

Fraud, Frauds, and Consumer Fraud *in NJ Real Estate Practice*



BY

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Warning:



- This is a SHORT course. It is intended as an overview of a complex area of the law, and we are just going to cover the basics.
- You'll get general information - not legal advice for any specific problem.
- Your sitting through it does not establish an attorney-client relationship with the speaker (but we can be friends).
- Course Identification/Reference Number is:
C20160367

Introduction



- Caveat Emptor
- The Evolution of Commercial Law
- Market place ethics over time
- Convergence of modern real property and commercial law

Introduction



- The rise of consumer protection
- NJ public policy in real estate transactions
- Sources of obligation: case opinions, statutory and regulatory authority (State and Federal)

The Statute of Frauds



- Statute of Frauds distinguished and explained
- historical overview
- application in New Jersey real estate transactions

Statute of Frauds – R.E. Transactions



- **25:1-10. Definitions**

- 1. Definitions. As used in this act:

"Interest in real estate" means any right, title or estate in real estate, and shall include a lease of real estate, a lien on real estate, a profit, an easement, an interest in a trust in real estate and a share in a cooperative apartment.

"Transfer of an interest in real estate" means the sale, gift, creation or extinguishment of an interest in real estate.

Source: R.S.25:1-1 through 25:1-4, 25:1-5(d).

L.1995,c.360,s.1.

Statute of Frauds – R.E. Transactions



- **25:1-11. Writing requirement, conveyances of an interest in real estate**
 2. Writing Requirement, Conveyances of an Interest in Real Estate.
 - a. A transaction intended to transfer an interest in real estate shall not be effective to transfer ownership of the interest unless:
 - (1) a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the transferor; **or**
 - (2) the transferor has placed the transferee in possession of the real estate as a result of the transaction and the transferee has paid all or part of the consideration for the transfer or has reasonably relied on the effectiveness of the transfer to the transferee's detriment.
 - b. A transaction which does not satisfy the requirements of this section shall not be enforceable except as an agreement to transfer an interest in real estate under section 4 of this act.
 - c. This section shall not apply to leases.
 - d. This section shall not apply to the creation of easements by prescription or implication.

L.1995,c.360,s.2.

Statute of Frauds – R.E. Transactions



- **25:1-12. Writing requirements, leases**

3. Writing Requirements, Leases. A transaction intended to create **a lease of real estate for more than three years** shall not be enforceable unless:

a. the leased premises, the term of the lease and the identity of the lessor and the lessee are established in a writing signed by or on behalf of the party against whom enforcement is sought; **or**

b. the real estate, the term of the lease and the identity of the lessor and the lessee are proved by **clear and convincing evidence**.

Source: R.S.25:1-1, 25:1-5(d).

L.1995,c.360,s.3.

Statute of Frauds – R.E. Transactions



- **25:1-13. Enforceability of agreement regarding real estate**

4. Enforceability of Agreements regarding Real Estate. An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless:

a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or

b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

Source: R.S.25:1-3, 25:1-4, 25:1-5(d).

L.1995,c.360,s.4.

Statute of Frauds - Guarantees



- **25:1-15. Liability for the obligation of another**

6. Liability for the Obligation of Another. A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing signed by the person assuming the liability or by that person's agent. The consideration for the promise need not be stated in the writing.

Source: R.S.25:1-5(a), 25:1-5(b), 25:1-8.

L.1995,c.360,s.6.

Statute of Frauds - Commissions



- **25:1-16. Commissions of real estate broker and business broker, writing required**

7. Commissions of Real Estate Broker and Business Broker, Writing Required.

a. As used in this section:

"Business broker" means a person who negotiates the purchase or sale of a business.

"Negotiates" includes identifies, provides information concerning, or procures an introduction to prospective parties, or assists in the negotiation or consummation of the transaction.

"Purchase or sale of a business" includes the purchase or sale of good will or of the majority of the voting interest in a corporation, and of a major part of inventory or fixtures not in the ordinary course of the transferor's business.

"Real estate broker" means a licensed real estate broker or other person performing the services of a real estate agent or broker.

Statute of Frauds - Commissions



- **25:1-16. Commissions of real estate broker and business broker, writing required**

7. Commissions of Real Estate Broker and Business Broker, Writing Required. a. As used in this section:

“ ...

"Transfer or sale" means the transfer of an interest in real estate or the purchase or sale of a business.

b. Except as provided in subsection d. of this section, a real estate broker who acts as agent or broker on behalf of a principal for the transfer of an interest in real estate, including lease interests for less than three years, is entitled to a commission only if before or after the transfer the authority of the broker is given or recognized in a writing signed by the principal or the principal's authorized agent, and the writing states either the amount or the rate of commission. For the purposes of this subsection, the interest of a mortgagee or lienor is not an interest in real estate.

c. Except as provided in subsection d. of this section, a business broker is entitled to a commission only if before or after the sale of the business, the authority of the broker is expressed or recognized in a writing signed by the seller or buyer or authorized agent, and the writing states either the amount or the rate of commission.

Statute of Frauds - Commissions



- **25:1-16. Commissions of real estate broker and business broker, writing required**

d. A broker who acts pursuant to an oral agreement is entitled to a commission only if:

(1) within five days after making the oral agreement and before the transfer or sale, the broker serves the principal with a written notice which states that its terms are those of the prior oral agreement including the rate or amount of commission to be paid; and

(2) before the principal serves the broker with a written rejection of the oral agreement, the broker either effects the transfer or sale, or, in good faith, enters negotiations with a prospective party who later effects the transfer or sale.

e. The notices provided for in this section shall be served either personally, or by registered or certified mail, at the last known address of the person to be served.

Source: R.S.25:1-9.

L.1995,c.360,s.7.

Common Law Fraud



- What is this?
- Why do they call it that?
 - They don't always; sometime they call it "legal fraud"
 - ✦ Why do they call it that? How could fraud be legal?
 - Isn't it break time yet?
- Flavors:
 - Affirmative Misrepresentation
 - Concealment

Affirmative Misrepresentation



A cause of action for common-law fraud has five elements:

- (1) a material misrepresentation of a presently existing or past fact;
- (2) knowledge or belief by the defendant of its falsity;
- (3) an intention that the other person rely on it;
- (4) reasonable reliance thereon by the other person; and
- (5) resulting damages.

[Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997).]

Affirmative Misrepresentation



- NJ Model Civil Jury Charge 3.30E FRAUD — DECEIT (Approved 2/92):
- “...The burden of proof is on the plaintiff to establish by clear and convincing evidence each of the following elements. First, that defendant made a false representation of fact to him/her. Second, that defendant knew or believed it to be false. Third, that defendant intended to deceive plaintiff. Fourth, that plaintiff believed and justifiably relied upon the statement and was induced by it to (action taken or omitted). Fifth, that as a result of plaintiff's reliance upon the statement, he/she sustained damage....”
 - Examples in New Jersey real estate practice

Concealment



- The fact that no affirmative misrepresentation is made does not bar relief predicated on a claim of fraud. Silence in the face of an obligation to disclose may be fraud, since the suppression of truth when it should be disclosed is equivalent to an expression of a falsehood. *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 610, 560 A.2d 655 (1989).

Concealment



- The "deliberate 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. [New Jersey Econ. Dev. Auth. v. Pavonia Restaurant, Inc., 319 N.J. Super. 435, 446, 725 A.2d 1133 (App. Div. 1998)]
- Examples in New Jersey real estate practice

THE ELEPHANT IN THE CORNER



- A thing you need to know: The Requisite Evidentiary standard is “Proof by **Clear and Convincing Evidence**”
 - So what does that mean?
 - What are the other (commonly used) standards?

Materiality



- Maybe you also ought to know: A statement is “material” if
 - A reasonable person would attach importance to its existence in determining a choice of action; or
 - The maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice or action, although a reasonable man would not so regard it.
 - Gennari v. Weichert Co. Realtors, (N.J.Super.A.D. 1996) 288 N.J.Super. 504, 672 A.2d 1190; 148 N.J. 582, 691 A.2d 350(1997)

Common Defenses



- Not a statement of fact at all, but an opinion
 - Must be “a material misrepresentation of presently existing or past fact”
- Lack of SCIENTER, i.e., no knowledge or belief by the defendant of its falsity
- Truth

Common Defenses



- Immateriality
- No detrimental reliance
- No causation
- No resulting damages
- Proofs don't meet requisite evidentiary standard
 - One who alleges fraud must do so with specificity and the proofs must be convincing. Brown v. Brown, 28 N.J. Super. 165, 172 (App.Div.1953).

Negligent Misrepresentation



- **Elements of the Claim**

- a material misrepresentation of a presently existing or past fact;
- made under circumstances in which the misrepresenter ought to have known of its falsity;
- an intention that the other person rely on it;
- reasonable reliance thereon by the other person;
and
- resulting damages

Negligent Misrepresentation



- Differs from common law fraud in that knowledge of falsity not necessary so long as speaker failed to make a reasonable investigation of the truth of his words
- The tort of negligent misrepresentation not available everywhere, and usually only applies in business transactions
- Common defenses track ordinary negligence case. Examples: contributory negligence; comparative negligence;

Negligent Misrepresentation



- The tort of negligent misrepresentation in NJ requires:
 - A party negligently provides false information;
 - The aggrieved plaintiff is a reasonably foreseeable recipient of the representation for its proper business purpose;
 - The plaintiff relied on the misrepresentation; and
 - The misrepresentation is the proximate cause of the plaintiff's damages
 - Damages limited to actual loss

Equitable Fraud



- Depending on the remedy sought, an action for fraud may be either legal or equitable in nature. See *Commercial Cas. Ins. Co. v. Southern Sur. Co.*, 100 N.J. Eq. 92, 96 (Ch. 1926), aff'd, 101 N.J. Eq. 738 (E. & A. 1927);
- In addition, fraud may be either actual or constructive. The distinguishing factor is the element of untruth between the parties required in the former but not in the latter.
- Constructive fraud is commonly known in New Jersey as Equitable Fraud.

Equitable Fraud



- Elements of the Claim
- (1) a material representation of a presently existing or past fact;
- (2) ~~knowledge or belief by the defendant of its falsity;~~
- (3) an intent that the other person relied on it;
- (4) reasonable reliance thereon by the other person, and
- (5) resultant damage.

Equitable Fraud



- Equitable fraud does not require the element of scienter, knowledge of the falsity and an intent to obtain an undue advantage. *Jewish Center of Sussex Cty. v. Whale*, 86 N.J. 619 (1981) at 624-25, 432 A.2d 521.
- The only relief that may be obtained is equitable relief, such as rescission or reformation of an agreement and not monetary damages. *Gherardi v. Trenton Bd. of Ed.*, 53 N.J.Super. 349, 366, 147 A.2d 535 (App.Div.1958).
- The object of these remedies is to restore the parties to the status quo ante and to prevent the misrepresenter from gaining benefit from the transaction.

Equitable Fraud



- Most often raised in cases where misrepresenter is in position of trust. (E.g., in Jewish Center of Sussex Cty., defendant Whale was a Rabbi who had lied on his resume). Lack of a fiduciary relationship may be raised as a defense.
- Common defenses track both legal fraud claims (with the exception of scienter) and equitable claims where money damages is not the issue.
- Examples of equitable defenses:
 - Unclean Hands
 - Laches
 - Estoppel

Slander of Title



- Elements:
 - Publication (communication to a third party) of
 - a false statement
 - disparaging plaintiff's title to real property;
 - made with the intention to cause harm, either with knowledge reckless disregard of falsity (i.e., malice) (Certain jurisdictions only)
 - resulting in special damages.

Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.



- **56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice**

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.



- Under the Consumer Fraud Act, the term “merchandise” includes any objects, goods, commodities, services or anything offered directly or indirectly to the public for sale. “Merchandise” does not include “securities”. *Lee v. First Union National Bank*, 199 N.J. 251, 261 (2009).

Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.



- **56:8-19 Action, counterclaim by injured person; recovery of damages, costs.**
- 7. Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

L.1971,c.247,s.7; amended 1997, c.359.

Consumer Fraud - Sharp Practice



- Elements of the of Affirmative Act/Sharp Practice Consumer Fraud Claim and Common Defenses
- The act, use or employment by any person of an unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation,
- in connection with the sale (including rental) or advertisement of merchandise or real estate, whether before or after,
- is liable to the consumer for attorney's fees and costs,
- and also, if as a result the consumer suffers any ascertainable loss of money or property, for three times the lost value (treble damages) and any other appropriate legal and equitable relief,
- and a refund of all money acquired by means of the consumer fraud.

- Examples in New Jersey real estate practice

Consumer Fraud - Knowing Concealment



- **Elements of the Omission/Knowing Concealment Claim and Common Defenses**
- The knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission
- in connection with the sale (including rental) or advertisement of merchandise or real estate, whether before or after,
- is liable to the consumer for attorney's fees and costs,
- and also, if as a result the consumer suffers any ascertainable loss of money or property, for three times the lost value (treble damages) and any other appropriate legal and equitable relief,
- and a refund of all moneys acquired by means of the consumer fraud.

- Examples in New Jersey real estate practice

Consumer Fraud - Regulatory Violation



- **Elements of the Claim and Common Defenses**
- The violation by any person of a specific-situation statute or administrative regulations, the violation of which constitutes *per se* Consumer Fraud by its terms,
- is liable to the consumer for attorney's fees and costs,
- and also, if as a result the consumer suffers any ascertainable loss of money or property, for three times the lost value (treble damages) and any other appropriate legal and equitable relief,
- and a refund of all moneys acquired by means of the consumer fraud.

- Examples in New Jersey real estate practice

The Safe Harbor



- **56:8-19.1 Exemption from consumer fraud law, certain real estate licensees, circumstances.**

1. Notwithstanding any provision of P.L.1960, c.39 (C.56:8-1 et seq.) to the contrary, there shall be no right of recovery of punitive damages, attorney fees, or both, under section 7 of P.L.1971, c.247 (C.56:8-19), against a real estate broker, broker-salesperson or salesperson licensed under R.S.45:15-1 et seq. for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson or salesperson demonstrates that he:

- a. Had no actual knowledge of the false, misleading or deceptive character of the information; **and**

The Safe Harbor



- **56:8-19.1 Exemption from consumer fraud law, certain real estate licensees, circumstances. (con'td)**
 - b. Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:
 - (1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, or an unlicensed home inspector until December 30, 2005, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person; (or)

The Safe Harbor



- (2) provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee;
or
(3) that the real estate broker, broker-salesperson or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller.

Nothing in this section shall be interpreted to affect the obligations of a real estate broker, broker-salesperson or salesperson pursuant to the "New Residential Construction Off-Site Conditions Disclosure Act," P.L.1995, c.253 (C.46:3C-1 et seq.), or any other law or regulation.

L.1999,c.76,s.1; amended 2004, c.18, s.2.

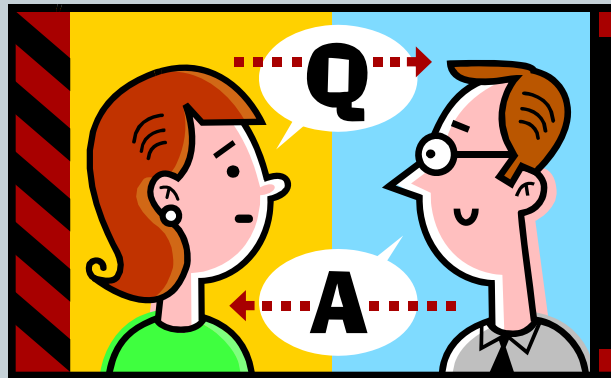
Conclusion



- Common Sense Guidelines for the Pressured Professional
 - It shall be the duty of a licensee to recommend that legal counsel be obtained whenever the interests of any party to a transaction seem to require it. (NJAC 11:5-6.4 (i))



Open Q&A



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