**STATE OF MAINE**
**SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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**Law Docket No. CUM-24-14**

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**ALRIG USA ACQUISITIONS**
Plaintiff/Appellant

**v.**

**MBD REALTY LLC**
Defendant/Appellee

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ON APPEAL FROM THE CUMBERLAND
COUNTY SUPERIOR COURT

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# BRIEF OF APPELLANT ALRIG USA ACQUISITIONS

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## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In ruling on a motion to dismiss the Court must "accept the facts alleged in a complaint as true." *Bowen v. Eastman*, 645 A.2d 5, 6 (Me. 1994). The parties here are Alrig USA Acquisitions ("Alrig"), a commercial real estate developer, and MBD Realty ("MBE"), the owner of commercial real property located at 1091-1107 Congress Street in Portland (the "Property"). A. 13 (Compl. ¶¶ 5–6). The Property is the site of a closed Denny's Restaurant in Portland's "Libbytown" neighborhood, near Exit 5 of Interstate 295. A. 14 (Compl. ¶¶ 7–8).

In February 2022 Alrig entered into a purchase and sale agreement to purchase the Property from MBD for $2.5 million, with a deposit of $50,000 (the "P&S Agreement"). A. 14 (Compl. ¶¶ 9–10). Alrig paid the $50,000 deposit. A. 14 (Compl. ¶ 11). On April 25, 2022, Alrig exercised its right to extend the Inspection Period (as defined in the P&S Agreement) and made an additional $10,000 deposit (the "Extension Payment" in the P&S Agreement (A. 20)), making the total deposit $60,000. A. 14 (Compl. ¶¶ 12–13). On May 25, 2022, the parties executed an amendment to the P&S Agreement that again extended the Inspection Period, this time to June 25, 2022, and Alrig made an additional $10,000 deposit, for a total deposit of $70,000. A. 14 (Compl. ¶¶ 14–16). On June 24, 2022, the parties

executed a second amendment to the P&S Agreement (the "June 24th Amendment"), and Alrig made an additional $100,000 deposit, making the total deposit $170,000. A. 14 (Compl. ¶¶ 17–18). The June 24th Amendment also provided (in ¶ 1) that Alrig "waives its title contingency contained in Section 5(b) of the Agreement and its due diligence contingency contained in Section 6 of the Agreement," and that Alrig's deposit—which would otherwise have been refundable under sections 5(b) & 6 in the event of title or due diligence issues—"shall be deemed nonrefundable . . . ."[1] A. 42 (June 24th Amendment ¶ 2).

MBD knew when it executed the P&S Agreement that the City of Portland intended to redevelop the Libbytown neighborhood, and that the redevelopment would include the construction of a roundabout that would require the taking of a portion of the Property by eminent domain. A. 15 (Compl. ¶¶ 19–21). Despite the fact that this was material information about the Property, MBD never disclosed the Libbytown redevelopment or information about the roundabout to Alrig before either the P&S Agreement or the June 24th Amendment was executed. A. 15 (Compl. ¶¶ 22–24).

[1] There is an exception in the case of "a default by [MBD] pursuant to Section 12(b) of the Agreement" (A. 42) that is not relevant here, as MBD is not alleged to have defaulted.

Alrig first learned about the Libbytown redevelopment and the roundabout at a meeting with the City of Portland in August 2022. A. 15 (Compl. ¶¶ 25–26). On September 9, 2022, Alrig issued a notice of termination of the P&S Agreement and requested that its deposit be returned under section 16. A. 15 (Compl. ¶¶ 27–28). Section 16 provides (in pertinent part):

> In the event that following the Effective Date the Property shall suffer a casualty or shall be subject to a taking by eminent domain, condemnation or otherwise, Purchaser may at its sole option . . . (a) terminate this Agreement, in which event Purchaser shall be entitled to the immediate refund of the Deposit and the Extension Payment, if applicable, and the parties hereto shall be relieved of all obligations hereunder . . . .

A. 25. MBD has refused to return Alrig's $170,000 deposit. A. 15 (Compl. ¶ 29).

Alrig filed this action alleging breach of contract for MBD's failure to return the deposit under section 16 of the P&S Agreement, and fraud for its failure to disclose the Libbytown redevelopment or information about the roundabout to Alrig before the P&S Agreement was executed. MBD moved to dismiss. In its order granting the motion the trial court observed that "[t]he parties do not dispute that section 16 allows Alrig, as the purchaser, to terminate the contract if the property 'shall be subject to a taking by eminent domain,'" and that "Alrig would be entitled to an immediate

refund of the deposit and extension payment if it terminated under section 16." A. 8. The trial court found, however, that the June 24th Amendment eliminated Alrig's right to a refund of the deposit, not just with respect to a termination based on the due diligence and title contingencies referenced in the amendment, but also with respect to the eminent domain contingency that is found in the P&S Agreement, but is referenced nowhere in the June 24th Amendment. The trial court rejected as a "tortured reading" (A. 9) Alrig's argument that the June 24th Amendment made its deposits nonrefundable only with respect to a termination based on the due diligence and title contingencies that were the subject of the June 24th Amendment.

The trial court also dismissed Alrig's fraud count, declaring that "Alrig has not alleged active concealment" of the redevelopment and roundabout plans, and that "there was no legal or equitable duty for MBD to disclose its knowledge." A. 11. Thus, in the trial court's view, MBD's withholding of material information from Alrig did not constitute actionable fraud.

Alrig appealed.

## STATEMENT OF THE ISSUE PRESENTED

1. Did the trial court err in ruling as a matter of law that the June 24th Amendment to the P&S Agreement, which made Alrig's deposit nonrefundable in connection with its waiver of the due diligence and title review contingencies, also made the deposit nonrefundable in connection with an eminent domain contingency that was not the subject of the June 24th Amendment?

2. Did the trial court err in ruling as a matter of law that MBD's failure to disclose a planned redevelopment and roundabout that would require the taking of a portion of the Property it was selling to Alrig could not be found to constitute actionable fraudulent concealment?

## ARGUMENT

"On a motion to dismiss, facts are not adjudicated, but rather there is an evaluation of the allegations in the complaint in relation to any cause of action that may reasonably be inferred from the complaint." *Salerno v. Spectrum Med. Grp., P.A.*, 2019 ME 139, ¶ 16, 215 A.3d 804, 811 (quotation marks omitted). The Court "examine[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quotation marks omitted).

## I. Alrig has stated a claim for breach of contract.

The trial court determined that the P&S Agreement, as amended by the June 24th Amendment, unambiguously provided that Alrig's deposit would be nonrefundable in an eminent domain scenario. *See* A. 9–10 ("The June 24th Amendment plainly and unambiguously establishes that the deposit(s) paid by Alrig are nonrefundable except in the event of a default by MBD pursuant to section 12(b) of the original contract."). The trial court's ruling that the relevant contract provisions were not ambiguous is subject to de novo review. *See Benton Falls Assocs. v. Cent. Maine Power Co.*, 2003 ME 99, ¶ 13, 828 A.2d 759, 763 ("Whether contract language is ambiguous is a question of law.").

"While interpretation of unambiguous contract language is . . . a question of law, interpretation of ambiguous contract language is a question of fact." *Id.* The trial court erred in deciding on a motion to dismiss the factual question of whether the June 24th Amendment made Alrig's deposit nonrefundable in an eminent domain scenario, rather than leaving that factual question to be answered by the jury.

In ruling that the contract was unambiguous, the trial court misconstrued the scope of the June 24th Amendment, which does not unambiguously negate Alrig's right to have its deposit returned under

section 16 of the P&S Agreement. Read in isolation, section 2 of the June 24th Amendment provides generally that Alrig's deposits "shall be deemed nonrefundable" absent a default by MBD. But reading that language in the context in which it appears supports a different interpretation.

The point of the June 24th Amendment, first and foremost, was to waive the due diligence and title contingencies in the P&S Agreement:

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

A. 42 (emphasis added). It is in this specific context that the June 24th Amendment makes Alrig's deposit nonrefundable. The amendment does other things that are related to the waiver of the due diligence and title review contingencies: it provides for additional deposits, extends the closing date, and "deem[s] the Deposit nonrefundable . . . ." *Id*. But it does these things in the context and in furtherance of waiving the due diligence and title review contingencies. The logic of all this is straightforward: in exchange for MBD agreeing to extend the closing date, Alrig agreed to waive the due diligence and title review contingencies and to deem the deposit nonrefundable with respect to those contingencies. While on its face the provision deeming the deposit nonrefundable could be read more

broadly, Alrig's reading is also reasonable. Because there are two ways to read the June 24th Amendment, ascertaining its meaning is a factual question for the jury, not a question of law for the trial court to decide on a motion to dismiss.

Section 16—the eminent domain contingency the trial court found had been modified by the June 24th Amendment to eliminate Alrig's right to a refund of its deposit in the event the contingency came to pass—deals with something very different than the due diligence and title contingencies that are the subject of the June 24th Amendment: the city's exercise of its eminent domain power, an event outside the control of either party. A jury could reasonably determine that when Alrig agreed that its deposit would become nonrefundable in connection with its waiver of the due diligence and title review contingencies, it did not further intend to waive its right to get its deposit back in the improbable event that the *force majeure*-like scenario envisioned in section 16 should come to pass. Because the contract is ambiguous as to whether the June 24th Amendment makes the deposit nonrefundable if the eminent domain contingency comes into play, the trial court erred in granting the motion to dismiss. *See Halco v. Davey*, 2007 ME 48, ¶ 9, 919 A.2d 626, 629 ("Construction of an ambiguous contract is a question of fact for the fact-finder.").

## II. Alrig has stated a claim for fraud.

The trial court summarily rejected Alrig's fraudulent concealment claim on the grounds that "Alrig has not alleged active concealment of the City's neighborhood redevelopment plans" and "there was no legal or equitable duty for MBD to disclose its knowledge."[2] A. 11. In support of that determination the trial court cited *Eaton v. Sontag*, 387 A.2d 33, 38 (Me. 1978), for the proposition that "'[i]t is not fraud for one party to say nothing respecting any particular aspect of the subject property for sale where no confidential or fiduciary relationship exists and where no false statements or acts to mislead the other are made.'" A. 11. *Eaton*, however, is not on point, and the trial court ignored the more instructive case of *Fitzgerald v. Gamester*, 658 A.2d 1065, 1068 (Me. 1995).

"[T]he elements of fraudulent concealment are (1) a failure to disclose; (2) a material fact; (3) where a legal or equitable duty to disclose exists; (4) with the intention of inducing another to act or to refrain from acting in reliance on the non-disclosure; and (5) which is in fact relied upon to the aggrieved party's detriment." *In re Boardman*, 2017 ME 131, ¶ 9, 166 A.3d 106, 110, as corrected (July 6, 2017) (quotation marks omitted). The

[2] Alrig does not argue that a confidential or fiduciary relationship existed between the parties.

Complaint states a claim for fraudulent concealment by alleging that MBD failed to disclose the redevelopment and roundabout so as to induce Alrig to enter into the P&S Agreement in reliance on MBD's nondisclosure of that information, and that Alrig relied on MBD's nondisclosure to its detriment. A. 15–17 (Compl. ¶¶ 19–24, 43–51).

"Where there is no affirmative misrepresentation by the defendant, in order to prove fraud a plaintiff must demonstrate an active concealment of the truth or a special relationship that imposes a duty to disclose to the defendant." *Kezer v. Mark Stimson Associates*, 1999 ME 184, ¶ 23, 742 A.2d 898 (Me. 1999). The facts recited in the Complaint are sufficient to allege that MBD actively concealed information about the redevelopment and roundabout from Alrig as the concept of active concealment was applied by this Court in *Fitzgerald v. Gamester*, 658 A.2d 1065 (Me. 1995).

The Court found active concealment in *Fitzgerald* where a seller of real estate "failed to tell" the buyer that a well on the property had been abandoned due to contamination. *Id.* at 1068. Nothing more was required. This is made clear in this Court's subsequent explication of *Fitzgerald* in *Kezer v. Mark Stimson Assocs.*:

> In *Fitzgerald*, the seller of real estate *did not tell* the buyer, until immediately after the closing, that the well water was not safe to drink. In fact, the well had been abandoned because the water was contaminated, and the seller had been using a

> neighbor's water source. The seller reconnected the well a few days before the closing and had the water tested again, but it was still unsafe. *These facts were sufficient to constitute an active concealment of the truth*."

1999 ME 184, ¶ 24, 742 A.2d 898, 905 (citations omitted) (emphasis added). The fact that the seller tested the water before the closing was no more relevant to the active concealment analysis in *Fitzgerald* than it would be relevant here if MBD had gone to the City to inquire about potential redevelopment plans; in each case the concealment lies in the seller not telling the buyer a material fact that only the seller knew. Under *Fitzgerald*, this is "sufficient to constitute an active concealment of the truth." *Id.*

*Eaton v. Sontag*, 387 A.2d 33 (Me. 1978), relied on by the trial court, is not to the contrary. The plaintiff in *Eaton* did not allege nondisclosure or concealment of a specific fact, but instead just the failure to clear up a misunderstanding. The Eatons had sold a campground to the Sontags, and the Sontags claimed (among other things) that the Eatons had "failed to disclose that the expenditures incurred in the development of the campground did not reflect the true value of the property." *Id.* at 35–36. The Court held that the Sontags did not have a claim for fraud based on any "misconception" about the value of the campground that they may have "inferred" from the investments the Eatons had made:

> The Sontags claim they were deceived, because the Eatons failed to advise them that the amount of expenditures already incurred in the campsite project as listed and furnished to them in the preliminary stages of the negotiations did not reflect a true picture of the value of the property. *Such resulting misconception of the value of the premises inferred by the Sontags from the Eatons' actual investment in the campground development*, the amount of which stands undisputed in the evidence, *would not constitute actionable fraudulent conduct on the part of the plaintiffs*.

*Id.* at 37 (emphasis added). So contrary to what the trial court appears to have concluded, the issue in *Eaton* was whether a plaintiff that had *inferred* a misconception from the defendant's conduct had a claim for fraud; it does not stand for the proposition that silence or omission cannot constitute actionable fraud where, as happened here, the defendant fails to disclose a material fact to the plaintiff.

As for *Kezer* (cited by the trial court), active concealment was not found there because the information the plaintiff received was accurate. The seller defendants in *Kezer* knew that a neighbor had complained that his well was contaminated, and that the DEP was doing testing in the area—but the undisputed evidence was that "all water tests done on the [property at issue] showed that the water was safe to drink," and these tests had been disclosed to the plaintiff. 1999 ME 184, ¶¶ 4, 7. Here, in contrast, MBD actively concealed material information from Alrig when it "did not tell" Alrig about the redevelopment and roundabout. *Kezer*, 1999 ME 184, ¶ 24

(explaining that in *Fitzgerald* the failure to disclose that well water was not safe to drink constituted active concealment of the truth). Alrig has stated a claim for fraud.

## CONCLUSION

Because Alrig's Complaint states a claim for both breach of contract and fraud, the trial court's order should be vacated, and the case remanded with instructions that the motion to dismiss be denied.

April 12, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Adam J. Shub, attorney for Appellant Alrig USA Acquisitions, certify that I have, on this date, emailed and mailed (by U.S. mail) two copies of this brief to the attorneys listed below:

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_____
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