SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Dominic Capponi and Louise Capponi	:	**Civil Action**
Plaintiffs	:	
v.	:	**DOCKET NO.: CPM L 410-14**
Kim S. Russell et al.	:	**Order**
Defendant	:	

THIS MATTER having come before the Court on the motion of Plaintiffs, to enforce the Settlement Agreement against Defendants; and the cross-motion of Defendants, to enforce the Settlement Agreement against Plaintiffs; and the Court having heard argument and considered the papers submitted; and for good cause shown;

IT IS ON THIS 15th day of September, 2017 ORDERED that:

1. The motion of Plaintiffs, Domenic Capponi and Louise Capponi, to enforce the Settlement Agreement against Defendants is denied.
2. The cross-motion of Defendants, Kim S. Russell and Robert P. Russell, to enforce the Settlement Agreement against Plaintiffs is granted.
3. Pursuant to paragraph 6 of the January 20, 2016 Settlement Agreement and Release between the parties, all claims against Defendants are hereby dismissed with prejudice.
4. FURTHER ORDERED that a copy of this Order be served on all parties within five (5) days.

J. Christopher Gibson, J.S.C.

Memorandum of Decision is attached.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Hurvitz & Waldman, LLC
Mitchell Waldman, Esquire
1008 South New Road
Pleasantville, NJ 08232

CASE: Dominic Capponi and Louise Capponi v. Kim S. Russell et al.

DOCKET NO.: CPM-L-410-14

NATURE OF APPLICATION: PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT; AND DEFENDANTS' CROSS-MOTION TO ENFORCE SETTLEMENT

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The Complaint in this matter was filed on August 26, 2014. The discovery end date was October 28, 2015. There was one previous extension of discovery for a total of 390 days of discovery. Neither arbitration nor trial was scheduled for this matter. Plaintiff, Dominic Capponi, now moves to enforce the settlement agreement entered into between the parties on February 3, 2016. See Exhibit A attached to Plaintiff's Brief. Defendants, Kim Russell and Robert Russell, cross-move to enforce the same settlement agreement.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

The Appellate Division in Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) provided a liberal standard in enforcing settlement agreements:

> An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into, and which a court, absent a demonstration of 'fraud or other compelling circumstances' shall honor and enforce as it does other contracts. Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974). Indeed, 'settlement of litigation ranks high in our public policy.' Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.), certif. denied, 35 N.J. 61 (1961). Moreover, courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a compromise settlement fairly and deliberately made. DeCaro v. DeCaro, [13 N.J. 36, 43 (1953)].

Id. at 124-25. See also Jennings v. Reed, 381 N.J. Super. 221, 227 (App. Div. 2005) (encouraging courts to "strain [themselves] to give effect to the terms of a settlement wherever possible" for the purpose of enforcing settlement agreements), quoting Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985), certif. denied, 137 N.J. 165 (1994).

MOVANT'S POSITION

Plaintiff, Dominic Capponi, requests that this Court enforce the settlement agreement entered into between the parties on February 3, 2016.

The underlying matter involves Defendants' allegedly defective repair work of Plaintiffs' condominium unit. Defendants own the condominium unit directly below the unit of Plaintiffs. The parties entered into a settlement agreement, which provided that Defendants shall make payment to Plaintiffs, WKR Contractors, and Czar Engineering for remedial construction

work on the subject unit. Exhibit A, paragraph 4a)-d), attached to Plaintiff's Brief. This work was clarified in a June 6, 2016 letter to counsel for Defendants, which stated that "jacking the floor joist system from within the Russell's units so that the floor joists and floor joist system [for Plaintiff's unit] are level" is included in the settlement agreement work. See Exhibit B attached to Plaintiff's Brief.

On August 26, 2016, an addendum to the settlement agreement was signed by Defendants, stating that Defendants would make a good-faith effort to complete the work 7-10 days from the work-start date of September 19, 2016. See Exhibit E attached to Plaintiff's Brief. The work was completed and inspected by Lamont "Butch" Czar, P.E. of Czar Engineering. In an e-mail dated October 13, 2016, Butch Czar stated that Plaintiff's floor was remediated back to its original level position; however, the floor was still out of level by as much as ½ inch, which he found to be unacceptable. See Exhibit F attached to Plaintiff's Brief. On October 13, 2016, counsel for Plaintiff reached out to counsel for Defendants via e-mail, asking when this issue would be addressed. See Exhibit G attached to Plaintiff's Brief. Accordingly, Plaintiff seeks to compel Defendants to have the work completed by a date certain.

OPPOSITION AND CROSS-MOVANTS' POSITION

Defendants, Kim Russell and Robert Russell, request that this Court enforce the settlement by declaring that the terms have been fulfilled by Defendants. Alternatively, Defendants request an opportunity for Defendants

to obtain a defense expert to inspect the condominium for deflections prior to a ruling on the motion.

As a preliminary assertion, Defendants identify that there is no dispute that the monetary amounts set forth in paragraph 4 of the settlement agreement have been paid to the respective parties. These amounts were identified by *Plaintiff's* expert appraisal in construction cost. As a result of the settlement agreement, Defendants were not able to depose Plaintiff's expert or retain their own defense expert. See Exhibit A, paragraph 6, attached to Defendants' Brief (representing the Certification of Counsel for Defendants).

Defendants state that the remedial work has been performed to completion, i.e., the Plaintiff's floor had been raised to a level position. Defendants contend that any minimal deflection in the floor was not proximately caused by any work commissioned by Defendants. Defendants theorize that the floor joists *were* raised to their original height, but the condominium building as a whole has a design defect of the floor deflection that exists in every unit. The original double joist plans for the condominium, which would rectify any floor deflection, were not followed. See Exhibit C, paragraph 7, attached to Defendants' Brief (representing the Certification of Taylor Smith, an employee of Cape May Contracting, Inc., who performed the remedial work in place of WKR Contractors); see also Exhibit D, p.1, attached to Defendants' Brief (representing a June 2, 2014 preliminary engineering evaluation by Butch Czar, P.E.).

Defendants argue that Plaintiff's assertion of an uneven floor is conclusory and unsubstantiated. The only supporting documentation is the one e-mail by Butch Czar, dated October 13, 2016, stating that the work was "inadequate" without a formal report or detailed explanation. Defendants further argue that Plaintiff has failed to explain that the remedial work was the proximate cause of the deflection.

OPPOSITION TO CROSS-MOTION

Plaintiff notes that the cross-motion was filed a month and a half after the initial motion was filed, which, for the first time, the legal theory of all units in the condominium association containing a deflection was asserted. Plaintiff submits that this argument is unsubstantiated. To the contrary, Plaintiff requests that this Court should focus on Butch Czar's statements that the remedial work had not been done or was done incorrectly. See Exhibit F attached to Plaintiff's Brief.[1]

DISCUSSION

Defendants are entitled to enforce the February 3, 2016 Settlement Agreement terms. Plaintiff is not entitled to enforce the Settlement Agreement terms. See Exhibit A attached to Plaintiff's Brief (representing the February 3, 2016 Settlement Agreement).

"An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into, and which a court, absent a demonstration of

[1] The Opposition to the cross-motion, and Defendants' March 15, 2017 response thereto, shall not be considered by the Court given the gross untimeliness of their submissions. Moreover, the substance of these submissions does not affect the Court's holding as to the issues set forth therein.

'fraud or other compelling circumstances' shall honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div. 1983).

The underlying matter involves Defendants' allegedly defective repair work of the condominium unit of Plaintiffs, Dominic Capponi and Louise Capponi. Defendants owned a condominium unit directly below the unit of Plaintiffs. On February 3, 2016, the parties entered into a settlement agreement. Defendants did not have an opportunity to depose Plaintiff's expert or retain their own defense expert before entering into the settlement agreement. See Exhibit A, paragraph 6, attached to Defendants' Brief (representing the Certification of Counsel for Defendants). Paragraph 4 of the settlement agreement states the following:

> **PAYMENT.** In consideration of the mutual promises contained herein, and other good and valuable, the parties agree to the following terms of settlement:
>
> a) The Plaintiffs will receive payment in the amount of $9,800.00 which represents the costs of all repairs to the [Plaintiff's] Unit as set forth in the cost estimate of Czar Engineering dated July 7, 2014.
>
> b) Payment in the amount of $4,995.00 will be paid for the retention of WKR Contractors to perform remedial work to address the deflection as set forth in the cost estimate of Czar Engineering dated August 18, 2015.
>
> c) An additional payment of $500.00 will be made to the Czar Engineering for an inspection fee in connection with its consultation with WKR and any inspection of the remedial work performed.

d) All remedial work will be performed by WKR Contractors upon the inspection of Czar Engineering and Notice to Victorias Walk Condominium Association.

Exhibit A. Paragraph 3, entitled "RELEASE AND DISCHARGE," states, "Plaintiffs further agree that they have accepted payment of the sums specified hereinafter as a complete compromise of matters involving disputed issues of law and fact." Id. Similarly, in paragraph 6, entitled "WAIVER OF ALL CLAIMS," all claims for damages by Plaintiffs shall be voluntarily withdrawn "[u]pon receipt by Plaintiffs of the payment referenced in Paragraph 4 and the completion of the remedial work set forth herein[.]" Id.

The term "remedial work" was clarified by Plaintiff's counsel in a letter to Defendants' counsel dated June 6, 2016. The letter specified that the remedial work included "jacking the floor joist system from within the [Defendants'] units so that the floor joists and floor system are level. If there is anything unclear with regard to this, please let me know immediately." See Exhibit B attached to Plaintiff's Brief. Defendants did not respond to this letter.

There is no dispute that the monetary payments set forth in paragraph 4 have been paid. Furthermore, the work was completed within the prescribed timeframe of September 19 to 29, 2016, pursuant to an addendum signed by Defendants. See Exhibit E attached to Plaintiff's Brief. However, in an e-mail dated October 13, 2016, the inspector for the unit, Lamont "Butch" Czar, P.E. of Czar Engineering, Mr. Czar stated that Plaintiff's floor was not jacked up to a level position, with a deflection as much as ½ inch in 10 feet.

Mr. Czar stated that such a deflection was "unacceptable." See Exhibit F attached to Plaintiff's Brief. Mr. Czar did not produce a formal expert report detailing the deflection in light of acceptable industry standards.

Defendants argue that the remedial work *has* been performed to completion, i.e., the Plaintiff's floor had been jacked up to a level position; however, any deflection in the floor was not proximately caused by any work commissioned by Defendants. See Exhibit C, paragraphs 5 & 8 attached to Defendants' Brief (representing the Certification of Taylor Smith, an employee of Cape May Contracting, Inc., who performed the remedial work in place of WKR Contractors). Defendants theorize that the floor joists *were* raised to their original height, but the condominium building as a whole has a design defect of the floor deflection that exists in every unit. Defendants only support for this theory is that the original double joist plans for the condominium, which would rectify any floor deflection, were not followed. See Exhibit C, paragraphs 7, 13-14; Exhibit D, p.1, attached to Defendants' Brief (representing a June 2, 2014 preliminary engineering evaluation by Butch Czar, P.E., acknowledging that the joist system was not doubled).

The Court finds that no issue of remedial work exists; Defendants complied with the obligations set forth under paragraph 4 of the Settlement Agreement. Exhibit A attached to Defendants' Brief. Defendants satisfied their obligations under the Settlement Agreement by jacking up the floor to a level position. Plaintiffs directly dispute this fact, noting that a ½ inch deflection remains in the floor planning of Plaintiffs' unit. However, this

factual dispute is resolved by the issuance of the Certificate of Occupancy, which is dispositive on the issue of the sufficiency of the remedial work. To the Court's knowledge, the Certificate of Occupancy has not been revoked.

Furthermore, there is no contractual requirement that Czar Engineering had to approve the remedial work – only that Czar Engineering would inspect the remedial work. Exhibit A, paragraph 4(d) attached to Defendants' Brief. Czar Engineering admits in the June 2, 2014 report that said report was preliminary and was meant to present background information on the case. Exhibit D, p. 1, attached to Defendants' Brief. Overall, neither party has provided formal expert evidence to rebut the validity of the issued Certificate of Occupancy. Accordingly, Defendants satisfied their obligations under the Settlement Agreement. Thus, Defendants are entitled to enforce the Settlement Agreement and to compel disbursement of the settlement proceeds.

CONCLUSION

The motion is opposed. The cross-motion is opposed.

The motion of Plaintiffs, Domenic Capponi and Louise Capponi, to enforce the Settlement Agreement against Defendants is denied.

The cross-motion of Defendants, Kim S. Russell and Robert P. Russell, to enforce the Settlement Agreement against Plaintiffs is granted.

Pursuant to paragraph 6 of the January 20, 2016 Settlement Agreement and Release between the parties, all claims against Defendants are hereby dismissed with prejudice.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

September 15, 2017

J. Christopher Gibson, J.S.C.