STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-24-14

ALRIG USA ACQUISITIONS
Plaintiff/Appellant

v.

MBD REALTY LLC
Defendant/Appellee

ON APPEAL FROM THE CUMBERLAND
COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT ALRIG USA ACQUISITIONS

Adam J. Shub, Bar No. 4708
Jonathan Mermin, Bar No. 9313
Preti, Flaherty, Beliveau & Pachios, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: (207) 791-3000
ashub@preti.com
jmermin@preti.com

Attorneys for Alrig USA Acquisitions

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ARGUMENT

I. The factual dispute over whether the June 24th Amendment makes Alrig's deposit nonrefundable in the eminent domain scenario this case presents cannot be resolved on a motion to dismiss.

Alrig's argument does not rest, as MBD asserts, on a "re-interpretation of the June 24 Amendment's intent" (Red Br. 5), but on the logic and import of the June 24th Amendment, where the parties agreed to waive the due diligence and title review contingencies, and in that specific context agreed that Alrig's deposit would be nonrefundable. MBD agreed to extend the closing date, and Alrig agreed to waive the due diligence and title review contingencies and to deem the deposit nonrefundable with respect to those contingencies. A jury could reasonably find that the parties' intent was not to make the deposit nonrefundable in an eminent domain scenario the June 24th Amendment neither contemplated nor addressed. No "re-interpretation" of the agreement is required.

MBD is not wrong that the disputed provision *could* be given a more expansive interpretation. But Alrig's reading is also reasonable. Deciding between two reasonable interpretations is a factual question for the jury, not a legal question for the trial court. *See Benton Falls Assocs. v. Cent. Maine Power Co.*, 2003 ME 99, ¶ 13, 828 A.2d 759, 763 ("While

interpretation of unambiguous contract language is . . . a question of law, interpretation of ambiguous contract language is a question of fact.”).

MBD mischaracterizes Alrig’s argument as being “that the June 24 Amendment is subject to a broader interpretation because Alrig had intended the Amendment to include more exceptions to preserve its right to a deposit refund if it opted to terminate the P/S for reasons other than a Section 12(b) seller’s default.” (Red Br. 7.) Alrig’s position is not that it “intended the Amendment to include more exceptions”—it is that the Amendment, which deals with terminations based on the due diligence and title review contingencies, does not apply in the first instance to a termination under section 16 based on eminent domain. While terminations under section 16 are unrelated to the due diligence and title review contingencies, terminations under section 12(b) (seller default) may be related to those contingencies. Unlike with section 12(b), no “exception” was needed for the deposit to continue to be refundable in the event of a termination under section 16 that has nothing to do with due diligence or title review.

MBD makes much of what it describes as the “siloed structure” of the June 24th Amendment. (Red Br. 9.) According to MBD, the Amendment is “structured to silo the distinct issues to be discussed in entirety within

separate, enumerated sections." (Red Br. 8.) This means that "[t]he content of one enumerated section cannot inform or alter the construction of any separate, different enumerated section." *Id.* "[E]ach separate issue," MBD declares, "is uncorrelatable with the next." (Red Br. 9.)

Contrary to what MBD suggests, items in a numbered list can in fact be interrelated. No principle of law or logic dictates that when provisions of a contract are set forth in separate, enumerated sections, "[t]he content of one enumerated section cannot inform or alter the construction of any separate, different enumerated section." (Red Br. 8.) It is of course possible for items in a numbered list to be unrelated to each other, but unrelatedness is not an inherent characteristic of numbered lists. Here, a jury could find that the items in the June 24th Amendment should be read in the context of Alrig's agreement to waive the due diligence and title review contingencies, and 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 mean to waive its right to the return of its deposit in the *force majeure*-like scenario of a taking by eminent domain. *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. The facts here are the same in material respects as the facts in *Fitzgerald v. Gamester* where "active concealment" was found.

MBD argues that "Alrig has not plead and cannot plead allegations that MBD took 'steps to conceal' material information . . . ." (Red Br. 10 (quoting *Kezer v. Mark Stimson Assocs.*, 1999 ME 184, ¶ 25, 742 A.2d 898).) MBD ignores *Fitzgerald v. Gamester*, 658 A.2d 1065 (Me. 1995), where the Court found active concealment based on a seller of real estate having "failed to tell" the buyer that a well on the property had been abandoned due to contamination. *Id.* at 1068; *see Kezer*, 1999 ME 184, ¶ 24 ("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.*") (citations omitted) (emphasis added).

MBD disputes Alrig's characterization of what happened in *Fitzgerald*:

> The *Fitzgerald* seller did not merely sit silently about a contaminated water supply. That seller had: (i) reconnected the contaminated well days before the closing; (ii) performed tests on the reconnected well that confirmed the water supply

> remained contaminated; and (iii) pressured the buyer to release the seller from liability for the malfunctioning well prior to closing. *See* 658 A.2d at 1068. Then, immediately after closing was completed, the seller warned the buyer "not to drink the water." *Id.*

(Red Br. 12.) MBD describes these actions as "affirmative steps taken to hide the well contamination . . . ." *Id.* But that is incorrect: while they are certainly *affirmative steps*, nothing the seller in *Fitzgerald* is described as having done—reconnecting the well, testing the water, seeking a release, issuing a warning—is an affirmative step *taken to hide* anything from the buyer. Indeed, seeking a release from the buyer is almost the opposite of an affirmative step taken to hide something from the buyer. Yet active concealment was found in *Fitzgerald*. If the facts of *Fitzgerald* are sufficient to support a finding of active concealment, so are the facts here.

MBD's final argument is that Alrig's fraud claim "fails for lack of justifiable reliance because the contract expressly disclaims any representations made regarding MBD's prior knowledge of the property." (Red Br. 15.) But Alrig's claim does not rest on representations made regarding MBD's prior knowledge of the property. Instead, the allegation is that MBD knew something important that it failed to disclose. It is irrelevant, then, that the P&S Agreement "provided that MBD would not make representations about the property" (Red Br. 16), as Alrig's claim is

not that MBD made false representations about the property, but that it concealed material information about the property. Alrig's complaint is not that MBD did not "offer it any matter of representation regarding its knowledge about the City of Portland['s] intent to redevelop the neighborhood roadways." (Red Br. 17). It is that MBD concealed material information from it. Alrig has stated a claim for fraudulent concealment.

CONCLUSION

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.

June 21, 2024

Respectfully submitted,

/s/ Adam J. Shub

Adam J. Shub, Bar No. 4708
Attorney for Alrig USA Acquisitions

PRETI, FLAHERTY, BELIVEAU & PACHIOS, L.L.P.
One City Center
P.O. Box 9546
Portland, ME 04112-9546
(207) 791-3000

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:

James G. Monteleone, Esquire
Bernstein Shur Sawyer & Nelson
PO Box 9729
Portland, ME 04112

Dated: June 21, 2024

/s/ Adam J. Shub

Adam J. Shub