**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

| | | |
|---|---|---|
| ACADEMY PLAZA L.L.C.1, | : | MAY TERM, 2002 |
| PORT RICHMOND L.L.C.1 and | | |
| WASHINGTON CENTER L.L.C.1, | : | No. 2774 |
| v. | : | |
| BRYANT ASSET MANAGEMENT, | : | |
| WASHINGTON CENTRE SHOPS, L.P. | | |
| a Delaware limited partnership, | : | |
| PORT RICHMOND ASSOCIATES, LLC | | |
| a New York limited partnership and | : | |
| ACADEMY STORES, L.P. | | |
| A Delaware limited partnership | : | (Commerce Program) |

**ORDER**

AND NOW, this 9th day of June 2006, upon consideration of the evidence presented at a bench trial, the respective proposed findings of fact and conclusions of law and responses of the parties, the respective briefs and memoranda, all matters of record, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is ORDERED that:

1. Judgment is entered in favor of plaintiffs, Academy Plaza L.L.C.1, Port Richmond L.L.C.1 and Washington Center L.L.C.1 ("plaintiffs"), and against defendants, Byrant Asset Management, Washington Centre Shops, L.P., Port Richmond Associates, LLC and Academy Stores, L.P. ("defendants"), in the amount of $1.7 million on plaintiffs' claim of fraudulent inducement.

2. The court finds in favor of defendants and against plaintiffs on the breach of contract claim.

3. The court finds in favor of defendants and against plaintiffs on the conspiracy claim.

4. The court finds in favor of defendants and against plaintiffs on the unjust enrichment claim.

5. A declaratory judgment is entered in favor of plaintiffs and against defendants, ordering that defendants indemnify and defend plaintiffs against claims related to Pep Boys allegedly overpaid CAM charges.

6. The court grants plaintiffs' request for attorneys' fees in an amount to be determined at a hearing to be scheduled.

**BY THE COURT,**

**ALBERT W. SHEPPARD, JR., J.**

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**…….....**

**FINDING OF FACT, DISCUSSION**
**AND CONCLUSIONS OF LAW**
**SUR BENCH TRIAL**

**Albert W. Sheppard, Jr., …….……. June 9, 2006**

## FINDINGS OF FACT

### The Parties and Their Representatives

1. Plaintiffs are Academy Plaza L.L.C.1., Port Richmond L.L.C.1.and Washington Center L.L.C.1. D-21; N.T. 12/9/2005 at 88.

2. Plaintiffs are special purpose entities created and wholly owned by Cedar Income Fund Partnership, L.P., now known as Cedar Shopping Centers, Inc. ("Cedar"). N.T. 12/8/2005 at 90-91, 180; Plaintiffs' FF, ¶ 2.

3. The court will refer to Cedar and plaintiffs interchangeably because for our purposes plaintiffs may be considered the same as Cedar[1].

4. Cedar is a publicly traded real estate investment trust ("REIT"). N.T. 12/8/2005 at 90.

5. Leo Ullman ("Ullman") is the Chairman, Chief Operating Officer, and President of Cedar. N.T. 12/9/2005 at 12; Plaintiffs' FF, ¶ 5.

6. Ullman testified that Academy Plaza L.L.C.1., Port Richmond L.L.C.1., Washington Center L.L.C.1 were created by Cedar to own each of the three shopping centers: Academy Plaza, Port Richmond Village and Washington Center. N.T. 12/8/2005 at 90; Plaintiffs' FF, ¶ 7.

7. Andrew Hascoe ("Hascoe") is the sole owner of defendant Bryant Management ("Bryant") and was the principal owner of the corporate general partner for the three shopping center defendants. N.T. 1/11/2006 at 177, 181-186.

8. Cedar and Bryant executed an Agreement of Sale for the three shopping centers on or about May 16, 2001. Exh. P-2.

9. Brenda Walker ("Walker") is the Vice President and a Director of Cedar. N.T. 12/14/2005 at 5.

10. At all relevant times, John Fasciano ("Fasciano") was the director of retail leasing for Cedar. N.T. 12/9/2005 at 5.

11. Stuart Widowski ("Widowski") is general counsel for Cedar Shopping Centers, Inc. N.T. 1/12/2006 at 167.

12. Denis Brauchle ("Brauchle") was the property manager of Bryant at all relevant times. N.T. 1/12/2006 at 79.

[1] N.T. 12/8/2005 at 90-91, 180-181.

13. Shelia DuPell ("DuPell") was Bryant's vice president of marketing and administration at all relevant times. N.T. 1/4/2006 at 61.

14. Samuel Becchofer ("Becchofer"), a partner at the law firm of Pryor, Cashman, Sherman and Flynn, specializing in the practice of real estate[2], drafted and negotiated (on behalf of Bryant) the transaction between Bryant and Cedar. N.T. 1/5/2006 at 13.

**The Claims**

15. Cedar was a small REIT that was in the market to buy shopping centers. 12/9/2005 at 7-8; N.T. 1/11/2006 at 133.

16. Fasciano testified that he learned that Bryant was interested in selling properties that fit the description of what Cedar was looking for. N.T. 12/9/2005 at 8. Fasciano, on behalf of Cedar, contacted Bryant. *Id*. at 10.

17. Fasciano forwarded Bryant Development's "East Coast Portfolio" to Ullman. N.T. 12/9/2005 at 12.

18. The brochure was comprised of an overview of the properties, rent rolls, income, expenses and statements of cash operations and cash projections. Exh. P-111.

19. Cash operations for the purposes of this case, are otherwise known as net operating income ("NOI"). N.T. 12/8/2005 at 111-112, 188.

20. Ullman testified that NOI is the end result of rental income minus property specific deductions. 12/8/2005 at 112.

21. Rent rolls setout the square footage of the properties, lease expiration dates, rental amounts, rent increases under the leases, and expenses. Exh. P-111.

[2] N.T. 1/5/2006 at 11.

22. There was much debate whether rent rolls should set out tenant defaults and early termination options. Walker testified that if she had tenant issues such as early terminations or defaults on the part of tenants, she would note these by hand on the rent roll. N.T. 12/14/2005 at 138.

23. She further testified that if a tenant in material default is, nonetheless, listed on the rent roll, the rent roll is inaccurate. N.T. 12/15/2005 at 16.

24. Douglas Nickel, plaintiffs' expert on the valuation of commercial property, testified that he had seen rent rolls that showed tenant delinquencies. N.T. 12/13/2005 at 124.

25. Ullman testified that he believes that it is an industry-wide practice that if a tenant is not in possession and not paying rent, it is false to list them on the rent roll. If a tenant is not in possession and they are substantially delinquent with no likelihood of payment, they should not be on the rent roll. N.T. 1/10/2006 at 19.

26. DuPell testified that a rent roll does not show tenant defaults. N.T. 1/4/2006 at 43.

27. Walker testified that she typically evaluates the purchase of a property based on a revenue stream that is based upon rent rolls. N.T. 12/14/2005 at 10.

28. Plaintiffs advised defendants that they relied upon defendants' 2001 projections of net income of the three properties[3] in determining their offer. Exh. P-132.

29. On February 16, 2001, Warren Vogel, attorney for MaST Charter School, a tenant of Academy Plaza, in a memo to his file, wrote that he had spoken with DuPell about MaST's intent to exercise their early termination option. Exh. P-92, last page.

[3] These projections can be found in the rent rolls attached to the Bryant Portfolio. Exh. P-111.

30. Walker testified that Ullman learned through the "rumor mill" that MaST was building at another location and was planning on moving. N.T. 1/11/2006 at 15.

31. Ullman wrote to Brauchle with his concerns about MaST. Exh. P-10.

32. Ullman testified that he went to Hascoe and addressed this concern, among others, and that Hascoe "unequivocally" said that MaST would not exercise their early termination option. N.T. 12/8/2005 at 119.

33. Subsequently, Walker wrote to Brauchle asking if Hascoe's opinion regarding MaST's early termination opinion was correct. Exh. P-39.

34. Hascoe denies that he ever told Ullman that MaST would not exercise its right to early termination. N. T. 1/11/2006 at 151.

35. Walker testified that Bryant was not forthcoming with documents that Cedar requested prior to the execution of the Agreement of Sale. N.T. 12/14/2005 at 45; Exh. P-46.

36. However, Walker and Widowski reviewed certain documents at Becchofer's offices prior to the execution of the Agreement. Exh. D-251; Exh. P-46; N.T. 12/14/2005 at 11; 11/22/2005 at 272.

37. Brauchle testified that court documents "were typically kept in the tenant file along with any correspondence and billings and reconciliations . . ." N.T. 1/12/2006 at 143-144.

38. Walker testified that when she reviewed the files, she was only privy to leases, title information and surveys for the three properties. N.T. 12/14/2005 at 11. Widowski testified similarly. N.T. 1/12/2006 at 272.

39. At least one meeting took place between Brauchle, DuPell, Fasciano and Walker. N.T. 1/11/2006 at 12.

40. There was divergent testimony regarding what was discussed, how many meetings took place, when the meeting (meetings) were held and the format of the meeting (meetings). N.T. 12/9/2005 at 38; N.T. 1/4/2006 at 18-26; N.T. 1/12/2006 at 110-112. However, there was a general consensus that tenants of the three shopping centers were discussed. N.T. 12/9/2005 at 38; N.T.12/14/2005 at 36-39; N.T. 1/4/2006 at 18.

41. Brauchle testified that he could not recall if he gave plaintiffs delinquency information and that very little time was spent on those tenants that were discussed. N.T. 1/12/2006 at 112-113

42. Walker testified that she was not told about the tenants that were in default at the time of the meeting. N.T. 12/14/2005 at 39.

43. Walker testified that Cedar would have lowered their offer had they had the information regarding MaST's early departure and the tenants that were in default. N.T. 12/14/2005 at 86.

44. Douglas Nickel, plaintiffs' expert on the valuation of commercial real estate,[4] performed two appraisals. The first appraisal was dated June 2001 (prior to closing). N.T. 12/13/2005 at 17. The date of the second appraisal report is July 29, 2004. The second appraisal takes into account "the alleged misrepresentations." N.T. 12/13/2005 at 13. He compared the evaluations and concluded that plaintiffs overpaid $1.7 million. *Id*.

[4] N.T. 12/13/2005 at 8-11.

45. An Agreement of Sale ("Agreement") was entered into between defendants, Washington Centre Shops, L.P., Port Richmond Associates, LLC and Academy Stores L.P., and Cedar Income Fund Partnership, L.P. on May 16, 2001. Exh. P-2.

46. The Agreement contains an integration clause and representations and warranties related to the status of tenants. *Id*.

47. After the Agreement was executed and before the closing, plaintiffs learned that there had been misrepresentations by defendants. For example, plaintiffs were told definitively that MaST had not missed their right to early termination. Exh. P-33. Further, plaintiffs learned that tenants American Furniture, Triple Play and A Formal Celebration were in arrears. Exh. P-29.

48. According to Ullman, Hascoe promised Cedar a price reduction. N.T.12/14/2005 at 83.

49. Hascoe admitted that the topic of a price reduction came up during a meeting between himself and Ullman. N.T.1/11/2006. However, Hascoe flatly denied that he promised Cedar a reduction in price. *Id*.

50. Brauchle, a witness to this meeting, testified that he "kind of" remembered hearing something about a request for a price reduction, but that he did not recall having a discussion with Ullman about a price reduction. Exh. P-39.

51. Plaintiffs issued two press releases announcing that they were buying the properties. P-106; N.T. 12/8/2005 at 79.

52. Ullman testified that the press announcements had to be released prior to closing "because under SEC guidelines and NASDAQ requirements at that time, any

material transaction involving the company which might have a meaningful effect on the value or its shares had to be disclosed as promptly as 48 hours." N.T. 12/8/2005 at 165.

53. Hascoe testified that he received drafts of a press release and forwarded them to Becchofer. N.T. 1/11/2006 at 155. Hascoe testified that he objected to the press release on account of confidentiality and that consequently, Cedar did not mention the properties by name or Bryant in the final version. *Id*.

**Declaratory Judgment**

54. After closing on the properties, plaintiffs received notice from tenant Pep Boys of Port Richmond Village, that Pep Boys had not received a statement of common area maintenance ("CAM") expenses for 4 years. N.T. 12/14/2005 at 108; N.T. 12/13/2005 at 6; Exh. P-50.

55. The lease between Pep Boys and Bryant called for reconciliations to be provided to Pep Boys every year. N.T. 12/13/2005 at 20.

56. Pep Boys alleges that they overpaid CAM expenses during the time that defendants owned Port Richmond Village. N.T. 12/13/2005 at 21.

57. The Assignment and Assumption of Lease and Contracts provides that defendants:

> . . . hereby agree[] to indemnify, hold harmless and defend [Cedar] from and against any and all damages, liabilities, loss, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) resulting by reason of any failure by [defendants] to perform or discharge any of [defendants'] duties or obligations under the Leases and/or Contracts during the period of [defendants'] ownership . . .

Exh. P-2 (attached Exhibit K); Plaintiffs' FF, ¶ 98.

58. Hascoe testified that "anything that happened before their (plaintiffs) ownership is my responsibility or the properties' responsibility. And we committed to indemnify them . . . against any claims from tenants prior to the sale." N.T. 1/11/2006 at 175-176.

59. However, counsel for defendants wrote to Widowski:

> . . . it is the position of Port Richmond Associates LLC . . . that it has absolutely no liability whatsoever to Port Richmond LLC.1 and/or Pep Boys pursuant to Pep Boys' lease, the Contract of Sale, the Assignment and Assumption of Leases and Contracts and/or any other documents.

Exh. P-114.

## DISCUSSION

Academy Plaza L.L.C.1, Port Richmond L.L.C.1 and Washington Center L.L.C.1 ("plaintiffs") brought the following causes of action: (1) fraudulent inducement (Count I), (2) negligent misrepresentation (Count II), (3) unjust enrichment (Count III), (4) breach of contract (Count IV) and (5) conspiracy (Count V). Plaintiffs also seek a declaratory judgment (Count VI) requiring defendants to defend and indemnify Cedar against claims brought by a tenant (Pep Boys). Previously, the court sustained preliminary objections to plaintiffs' claims of negligent misrepresentation and breach of contract as to defendant Bryant only.

### I. FRAUDULENT INDUCEMENT

Plaintiffs argue that defendants "fraudulently induced plaintiffs to sign the Agreement . . . at an inflated price by intentionally overstating the net operating income ("NOI") for the shopping centers." Plaintiffs' CL, ¶ 106. Plaintiffs claim that they would not have paid the price they ultimately paid had they known the net operating income ("NOI") was inaccurate. *Id*.

Defendants deny that they committed fraud. Instead, they insist that plaintiffs "had all the relevant existing facts before the Agreement . . ." Defendants FFCL, p. 49.

The elements of fraudulent inducement are: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury that was proximately caused by the reliance." *Eigen v. Textron Lycoming Reciprocating Engine Division*, 2005 PA Super 141, 874 A.2d 1179, 1185 (Pa. Super 2005) (citing *Skurnowicz v. Lucci*, 2002 PA Super 140, 798 A.2d 788, 795 (Pa. Super. 2002)) (quoting *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555, 560 (Pa. 1999)).

Plaintiffs complain that the NOI's and the rent rolls contained misrepresentations that caused them to offer a purchase price that was substantially higher than the value of the properties. Specifically, plaintiffs argue that the rent rolls were false because: (1) they did not contain information regarding the weaknesses, including the litigation history, of certain tenants and (2) despite the fact that rent rolls provide the terms of leases, defendants did not note MaST Charter School's early termination option on the Academy Plaza rent roll.

**A. <u>Representation</u>**

Plaintiffs were supplied with a marketing brochure, Bryant Development's "East Cost Portfolio". This brochure had as its subject the six properties that were initially for sale. Exh. P-111. The brochure was first received by John Fasciano, a former employee of Brentway Management[5] and subsequently passed on to Leo Ullman ("Ullman"), the

[5] Brentway Management was the company that handled property management for Cedar. N. T. 12/9/2005 at 6.

chairman, CEO and president of Cedar Shopping Centers Partnership, L.P. N.T. 12/8/2005 at p. 88; N.T. 12/9/2005 at p. 12. This brochure was comprised of an overview of the properties, rent rolls, income expenses and statement of cash operations (otherwise known as "NOI") and cash projections. Exh. P-111.

According to Ullman, NOI embodies the concept of income flowing from operations, as opposed to miscellaneous income.[6] N.T. 12/8/2005 at p. 111. Ullman testified that "net operating income . . . . is a function of primarily rental income with property-specific deductions." N.T. 12/8/2005 at 113. Ullman explained the connection between NOI and rent rolls:

> The concept of net income, whether operating net income, other net income, funds from operations, adjusted funds from operations, cash flow, et cetera, all come at the outset from the rental income from the tenants in the shopping center. So the net income figure, if that's the relevant measure, is purely and critically related to the predictable revenue stream that's set forth in the rent roll.

*Id.*

Ullman explained further:

> The determination of net operating income on a - - on an estimated basis, which is what we go on, for the current or the subsequent year, when you buy a property, is based on the rent roll and those rents are projected out for the term of the lease. And then the income and expenses and the recovery of those income expenses also come out of the rent roll, where you're told how much the tenants will pay [for] the common area charges . . ."

N.T. 12/8/2005 at 269.

[6] Counsel for defendants objected numerous times to plaintiffs' claims regarding NOI. He argued that these claims should not be addressed at trial because they were not alleged "in the complaint and never asserted or mentioned in discovery." N.T. 12/14/2005 at p. 13. The court, finding that NOI and rent rolls are inextricably woven, overruled these objections. *Id.* However, the court allowed defense counsel a continuing objection on this issue. N.T. 12/14/2005 at p. 16.

Brenda Walker ("Walker"), Vice President and a director of Cedar Shopping Centers, Inc.,[7] testified that she typically evaluates the purchase of an income producing asset by putting together "a stream of revenues based upon the rent roll that's given to [her] by the sellers." N.T. 12/14/2005 at 10.

The court finds that defendants made the requisite representation to plaintiffs by providing, among other information, NOI and rent rolls.

**B. Materiality and Reliance**

The elements of materiality and reliance go hand in glove in this case. If the representations in the form of rent rolls, NOI and NOI projections constituted the bases of plaintiffs' purchase offer, than the representations were relied upon and basic to plaintiffs deciding whether to enter into an agreement of sale. Therefore, the court will address these two elements together.

Plaintiffs aver that had they known the NOI was lower than what they were told, their offer would have been lower. N.T. 12/14/2005 at 86. In fact, plaintiffs put defendants on notice that they were relying on their numbers. In a letter dated March 5, 2001 from Ullman to Denis Brauchle ("Brauchle")[8], Ullman writes, "Please note that in submitting the offer described above, we have used your 2001 projections for net income of the respective properties . . ." Exh. P-132.

Thus, the information at issue was material and relied upon.

[7] N.T. 12/14/05 at p. 5.
[8] Brauchle was the property manager for defendants at all relevant times. N.T. 1/12/2006 at 79.

### C. Justifiable Reliance

As to whether reliance was justifiable, defendants argue that "plaintiff here was given ample opportunity to inspect the property and to gather information that would have led any reasonable purchaser in its position to the conclusion that some tenants were in arrears on their rent." Defendants' FFCL, p. 53. The defendants urge that because plaintiffs did not avail themselves of this opportunity, their reliance on defendants' numbers was unjustifiable. Consequently, what information the plaintiffs were privy to prior to the execution of the Agreement determines whether plaintiffs' reliance was justifiable.

Defendants were on notice at least one month before the Agreement was executed that MaST charter school, a large tenant in Academy Plaza, intended to exercise their early termination option. In a February 16, 2001 memo to his file, Warren Vogel, attorney for MaST, wrote:

> I spoke with Sheila DuPell, of the Bryant Development Corp., the owner of the Academy Plaza Shopping Center, and the person designated as property manager of the Academy Plaza Shopping Center. I had previously spoken to Sheila with regard to MaST's intent to exercise its right of early termination as set forth in the lease. In my discussion with Ms. DuPell, we discussed the ambiguity of the notice provision in the lease. **In our discussion, Sheila made clear that she was amenable to accept a notice of termination which will be effective as of the end of the year (or such other date as we may specify) so long as the termination date is set forth in notice given under the lease.**
>
> My recommendation to the school is to give that notice only after the agreement of sale for the property is executed.

Exh. P-92, last page. (Emphasis added.)

Walker testified that Ullman had heard that MaST was building at another location through the "rumor mill" and that "[MaST] would ultimately move out of the property." N.T. 1/11/2006 at 15 Ullman writes in an April 27, 2001 memorandum to Brauchle: "Specifically, I think it important that we deal with certain essential differences as to price to wit . . . certain serious concerns on tenancies, such as . . . the impending departure of the charter school at the Academy property . . .." Exh. P-10.

Ullman testified that he went to Andrew Hascoe ("Hascoe") and addressed this issue along with other concerns. N.T. 12/8/2005 at 118. Ullman testified that Hascoe "unequivocally said to me that they would not exercise that right to leave." *Id*. at 119. Included in a June 4, 2001 series of questions prepared by Walker sent to Brauchle, Walker asks: ". . . [MaST charter] has until the end of August 2001 to terminate the lease . . . Hascoe told Leo that the time for such termination to be exercised had passed . . . Are we wrong?" Exh. P-39. Hascoe refutes Ullman's testimony. N.T. 1/11/2006 at 149.

There is also evidence that Bryant representatives thwarted attempts to collect information prior to the Agreement. In a May 8, 2001 letter from Cedar's counsel, Stuart Widowski ("Widowski"), to Bryant's counsel, Samuel Becchofer ("Becchofer"), Widowski writes: "I am concerned that not all promised documentation has been made available in a timely fashion . . . ." A May 24, 2001 letter from Walker to Brauchle reiterates Cedar's growing frustration:

> I have been communicating with you since the week of the May 7th . . . regarding certain information that we require to complete our due diligence . . . . As of this writing we have not received the information requested on May 10th and May 16 . . . .."

Exh. P-48.

A review of certain documents took place at Becchofer's offices prior to the execution of the Agreement.[9] The key question remains: What documents were available for review?

Walker testified that she and Widowski reviewed all of the existing leases, title information and surveys for the three properties. N.T. 12/14/2005 at 11. Widowski's testimony mirrored that of Walker's:

> . . . we [Walker and Widowski] were given access to copies of leases and previous title information and surveys **only** at the offices of [Becchofer] where Brenda Walker and I spent several days going through these boxes of photocopies.

N.T. 1/12/2006 at 272. (Emphasis added.) Brauchle, defendants' witness, testified that court documents "were typically kept in the tenant file along with any correspondence and billings and reconciliations . . ." N.T. 1/12/2006 at 143-144.

The court found Walker and Widowski credible. As a result, the court infers that that correspondence which would have demonstrated past litigation and other collection efforts was not in the tenant files. This court further finds that this missing historical information was material to an assessment of the financial performance of the shopping centers.

Prior to the execution of the Agreement, a second meeting took place among Brauchle, DuPell, Fasciano and Walker in late April, 2001. N.T. 12/9/2005 at 16; N.T. 1/4/2006 at 8; N. T. 1/11/2006 at 137. Controversy swirls around this meeting (or meetings), as DuPell and Walker have dueling versions of how many meetings took place, what was discussed and the format of the meeting(s). Walker testified that she met with Brauchle while Fasciano met with DuPell. N.T. 12/14/2005 at 37. She recalled

[9] Exh. D-251; Exh. P-46; N.T. 12/14/2005 at 11.

discussing issues related to the properties. *Id*. She was not involved with the leasing discussion with DuPell and Fasciano. *Id*. Walker testified that she was not told about the tenants that were in default at the time. *Id*. at 39.

DuPell testified that there were two meetings. One of the meetings took place in either April or early May, before the Agreement of Sale was executed. N.T. 1/4/2006 at 18. According to DuPell, the first meeting included Walker, Fasciano, a third gentleman from Cedar, Brauchle and DuPell. She further testified that she attended this meeting for approximately two hours. N.T. 1/4/2006 at 17. DuPell testified that a second meeting took place in June and that the attendees reviewed a site plan for each shopping center, discussed availability of space, square footage and unit numbers, and that Bryant was quietly looking for a replacement for Triple Play because they were "weak and having trouble paying their rent." *Id*. at 18-26. DuPell further testified that MaST was discussed inasmuch as Bryant was not sure about their early termination option. She also testified that she was talking to a buffet restaurant to replace American Furniture. *Id*. at 54.

John Fasciano testified to being involved in a meeting that "most likely" took place at Bryant's offices. N.T. 12/9/2005 at 16, 37. Overall, Mr. Fasciano's memory of what took place at the meeting was sketchy. He testified that he had no "recollection that tenants were discussed. I don't know if they [*sic*] were delinquencies or not." *Id*. at 38. He did not recall Walker asking about delinquencies. *Id*.

Denis Brauchle, an individual who was intimately involved in this deal, testified that he generally recalled what was discussed and that they "pretty much" went through "the majority of the tenants".[10] He testified that he did not recall what he said about any specific tenant. N.T. 1/12/2006 at 110. He also admitted that he did not recall if he gave the buyers delinquency information[11] and that he spent very little time on the tenants that were discussed. *Id*. at 112.

The court finds that Bryant's representatives did not share material information with Walker and Fasciano concerning tenants that were in material default and tenants with litigation histories. Therefore, defendants' argument that all relevant information was available to sellers for the asking fails. This court finds that plaintiffs justifiably relied on the information they were given.

**D. <u>Knowledge and Intent</u>**

Despite the fact that MaST charter school's lease was listed on the rent roll as having an expiration date of July 31, 2004[12], defendants had knowledge one month before the execution of the Agreement that MaST was planning to exercise their early termination option.[13]

In addition, Denis Brauchle testified that court documents "were typically kept in the tenant file along with any correspondence and billings and reconciliations . . ." N.T. 1/12/2006 at 143-144. As noted, Walker and Widowski both testified that the tenant files that were available for their review at Becchofer's office did not include court

[10] N.T. 1/12/2006 at 84, 111.
[11] *Id*. at 113
[12] Exh. P-111.
[13] Exh. P-92.

documents, correspondence or reconciliations. N.T. 12/14/2005 at 11; N.T. 1/12/2006 at 272.

Potential buyers interested in purchasing real estate must determine whether a property has steady income or income potential. If potential buyers are not given relevant information with which they can predict future income, they are buying their real estate blind. Here, the defendants, with their experience buying and selling commercial real estate, knew that this missing information was crucial to the plaintiffs. Accordingly, the elements of knowledge and intent were met.

**E. Injury Proximately Caused by Reliance**

Walker testified that if she had the relevant information described, they would have reduced the expected revenues and adjusted their offer. N.T 12/14/2005 at 86. Ullman testified that among the factors that were of interest to him in purchasing the three shopping centers were "prospects for future income growth" and "value over a period of time." N.T. 12/8/2005 at 105. He described his process for determining how much he was willing to pay:

> The normal process is that you determine the estimated income for the properties, for the current or the next following year, depending on what period of the year it's in and you apply to that a capitalization rate, which will vary, depending on the quality of the tenants, the predictability of the cash flow, location, et cetera, et cetera.

N.T. 12/8/2005 at 108.

Furthermore, it bears repeating that in a letter dated March 5, 2001 from Ullman to Denis Brauchle[14], Ullman was explicit on this issue: "Please note that in submitting the offer described above, we have used your 2001 projections for net income of the respective properties . . ." See Exh. P-132.

[14] Brauchle was the property manager for defendants at all relevant times. N.T. 1/12/2006 at 79.

To reiterate, the plaintiffs bear the burden to prove they suffered an injury as a result of their justifiable reliance on the fraudulent misrepresentations. *Eigen supra* at 1185. Douglas Nickel, plaintiffs' expert on the valuation of commercial real estate[15], prepared appraisals both prior to and subsequent to the closing. N.T. 12/13/2005 at 15. Nickel's July 1, 2001 evaluation was based on information he had at that time. *Id*. at 42. His second evaluation of July 29, 2004 was based on actual post-closing events. *Id*. at 48-49. He concluded that a well informed purchaser aware of the misrepresentations would have paid 1.7 million less than what plaintiff paid. *Id*. at 17.

Defendants' expert, opined that he did not agree with the techniques used by Nickel but that "he doesn't know if [Nickel's figures] are the right answer." N.T. 1/5/2006 at 163.

The court finds that plaintiffs' have proven the elements of fraudulent misrepresentation,[16] and finds that plaintiffs were injured in the amount of 1.7 million dollars.[17]

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[15] N.T. 12/13/05 at 8-11.

[16] Plaintiffs also request punitive damages. This court believes that taking into account the totality of circumstances surrounding this case, punitive damages are not warranted.

[17] Although neither party addressed this issue, this court is aware that the Pennsylvania Superior Court stated:

> … a party may introduce evidence of factual misrepresentations allegedly made prior to the execution of a written agreement by misrepresentation provided … the party may not thereby achieve a reformation of the agreement but rather may obtain total rescission only."

*1776 Cherry Street v. Bell Atlantic*, 439 Pa. Super. 141, 149, 653 A.2d 663 (Pa. Super. 1995).

The court believes that, in this case, a rescission of the contract is not only impractical, it would be unjust. This court has company. In *Scaife v. Rockwell-Standard Corporation*, 446 Pa. 280; 285 A.2d 451 (1970), the Superior Court of Pennsylvania upheld a jury verdict of $1,200,000.28 in a fraudulent misrepresentation case. See, also (*Restatement of Torts*) §549(1)(a).

## 1. Gist of the Action Doctrine

Defendants' assert that the gist of the action doctrine bars plaintiffs' claim of fraudulent inducement. Defendants' FFCL, p. 39. Plaintiffs maintain that "the gist of the action doctrine does not bar a claim of fraud in the inducement because fraud to induce a person to enter a contract is collateral to the terms of the contract itself and implicates society's desire to avoid the fraudulent inducement of contracts." Plaintiffs' CL, ¶120. The court agrees.

The gist of the action doctrine "is designed to maintain the conceptual distinction between breach of contract claims and tort claims." *Bash v. Bell Telephone Co. of Pennsylvania*, 411 Pa. Super. 347, 601 A.2d 825, 829 (Pa. Super. 1992). The doctrine prevents plaintiffs from recasting ordinary breach of contract claims into tort claims. *Id*. Relying on *Bash*, the Court in *eToll, Inc. v. Elias/Savon Advertising, Inc*., 2002 PA Super 347, 811 A.2d 10 (Pa. Super. 2002), reasoned that: [g]enerally the doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort.[18] *eToll* cited the *Bas*h Court's delineation of contract claims and tort claims thusly:

> [a]lthough they derive from a common origin, distinct differences between civil action of tort and contract breach have developed at common law. **Tort actions lie for breaches of duties imposed by law as a matter of social policy**, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals . . .

*Id*. at 14. (Emphasis added.)

Similarly, in *Redevelopment Auth. v. International Ins. Co.*, 454 PA Super 374, 685 A.2d 581, 590 (Pa. Super. 1996) the court noted that "[t]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter

[18] *Bash* supra at 829

of social policy while the former lie for the breach of duties imposed by mutual consensus."

In *Sullivan v. Chartwell Investment Partners, L.P.*, 2005 PA Super 124, 873 A.2d 710 (Pa. Super. 2005), plaintiff employee appealed the trial court's sustaining defendant's Preliminary Objections and dismissing plaintiff's Complaint. The trial court found that the gist of the action doctrine barred prosecution of all of plaintiff's fraud and negligent misrepresentation claims. Appellee argued that Appellant "fraudulently and/or negligently agreed to perform obligations that it never intended to perform in order to induce Appellant to agree to the proposed changes to his compensation package and to forgo an immediate resignation." *Id*. at 719. The Appellate court concluded that because "Appellant's tort claims related to the inducement to contract, they were collateral to the performance of the contracts and therefore, are not barred by the gist-of-the-action doctrine." *Id*. (citing *eToll*, *supra* at 17).

This court submits that the fraudulent misrepresentations that induced plaintiffs to enter into the Agreement implicate society's interest in preventing the formation of contracts based on fraud and that the tort claim is the gist of the action. Accordingly, the court finds that the gist of the action doctrine does not bar plaintiffs' claim for fraudulent inducement.

**2. <u>Parol Evidence</u>**

Defendants' second line of defense is a claim that the parol evidence rule bars plaintiffs' reliance on pre-contractual misrepresentations. Defendants FFCL, p. 40.

The parol evidence rule has been described as follows:

> Where the parties to an agreement adopt a writing as the final and complete expression of their agreement, . . . **evidence of negotiations**

> **leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement**. . . .

*McGuire v. Schneider, Inc.*, 368 PA Super 344, 534 A.2d 115, 117 (Pa. Super. 1995).

Defendants list a number of cases that they claim "hold that parol evidence may not be considered in a case alleging fraud in the inducement of an integrated commercial contract". [19] Defendants' FFCL, p. 41.

In *Nicolella v. Palmer*, 432 Pa. 502; 248 A.2d 20 (1968), the Court held that appellant was barred from "seeking to **vary the terms** of an integrated written agreement by prior or contemporaneous oral agreements." *Id*. at 22. (Emphasis added.) The *Nicolella* court, in coming to their decision relied on another of defendants' cases, *Bardwell v. The Willis Company*[20].

*Bardwell* provides:

> [T]he law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parol evidence to **vary, modify or supersede the written contract is inadmissible in evidence.**

*Id*. at 506. (Internal citations omitted and emphasis added.)

In another case cited to by defendants, *HCB Contractors v. Liberty Place Hotel Assoc.*, 539 Pa. 395, 652 A.2d 1278 (1995), the Court simply acknowledged that the Superior Court was correct in ruling that *HCB* was controlled by *Nicolella*.

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[19] The Agreement's integration clause provides:

> This Agreement embodies and constitutes the entire understanding between the parties hereto with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged into this Agreement. . . .

Exh. P-111.

[20] 375 Pa. 503, 100 A.2d 102 (1953)

*Youndt v. First National Bank of Port Allegheny*, 2005 PA. Super 42, 868 A.2d 539 (2005) quotes the rationale supporting the *Blumenstock* decision: [t]he case law clearly holds that a party cannot justifiably rely upon prior oral representations yet sign a contract **denying the existence of those representations.**" *Id.* (Emphasis added.)

The court finds that the parol evidence rule is not activated in this case because the fraudulent misrepresentations **were consistent with** the terms of the agreement.

### 3. Waiver

Defendants' argue that because plaintiffs ultimately closed this sale, they have waived their rights to seek damages. Defendants write: "What plaintiffs do not have a right to do is to have their cake and eat it too . . . ." Defendants' FFCL, p. 34. Plaintiffs counter with *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451, which held that "the affirmance of a contract induced by fraud of the seller does not extinguish the right of the purchaser, and it is not a waiver of the fraud, nor does it bar the right of the purchaser to recover damages for the fraud." (Internal citation omitted.)

Defendants urge that the facts of *Scaife* are distinguishable from the present case because the plaintiff in *Scaife* did not learn about a defect in the product until after they purchased the manufacturer. In the case at bar, the plaintiffs closed on the properties after they learned of the majority of the tenant issues.

Plaintiffs argue that although they had knowledge of some significant tenant issues before the closing[21], if they did not close the deal "it would have been the end of

[21] For instance, between the signing of the Agreement of Sale and the closing, plaintiffs' learned that MaST was going to exercise their early termination option. See Exh. P-33. On June 13, 2001, Walker received the Activity Reconciliation Reports for all three centers. These reports showed the Triple Play, A Formal Celebration and American Furniture delinquencies. Exh. P-161.

the real estate investment trust", it would have been "the demise of Cedar Income Fund." N.T. 12/14/2005 at 102-103.

Plaintiffs assert that they had to close because they issued two press releases informing their investors and other interested parties that they were purchasing the three shopping centers as the first step in the process of transforming their small REIT into a much larger REIT. Exh. P-106. According to plaintiffs, these press items had to be released "because under SEC guidelines and NASDAQ requirements at the time, any material transaction the company which might have a meaningful effect on the value or its shares had to be disclosed as promptly as 48 hours." N.T. 12/8/2005 at 165. [22]

Plaintiffs also contend that they closed the deal because they were told that they would receive a price reduction to compensate for the delinquencies that were uncovered during due diligence. Plaintiffs' FF, ¶ 75. This is a promise that defendants flatly deny. A meeting took place at the Bryant offices between Hascoe and Ullman.[23] According to Hascoe the topic of a price reduction came up and "Ullman walked out of the office knowing that he was not going to get a price reduction**."** N.T. 1/11/2006 at 149, 154. Hascoe also testified that he had a witness to this meeting, Denis Brauchle. *Id*. at 154.

Brauchle's testimony was opaque on this issue and on the meeting itself. He testified that he "kind of" remembered hearing something about a request for a reduction of price and that he did not recall having a conversation with Ullman about a price reduction. N.T. 1/12/2006 at 95.

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[22] Hascoe testified that he received drafts of a press release and forwarded them to Becchofer. N.T. 1/11/2006 at 155. Hascoe further testified that he objected to the press release on account of confidentiality and that consequently, Bryant did not mention the properties by name or Bryant in the final version. *Id.*

[23] N.T. 1/10/2006 at 67.

The court believes that had this meeting proceeded consistent with Hascoe's testimony, Brauchle, in this multi-million dollar deal, would have had more than a "kind of" remembrance about a reduction in price. Further, Walker testified that plaintiffs were required to raise more equity for closing because they did not get the price reduction they were relying on. N.T. 12/14/2005 at 91.

This court found Walker and Ullman to be credible. Thus, the court finds that a promise for a price reduction was given and that a failure to close would have resulted in greater damage to plaintiffs than to close and face the uncertainty that underlies all lawsuits. The court finds that plaintiffs did not waive their right to bring this action.

## II. BREACH OF CONTRACT

Plaintiffs contend that defendants, with the exception of Byrant Asset Management[24], are liable for breach of contract. According to plaintiffs, "[d]efendants breached the Agreement by representing and warranting that there were no material tenant defaults and that the information on the rent rolls was true . . . when there were, in fact multiple material tenant defaults and the information on the rent rolls was not true." Plaintiffs' CL, ¶ 140.

The pertinent provisions of the Agreement provide that the seller represents "the information set forth in the [rent rolls] is true correct and complete in all material respects. To Seller's knowledge, there is no material default of either the landlord or any Tenant under any of the Tenant Leases . . ." Exh P-2, 3.3 (c)

The following is plaintiffs' own characterization of this case:

> . . . while the underlying complaint contains allegations that the Agreement was breached, **the action as a whole clearly sounds in tort**,

[24] This court previously held, in response to defendants' Preliminary Objections, that the breach of contract claim was dismissed as to defendant Bryant only.

> as the action is grounded in the general duty to refrain from deceit and fraud. The contract allegations are merely collateral to conduct that is primarily .

Plaintiffs' Opposition to Defendants' Second Motion for Summary Judgment, p. 21. (Emphasis added.)

If this case is grounded in fraud, and this court agrees that it is, can plaintiffs maintain a breach of contract claim after the court has found that the tort claim is the gist of the action?

The gist of the action doctrine maintains the "conceptual distinction between breach of contract claims and tort claims." *Bash v. Bell Telephone Co. of Pennsylvania*, 411 Pa. Super. 347, 601 A.2d 825, 829 (Pa. Super. 1992). The doctrine prevents plaintiffs from recasting ordinary breach of contract claims into tort claims. *Id*. The gist of the action doctrine must also prevent tort claims from being molded into breach of contract claims. *Bash*, the first Pennsylvania Superior Court case to recognize the gist of the action doctrine, cites to the Corpus Juris Secundum for the key proposition that the conduct of the defendant will be ascribed as a tort if it is "the gist of the action, the contract being collateral." CJS Actions § 136. That section also provides:

> . . . if the complaint states a cause of action in tort and it appears that this is the gravaman of the complaint, the nature of the action as ex delicto is not affected or changed by allegations in regard to the existence of breach of a contract, which may be disregarded as surplusage . . .

This court agrees and finds that plaintiffs' breach of contract claim is barred by the gist of the action doctrine.[25]

[25] The court finds that plaintiffs' claim for unjust enrichment fails because of the **presence** of a contract. "By its nature, the doctrine of quasi-contract, or unjust enrichment, is inapplicable where a written or express contract exists." *Mitchell v. Moore, 1999 PA Super 77, 729 A.2d 1200, 1203 (Pa.Super. 1999).*

## III. CONSPIRACY

Plaintiffs allege that the "defendants agreed to act in concert to mislead and defraud Cedar to overpay for the Bryant Portfolio, defendants agreed to act in concert to mislead and defraud Cedar regarding the financial performance of the shopping centers, the NOI, the rent rolls, and the promise of a purchase price reduction." Plaintiffs' CL, ¶ 146.

The elements of civil conspiracy are: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for a lawful purpose, (2) with an intent to injure without justification, (3) an overt act "done in pursuance of the common purpose or design", and resultant actual legal damage. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (1979). Moreover, the *Thompson* court stated, "[a] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves." *Id*. This court submits that plaintiffs have failed to satisfy the first element.

Hascoe, the sole owner of defendant Bryant Asset Management, and the principal owner of the corporate general partner for the three shopping center defendants, testified that he owned 100% of the stock in Bryant Development Company. N.T. 1/11/2006 at 167, 177. He explained that Bryant Asset Management was used for day-to-day management of the three shopping centers. *Id*. at 178. The shopping centers were limited partnership bankruptcy remote entities which were controlled by general partners. *Id*. at 181-182. There were management agreements between the general partners and Bryant Asset Management. *Id*. at 186. Finally, Hascoe testified that he had ultimate decision making authority for all four defendants. N.T. 1/11/2006 at 178-180.

The case that plaintiffs cite in support of their proposition that "there is no rule that a corporation and its wholly owned subsidiaries are immune from civil conspiracy claims"[26], also states that "a corporate parent may have varying degrees of involvement with its corporate subsidiary".[27] The Superior Court concluded that the closer the relationship between corporate parent and subsidiaries, the more likely it is that they cannot be capable of conspiracy.[28]

The court finds that Bryant Asset Management was so involved with the three remaining defendants that they were not able to conspire. The court finds that plaintiffs' claim for conspiracy fails.

**DECLARATORY JUDGMENT**

The court has been asked to enter a declaratory judgment in favor of Cedar and against the defendants with respect to claims by tenant Pep Boys of alleged overpayments of Common Area Maintenance ("CAM") charges during the time that Bryant owned the properties.

After closing on the properties, plaintiffs received notice from Pep Boys, a tenant at Port Richmond Village, that Pep Boys had not received a statement of common area maintenance ("CAM") expenses for 4 years. Exh. P-50. The lease between Pep Boys and Bryant called for reconciliations to be provided to Pep Boys every year. N.T. 12/13/2005 at 20. Pep Boys alleges that they overpaid CAM expenses during the time that defendants owned Port Richmond Village. N.T. 12/13/2005 at 21.

[26] *Shared Communications Services of 1800-80 JFK Blvd. Inc. v. Bell Atlantic Properties, Inc.*, 692 A.2d 570 (Pa. Super. 1997).
[27] *Id*. at 574.
[28] *Id*.

The Assignment and Assumption of Lease and Contracts provides that defendants:

> . . . hereby agree[] to indemnify, hold harmless and defend [Cedar] from and against any and all damages, liabilities, loss, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) resulting by reason of any failure by [defendants] to perform or discharge any of [defendants'] duties or obligations under the Leases and/or Contracts during the period of [defendants'] ownership . . .

Exh. P-2 (attached Exhibit K); Plaintiffs' FF, ¶ 98.

Hascoe testified that "anything that happened before their (plaintiffs) ownership is my responsibility or the properties' responsibility. And we committed to indemnify them . . . against any claims from tenants prior to the sale." N.T. 1/11/2006 at 175-176. However, counsel for defendants wrote to Widowski:

> . . . it is the position of Port Richmond Associates LLC . . . that it has absolutely no liability whatsoever to Port Richmond LLC.1 and/or Pep Boys pursuant to Pep Boys' lease, the Contract of Sale, the Assignment and Assumption of Leases and Contracts and/or any other documents.

Exh. P-114.

The court accepts the testimony of Hascoe and finds that defendants did commit to indemnify and defend plaintiffs against claims made by tenants for that period of time Bryant owned the shopping centers. Therefore, this court enters a declaratory judgment in favor of plaintiffs and against defendants ordering defendants to indemnify and defend plaintiffs against claims related to Pep Boys allegedly overpaid CAM charges.

As to plaintiffs' claim for attorneys' fees, the relevant provision in the Agreement provides:

> If either party hereto fails to perform any of its obligations under this Agreement or if a dispute arises between the parties hereto concerning the meaning or interpretation of any provision of this Agreement, then the defaulting party or the party not prevailing in such dispute shall pay any

> and all costs and expenses incurred by the other party on account of such default and/or enforcing or establishing or enforcing or establishing its rights hereunder, including without limitation court costs and reasonable attorneys' fees and disbursements.

Exh. P-2, § 10.20.

This court has found that defendants breached the Assumption and Assignment of Leases and Contracts provision set out in the Agreement. Accordingly, the court finds that plaintiffs' are due attorneys' fees specifically related to the Declaratory Judgment action. Therefore, the court will schedule a hearing on the issue of the amount of attorneys' fees.

## CONCLUSIONS OF LAW

1. Plaintiffs were fraudulently induced to enter into the Agreement of Sale.

2. The plaintiffs are entitled to a judgment in the amount of $1.7 million, which amount represents the damages testified to by plaintiffs' expert (Nichol) and which amount defendants' expert testified he could not dispute.

3. Plaintiffs' Breach of Contract claim is barred by the gist of the action doctrine.

4. Plaintiffs did not satisfy the first element of civil conspiracy, that is, a combination of two or more persons acted with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose.[29] Thus, plaintiffs' claim of Civil Conspiracy fails.

[29] *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 472 (1979).

5. Plaintiffs' claim for unjust enrichment fails because of the presence of a contract. "By its nature, the doctrine of quasi-contract, or unjust enrichment, is inapplicable where a written or express contract exists." *Mitchell v. Moore, 1999 PA Super 77, 729 A.2d 1200, 1203 (Pa.Super. 1999).*

6. Under the contract, defendants must indemnify and defend plaintiffs against claims brought by Pep Boys relative to that period of time that defendants owned the shopping centers.

7. Plaintiffs are entitled to attorneys' fees under the contract because defendants breached the Assumption and Assignment of Leases and Contracts provision.

The court will enter an Order consistent with these Findings and Conclusions.

**BY THE COURT,**

_____

**ALBERT W. SHEPPARD, JR., J.**