAN
DONALD H. LIPSON
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DONALD A. ZAMBORSKY
ALDRICH FOUCEK, III
MATTHEW R. SORRENTINO
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SCOTT R. LIPSON

JOHN R. HUDDERS
(Retired)

WILLIAM H. FITZGERALD
(1970-1997)

PAUL J. SCHOFF
JOHN F. LUSHIS, JR.
JEFFREY A. DURNEY
WILLIAM H. ECKENSBERGER, JR.
Of Counsel

November 5, 2003

Paul G. Sklodowsky
23 Union Road
Frenchtown, NJ 08825

Re: Sale of Property - Kingwood Township, New Jersey

Dear Paul:

This is to follow up our discussions of earlier this week concerning the sale of your property in Kingwood Township, New Jersey and, in particular, issues you raised with me concerning the potential rights your wife, Joanne, may have with respect to the property.

Specifically, I understand you are concerned that if you consummate the sale of your property, it could cause Joanne to seek a share of the sale proceeds. As I indicated I would, I spoke with Attorney Judith A. Harris in our office, who has significant expertise in estate planning. As you know, neither Judy nor I have discussed this matter with you in detail, so we do not have all the facts necessary to render comprehensive counsel to you. Based on the information you provided to me, however, we are of the general view that Joanne may have rights with respect to the Kingwood Township property (as well as any other assets either acquired during or held during the marriage) regardless of whether you sell it to American Home Builders. For example, you indicated the value of the Kingwood Township property has appreciated in value and typically, a property's appreciation in value during the marriage is considered to be marital property. Other factors, such as whether property was purchased during a marriage, and the source of the funds used to purchase the property, typically affect the potential rights a spouse has with respect to the property and would be relevant to your particular situation.

Whether your receipt of a substantial amount of sale proceeds would cause Joanne to pursue, perhaps more aggressively, any rights she may have with respect to those proceeds, is a question that I believe you are ultimately in the best position to answer. Joanne may currently have rights with respect to the property, as mentioned above, and the existence of these rights could influence her views of the situation even before you have realized any sale proceeds.

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HUDDERS &
SORRENTINO**

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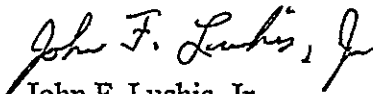
Paul G. Sklodowsky
November 5, 2003
Page Two

As I previously indicated, we have engaged in significant efforts to move this transaction to a point where we now have an agreement of sale ready to be executed. The agreement contains several provisions that are particularly favorable to you. In addition, even provisions that obligate you to make a monetary payment, e.g. the realty transfer tax, are based on custom. With respect to this tax, the amount you will be obligated to pay at closing is approximately \$6,000, which is substantially less than the amount you would have paid if this property were in Pennsylvania.

In fairness to the parties involved in this transaction, I emphasize that making a prompt, definitive decision concerning whether you will move forward with it is very important. I look forward to receiving your further input as soon as possible.

Thank you for your cooperation and allowing me to be of assistance.

Very truly yours,


John F. Lushis, Jr.

JFL:sh

Pa 12d

RECEIVED/FILED
SUPERIOR COURT OF NJ
HUNTERDON COUNTY

Law Offices of Thaddeus P. Mikulski, Jr.
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Hamilton, New Jersey 08610
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DEPUTY CLERK
CIVIL DIVISION

Attorneys for Plaintiff, Paul G. Sklodowsky

Paul G. Sklodowsky,

Plaintiff

vs.

**John F. Lushis, Jr., Esq. and Tallman,
Hudders & Sorrentino, A Professional
Corporation,**

Defendant

**Superior Court of New Jersey
Hunterdon County - Law Division**

Docket Number: 649-09

Civil Action

**Certification of Thaddeus P.
Mikulski, Jr.**

1. I., Thaddeus P. Mikulski, Jr. am the attorney for plaintiff.
2. I attached as the following
 - Exhibit A. Decision of this court in the real estate litigation, dated March 10, 2006.
 - Exhibit B. Decision this court in the real estate litigation, dated May 11, 2006.
 - Exhibit C. A true copy of the deposition transcript of Joanne Sklodowsky in the real estate litigation .
3. In the Pennsylvania litigation, plaintiff did not pursue a legal malpractice claim against Defendants Nanovic and Baurkot on the grounds that they should have asserted claims against John F. Lushis, Jr., Esq. and Tallman, Hudders & Sorrentino, A Professional Corporation in the real estate litigation. Plaintiff took this action based my advice

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that any cause of action against John F. Lushis, Jr., Esq. and Tallman, Hudders & Sorrentino, A Professional Corporation would not have accrued until the real estate litigation terminated.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

3/1/10


Thaddeus P. Mikulski, Jr.

Memorandum of Decision on Motions

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

PAUL G. SKLODOWSKY

v.

AMERICAN DEVELOPERS OF NEW JERSEY, LLC

v.

JOHN F. LUSHIS, JR., JOANNE SKLODOWSKY and TALLMAN HUDDERS and
SORRENTINO

Docket No. HNT-L-459-04

Motion for Summary Judgment by plaintiff, Paul Sklodowsky

Motion for Summary Judgment by third-party defendants, Lushis
and Tallman Hudders and Sorrentino

Motion for Summary Judgment by third-party defendant, Joanne
Sklodowsky

Motion for Summary Judgment by defendant/third-party plaintiff,
American Developers of New Jersey, LLC

Argument heard: March 6, 2006; Decided: March 6, 2006 from the
bench

Memorandum filed March 10, 2006;

The Honorable Peter A. Buchsbaum, J.S.C.

FACTS

This case arises from an aborted closing which was to have
taken place pursuant to a November 11, 2003 contract between
Paul G. Sklodowsky ("PGS" or "Paul"), plaintiff, and the
defendant/third-party plaintiff American Developers of New
Jersey, LLC ("American") for sale of plaintiff's marital
residence and accompanying lands. Initially, the plaintiff

sought a declaratory judgment establishing his right to retain an \$85,000 deposit which had been posted as part of that real estate transaction.

In response, the defendant/third-party plaintiff counterclaimed against Paul Sklodowsky asserting that he committed fraud by not disclosing his martial status, which was the chief obstacle to the closing. Defendant also filed a third-party suit against Mrs. Joanne Sklodowsky ("JS" or "Joanne"), whose refusal to sign the deed made it impossible for Paul Sklodowsky to convey good title. A third-party claim was filed against Paul's attorney, John Lushis and his firm, Tallman Hudders and Sorrentino ("TH&S") claiming fraud, negligent misrepresentation and a violation of the doctrine of *Petrillo v. Bachenburg*, 139 N.J. 472 (1995) in failing to disclose Mr. Sklodowsky's martial status. The negligent misrepresentation claim against Lushis and/or TH&S were dismissed by Judge Reed as being inconsistent with §5.06 of the contract, which was construed as stating that cancellation was the only remedy for negligent misrepresentation. Later, this Court denied Lushis' motion to add a fourth-party *Petrillo* claim against American's attorneys, Alan Wohl and his law firm Wohl & Goldstein.

LEGAL ANALYSIS

Except for the claims with respect to specific performance (now withdrawn) and breach of contract (to be addressed below),

each of the summary judgment motions in this case addresses essentially two allegations. The first of these is that either or both of the Sklodowskys as well as Lushis and his firm committed fraud by failing to disclose plaintiff Paul Sklodowsky's marital status. Additionally, defendants claimed that such non-disclosure violated the requirements of *Petrillo v. Bachenburg*, supra, concerning information known to one party of a real estate contract which is conveyed to the other party with the expectation that the other party will rely on it. The Court will evaluate these motions under the well accepted principles of R. 4:46-2 as explained in numerous cases, most notably *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995) to determine whether genuine issues of fact exist herein.

Despite the enormous number of exhibits, documentary and deposition records provided, the considerations underlying these motions are not complex. All parties agree as to the elements of fraud. These require 1) a material misrepresentation of a existing or past fact which can come in the form of either an affirmative representation or a deliberate withholding of information, 2) knowledge or belief of the falsity of the facts as conveyed to the other side, 3) an intention that the other side rely on the stated facts conveyed or withheld, 4) reasonable reliance thereon by the other side and 5) resulting damages. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610

(1997); see also *Winslow v. Corporate Express, Inc.*, 364 N.J. Super. 128, 140 (App. Div. 2003).

The record at this stage of the proceedings suggests that summary judgment is not appropriate with respect to a number of the elements of fraud. The plaintiff and third-party defendants strenuously argue that it will be impossible to show any misrepresentation or knowledge of falsity from the mere failure to disclose that plaintiff was married. They assert that Joanne Sklodowsky was not even aware of a contract until at about the time the issue concerning her was disclosed on May 11, 2004 and that she had not discussed the matter with her husband. They also claim that Paul Sklodowsky never mentioned his marital status and thus made no misstatement.

However, the facts on these issues bear another interpretation. At about the time the contract was executed, in November 2003, Paul was advised by Joanne that she was not going to cooperate in any sale of the premises at issue. He also may have known, from past transactions, including a 1999 deed about which much has been written, that he needed her consent to convey the property. The record does thus afford an inference which a jury might draw that the Sklodowskys knew they could not deliver good title with Mrs. Sklodowsky's cooperation, they knew she would not cooperate, and that they failed to disclose these material facts to the defendant/third-party plaintiff.

However, as counsel states, each of the elements of fraud must be proven. *Gennari, supra*. For the reasons stated below, this Court finds that American Developers has not demonstrated any reasonable reliance on non-disclosure and thus is unable to prove fraud by clear and convincing evidence or otherwise.

It is apparent that information concerning Mr. Sklodowsky's marital status was immediately made available soon after the contract was signed. The title commitment dated December 4, 2003 contains a reference to him as being married in a 1988 mortgage. In addition, the County Clerk's records reflect a deed from both Sklodowskys to their son dated June 23, 1999. It is further undisputed that defendant was aware of the house on the premises so it was apparent that the property was not vacant land which never could have been a marital home.

Fourth, there was disclosure well before the closing. On May 11, 2004, third-party defendant Lushis wrote to American Developers disclosing Paul's marriage. Equally as critical, the May 11th letter stated "whether Mrs. Sklodowsky will execute the deed is unclear". At that point, all the cards were on the table. The marriage was in the open and the potential for Mrs. Sklodowsky to veto the closing was also in the open.

Defendant's reaction was totally inconsistent with its current fraud claims. On June 9, 2004, it wrote to Mr. Sklodowsky and to Mr. Lushis not disclaiming the contract as

would have been its right because of the potential failure to give good title, contract §5.06, but fully embracing the contract. In fact, the letter waived the due diligence contingency and set forth an anticipated closing date. Even more incredibly, for an alleged fraud victim, American enclosed \$50,000.00 as additional deposit towards consummation of the sale.

Such action is completely utterly and totally contrary to the notion that defendant was somehow hoodwinked into proceeding with the contract by virtue of non-disclosure of marital status. In fact, when the marriage was disclosed, it reacted on June 9th by embracing the contract, paying a lot of money and treating the issue as of no moment.

In addition, plaintiff cites well settled law that if a party to whom representations were made chooses to investigate the facts for himself he will be deemed to rely on his own investigation. *DSK Enterprises, Inc. v. United Jersey Bank*, 189 N.J. Super. 242, 251 (App. Div. 1983). While defendant seeks to distinguish that case on the ground that it hired no expert in contrast with the party in *DSK*, in fact they did hire an expert. That expert was its attorney Alan Wohl. It is undisputed, that he is a real estate attorney of 45 years experience. Clearly, he was in the position to review the title commitment and raise an issue if any had to be raised concerning Paul Sklodowsky's

marital status. See also *Byrne v. Weichert Realtors*, 290 N.J. Super. 126 (App. Div.) certif. denied, 147 N.J. 259 (1996) where failure to disclose a termite infestation was held not to be fraudulent where the party had itself undertaken a termite inspection and *Simpson v. Widger*, 311 N.J. Super. 379, 392-393 (App. Div. 1998) where statements about the soundness of a horse, even if "knowing, material misrepresentation of an existing fact", were not held to be fraudulent since the plaintiff had obtained an independent examination of the horse himself. Here Wohl was the inspector who had a title report, access to the county land records, and the May 11th disclosure letter.

Indeed, Mr. Wohl has acknowledged his responsibilities in this regard. His explanation that he just missed the issue, i.e. "he did not ask the right questions" about marital status, or that he "in my opinion made a mistake" as testified to by American is not conduct with which the plaintiff or the third-party defendants can be charged.

Mr. Wohl thus had sufficient information to ascertain the facts or conduct the investigation he was charged to undertake. He would be expected to look at marital status as a routine matter. His failure to do so, and his client's ignoring of the May 11th letter with respect to Mrs. Sklodowsky's potential non-cooperation demonstrates that American Developers in no legal

sense reasonably relied on defendant's alleged pre-May 11, 2004 silence concerning Mr. Sklodowsky's marital status.

Under these circumstances, given what was made known in the title report, the physical status of the property, the hiring of Mr. Wohl to review title, and the defendants own reaction to the timely, formal pre-closing disclosure of the marital status, defendant's claim that it was defrauded into reasonably relying on Sklodowsky's silence about his marital status is unsustainable as a matter of law. These circumstances do not admit a jury question as to such reasonable reliance.

For the same reason, defendant's *Petrillo v. Bachenberg* claim must be rejected. In *Petrillo*, 139 N.J. 472 (1995) the Court established in a unique setting an obligation on the part of an attorney representing one party to deal fairly with the other party. It should be remembered that *Petrillo* is very much the exception to the rule. In general, an attorney owes duty only to his client, not to the other side's client. *Petrillo*, however, involved a particular set of facts. The attorney for the seller had provided a summary of soil tests which made it appear as if it would be relatively easy to obtain the right to install a septic system and build a house on the property in question. The information at issue, namely, the past test performance, was information which was peculiarly in the province of the seller and his attorney. The defendant had no

access to the past soil test information. Moreover, it was clear that the buyer relied on the favorable report to his detriment and only later found out that there had been numerous failing tests which had not been disclosed. Then, upon such finding, the buyer attempted to reopen and then cancel the contract.

Here, neither Lushis nor his firm stood athwart the channels of communication. Wohl was the one empowered to investigate title; marital status was, as he admitted, a normal part of the investigation. Further, the title commitment, as well as the 1999 deed should have sparked some inquiry about the plaintiff's marital status. And even when the May 11th letter handed the information to plaintiff on a silver platter, American, unlike *Petrillo*, who sought more tests and cancellation, finalized the contract without question.

Transposing these facts to the *Petrillo* situation shows why the case is different. Had the plaintiff-buyer in *Petrillo* gotten only the required soil tests four months before closing, and then sent a letter accompanied by \$50,000 re-affirming the contract, it is highly doubtful the Supreme Court would have found any breach of duty by the seller's attorney. Yet that is the circumstance in this case.

This Court's refusal to extend *Petrillo* to cover this situation is consistent with *Lyons Doughty & Veldhuis v. Powers*,

331 N.J. Super. 193 (App. Div. 2000), where information about a date of a sale was available to all parties. In that case, the court limited *Petrillo* to situations in which "the lawyer intended or should have foreseen that the third-party would rely on the lawyer's work", *Lyons, supra*, at 196, quoting *Petrillo* at 482. The court also stressed the fact that the attorney in *Petrillo* "controlled the risk" that his report would mislead a purchaser.

Here, the attorney provided no report. Moreover, as part of its normal title work, defendant had ready access to information about Mr. Sklodowsky's marital status. In addition, it was actually given that information and chose to proceed anyway. The situation is very much like *Lyons*, in which plaintiff had sufficient access to information concerning a sale date about which it was not subjectively informed.

Likewise in *Banco Popular v. Gandi*, 184 N.J. 161, 182 (2005) the court declined to extend *Petrillo* to a situation involving failure to disclose the potential borrower's asset transfer. The lawyer in question had made no representations to the bank concerning the asset transfer. *Banco Popular* suggests no basis for relief here where it is likewise hard to believe that Wohl would rely on Lushis' work in examining title, where Lushis essentially said nothing.

In fact, Lushis and TH&S made no affirmative representation concerning plaintiff's marital status whatsoever and thus did nothing to induce Wohl to discontinue his own investigation of title. Had Lushis somehow attempted to induce Wohl to discontinue his own investigation of title, such as lulling Wohl to sleep concerning Sklodowsky's marital status, i.e., by saying "don't worry, she'll sign" the case might be different. Compare, *Brunswick Hills Racquet Club v. Route 18 Shopping Center Associates*, 182 N.J. 210 (2005). In this case, however, Lushis at first simply let matters take their course as would normally be expected in a title evaluation. Then contrary to the attorney in *Petrillo*, or even the attorney in *Banco Popular*, he did, four months before closing, provide accurate information about Joanne's potential refusal -- and defendant chose to ignore it.

Finally, defendant attempts to sustain both its fraud and *Petrillo* claims by arguing strenuously that plaintiff's attorney and third-party defendants were not silent, that they affirmatively represented, in §3.04 of the November 11, 2003 contract that he could deliver good title free of the occupancy right of others. It claims that defendant/third-parties actually knew of the falsity of this representation, given Joanne's alleged contemporaneously stated intent not to cooperate and that it should receive damages for expenditures

incurred between the November 11, 2003 contract signing and the May 11, 2004 disclosure of plaintiff's marital status. These arguments lack merit.

First, the representation in §3.04 speaks only of ability to convey full and clear title as of the date of closing. It is thus not a representation as to current facts. Second, as noted above, defendant had its ability to investigate the situation. §3.04 clearly does not invite defendant to forgo an investigation of title issue or its own independent analysis which was in event customary for its own satisfaction. Thus, §3.04 does support the fraud and *Petrillo* claims.

In addition, as also ruled previously, the lack of such reliance, in fraud terms, or invitation to rely, under *Petrillo*, is established by defendant's ignoring of the information even when it was presented. Its latter day self-serving claim as to being misled presents no factual issue for jury resolution. The matter can be compared to *El-Sioufi v. St. Peters University Hosp.*, 382 N.J. Super. 145, 175-177 (App. Div. 2005), where self-serving conclusory allegations as to discrimination in an employment context were insufficient to withstand summary judgment when the overwhelming objective evidence in the record revealed no true factual dispute. Here, defendant, relying on its subjective consciousness, has stated no viable fraud claim where objective evidence shows it had a full chance to evaluate

the facts and it ultimately embraced the supposedly fraudulent transaction when the facts became known to it.

Viewed in the above light, it is apparent that defendant's fraud and Petrillo claims must fail on this record.

Contract Claims

Further, defendant has waived its claims that it is entitled to specific performance as a matter of law by virtue of plaintiff's failure to be able to deliver good title. There however remains a determination of plaintiff's claims that defendant's failure to assert a title objection or to close constitute a breach of contract as a matter of law. Defendant has likewise asserted a breach based on defendant's failure to give good title. It is the finding of this Court that neither claim can be resolved on summary judgment. The facts do not allow this Court to rule that buyer had somehow waived its claim for good title. ¶5.06 of the contract simply provides that the warranties including the warranty for delivery of possession free of occupancy rights of others must be good at the closing. There is no requirement that any such assertion be raised at some earlier point if it is not to be waived.

Moreover, the conduct between the parties suggests a non-waiver. Plaintiff informed defendant as early as May 11th of a potential issue regarding Joanne Sklodowsky's signature on a deed. Yet both parties acted up to the time of the aborted

closing as if the transaction could proceed. There is no indication that plaintiff ever demanded that defendant accept such limited title as Paul Sklodowsky could convey or that its title objections were waived.

The common sense that some issues cannot be resolved until closing is consistent with our case law. In *Davis v. Strazza*, 380 N.J. Super. 476 (App. Div. 2005), certif. denied 2006 N.J. Lexis 60 (1/19/06), the court refused to enforce a specific deadline for cancellation of a contract with respect to a mortgage contingency. In this situation, the defendant who later sought out of the contract, had received a conditional mortgage commitment within time and did not cancel. The court construed the contract as allowing a later cancellation if the conditions in the mortgage commitment, in that case, the sale of the buyer's other house, were not satisfied. 380 N.J. Super. at 483-485. The court in *Strazza*, as must the Court here, looked at the purpose of the contract. In that case the common sense was that the buyer needed additional mortgage funds to close. Here the common sense is that the parties agreed that the defendant would get good title at closing.

Davis v. Strazza also forestalls plaintiff's effort to rely upon §7.01 of the contract with respect to title objections and 8.01 with respect to due diligence. Clearly none of the parties understood plaintiff's June 9th waiver of the due diligence

contingency as allowing Paul Sklodowsky to convey bad title. The thrust of 8.01, in any event, is environmental and developability constraints, not title. To view waiver of this absolute right to cancel due to site constraints as a waiver of title objections is a nonsensical reading which would defeat the purposes of the contract as a whole which provided that good title to be provided at the closing.

Similarly, the title objections deadline in 7.01 again gives seller no license to provide an inadequate title. Suffice it to say that there are always issues which crop up and which are generally cured only at closing through an appropriate affidavit of title. In fact, such a result is anticipated in §5.06 which requires only that 3.04 title issues be resolved at the closing. All that 7.01 requires is an application for title insurance which was in fact done and the conveyance of objections promptly upon receipt of the title report. There was nothing either in the language of the contract or the sense of its purposes suggesting that any failure to raise title issues which he actually acknowledged would allow Paul Sklodowsky to submit a bad deed as he attempted to do in this case. In sum, neither of these sections or the fact that a real factual issue remains as to whether the plaintiffs conspired to frustrate the contract by manipulating Joanne Sklodowsky's non-signature. As

set forth below, only a jury can decide if these allegations are correct.

Under these circumstances, the Court cannot find as a matter of law that defendant's failure to cancel the contract or accept diluted title constituted a breach thereof for which defendant must respond in damages.

Defendant, for its part, seeks damages from the plaintiff's lack of good faith in failing to obtain Joanne Sklodowsky's cooperation in the execution of the deed. It cites, among other cases, *Brunswick Hills Racquet Club*, *supra* at 225, for the proposition that as to a real estate agreement, "subterfuge and evasion in the performance of a contract violate the covenant of good faith and fair dealing even though the actor believes his conduct to be justified". It urges that the cancellation remedy in ¶5.06 was not intended to bar damages for willful violation of the covenant of good faith and fair dealing; and that it is available in such situations as well as fraud.

§5.06 reads as follows:

In the event Buyer determines that any of the representations and warranties of Section 3.04, Section 3.07, this Article 5 and Article 6 shall be inaccurate as of the closing, other than as a result of such representation and warranty having been knowingly and willfully falsely made, Buyer's sole remedy shall be to cancel this Contract, in which event the entire Deposit (including the payment referred to in Section 2.02(b), if made) shall be returned

to Buyer and this Contract shall be null and void and the parties shall have no further rights and obligations hereunder except those that expressly survive.

While limited explicitly to cancellation, it can be read functionally as not excluding other relief for willful misconduct, even if not actually fraudulent, if there is willfully false behavior.

True, the Sklodowskys deny they conspired to frustrate the contract. The Sklodowskys claim, of course, in sworn deposition testimony, that they barely discussed the matter and that Mrs. Sklodowsky was not aware that she had the right to veto the contract. However, it is for a jury to determine whether these assertions are believable. The jury could find that the Sklodowskys are believable and that the May 11th letter from plaintiff's attorney laid the issue out fairly for the defendant who then simply took a chance on Mrs. Sklodowsky's relenting and signing.

On the other hand, the evidence that Mrs. Sklodowsky had signed similar deeds in the past and that had generally gone along with her husband suggests a course of conduct that might induce a jury to disbelieve the Sklodowskys' assertions of innocence. They could believe that the Sklodowskys did willfully attempt to frustrate the contract in order to obtain some advantage. In either event, these disputed facts are not

capable of being resolved in a summary judgment motion. Taking the facts on either side and giving all possible inferences there from to the respective parties on their cross-motion with respect to the contract, this Court finds there are disputed issues as to deliberate frustration which require factual resolution, and may justify a damage award for willful conduct outside the scope of the termination language of §5.06.

On point is the seminal case of *Sons of Thunder v. Borden*, 148 N.J. 396, 425 (1997), a non-real estate case which preceded *Brunswick Hills*, supra, and supplied the doctrinal basis for it. *Sons of Thunder* held that factually supported assertions of dishonest conduct which defeated plaintiff's reasonable expectations and right to receive the fruits of the contract survived even a rightful cancellation of the contract. The Court stated, in language applicable the defendant's instant claims for frustration, that "in every contract there is an implied covenant that neither party shall do anything which shall have the effect of destroying or injuring the right of the other party to receive the fruits of the contract". Id. at 420.

Such conduct is what defendant alleges here regarding delivery of good title. Defendant's allegation as to deliberate frustration are sufficiently supported so that they can survive summary judgment.

In sum, even if there is no fraud as the Court has found, Paul and Joanne Sklodowsky may still have intentionally manipulated her right of veto to willfully frustrate the contract in violation of the covenant of good faith and fair dealing while the contract was in effect. Under these circumstances, cancellation need not have been the defendant's sole remedy; damages can be available for lack of good faith.

Accordingly, neither party's contract claims can be resolved on summary judgment.

CONCLUSION

The motions for summary judgment by the third-party defendant John Lushis and Tallman Hudders and Sorrentino as to fraud and under *Petrillo* are GRANTED and the defendant's cross-motions for summary judgment by defendant on those issues are DENIED. Further, plaintiff's motion for summary judgment with respect to those counts of the complaint alleging fraud are GRANTED and defendant's motion for summary judgment with respect to those claims are DENIED. Third-party defendant Joanne Sklodowsky's motions are likewise granted as to all but Counts 4 and 5 of the amended third-party complaint but denied as to these two counts as they deal with the frustration of the contract.

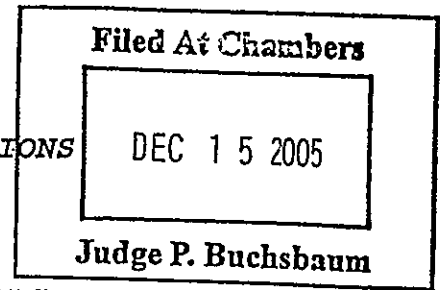
Further, the Court DENIES summary judgment as to all portions of the motions by plaintiff and defendant as to breach

of contract by defendant, and wrongful attempts to frustrate the contract. Only these issues, and only the Sklodowskys and defendant American Developers of New Jersey, LLC remain in this case. Further, should the counterclaim need to be amended to conform to this claim, the Court will consider such motion.

Mr. Vinci shall submit an appropriate order.

Memorandum of Decision on Motion

NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS



Paul G. Sklodowsky
v.

American Developers of New Jersey, LLC
v.

John F. Lushis, Jr., Joanne Sklodowsky and Tallman, Hudders &
Sorrentino, P.C.

Docket No. HNT-L-459-04

- 1) Third-party defendants' motion to compel additional testimony and production of documents withheld on the basis of privilege (joined by plaintiff's cross-motion)
- 2) Third-party defendants' motion for leave to file a fourth-party complaint (joined by plaintiff's cross-motion)
- 3) Third-party defendants' motion to quash subpoena issued to Porzio, Bromberg & Newman, P.C. (joined by plaintiff's cross-motion)
- 4) Defendant's motion to compel testimony, more specific answers to interrogatories and production of documents, and to set a date certain for deposition testimony

Opposed

Submitted and oral argument heard December 9, 2005; Decided
December 9, 2005

Memorandum issued December 15, 2005

The Honorable Peter A. Buchsbaum, J.S.C.

FACTS

This matter arises out of a failed real estate transaction between plaintiff Paul Sklodowsky ("Sklodowsky") and defendant/third-party plaintiff American Developers of New Jersey, LLC ("American Developers"). American Developers attempted to buy property owned by Sklodowsky and his wife,

Joanne Sklodowsky in Kingwood Township, New Jersey. The sale was aborted because American Developers refused to complete it unless Mrs. Sklodowsky signed the deed. The sales contract and deed for the property were in Mr. Sklodowsky's name only. At some point after the sales agreement was signed but prior to closing, Joanne Sklodowsky declined the request to sign the deed or to relinquish her marital rights in the marital residence located on the property.

Sklodowsky commenced this litigation against American Developers to determine the distribution of \$85,000 held in escrow pending the aborted closing. American Developers, in its Answer, filed a Counterclaim against Sklodowsky, as well as a Third-Party Complaint against John Lushis, an attorney who represented Sklodowsky with respect to the transaction. American Developers subsequently filed an Amended Third-Party Complaint naming Tallman, Hudders & Sorrentino ("TH&S"), Mr. Lushis' employer, as an additional third-party defendant.

American Developers alleges that Lushis fraudulently and willfully withheld the information that Sklodowsky was married as part of a scheme to induce American Developers into agreeing to accept a smaller portion of the property in order to allow Mrs. Sklodowsky to retain the marital residence. See Third-Party Defendants' Exhibit B, Second Count at ¶¶2-4. American Developers further alleges that Lushis' alleged failure to

disclose Sklodowsky's marital status constituted a negligent breach of duty owed to American Developers. Id. at ¶5.

Third-party defendants Lushis and TH&S have moved to compel Alan Wohl, who represented American Developers with respect to the transaction, to answer deposition questions pertaining to his alleged failure to inquire into Sklodowsky's marital status and to raise a title objection. American Developers has asserted the attorney-client privilege with respect to these questions. Third-party defendants also seek to compel additional deposition statements from Farouk Barakat, sole owner of American Developers. More specifically, third-party defendants seek to compel testimony regarding communications about the marriage between Wohl and Barakat, as well as Wohl's communications with the contractors retained by American Developers to perform testing on the property, and those concerning the title report and certificate of title obtained with the property.

Additionally, third-party defendants Lushis and TH&S move for leave to file a fourth-party complaint against Mr. Wohl and his employer, Wohl & Goldstein, P.A. Third-party defendants assert that, in the event it is determined American Developers sustained damages because it was not advised by Lushis that Sklodowsky was married, third-party defendants would be entitled

to contribution from Wohl for his alleged negligent representation of American Developers.

Third-party defendants Lushis and TH&S also move to quash a subpoena served upon the law firm of Porzio, Bromberg & Newman, P.C. ("PB&N"), formerly the attorneys for third-party defendant, Joanne Sklodowsky. This subpoena requested that PB&N produce certain documents relating to any communications between them and third-party defendants. Plaintiff has joined in all of third-party defendants' motions.

Defendant has cross-moved to compel plaintiff to testify as to attorney-client communications as to Mrs. Sklodowsky's unwillingness to complete the contract, compel more specific answers to interrogatories as to same, compel the production of documents withheld under attorney-client privilege, and set a date certain for the deposition of Joanne Sklodowsky.

LEGAL ANALYSIS

I. Third-Party Defendants' Motion to Compel Testimony

The attorney-client privilege protects communications between an individual and his attorney. The client holds this privilege, and only he can waive it. N.J.S.A. 2A:84A-20; N.J.R.E. 504. In New Jersey, the privilege regarding confidential communications between an attorney and client "extends to the necessary intermediaries and agents through whom the communications are made." *State v. Davis*, 116 N.J. 341, 362

(1989) (quoting *State v. Kociolek*, 23 N.J. 400, 413 (1957)). It has long been recognized that a client's privileged communications are "permanently protected from disclosure by himself, or by the legal advisor, or by the agent of either confidentially used to transmit the communications." Id. (quoting *State v. Loponio*, 85 N.J.L. 357, 360 (E. & A. 1913)).

In the present case, third-party defendants argue that American Developers has waived its right to assert the attorney-client privilege as to Wohl by filing the malpractice and fraud claims against Lushis and TH&S. N.J.S.A. 2A:84A-20(2)(c) provides that the attorney-client privilege shall not extend to "a communication relevant to an issue of breach of duty by the lawyer to his client."

Indeed, the New Jersey Supreme Court has noted that this statute permits an attorney to reveal confidences in order to establish a defense to a legal malpractice claim by the client. *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 292 (1995). However, the Court also noted that "the lawyer is not free to divulge all confidences. Rather, a lawyer sued for malpractice is obliged to make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to

know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure." Id. at 293.

Third-party defendants' assertion that attorney-client privilege has been waived with respect to a malpractice claim is erroneous. As the above statute and case law make clear, the waiving of the privilege in a malpractice action is limited only to information necessary to establish a defense to the malpractice claim. Third-party defendants' argument appears to be that, because American Developers filed a legal malpractice claim against them, the attorney-client privilege should be waived as to American Developers' attorney, Mr. Wohl. However, the precedents cited by third-party defendants do not support such a conclusion.

However, the third-party claim also alleges fraud, as is evident from the colloquy in oral argument. Clearly, an element of fraud is reliance. *Genneri v. Weichert Realtors*, 148 N.J. 582, 610 (1997). To make out this claim, American Developers has to show it relied on Lushis and not on its own attorney for information concerning the marriage. Third-party defendants argue they should be entitled to counter the claim of reliance by American Developers on Lushis by questioning Mr. Wohl with regard to his alleged knowledge of Sklodowsky's marital status. In support of this argument, third-party defendants cite

Weingarten v. Weingarten, 234 N.J. Super. 318 (App. Div. 1989), a case in which the Court pierced the attorney-client privilege based on allegations of fraud. See also *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997). The Court held that a wife had waived her attorney-client privilege by claiming reliance upon information supplied by her husband in reaching a settlement, and therefore that the husband was entitled to explore communication between her and her attorney to demonstrate she did not rely on the information. The Court further held:

To the extent the communications with her attorney bear on the issues involved here, the privilege should be deemed waived. The waiver is not a complete one, however, but only applies to information relevant to the issues implicated by her application to the court. Id. at 327-328.

The Court also noted:

In light of the limited facts before us we caution that the "competing demands of secrecy and disclosure can best be accommodated by compelling release of only those documents which bear upon the extent to which [the wife] reasonably relied upon [the husband's] representations allegedly made during the negotiation process [which ultimately produced the property settlement agreement]. Id. at 329-330 (quoting *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553 (App. Div. 1984)).

The Lushis third-party defendants further cite *Blitz v. 970 Realty Association*, 233 N.J. Super. 29 (App. Div. 1989), in which a purchaser-plaintiff claimed she relied on a seller's fraudulent misrepresentations regarding environmental conditions the property to be purchased. The Court held that the plaintiff had waived attorney-client privilege with regard to communications prior to closing, on the basis that these communications might show she was aware of the problems on the property.

Given the holdings in *Weingarten* and *Blitz*, this Court finds that third-party defendants are, in fact, entitled to explore the existence of such evidence as may enable them to demonstrate that American Developers or Wohl knew or were able to know Paul Sklodowsky's marital status before Lushis formally disclosed it to them, and did not rely on what Lushis said or failed to say in implementing the contract after it was signed. Accordingly, the Court will require an *in camera* review of all documents exchanged between American Developers and its counsel sent, dated or received between the day the real estate contract was signed on November 11, 2003 and the May 11, 2004 letter from Lushis to American Developers.

II. Third-Party Defendants' Motion To File Fourth-Party Complaint

R. 4:8-1(a) provides that within 90 days after service of the original answer, a defendant:

may file and serve a summons and third-party complaint upon a person not a party to the action who is or may be liable to defendant for all or part of the plaintiff's claim against defendant and may also assert any claim which defendant has against third-party defendant involving a common question of law or fact arising out of the same transaction or series of transactions as the plaintiff's claim.

The grant or denial of a motion to implead a third-party (or fourth-party) defendant is a matter left to the sound discretion of the trial court. *Newmark v. Gimbel's Inc.*, 54 N.J. 585 (1969).

In the present case, third-party defendants seek to implead Alan Wohl and his employer, Wohl and Goldstein, arguing that the claims arise from the same real estate transaction and stem from defendant's claim that it was not informed that Sklodowsky was married. Third-party defendants further assert that in the event it is determined that American Developers sustained damages because it was not advised plaintiff was married, then third-party defendants are entitled to contribution from Wohl for his failure to investigate this issue.

This Court finds there is no legal cause of action against Wohl that would merit third-party defendants' impleading Wohl and his employer. Very simply, Wohl cannot be a joint

tortfeasor as to the conduct of Lushis. Whether an attorney owes a duty to a non-client third party depends on balancing his duty to represent clients vigorously with the duty not to provide misleading information on which third parties may rely. *Petrillo v. Bachenberg*, 139 N.J. 472, 479 (1995). Further, attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorney's representations and that the non-clients are not too remote from the attorneys to be entitled to protection. Id. at 483.

Third-party defendants claim it was Wohl's duty to Lushis to investigate plaintiff's marital status and determine whether the dwelling on the property was plaintiff's marital residence. However, no such duty to Lushis existed. As defendant points out in its opposition brief, it is custom and practice in New Jersey that the Seller's attorney prepares the Seller's Affidavit of Title and Deed. Thus, it was the responsibility of Sklodowsky's attorney, Lushis, to prepare a correct Deed and convey possession pursuant to the terms of the Agreement of Sale. Mr. Wohl owed no duty to Lushis or any other proposed fourth-party plaintiff in this matter. Nor should he be held partially liable for Lushis' benefit if Lushis acted fraudulently or negligently as to third-party plaintiffs.

This case differs from *Petrillo*, as well as from *Blitz* and *Weingarten*, which are cited by third-party defendants. In those cases, misconduct was alleged that was related to information peculiarly within the possession of the party sought to be sued. In this case, Wohl's knowledge of Mr. Sklodowsky's marital situation could only be obtained from Sklodowsky or Lushis. Wohl certainly owed no duty to Lushis to tell his client, American Developers, about the marital status of Sklodowsky. Such a result would extend *Petrillo* beyond any rational bounds.

Accordingly, third-party defendants' alleged claim against Mr. Wohl and his employer lacks legal support, and this Court, in its discretion under R. 4:8-1, will deny the motion to file a fourth-party complaint. Such denial is without prejudice to Lushis and TH&S claiming at trial that they breached no duty to or did not defraud American Developers if it in fact relied on its own counsel, Wohl, not Lushis, to investigate marital information.

III. Third-Party Defendants' Motion to Quash Subpoena

Third-party defendants move to quash the subpoena served upon Mrs. Sklodowsky's former attorneys, PB&N. PB&N has withdrawn as counsel for Mrs. Sklodowsky, and she is proceeding *pro se*. The subpoena seeks to obtain copies of documents relating to any communications between Mr. Lushis and PB&N.

Third-party defendants seek to quash the subpoena, claiming that it seeks to obtain documents protected by the work product doctrine.

Where parties and their counsel have a common purpose with respect to the subject matter of communications between them, the common interest doctrine precludes discovery into those communications as an extension of the attorney-client and work product privileges. *LaPorta v. Gloucester County Bd. of Chosen Freeholders*, 340 N.J. Super. 254, 261 (App. Div. 2001). The doctrine may be asserted with respect to communications among counsel for different parties as well as for communications between counsel for one party and any representative of another party. Id. at 262. Further, it is not necessary for every party's interest to be identical; rather, the parties need only have a common purpose. Id.

Third-party defendants assert that they and their present and former counsel (Lushis), and plaintiff's counsel, Baurkot, share a common interest with PB&N in light of the allegations raised in American Developers' third-party complaint. For example, the third-party complaint alleges that Mr. Lushis, Mr. Sklodowsky and Mrs. Sklodowsky all conspired with one another in an effort to convince American Developers to accept less than the entire property. Accordingly, these parties have a common

interest in attempting to refute American Developers' allegations.

American Developers replies that the interests of Mr. and Mrs. Sklodowsky have been adverse to each other throughout the litigation. While to some extent this assertion is true, this matter requires further discovery since the common interest doctrine may apply even between parties whose interests are not identical.

Therefore, a decision on this motion, which deals with communications including PB&N, will be held until after Mrs. Sklodowsky has been deposed. Her testimony will shed light on the common interest. For the time being, as to communications between PB&N, Lushis, TH&S, Baurkot and the Spector firm, that is all the firms involved in this case as counsel other than for American Developers, counsel shall submit privilege logs. With respect to communications with outside parties, other than those listed in the prior sentence, the motion will be denied and subpoenas will be enforced on PB&N.

IV. Defendant's Motion to Compel Discovery and Set a Deposition Date for Joanne Sklodowsky

Defendant American Developers asks this Court to compel testimony and production of documents regarding attorney-client communications between Mr. Sklodowsky and Mr. Lushis. In support of this motion, it argues, that the privilege should be

pierced because a civil fraud has been committed. However, defendant can only overcome the attorney-client privilege and obtain access to a communication under the fraud exception if it makes a *prima facie* showing of future fraud as to which the attorney has been consulted. *In re Sesler*, 15 N.J. 393, 406 (1954).

Defendant has not made such a *prima facie* showing of fraud. Defendant argues that Lushis was fully aware that Sklodowsky was married and yet failed to disclose to American Developers that the property may not be free of all occupancy rights at closing. Defendant further alleges that Lushis and Sklodowsky developed a scheme to "carve out" of the sale certain acreage including that upon which the marital residence was located. Defendant, however, provides no evidence suggesting that such a scheme in fact existed.

The only evidence of fraud defendant offers is Sklodowsky's answers to interrogatories, in which he stated that Lushis knew he was married in "early Fall 2003," around the time period when the contract was signed. See Schachter cert. at Exhibit F. While this evidence supports defendant's claim that Lushis may have known of the marriage, it does not constitute *prima facie* evidence that Lushis and Sklodowsky committed a knowing fraud, which duped American Developers in continuing with the contract between November 2003 and May, 2004. This holding is supported

by Judge Reed's suggestion, in not dismissing the third-party claim, that it might nonetheless be subject to summary judgment.

Here, defendant does not even argue that Lushis and Sklodowsky made a misrepresentation, but rather that they omitted material information. Additionally, the fact that American Developers went ahead with the contract in June 2004 after being told about Mr. Sklodowsky's marital situation in May 2004 suggests a lack of reliance. Further, the fact that such title issues are usually dealt with at closing does not bespeak fraud. Thus, defendant has not made a *prima facie* showing of fraud that would warrant the breaching of the attorney-client privilege.

Defendant also argues that Sklodowsky waived his attorney-client privilege through his allegations against American Developers in the Complaint as well as his admission in his answers to interrogatories. In support of this argument, defendant cites *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553 (App. Div. 1984). In that case, a judgment creditor bank agreed to settle judgment for an amount less than the original loan amount. However, the bank later learned that defendant had not fully disclosed his assets during the settlement proceedings and sought to gain access to his attorney-client communications with respect to these misrepresentations. The Court held that:

[There is a] tripartite test in determining whether the privilege must yield to other important societal concerns. First, "[t]here must be a legitimate need . . . to reach the evidence sought to be shielded." Second, "[t]here must be a showing of relevance and materiality of that evidence to the issue before the court." Lastly, the party seeking to bar assertion of the privilege must show "by a fair preponderance of the evidence including all reasonable inferences that the information [cannot] be secured from any less intrusive source." Id. at 563-564 (quoting *In re Kozlov*, 79 N.J. 232 (1979)).

The Court further held, as in *Weingarten* and *Blitz*, supra, that the privilege could be breached to the extent the confidential communications were relevant to the question of reasonable reliance. Id. at 567.

Here, no issue of reasonable reliance is involved. Sklodowsky's suit was simply for return of a deposit. It raises no issues of state of mind. There is thus no waiver of the privilege.

Finally, even assuming a valid fraud claim as to Sklodowsky, defendant need not breach the privilege to obtain information as to whether Sklodowsky committed fraud in withholding information about his marriage. Pursuant to *United Jersey Bank* and *Kozlov*, information about fraud by Sklodowsky can be obtained through a less intrusive source, that avoids a breach of privilege, namely the deposition testimony of Joanne or Paul Sklodowsky. There is no need to examine conversations

between Lushis and Sklodowsky to get information about Paul's knowledge.

Therefore, the privileged communications are not discoverable for the purpose of showing fraud, as defendant alleges. Nor has the privilege been waived. Accordingly, defendant's motion will be denied with respect to the attorney-client communications.

In this connection, this Court finds the Sklodowsky's have waived marital privilege as a result of their discovery responses, and defendants may examine either Sklodowsky about these communications. Defendant will be able to ask whether Mrs. Sklodowsky discussed her refusal to accept the sale with Paul Sklodowsky, and the time and substance of such discussion. Defendant may also ask her if she communicated such information to Lushis, and if so, when, but may not ask about the substance of such conversations.

Finally, there has been no opposition to defendant's motion to set a date certain for the deposition of Joanne Sklodowsky, and this Court will order that Mrs. Sklodowsky's deposition take place by December 23, 2005. Mrs. Sklodowsky was in Court when this matter was argued and did not object to such order when the Court specifically asked her if she had any objections.

CONCLUSION

Third-party defendants John Lushis and Tallman, Hudders & Sorrentino, P.C. move to compel additional testimony and production of documents withheld on the basis of privilege. For the reasons stated above, motion is DENIED, except that the Court shall review *in camera* all documents involving the contract dated, sent, or received by Wohl or Wohl and Goldstein between November 11, 2003 and April 11, 2004.

Third-party defendants move for leave to file a fourth-party complaint against Alan Wohl and Wohl & Goldstein, P.A. For the reasons stated above, motion is DENIED.

Third-party defendants move to quash the subpoena issued to Porzio, Bromberg & Newman, P.C. For the reasons stated above, decision on the motion is deferred pending completion of Mrs. Sklodowsky's deposition but a privilege log shall be provided as to any such communications within two (2) weeks of the date of the order implementing this opinion, except the motion is DENIED as to Porzio communications not to counsel for the plaintiff and third-party defendants.

Defendant American Developers moves to compel plaintiff to testify as to attorney-client communications, compel more specific answers to interrogatories, compel production of documents withheld under attorney-client privilege and set a date certain for the deposition of Joanne Sklodowsky. For the reasons stated above, motion is GRANTED with respect to setting

a date for Mrs. Sklodowsky's deposition, and DENIED as to all other requests.

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Paul G. Sklodowsky
v.
American Developers of New Jersey, LLC
v.
Joanne Sklodowsky, et al.

Docket No. HNT-L-459-04

Defendant's motion to amend the answer to add a counterclaim;
plaintiff's/third-party defendant's motion for reconsideration.

Opposed

Oral argument heard May 11, 2006; Decided May 11, 2006
PETER A. BUCHSBAUM, J.S.C.

FACTS

This matter arises from an aborted closing which was to have taken place pursuant to a November 11, 2003 contract between plaintiff Paul G. Sklodowsky and the defendant/third-party plaintiff American Developers of New Jersey, LLC ("ADNJ") for sale of plaintiff's marital residence and accompanying lands. Initially, the plaintiff sought a declaratory judgment establishing his right to retain an \$85,000 deposit which had been posted as part of that real estate transaction.

In response, ADNJ counterclaimed against Paul Sklodowsky asserting that he committed fraud by not disclosing his marital status, which was the chief obstacle to the closing. Defendant also filed a third-party suit against Mrs. Joanne Sklodowsky,

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whose refusal to sign the deed made it impossible for Paul Sklodowsky to convey good title. A third-party claim was also filed against Mr. Sklodowsky's attorney, John Lushis and his firm, Tallman Hudders and Sorrentino ("TH&S") claiming fraud, negligent misrepresentation and a violation of the doctrine of *Petrillo v. Bachenburg*, 139 N.J. 472 (1995) in failing to disclose Mr. Sklodowsky's marital status. The negligent misrepresentation claim against Lushis and/or TH&S were dismissed by Judge Reed as being inconsistent with §5.06 of the contract, which was construed as stating that cancellation was the only remedy for negligent misrepresentation. Later, this Court denied Lushis' motion to add a fourth-party *Petrillo* claim against American's attorneys, Alan Wohl and his law firm Wohl & Goldstein.

On March 21, 2006, this Court issued an Order granting summary judgment to third-party defendants John Lushis and TH&S as to fraud and under *Petrillo*, and denied defendant's cross-motions for summary judgment on those issues. The Court also granted plaintiff's motion for summary judgment with respect to those counts of the complaint alleging fraud, and denied defendant's motion for summary judgment with respect to those claims. Additionally, the Court granted Mrs. Sklodowsky's summary judgment motions as to all but Counts 4 and 5 of the amended third-party complaint but denied as to these two counts.

Defendant ADNJ now moves for leave to amend its counterclaim. Plaintiff has also cross-moved for reconsideration of this Court's March 21, 2006 Order.

LEGAL ANALYSIS

Defendant's Motion to Amend Counterclaim

R. 4:7-3 provides that a claim which either matured or was acquired by the pleader after service of the pleading may, by leave of court, be presented as a counterclaim by supplemental pleading.

A motion for leave to amend is required by the Rules to be liberally granted and without consideration of the ultimate merits of the amendment. *Kernan v. One Washington Park*, 154 N.J. 437, 456-57 (1998). Amendment should also be permitted to avoid the possibility of inconsistent verdict and duplicative actions, particularly where no undue prejudice to any party is demonstrated. *Brower v. Gonnella*, 222 N.J. Super. 75 (App. Div. 1987).

In the present case, defendant seeks to amend its counterclaim to include an additional claim against plaintiff, alleging that as a result of conspiracy and collusion between plaintiff and third-party defendant Joanne Sklodowsky, ADNJ has sustained damages. Defendant adds that adding this additional claim will not necessitate further discovery, as the facts upon which the claim is based have already been fully explored in

discovery.

Plaintiff has opposed defendant's motion, asserting that defendant's new claim repeats the allegations of fraud and misrepresentation that were already dismissed by this Court. He states that the claim Paul and Joanne Sklodowsky colluded and conspired to withhold the information regarding his marriage is the same as the previous claim of fraud and misrepresentation. However, as defendant points out, the claim does not allege fraud, but rather that an alleged collusion between Mr. and Mrs. Sklodowsky led to a deliberate frustration of the contract. As this Court has previously noted, disputed issues remain as to such deliberate frustration which require factual resolution, and a damage award outside the termination language as contained in Section 5.06 of the contract may prove to be justifiable. Thus, given the liberal standard to be applied to amending counterclaims, defendant shall be permitted to add their "collusion and conspiracy" claim against plaintiff.

Third-party defendants Lushis and TH&S have also opposed this motion, pointing out that the proposed Amended Counterclaim includes defendant's allegations of fraud against Lushis, which were dismissed by this Court. Defendant, however, has responded that it understands this Court's March 21, 2006 decision and does not intend to pursue any claims against third-party defendants Lushis and TH&S. However, defendant claims it

retained the original form, because it does not want the failure to repeat the claims deemed to be a waiver in the event of an appeal.

Accordingly, defendant's motion will be granted, but with the understanding that defendant may not pursue any claims which have already been dismissed by this Court.

Plaintiff's Motion for Reconsideration

Plaintiff and third-party defendant Mrs. Sklodowsky have moved for reconsideration of this Court's March 21, 2006 Order, arguing that newly discovered evidence reveals that defendant had been advised earlier than originally thought that plaintiff would not be able to tender a deed conveying the marital residence, and it still failed to cancel the contract. In support of this motion, plaintiff cites R. 4:49 and R. 4:50. However, this motion is in fact governed by R. 4:42-2, which provides:

Any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.

Here, counsel for plaintiff asserts that he discovered new evidence at the time he assumed the representation of Joanne Sklodowsky. This evidence includes several letters and e-mail

transmissions exchanged between counsel involved in the sale of the subject property. Plaintiff's counsel asserts that these letters show that defendant was advised almost two months before the closing date that Joanne Sklodowsky would not be signing the deed, and thus that defendant had ample opportunity to cancel the contract.

In opposition, defendant first points out that the documents plaintiff claims are new evidence were actually produced to plaintiff on June 14, 2005 and September 27, 2005, during the discovery period. However, defendant further asserts that, even if they constitute "new evidence," the issue of whether Joanne Sklodowsky would have joined in the deed could not have been resolved until closing. Defendant also notes that the documents show plaintiff himself was advised that Mrs. Sklodowsky was not going to cooperate in the sale of the property. Even given the information in the documents, defendant argues, an inference can be drawn that the Sklodowskys knew they would not be able to convey good title and still colluded and conspired to frustrate the contract.

This Court denied summary judgment to plaintiff on the ground that it could not be determined as a matter of law that he is entitled to the return of the deposit for the transaction. While the "new" documents provided by plaintiff are clearly probative, they do not provide sufficient evidence for this

Court to modify its ruling under R. 4:42-2 in the interest of justice, as factual issues still remain as to whether Mr. and Mrs. Sklodowsky acted in good faith in their dealings with defendant. As the facts are not yet clear on this issue, plaintiff cannot be entitled to judgment as a matter of law, and this Court's denial of his summary judgment motion must stand. Accordingly, the motion to reconsider will be denied.

Conclusion:

Defendant American Developers of New Jersey moves to amend its counterclaim against plaintiff. For the reasons stated above, motion is GRANTED.

Plaintiff Paul Sklodowsky and third-party defendant Joanne Sklodowsky move for reconsideration of this Court's March 21, 2006 Order. For the reasons stated above, motion is DENIED.

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Court to modify its ruling under R. 4:42-2 in the interest of justice, as factual issues still remain as to whether Mr. and Mrs. Sklodowsky acted in good faith in their dealings with defendant. As the facts are not yet clear on this issue, plaintiff cannot be entitled to judgment as a matter of law, and this Court's denial of his summary judgment motion must stand. Accordingly, the motion to reconsider will be denied.

Conclusion:

Defendant American Developers of New Jersey moves to amend its counterclaim against plaintiff. For the reasons stated above, motion is GRANTED.

Plaintiff Paul Sklodowsky and third-party defendant Joanne Sklodowsky. move for reconsideration of this Court's March 21, 2006 Order. For the reasons stated above, motion is DENIED.

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Page 1
 SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION - MONTGOMERY COUNTY
 DOCKET NO. HM14-03904
 PAUL G. SKLODOWSKY,
 Plaintiff,
 vs.
 DEPOSITIONS OF
 JOANNE SKLODOWSKY
 AMERICAN DEVELOPERS OF
 NEW JERSEY, PAUL G. SKLODOWSKY
 Defendants/Third
 Party Plaintiff,
 vs.
 JOHN E. LUSHIS, JR.
 JOANNE SKLODOWSKY and
 SORRENTINO,
 Third Party Defendants.
 TRANSCRIPT of testimony as taken by and
 before MARY ELLEN KARAMUS, a Certified
 Shorthand Reporter and Notary Public of the
 State of New Jersey at the law offices of
 NORRIS, MCLAUGHLIN & MARCUS, 721 Route 202-206,
 Bridgewater, New Jersey on Thursday, December
 22, 2005, commencing at 10:15 a.m.

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 JOANNE C. SKLODOWSKY,
 23 Union Road, Frenchtown, New Jersey,
 08825, having been duly sworn, testified
 as follows:
 DIRECT EXAMINATION BY MR. SCHACHTER:
 Q. Mrs. Sklodowsky, my name is Dick
 Schachter. I'm an attorney. I practice law in
 Bridgewater, New Jersey and I represent
 American Developers of New Jersey in this
 case.
 You and I have spoken over the
 phone, isn't that true?
 A. Yes.
 Q. We have met only briefly, either in
 court or somewhere else, with a lot of other
 people around, correct?
 A. Correct.
 Q. I'm going to ask you a series of
 questions related to a lawsuit that was started
 by your husband against American Developers, in
 which American Developers filed claims, both
 against you and your husband.
 Are you aware of that?
 A. Yes.
 Q. And are you aware of claims that

Page 2
 APPEARANCES:
 LAW OFFICE OF DANIEL J. BAURKOT
 14 Filadelfia Court
 Newark, New Jersey 07102
 BY: DANIEL J. BAURKOT, ESQ.,
 Attorney for the Plaintiff.
 SPECTOR, GADON & ROSEN
 100 Lenox Road
 Montclair, New Jersey 07042
 BY: GEORGE M. VINCI, JR., ESQ.,
 Attorney for the Third Party Defendants,
 John F. Lushis, Jr., Tallman
 Hudders & Sorrentino,
 NORRIS, MCLAUGHLIN & MARCUS
 721 Route 202-206
 Bridgewater, New Jersey 08807
 BY: ARTHUR J. SCHACHTER, ESQ.,
 ALYSSA VERDERAMI, ESQ.,
 Attorney for the Defendant/Third Party
 Plaintiff, American Developers of New
 Jersey.
 JOSEPH T. MANOVIC, ESQ.,
 101 Windsor Place
 Mechanicsville, Pennsylvania 19062
 Attorney for the Plaintiff.

Page 5
 were asserted against you and your husband?
 A. Yes.
 Q. You have seen the papers?
 A. Yes.
 Q. You're not represented by a lawyer
 here today I guess?
 A. No.
 Q. Is that correct?
 A. No I'm not.
 Q. If I ask you a question that you
 don't understand, please let me know and I'll
 try to rephrase the question.
 A. Okay.
 Q. If I ask you a question that you
 don't know the answer to or you don't remember
 the answer to, tell me that.
 Okay?
 A. Yes.
 Q. You have to talk audibly so that
 what you say can be taken down and recorded
 because eventually what you say and I say here
 today is going to be typed up in a booklet form
 and anyone will be able to read it.
 Do you understand that?
 A. Yes I do.

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 908-369-3931

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 Q. Do you understand also that you are
 under oath?
 A. Yes.
 Q. And as a result of being under oath
 you're obligated to tell the truth, obviously?
 A. Yes.
 Q. And you should know that whatever
 you or I say here today could be used at trial
 of this case. You're aware of that also?
 A. Yes.
 Q. Do you have any questions of me
 that you want to ask before we start?
 A. No.
 Q. One other instruction. There are
 other lawyers here; one representing your
 husband, one representing someone named John
 Lushis. Two represent your husband. I beg
 your pardon.
 If someone makes an objection to a
 question I ask, wait until we discuss it, wait
 until the objection is on the record and then
 you will be told whether or not you should
 answer the question.
 Do you understand that?
 A. Yes, I do.

PQ

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1 rehashing this again.
 2 Q. Can you answer my question?
 3 A. It was what I had said previously.
 4 Q. My question was, was this
 5 conversation, where you said you wouldn't have
 6 anything to do with it and he said it was his
 7 property and that he would do with it as he
 8 pleased, my question was, if you remember, was
 9 it before or after your telephone conversation
 10 with Mr. Lushis?
 11 A. It was before.
 12 Q. Can you estimate how long before?
 13 A. As far as dates and times, I'm not good
 14 at remembering times. I don't write things
 15 down.
 16 Q. Did you talk to your children about
 17 it? Did you talk to anybody about not having
 18 anything to do with the sale of the property?
 19 A. No.
 20 Q. Did you tell Shannon about it?
 21 A. No.
 22 Q. When you spoke to Mr. Lushis you
 23 told us that he told you to get a lawyer in New
 24 Jersey I think you said?
 25 MR. VINCI: Objection.

1 A. No.
 2 Q. The conversation you had with Mr.
 3 Lushis in November 2003, you testified to that,
 4 correct?
 5 A. Yes.
 6 Q. My question is, did you contact a
 7 lawyer after that conversation?
 8 A. No.
 9 Q. You did contact a lawyer at some
 10 point, correct?
 11 A. After June 2004.
 12 Q. Between November 2003 when you had
 13 the conversation with Mr. Lushis and June 2004,
 14 did you ever contact any other lawyer about
 15 your rights to the property?
 16 A. No.
 17 Q. Other than the conversations you've
 18 already told us about with your husband, did
 19 you have any other conversations with your
 20 husband about the property and its sale?
 21 A. Can you be more specific?
 22 Q. You don't understand my question?
 23 A. No.
 24 Q. You told us about, I believe two
 25 conversations with your husband concerning the

1 Q. Or am I misstating your testimony?
 2 MR. VINCI: That was not her
 3 testimony. She said he wouldn't speak to her,
 4 that he represented her husband.
 5 MR. SCHACHTER: All right. Fair
 6 enough.
 7 Q. You said that he couldn't speak to
 8 you, he represented your husband, correct?
 9 A. Yes.
 10 Q. In your Answer to Number Seven that
 11 I showed you before, you said in that
 12 conversation he told you to get a lawyer in New
 13 Jersey, correct?
 14 MR. VINCI: Are you asking her what
 15 the Interrogatory says?
 16 MR. SCHACHTER: I'm asking her what
 17 the Interrogatory says.
 18 A. She could contact other New Jersey
 19 counsel.
 20 Q. My question is, did you contact any
 21 lawyer, whether in New Jersey or anywhere else,
 22 about your rights to the property, if any?
 23 MR. BAURKOT: At what time are you
 24 referring to?
 25 MR. SCHACHTER: The conversation.

1 sale of the property, am I right?
 2 A. Yes.
 3 Q. Do you remember having any other
 4 conversations with your husband about the sale
 5 of the property?
 6 A. No.
 7 Q. Do you remember having any
 8 conversations about the sale of the property
 9 with any of your children after your
 10 conversation with Mr. Lushis, the telephone
 11 conversation?
 12 MR. VINCI: Objection to the form.
 13 Q. You can answer the question.
 14 A. About I just said I wouldn't sign, you
 15 know, I wouldn't -- not that I wouldn't sign.
 16 I said I wouldn't have anything to do with the
 17 sale of the property.
 18 Q. And you told that to your children?
 19 A. Yes.
 20 Q. Do you know when you told it to
 21 your children?
 22 A. After I found out that it was being sold.
 23 Q. And when you say after you found
 24 out it was being sold, you mean after Shannon
 25 told you that it was for sale?

1 MR. VINCI: Objection.
 2 MR. BAURKOT: Which conversation?
 3 MR. SCHACHTER: Come on. Give me a
 4 break.
 5 Q. That refers to a conversation with
 6 Mr. Lushis, does it not, Number Seven?
 7 MR. BAURKOT: No, it does not. You
 8 mean the specific one?
 9 MR. SCHACHTER: Give me that for
 10 one minute.
 11 MR. BAURKOT: It doesn't have a
 12 date on there.
 13 MR. SCHACHTER: I'm sorry. I
 14 misstated the date anyway.
 15 Q. Let me ask you this question.
 16 Mrs. Sklodowsky, did you ever have
 17 another conversation with Mr. Lushis after the
 18 first one you already testified to today?
 19 A. Yes.
 20 Q. When?
 21 A. In June 2004.
 22 Q. Did you talk to Mr. Lushis between
 23 November 2003 when you said you had that
 24 telephone conversation with him and June of
 25 2004?

1 A. Yes.
 2 Q. Were any of those conversations in
 3 front of your husband?
 4 A. No.
 5 Q. Did the issue of the sale of the
 6 house come up in any of your family counseling
 7 sessions?
 8 MR. VINCI: Objection. Asked and
 9 answered.
 10 Q. You can answer.
 11 A. As far as I remember, no.
 12 Q. Did your husband ever tell you when
 13 he signed the contract to sell the property?
 14 A. Did he? Pardon me?
 15 Q. Did he ever tell you that he signed
 16 the contract to sell the property?
 17 A. No.
 18 Q. Did you ever find out that he
 19 signed the contract to sell the property?
 20 A. I found out in the winter of 2004 there
 21 was a signed contract.
 22 Q. How did you find out?
 23 A. From Shannon, my daughter-in-law.
 24 Q. I asked you if you told your
 25 children that you wouldn't assist in the sale

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1 of the property. Did you tell that to Shannon
2 also?
3 A. I don't remember.
4 Q. Do you remember when in the winter
5 of 2004 Shannon told you that the property was
6 under contract?
7 A. Could have been around February or so.
8 Q. If you know, were your children on
9 good terms with your husband in November of
10 2003?
11 MR. BAURKOT: Objection to the
12 form.
13 Q. If you know?
14 A. Well, it has nothing to do with the sale
15 of the property.
16 Q. I understand but maybe you can
17 answer the question.
18 A. No.
19 Q. They did not?
20 A. No. I have nothing to say upon that.
21 Q. Was Shannon on good terms with your
22 husband?
23 MR. BAURKOT: Objection to the
24 form.
25 Q. In November of 2003?

1 people in?
2 A. Do I, no. I do not remember.
3 Q. Do you remember ever speaking to
4 any of these people?
5 A. No.
6 Q. Were you introduced to any of these
7 people?
8 A. That, I don't remember if I was.
9 Q. Do you know what the people were
10 doing there?
11 MR. BAURKOT: Objection. Asked and
12 answered.
13 Q. Well, you said digging. Let me ask
14 it this way.
15 Do you know why the people were
16 there.
17 MR. BAURKOT: Objection. Asked and
18 answered.
19 Q. Can you answer that question?
20 A. Just, I, I didn't have any concern what
21 they were doing there.
22 Q. You didn't care?
23 A. I didn't ask and I didn't get any
24 response because I didn't ask anybody.
25 Q. Did you think it may have been in

1 A. As I said, I have nothing to say on that.
2 Q. Were Shannon and your husband
3 speaking in November 2003?
4 A. I have nothing to say on that.
5 Q. I'm asking you the question. I
6 think it's a fair question.
7 A. Year what?
8 Q. 2003?
9 A. Yes, they were speaking.
10 Q. Did you ever meet someone named
11 Farouk Barakat?
12 A. Pardon me? Did I?
13 Q. Ever meet someone named Farouk
14 Barakat?
15 A. When I came to the meeting in --
16 Q. Here?
17 A. At the office here is the first time I
18 ever met him.
19 Q. Were you living at the property in
20 November 2003?
21 A. Yes.
22 Q. Was your husband living there?
23 A. Yes.
24 Q. At any time after November 2003 did
25 you see people coming around on the property

1 connection with your husband's sale of the
2 property?
3 MR. BAURKOT: Objection.
4 Q. You can answer.
5 A. I have. I had nothing to do with it.
6 Q. I understand you had nothing to do
7 with it but did you have any idea as to maybe
8 that's what it was about?
9 A. No.
10 Q. Now you said that you spoke to Mr.
11 Lushis in November of 2003 and your next
12 conversation with him, I think was June of
13 2004, is that right?
14 A. Yes.
15 Q. Did you meet with Mr. Lushis in
16 June of 2004?
17 A. Yes.
18 Q. Was anyone else present?
19 A. I was in the office with him alone.
20 Q. In which office?
21 A. In his office in Pennsylvania.
22 Q. He met with you?
23 A. Yes.
24 Q. And had you made an appointment?
25 A. Yes.

1 who you did not know?
2 A. Yes.
3 Q. Did you ask anyone what they were
4 doing there?
5 A. No.
6 Q. Did you ask your husband what they
7 were doing there?
8 A. No.
9 Q. Did you see what they were doing?
10 A. They were digging holes.
11 Q. Do you know why they were digging
12 holes?
13 A. No.
14 Q. Did you ever talk to any of them?
15 A. No.
16 Q. Did any of them ever ask you for
17 access to the property so they could get on the
18 property or if they could go in any particular
19 place in the property?
20 A. I, if I was there I had to open the gate,
21 if I was in the office but I don't remember if
22 I had to open the gate because we have gates on
23 the property.
24 Q. Do you ever remember opening the
25 gates on the property to let any of these

1 Q. Were you represented by a lawyer at
2 the time?
3 A. No.
4 Q. Did you ever meet with Mr. Lushis
5 again after that or speak to him again after
6 that, other than in connection with court
7 appearances or appearances at --
8 A. No.
9 Q. Depositions like this?
10 A. No.
11 Q. You retained the law firm called
12 Porzio, Bromberg and Newman to represent you in
13 this case?
14 A. Yes.
15 Q. Did you call them directly or did
16 someone make a phone call on your behalf?
17 A. John Lushis gave me his name and we made
18 an appointment to meet with him mid June.
19 Q. Did you pay this law firm or did
20 your husband pay this law firm?
21 A. I paid it.
22 Q. I'm sorry?
23 A. I paid it.
24 Q. And I think you said Mr. Lushis
25 made the appointment with this law firm?

1 A. Yes.
 2 MR. VINCI: Objection. I think she
 3 said Lushis gave her the card. She made the
 4 appointment. That's what I thought she said.
 5 Q. When you met with this firm did
 6 your husband go with you?
 7 A. He drove me there.
 8 Q. Did you tell your husband why you
 9 were going there?
 10 A. We had to. I had to discuss the, you
 11 know, sale of the property.
 12 Q. And what did he say?
 13 A. Nothing.
 14 Q. You just told him that you were
 15 going to see the lawyer about your rights and
 16 the property?
 17 MR. VINCI: Objection.
 18 A. I was told that I had rights by the
 19 lawyer so I had to, you know, find out what my
 20 rights were.
 21 Q. Which lawyer told you you had
 22 rights?
 23 MR. VINCI: Objection.
 24 A. That's confident -- that's privileged.
 25 MR. VINCI: You're asking her about

1 you know, sell it on his own.
 2 Q. Is that what he told you or is that
 3 what you're assuming?
 4 A. That's what I'm assuming.
 5 Q. What did he tell you?
 6 A. He didn't.
 7 Q. I'm sorry?
 8 A. He didn't say anything.
 9 Q. He bought the Warren property on
 10 his own, did he not?
 11 A. Yes.
 12 (10/7/94 deed received and marked
 13 JS-2 for Identification.)
 14 Q. I want to show you a document
 15 that's been marked JS-2. I'm showing you Page
 16 Two and the name Paul G. Sklodowsky is typed
 17 in.
 18 Do you see that?
 19 A. Yes.
 20 Q. Is that your husband's signature
 21 above it?
 22 A. Yes, it is.
 23 Q. Then the name Joanne C. Sklodowsky
 24 is typed under the line underneath your
 25 husband's, is that right?

1 communications with attorneys.
 2 MR. SCHACHTER: It's a proper
 3 objection. I understand. I'll, I'll back
 4 off.
 5 MR. VINCI: You know she's not
 6 represented so I would ask that you refrain
 7 from asking questions that --
 8 MR. SCHACHTER: I'm doing the best
 9 I can, George. This is very difficult.
 10 Q. Did you discuss your rights with
 11 your husband?
 12 A. No.
 13 Q. At no time?
 14 A. No.
 15 Q. I'm sorry. That was a bad
 16 question. I guess the answer is you never
 17 discussed rights, your rights with your
 18 husband?
 19 A. I never gave it any thought.
 20 Q. I'm talking about after your
 21 conversations with Mr. Lushis.
 22 A. I --
 23 MR. VINCI: Objection.
 24 MR. BAURKOT: I believe she said
 25 she never discussed her rights with her husband

1 A. Yes, yes.
 2 Q. Is that your signature?
 3 A. Yes it is.
 4 MR. SCHACHTER: I'll give you
 5 copies of these.
 6 MR. VINCI: That's what? Could you
 7 just tell me what it is? Is it the '99 deed?
 8 MR. SCHACHTER: It's a deed to the
 9 19 --
 10 MR. VINCI: 1999?
 11 MR. SCHACHTER: 1994 deed.
 12 MR. NANOVIC: May I see that,
 13 please?
 14 Q. Do you remember your son Joe
 15 acquiring a portion of the property in
 16 Frenchtown or Kingwood?
 17 A. Yes.
 18 Q. And do you know when that was?
 19 A. I ran through it in the papers. Here in
 20 the Interrogatory it said 1999.
 21 Q. Do you remember signing a deed to
 22 that property?
 23 A. Yes.
 24 Q. When it was given to Joe?
 25 A. Yes.

1 so that would cover that time frame you're
 2 referring to in that last question.
 3 Q. You never discussed your rights
 4 with your husband, that's what you're saying?
 5 A. Right.
 6 MR. VINCI: Objection. That's what
 7 she said.
 8 Q. And when did you learn you had
 9 rights to the property?
 10 MR. VINCI: Objection.
 11 A. I don't know.
 12 MR. BAURKOT: Objection.
 13 MR. VINCI: I believe that may call
 14 for --
 15 MR. SCHACHTER: I'm just asking
 16 when.
 17 MR. VINCI: I would, I would be
 18 concerned. It could lead to --
 19 MR. SCHACHTER: I think the answer
 20 was "I don't know," so it doesn't matter.
 21 Q. When you said to your husband that
 22 you would not have any part of the house being
 23 sold, the property being sold, what was his
 24 reaction?
 25 A. Like he bought it on his own so he could,

1 Q. Do you know why you signed that
 2 deed?
 3 A. Because my husband Tank and son told me
 4 to sign the piece of paper.
 5 Q. Did they tell you why you should
 6 sign the deed?
 7 A. Did he say why? No.
 8 Q. Did you ask why?
 9 A. No.
 10 Q. Did your husband say you had to
 11 sign them?
 12 A. No.
 13 Q. Did Joe tell you why you had to
 14 sign it?
 15 A. No.
 16 Q. Did anyone tell you why you had to
 17 sign it?
 18 A. No. Just it was a deed and we were
 19 giving a piece of property to my son and they
 20 said "Here, sign this paper," and I just signed
 21 it.
 22 Q. Did your husband talk to you about
 23 giving a part of the property to your son Joe?
 24 A. Did he?
 25 Q. Before the deed was signed?

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1 A. He carved out a piece of property that he
2 was -- the three acres or whatever it is that
3 Joe, for his, one of his children and Joe was
4 the only one that expressed interest in it. It
5 was offered to his other sons but they didn't
6 want it.
7 Q. The same piece was offered to your
8 other sons you mean?
9 A. Yes.
10 Q. And when did you first learn or
11 when did someone first ask you that you should
12 sign a deed to the property that your son Joe
13 got?
14 A. When? The accountant, who was Fred
15 Scheffman, came with a piece of paper and said
16 "This is the sale, this is for the deed," I
17 guess, "For the property for Joe so just sign
18 it."
19 Q. And where was this done? Where did
20 the accountant come?
21 A. Into our office in, you know, the Union
22 Road property.
23 Q. Did he come by himself?
24 A. He was with Joe.
25 Q. Who else was there?

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1 Who decided what piece to give to
2 Joe, what part of the property to give to Joe?
3 A. It was a carve out. I guess they had a
4 piece of property that was carved off of the
5 main piece that he bought.
6 Q. When you say "he bought," you mean
7 that your husband bought?
8 A. Correct.
9 Q. Who decided what piece to carve
10 out?
11 A. I'm not an engineer. I don't know.
12 Q. Were you involved in the decision
13 at all?
14 A. No.
15 Q. Were you in favor of doing this for
16 your son?
17 A. I'd do anything for my children.
18 MR. SCHACHTER: I have no more
19 questions, subject to our calling the judge.
20 Do you have any?
21 MR. BAURKOT: Do you want to go
22 first?
23 MR. SCHACHTER: Let me take five
24 minutes.
25 (A brief recess is taken.)

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1 A. My husband Tank.
2 Q. Anyone else there that you know of
3 or that you can remember?
4 A. No, I can't, no.
5 Q. Were you told in advance to be
6 there?
7 A. I live there. I live in the house, so.
8 Q. Well, understand but you're not
9 always home, are you?
10 A. Well, at that point.
11 Q. Well, I guess my question is, and
12 if you remember, fine and if you don't, then I
13 understand. Was this an appointment made so
14 that he came and he knew you would be home at
15 the time?
16 A. That I can't remember.
17 Q. When your husband bought the
18 property in Frenchtown, Kingwood Township, did
19 you know it was in his name only?
20 A. Well, yeah, I didn't sign anything so I
21 knew it was his name.
22 Q. When you were asked to sign the
23 deed for Joe, did you ask why you had to sign
24 if you didn't own the property at all?
25 A. No.

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1 CROSS EXAMINATION BY MR. BAURKOT:
2 Q. Mrs. Sklodowsky, my name is Dan
3 Baurkot. You've met me before, correct?
4 A. Yes.
5 Q. You understand that I represent
6 your husband, Paul Sklodowsky, in this matter?
7 A. Yes.
8 Q. I'm just going to ask you a few
9 follow-up questions as a result of your
10 testimony that you gave earlier here today.
11 I believe you testified earlier,
12 and you can correct me if I'm wrong, that you
13 did not find out that you had any rights to
14 the, to the marital residence until sometime
15 after June of 2004, is that correct?
16 A. Yes, that's correct.
17 Q. Is it also correct, then, that you
18 did not know until June, sometime after June of
19 2004, that you had the ability to stay on the
20 property as a result of not signing the deed in
21 this matter, is that correct?
22 A. Yes.
23 Q. I was confused by some of your
24 earlier testimony with respect to when you
25 learned of, Number One, when the property was

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1 Q. Did your husband ever tell you or
2 Joe ever tell you that you had to sign the deed
3 for that property that Joe got?
4 A. Did Joe or my -- what was that? Did
5 Joe?
6 Q. Well, let me ask it this way.
7 Did anyone ever tell you you had to
8 sign the deed to the property that Joe got?
9 A. No. Just that Tank said the property was
10 to go to Joe which should be from both of us.
11 Q. Was that a gift?
12 A. It's hard to say.
13 Q. I'm sorry?
14 A. It was -- it wasn't a gift and it wasn't
15 -- it was -- he was supposed to pay for the
16 property. He was supposed to pay for the
17 property so I guess you couldn't consider that
18 a gift.
19 Q. How much was he supposed to pay?
20 A. It was supposed to be \$75,000.
21 Q. So the property was not a gift?
22 A. Right.
23 Q. It was a sale?
24 A. Yes.
25 Q. Correct?

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1 listed for sale and, Number Two, when you
2 learned of a contract of sale being signed by
3 anybody in connection with this property.
4 MR. SCHACHTER: Objection to the
5 form.
6 Q. I'm going to ask you a couple of
7 questions about this to try to clarify the
8 timing.
9 A. Okay.
10 Q. As far as learning that the
11 property was for sale, was that sometime in
12 2003?
13 A. Yes, 2003.
14 Q. And you learned that through
15 conversations with Shannon Sklodowsky?
16 A. Yes.
17 Q. As far as when you learned that
18 there was a contract for sale that had been
19 signed, was that sometime in 2004?
20 A. Yes.
21 Q. Did you also learn of that contract
22 for sale being signed through Shannon
23 Sklodowsky?
24 A. Yes.
25 Q. And at that time you had no

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1 knowledge that you had marital rights to the
 2 property in February of 2004 when you learned
 3 that there was a contract for sale that had
 4 been entered into?
 5 A. No.
 6 Q. No?
 7 A. I did not know I had any rights.
 8 Q. So when you testified that you
 9 would not, in your mind, you would not
 10 cooperate with the sale at that time, was it
 11 your testimony that you would not have anything
 12 to do with the sale?
 13 A. Right, yes. That I wouldn't have
 14 anything to do with the sale of the property.
 15 Q. If the first time that you learned
 16 that you had the ability to not sign a deed and
 17 effect the sale of this property was in June of
 18 2004, is it correct, then, that prior to this
 19 time you never communicated a refusal to sign
 20 the deed to anybody in this case?
 21 A. Correct.
 22 Q. Is it also correct that the first
 23 time that you communicated this refusal to sign
 24 the deed was at the closing?
 25 A. I was not at the closing.

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1 daughter?
 2 A. Daughter-in-law.
 3 Q. Daughter-in-law. Who is she
 4 married to?
 5 A. To Joseph Sklodowsky.
 6 MR. VINCI: That's all I have.
 7 MR. SCHACHTER: Just a few
 8 follow-up questions.
 9
 10
 11 REDIRECT EXAMINATION BY MR. SCHACHTER:
 12 Q. Shannon and Joe, do they live
 13 together now?
 14 A. Yes.
 15 Q. They are still, are they still
 16 located at 203 Barbervtown Point Breeze Road
 17 Frenchtown, New Jersey?
 18 A. Yes.
 19 Q. Is Robert Sklodowsky your son?
 20 A. Yes.
 21 Q. Does he still live at 172 Cemetery
 22 Hill Road, Washington, New Jersey?
 23 A. Yes.
 24 Q. And who is Sharon Sklodowsky?
 25 A. That's my daughter.

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1 Q. So you did not, you did not show up
 2 for the closing?
 3 A. Yes.
 4 MR. BAURKOT: I don't believe I
 5 have any further questions at this time.
 6
 7
 8 CROSS EXAMINATION BY MR. VINCI:
 9 Q. Hello, Mrs. Sklodowsky. My name is
 10 George Vinci. We've met at, I believe a couple
 11 of these depositions and also in court a couple
 12 of weeks ago.
 13 As you know, I represent John
 14 Lushis and his firm.
 15 A. Yes.
 16 Q. You mentioned earlier that there
 17 were some people on the property, earlier in
 18 response to Mr. Schachter's questioning. These
 19 observations that you had of people digging,
 20 was this 2003 or 2004? Do you remember?
 21 A. I believe it was in the early part of
 22 2004.
 23 Q. Was there ever a time in 2004 where
 24 anyone, either any of these people that were
 25 digging or anyone else -- strike that.

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1 Q. Does she still live at 225
 2 Creekside Drive, New Hope, Pennsylvania?
 3 A. No.
 4 Q. Where does she live now?
 5 A. She lives in Kintnersville, Pennsylvania.
 6 Q. Do you know an address?
 7 A. I'd have to look it up.
 8 It's 395 Frog Town Road.
 9 Q. Frog Town?
 10 A. Yup.
 11 Q. F-R-O-G?
 12 A. Yes. In Kintnersville, Pennsylvania.
 13 Q. K-I-N-T-E-R-S-V-I-L-L-E?
 14 A. Yeah.
 15 Q. Have I named all of your children?
 16 A. No. I have an oldest son. Paul T.
 17 Sklodowsky.
 18 Q. And where does he live?
 19 A. Stockertown, Pennsylvania.
 20 Q. Do you have an address?
 21 A. Oh, it's a post office box and I don't
 22 know the house address but their street name is
 23 Faith Avenue.
 24 Q. F-A-I-T-H?
 25 A. Yes.

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1 Was there ever a time where any of
 2 these individuals that were digging on the
 3 property entered the house?
 4 A. No, never entered the house.
 5 Q. Have you ever heard of the name
 6 RBZ?
 7 A. Just through the Interrogatories.
 8 Q. How about a Mr. Cederbaum? Do you
 9 know who Mr. Cederbaum is?
 10 A. No.
 11 Q. Was there ever a time in 2004 that
 12 there were any individuals on the property --
 13 strike that.
 14 Was there ever a time after January
 15 of 2004 where anyone came into the property
 16 that you didn't know who they were that were
 17 there to do any inspection or look at
 18 something?
 19 A. No.
 20 Q. And it's my understanding from your
 21 prior testimony that you never had any
 22 conversations with any of these people that
 23 were digging on the property?
 24 A. That's correct.
 25 Q. Shannon Sklodowsky, she's your

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1 Q. You said I believe, correct me if
 2 I'm wrong, that your husband wanted to sell
 3 this property, as far as you know, to help the
 4 children financially?
 5 A. Yes.
 6 Q. And you also testified you would do
 7 anything to help your children?
 8 A. Correct.
 9 Q. Why, then, did you oppose the sale
 10 of the property?
 11 MR. VINCI: Objection to the extent
 12 it calls for testimony or information that may
 13 have been provided to her by counsel.
 14 Q. Can you answer the question? Don't
 15 tell us anything a lawyer told you.
 16 A. I don't know how to answer that.
 17 Q. What did your husband, as far as
 18 you know, intend to do with the money from the
 19 sale of the property?
 20 A. That as I said, he wanted to help out
 21 his children, you know.
 22 Q. Why did you think it was for the
 23 purpose of helping his children?
 24 A. Because they were in a financial bind.
 25 Q. Did anyone tell you that was the

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