IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EUCLID BUSINESS PARK, LLC,	)	**CASE NO. CV 06 589304**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
JERRY PETERS, *et al.*	)	**JOURNAL ENTRY DENYING EUCLID REALTY AND THE CO-MAKERS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING AND DENYING IN PART EUCLID BUSINESS PARK AND STUART LICHTER'S MOTIONS FOR SUMMARY JUDGMENT**
	)	
Defendants.	)	
_____	)	
	)	
EUCLID REALTY, LLC, *et al.*,	)	
	)	
Intervenor plaintiff,	)	
	)	
vs.	)	
	)	
SESTECH ENVIRONMENTAL, *et al.*	)	
	)	
Intervenor defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

This lawsuit was initiated by Euclid Business Park, LLC,[1] the seller of a piece of real estate, against Jerry Peters, John Peters, Armond Waxman and Melvin Waxman, the four individual co-makers of a promissory note that help financed the sale. The co-makers, along with the buyer – Euclid Realty, LLC[2] (an intervention plaintiff) – have asserted their own causes of action against Euclid Business Park and Stuart Lichter, the president of Euclid Business Park's managing member Industrial Realty Group, Inc.[3]

[1] Euclid Business Park, LLC will be referred to in this entry as "Euclid Business Park" or "seller."
[2] Euclid Realty, LLC will be referred to in this entry as "Euclid Realty" or "buyer."
[3] Euclid Realty also brought in a third-party entity and two of its employees; however, the claims against those parties have been resolved.

Although the case has sprawled, the remaining issues can be concisely summarized: Euclid Business Park seeks a judgment for the money still owed on the promissory note, while Euclid Realty and the co-makers (who are all members of Euclid Realty) claim nothing is owed on the note because Euclid Business Park not only breached the parties' contract but, with Lichter, illegally procured the sale through fraudulent inducement to contract, fraud, negligent misrepresentation, and civil conspiracy.

The causes of action

The operative pleadings are Euclid Business Park's complaint, filed here on April 14, 2006, and the omnibus amended claims and counterclaims of Euclid Realty and the four defendants[4] against Euclid Business Park and Lichter, filed September 24, 2008.

Euclid Business Park's complaint contains a single cause of action: breach by the Peterses and Waxmans[5] of a May 31, 2003, amended and restated promissory note.

The claims of Euclid Realty and its members against Euclid Business Park and Lichter are more numerous. They include causes of action for: breach of contract against Euclid Business Park only;[6] negligent misrepresentation against Euclid Business Park and Lichter;[7] fraudulent inducement to contract against Euclid Business Park and Lichter;[8] fraud against Euclid Business Park and Lichter;[9] and civil conspiracy against Euclid Business Park and Lichter.[10]

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[4] This pleading will be referred to in this entry as either "omnibus claims, etc." or "Euclid Realty's affirmative pleading."
[5] Together the four defendants will be referred to in this entry either as the co-makers or as the members of Euclid Realty.
[6] Omnibus claims, etc., counts 13 and 23.
[7] *Id.*, count 17.
[8] *Id.*, count 18.
[9] *Id.*, count 19.
[10] *Id.*, count 21. All other causes of action were either voluntarily dismissed by Euclid Realty and its members or were dismissed by the court by entries journalized on May 4, 2009.

The pending motions

Euclid Business Park has moved for summary judgment on its complaint.[11] Euclid Business Park and Lichter have jointly moved for summary judgment in their favor on all of the remaining claims against them.[12]

For their part, Euclid Realty and its members have moved for summary judgment on their causes of action for breach of contract, fraud and fraudulent inducement.[13]

The motions for summary judgment are fully briefed and this entry follows.[14]

STATEMENT OF FACTS

The purchase agreement

Euclid Business Park and Euclid Realty entered into a purchase agreement on April 19, 2001. The contract called for Euclid Business Park to sell to Euclid Realty for $10,167,000 the real property located at 20001 Euclid Avenue in Euclid. Most of the purchase price was financed through a bank loan, but $1,479,454.45 of it came from a seller-financed promissory note personally signed by the four members of Euclid Realty.

Germane to the pending motions, the purchase agreement imposes three obligations on Euclid Business Park. First, a part of the property was under lease to an operator of self-storage units and the parties agreed that Euclid Business Park would keep that part of the land and continue to receive the tenant's rent. But because the self-storage part of the property could not be separately split or subdivided into a new, separate parcel of land before the sale, the parties agreed to cooperate after the sale to do whatever was necessary to obtain a lot split.

[11] Filed October 28, 2009.
[12] Filed November 19, 2009.
[13] All filed March 1, 2010.
[14] There is no question that this entry is very late. For that, I am sorry. In slight mitigation, because of an informal stay while the parties mediated, the final brief in support of summary judgment was not filed until February 6, 2012, so this ruling is not as tardy as the initial motion filing dates make it seem.

Second, although Euclid Business Park would still get the rent it would be obligated to remit to Euclid Realty "that portion of the rent that represents reimbursement for real estate taxes, insurance and common area maintenance charges."[15] Third, Euclid Business Park had to obtain a covenant not to sue from the Ohio Environmental Protection Agency within one year of the sale closing date. These three obligations are specifically set forth in the contract as follows:

PURCHASE AGREEMENT

> THIS PURCHASE AGREEMENT (the "Agreement") is entered into as of April 19, 2001, by and between EUCLID BUSINESS PARK, LLC, a Delaware limited liability company (the "Seller"), and EUCLID REALTY LLC, an Ohio limited liability company (the "Buyer").
>
> ***
>
> 2. Purchase Price. . . . Buyer shall pay or cause to be paid to Seller . . . the sum of . . . $10,167,000 . . .
>
> ***
>
> 6. Title. . . . (f) It is the intention of Buyer and Seller that Seller retain all the benefits of, and shall continue to be bound by all the obligations contained in, the following agreements relating to space leased to Self-Storage America (Euclid), LLC ("Self-Storage"): (a) the Lease Agreement, dated August 20, 1999, by and between Seller, as landlord, and Self-Storage, as tenant, . . . and (b) the Purchase Option Agreement, by and between Seller and Self Storage, dated October 5, 2000 (the "Purchase Option"). The parties acknowledge that the Purchase Option was exercised by letter dated April 26, 2001[16] and delivered to Seller, but that the premises subject to the Purchase Option (the "Self-Storage Premises") is part of a larger parcel comprising the Property and is not a separate tax parcel. The Self-Storage Premises is being conveyed to Buyer at Closing as part of this Agreement because there is insufficient time to obtain a legal subdivision or lot split of the Self-Storage Premises from the larger tax parcel of which it is a part. Accordingly, Buyer and Seller agree as follows: (i) they shall cooperate with each other and with Self-Storage to obtain a legal subdivision or lot split of the Self-Storage Premises from the Property (the "Subdivision") as soon as reasonably practicable after the Closing (the cost of which shall be paid by Self-Storage as set forth in the Purchase Option), (ii) upon obtaining the Subdivision, Buyer will convey to Seller (or its designee) the

[15] Omnibus exhibits, filed March 1, 2010, Exhibit A, purchase agreement, page 4.

[16] It is unclear how the purchase option could have been exercised on a date after the purchase agreement was signed.

> Self-Storage Premises . . . , (iii) at Closing, Seller shall not assign to Buyer the Self-Storage Lease or Purchase Option, (iv) until such time as the Self-Storage Premises is conveyed by Buyer to Seller (or its nominee), Seller shall collect and retain all rent under the Self-Storage Lease, but shall remit to Buyer that portion of the rent that represents reimbursement for real estate taxes, insurance and common area maintenance charges . . .
>
> ***
>
> 20. Environmental Remediation. As soon as reasonably practicable after the Closing, Seller covenants and agrees to enter the voluntary action program and to undertake, perform and complete with reasonable diligence, at its sole cost and expense, the remediation of all environmental conditions at the Property disclosed in the Environmental Report, to the extent required in order to obtain a Covenant Not to Sue with respect to the Property . . . within one (1) year of the Closing, subject to delays caused by the State of Ohio or other conditions outside the reasonable control of Seller. . .

The lot split and self-storage proportionate payments

Although Self-Storage America (Euclid), LLC had a lease and an option to buy the self-storage part of the property before the parties here entered into the purchase agreement, Self-Storage America never took possession of the property under the lease and never purchased the property under the option. While the reasons why the deal between Euclid Business Park and Self-Storage America fell through are disputed, the result is that no rent was ever paid or collected and the proportionate payments for tax, insurance and common area maintenance were not made. Moreover, the lot split was never done and the self-storage portion of the property is still part of the entire parcel.

Covenants not to sue[17]

Sestech Environmental is an environmental firm specializing in environmental compliance and assessment. By the time the purchase agreement was made, Euclid Realty and its members had been provided an April 2001 report prepared for Euclid Realty's lender by

[17] Much of this section is copied from pages 4 and 5 of Euclid Business Park and Lichter's 11/19/2009 motion for summary judgment on Euclid Realty's claims.

Sestech that detailed the environmental conditions on the premises. The gist of the report is that Sestech found one 2500-square-foot area of soil contamination by volatile organic compounds, primarily xylene, and identified small quantities of asbestos. Sestech recommended that an asbestos survey be performed before any demolition or construction and, as to the contaminated soil, that a covenant not to sue be obtained from the Ohio Environmental Protection Agency.

Euclid Business Park had used Sestech as an environmental consultant on other properties before this one. To comply with Paragraph 20 of the purchase agreement, Euclid Business Park then hired Sestech to obtain the covenant not to sue[18] from the Ohio EPA.

In order to receive a CNS, an individual or entity must follow the mandates of Ohio's voluntary action program as set forth in Chapter 3746 of the Ohio Revised Code. VAP was created to give individuals a way to investigate possible environmental contamination, clean it up if necessary, and receive a promise from the State of Ohio – in the form of a CNS – that no more cleanup is necessary. Once all EPA rules and regulations have been satisfied, and any necessary environmental cleanup conducted, a certified professional prepares a no further action letter, which outlines all investigatory and remedial work performed related to the property. After a review of the no further action letter, the Ohio EPA will issue a CNS if it finds that the work performed is satisfactory and that the property is in compliance with all Ohio EPA rules and regulations. Ohio Revised Code section 3746.11. A CNS protects a property owner or operator from being legally responsible to the state of Ohio for further investigation and cleanup related to a property. R.C. 3746.01(G) and R.C. 3746.12.

[18] A covenant not to sue will be referred to in this entry as a CNS.

The settlement and release agreement

Euclid Business Park did not obtain a CNS within the year called for in the purchase agreement. At the same time, the co-makers defaulted on the promissory note by failing to make scheduled payments. The parties therefore settled their potential claims against each other by amending their previous agreements.

The settlement agreement contains the following specific provisions:

SETTLEMENT AND RELEASE AGREEMENT

> THIS SETTLEMENT AND RELEASE AGREEMENT ("Agreement") is made effective May 31, 2003 (the "Effective Date"), by and among . . . EUCLID BUSINESS PARK, LLC, . . . ("EBP"), EUCLID REALTY LLC, . . . ("Euclid Realty"), JERRY PETERS, JOHN PETERS, ARMOND WAXMAN, and MELVIN WAXMAN . . . (each, a "Maker," and collectively, the "Makers") . . . on the following terms and conditions:
>
> NOW, THEREFORE, in consideration of the mutual promises herein, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties, the parties do hereby agree as follows:
>
> ***
>
> 4. Euclid Note.
>
> (a) Definitions. For purposes of this Section 4, the term "Euclid Note" shall mean that certain $1,479,454.45 Promissory Note dated May 14, 2001, from the Makers in favor of EBP. . . . For purposes of this Section 4, the term "Interest Amount" shall mean all accrued yet unpaid interest under the Euclid Note. For purposes of this Section 4, the term "Principal Amount" shall mean the outstanding principal indebtedness evidenced by the Euclid Note.
>
> (b) Principal & Interest Credits. . . . Notwithstanding any contrary provision in the Euclid Note, . . . the Makers and EBP agree that:
>
> (i) The Principal Amount equals $1,479,454.45 as of the Effective Date.
>
> (ii) The Interest Amount equals $160,446 as of the Effective Date.
>
> ***

(iv) On execution of this Agreement, Makers shall pay to Euclid the sum of $73,091 which is the difference between the Interest Amount of $160,446 and the Past Due Rent from SKLZ of $87,355.[19] If SKLZ fails to pay Mentor[20] the Past Due Rent of $87,355 in full, the amount of the Euclid Note shall be increased by the amount unpaid.

***

(vi) EBP's prior election to accelerate the maturity date of the Euclid Note is hereby rescinded, neither EBP nor the Makers are in default under the Euclid Note, and, subject to the terms of this Section 4(b), the terms and conditions of the Euclid Note remain in full force and effect, and are hereby ratified and confirmed. Concurrent with execution of this Agreement, EBP and the Makers agree to execute that certain Amended and Restated Promissory Note . . . The Amended and Restated Promissory Note shall supersede and replace the Euclid Note in its entirety. . . .

5. Self-Storage Parcel.

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(c) Euclid Avenue Parcel.

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(ii) Euclid Realty shall use its commercially reasonable efforts to obtain all approvals from Euclid Realty's mortgage lender necessary as follows: . . . (ii) to allow Euclid Realty to convey to EBP, or its nominee, the Self-Storage Parcel . . . free and clear of any mortgage lien in favor of Euclid Realty's mortgage lender. For these purposes, the term "commercially reasonable efforts" shall include filing a lawsuit against Euclid Realty's mortgage lender, if necessary, to obtain the approvals required under this Section 5(c)(ii).

(iii) Euclid Realty shall reasonably cooperate with EBP's efforts to obtain any lot split approvals necessary to convey the Self-Storage Parcel . . . to EBP or its nominee.

(d) Environmental. In connection with the sale of the Euclid Building from EBP to Euclid Realty, EBP undertook to complete remediation of certain environmental conditions at the Euclid Building within one (1) year of the closing, subject to delays caused by the State of Ohio or other conditions outside the reasonable control of EBP, all as set forth in Section 20 of the Purchase Agreement. EBP retained the environmental consulting firm

[19] Per a lease agreement, SKLZ should have paid that rent to Euclid Realty.

[20] According to Euclid Realty's motion to file a sur-response to plaintiff's reply brief in support of its motion for summary judgment on the promissory note, page 6, SKLZ and Mentor are both Lichter entities.

> SESTECH Environmental to perform the remediation and closure activities. EBP entered the voluntary action program with the State of Ohio and is awaiting closure of the facility. Euclid Realty acknowledges and agrees that: (i) the Euclid Building has entered the voluntary action program, (ii) the remediation has not been completed in one year, but the delays have been caused by the State of Ohio or other conditions outside the control of EBP as contemplated by Paragraph 20 of the Purchase Agreement and not by EBP; and (iii) a draft of the no further action letter has been submitted and is being reviewed by the State of Ohio as of the Effective Date of this Agreement. Accordingly, Euclid Realty hereby releases EBP from any and all claims, liabilities or damages, if any, resulting from any delays prior to the Effective Date in obtaining closure of the site and satisfying the obligations of EBP under Paragraph 20 of the Purchase Agreement, and EBP covenants and agrees with Euclid Realty that EBP shall continue to continuously and diligently pursue the completion of any unsatisfied terms and conditions to be observed and performed by EBP under the Purchase Agreement, and EBP and Euclid Realty hereby ratify and confirm the terms and conditions of the Purchase Agreement. EBP shall continue to keep Euclid Realty informed of the status of the environmental activities.

The covenant not to sue is issued

The CNS was eventually issued by the Ohio EPA on August 21, 2008, and filed in the Office of the Cuyahoga County Recorder on September 18, 2008.

SUMMARY OF THE PARTIES' CLAIMS[21]

Euclid Realty and its members' claims for fraudulent inducement to contract and fraud

At counts 18 and 19 of their omnibus amended claims, etc., Euclid Realty and the co-makers allege that Euclid Business Park and Lichter made misrepresentations and concealed material facts in order to induce them to enter into the purchase agreement, close on the purchase of the property, execute and deliver the original and amended promissory notes, and enter into the settlement agreement.[22] In particular, Euclid Realty and its members complain that they were induced into contracting for the purchase of the property and making the

[21] I do not address the various claims here in the order they were asserted or the order they would necessarily be presented at a trial. Instead, I address them in the order that seems to me to make the most sense. For example, if Euclid Realty and its members are entitled to summary judgment on their claims for fraudulent inducement then most of the other affirmative claims of both sides are moot.

[22] Omnibus claims, etc., ¶ 117.

promissory note by: misrepresentations contained in the April 2001 report of environmental conditions on the property, a provision in the purchase agreement where Euclid Business Park asserted that it had not been notified by a government agency that any condition at the property violated environmental laws, and the part of the purchase agreement where Euclid Business Park promised to diligently pursue the covenant not to sue. Euclid Realty and its members go on to allege that they were fraudulently induced to entering into the settlement agreement and the amended note by the misrepresentation that the delay until then in obtaining the CNS was caused by the state or by other conditions beyond Euclid Business Park's control.

Euclid Realty and its members' claims for negligent misrepresentation

Euclid Realty and the co-makers claim that Euclid Business Park and Lichter breached a duty they owed to provide accurate information to guide Euclid Realty and the co-makers in connection with "this business transaction" by supplying false statements and misrepresentations which Euclid Realty and the co-makers justifiably relied upon, to their detriment.[23]

Euclid Realty and its members' claims for civil conspiracy

By this claim, count 21 of their affirmative pleading, Euclid Realty and the co-makers assert that Euclid Business Park and Lichter conspired with each other and others to perpetrate the negligent misrepresentation and fraud.

Euclid Realty's claims for breach of contract against Euclid Business Park

Euclid Realty claims that Euclid Business Park breached the parties' agreement because: it failed to obtain the CNS in a reasonable amount of time, it failed to obtain a lot split of the self-storage parcel, and it failed to remit to Euclid Realty the proportionate share of taxes, insurance and common area maintenance attributable to the self-storage parcel.

[23] *Id.*, ¶ 114.

Euclid Business Park's cause of action on the promissory note

Euclid Business Park claims that the co-makers are in default under the terms of the amended promissory note for failure to make payments. Euclid Business Park asserts that it is entitled to the full principal amount plus interest, late fees, and attorneys' fees.

LAW AND ANALYSIS

Fraudulent inducement to contract

Both sides have moved for summary judgment on this claim, count 18 of Euclid Realty and the co-makers' affirmative pleading. The elements of fraud are (a) a representation or, where there is a duty to disclose, concealment of a fact; (b) which is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment; and (f) a resulting injury proximately caused by the reliance. *Simpson v. Capital Van & Storage Co.*, 8th Dist. No. 68398, 1995 Ohio App. LEXIS 3879 (Sept. 7, 1995).

For the fraudulent inducement to contract cause of action in their affirmative pleading, Euclid Realty and its members claim, in essence, that their justifiable reliance on Euclid Business Park and Lichter's false representations is demonstrated, in the first place, by their entering into the sale contract and the promissory note in May 2001. Yet their motion for summary judgment does not allege, or include evidence of, any false representations of Euclid Business Park or Lichter that were made before May 2001. Instead, they describe as Euclid Business Park and Lichter's false representations only an April 27, 2001, letter from Self-Storage America (Euclid), LLC that it "has accepted possession"[24] of the self-storage area and

[24] Omnibus exhibits, Exhibit 7, ¶4.

post-contract statements by Euclid Business Park and Lichter about "their progress in obtaining"[25] a CNS.

In connection with the claims for fraudulent inducement to enter into the purchase agreement and first promissory note it is important to recognize that nowhere in their affirmative pleading or their motions for summary judgment and related briefs do Euclid Realty and its members assert, much less provide evidence, that at the time the contracts were made Euclid Business Park and Lichter had a present intention not to perform their obligations under the contracts. As a result, Euclid Realty and its members cannot use post-contract statements and conduct to support these claims. That leaves the statement from Self-Storage America (Euclid), LLC as the only representation made before the contract of sale and the first promissory note. Assuming, for now, the falsity of that statement, Euclid Realty and its members offer no evidence why it should be imputed to Euclid Business Park and Lichter. Because of that, Euclid Realty and its members are not entitled to summary judgment on the claims that they were fraudulently induced to enter into the purchase contract and first promissory note. To the contrary, the evidence, construed most favorably for Euclid Realty and the co-makers, supports summary judgment in Euclid Business Park and Lichter's favor on those claims.

To support their claims that they were fraudulently induced by Euclid Business Park and Lichter to enter into the settlement agreement and amended promissory note, Euclid Realty and the co-makers point to the same broad categories of representations. They assert that Euclid Business Park and Lichter represented in the sale contract that Euclid Business Park would collect rent from the self-storage tenant and remit a portion of it to Euclid Realty despite knowing that Self-Storage America never possessed the property or paid any rent. As

[25] Euclid Realty's motion for partial summary judgment on fraud claims, p. 1.

misrepresentations about the status of the CNS, they describe false statements 1) in June 2002 that Sestech had made substantial progress toward the CNS and Euclid Business Park had spent "considerable money" to fund that progress and 2) in May 2003 that the delays in getting the CNS were not Euclid Business Park's fault and that Euclid Business Park would "continue to continuously and diligently pursue" the completion of its unperformed obligations under the purchase agreement, when, in fact, Euclid Business Park and Lichter knew at the time that the delay in the CNS was because they weren't paying Sestech and they knew they had not collected any rent from Self-Storage America and never would.

Since Euclid Realty and the co-makers are relying on representations and other evidence that happened before the settlement agreement and amended promissory note, the claims of fraudulent inducement to enter into those contracts cannot be disposed of by virtue of the impossibility of reliance and all of the elements of fraud must be examined on these claims.

First, there must be evidence that representations were made. As to the tenant, Euclid Business Park did agree in the purchase agreement to "collect" rent from the self-storage tenant and "remit" a portion of it to Euclid Realty.[26] But there is no evidence, much less an allegation, that Euclid Business Park had a present intention not to abide by that part of the contract at the time it was made, so Euclid Realty cannot bootstrap that contractual term into a "representation" for the purpose of a fraudulent inducement cause of action. Moreover, assuming the term of the contract obligating Euclid Business Park to collect and pay the proportionate share of the self-storage area rent can be considered a "representation" at all, it cannot be contorted into a false representation that Self-Storage America was already in possession and paying rent. The only other evidence of a possible representation about the status of the tenant comes in the form of Jerry Peters's March 1, 2010, affidavit. Peters avers

[26] Omnibus exhibits, Exhibit A, purchase agreement, ¶6(f), p. 4.

that he "understood from Euclid Park, Lichter and Self-Storage that Self-Storage had taken possession" of the self-storage area and was paying rent.[27] He apparently made this inference because Euclid Business Park did make some of the proportionate payments. But what Peters inferred is not evidence of a representation by Euclid Business Park or Lichter. Euclid Realty and the co-makers have thus not proffered any evidence sufficient to create a genuine issue of material fact that Euclid Business Park or Lichter ever represented as a fact that Self-Storage America was on the property and paying rent. As a result, Euclid Realty and the co-makers' motion for summary judgment on that claim must be denied and Euclid Business Park and Lichter's motion must be granted.

As to diligence in procuring the CNS, by a letter dated June 7, 2002, Euclid Business Park's lawyer assured counsel for Euclid Realty that Sestech had made "substantial and timely efforts" to get the CNS and was "in the final phase of completing the process."[28] Ten days later, he corresponded to Euclid Realty's counsel to "once again confirm that EBP is complying with its obligations under" the purchase agreement and "is spending considerable money in meeting its obligation to exercise reasonable diligence in obtaining a CNS."[29] Then, in the settlement agreement, Euclid Business Park and Lichter represented that the delay until then in getting the CNS was "caused by the State of Ohio or other conditions outside the control of EBP" and that they would "continue to continuously and diligently pursue the completion of any unsatisfied terms and conditions" under the purchase agreement.[30] These statements constitute representations of fact – that Sestech had done considerable work, that Euclid Business Park is diligently performing under the contract, and that Euclid Business Park had

[27] *Id*., Exhibit 2, ¶9.
[28] *Id*., Exhibit 14.
[29] *Id*., Exhibit 15.
[30] *Id*., Exhibit 18, settlement agreement, ¶5(d), p. 7.

done nothing to delay the CNS – sufficient to support the first element of a claim of fraudulent inducement to contract.

Second, the representations were material. If a contract would not be formed but for a representation, then the representation is material. *Burke Lakefront Servs. v. Lemieux*, 8th Dist. No. 79665, 2002-Ohio-4060, ¶40. A primary reason for the settlement and the new promissory note from Euclid Realty and the co-makers' perspective was to reinforce the obligation to promptly get the overdue CNS. Otherwise there was no need for the settlement.

Next, the representations must be false. Euclid Realty and the co-makers have produced evidence that Euclid Business Park did not pay Sestech anything from April 2001 through at least June 2, 2003.[31] A reasonable finder of fact could conclude that Euclid Business Park was not "continuously and diligently" pursuing the CNS at the same time it wasn't paying the expert retained to persuade the Ohio EPA to issue the CNS, and Euclid Realty and its members have shown enough evidence on the element of falsity to survive a defense motion for summary judgment. At the same time, because a reasonable fact finder could reach the opposite conclusion based upon the evidence that, despite not being paid, Sestech did do considerable work to get the CNS,[32] they have not shown they are entitled to summary judgment in their favor on this element of the fraudulent inducement claim.

The same can be said for the next element of the tort, Euclid Business Park and Lichter's intent to mislead. Intent to mislead is rarely shown by direct evidence. Instead, it is usually inferred from the fact that a false statement is made. "In proving knowing falsity and intent to mislead or deceive, a plaintiff is not necessarily required to present direct evidence, such as a confession by the tortfeasor that he knowingly deceived the plaintiff. Rather, a

[31] *Id*., Exhibit 16, Massoud Tabrizi's 6/2/2003 letter, p. 3: Sestech has not received payment of any invoices on this project and to date has borne the entire cost of the project since April 2001.
[32] See, e.g., the first three pages of Tabrizi's 6/2/2003 letter.

plaintiff may present circumstantial evidence to show the required knowledge or intent." *Andrew v. Power Mktg. Direct*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, ¶50. Enough of that circumstantial evidence exists here to create a genuine issue of material fact about whether Euclid Business Park acted with an intent to deceive. Because there is an issue of fact, neither side is entitled to summary judgment on this element.

The penultimate element of Euclid Realty's claim of fraudulent inducement to contract is justifiable reliance. Justifiable reliance is a standard that falls somewhere between actual reliance and reasonable reliance. The question of justifiable reliance is one of fact and requires an inquiry into the relationship between the parties. *AmeriFirst Sav. Bank v. Krug*, 136 Ohio App. 3d 468, 495 (2d Dist. 1999). Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases. *Id.* The United States Supreme Court has distinguished justifiable reliance from reasonable reliance, recognizing that the mere fact that a person could have discovered a misrepresentation before relying on it does not negate the possibility that reliance on the misrepresentation was justified. The court observed that

> by the distinct tendency of modern cases, the plaintiff is entitled to rely upon representations of fact of such a character as to require some kind of investigation or examination on his part to discover their falsity, and a defendant who has been guilty of conscious misrepresentation cannot offer as a defense the plaintiff's failure to make the investigation or examination to verify the same. *Field v. Mans*, 516 U.S. 59, 72 (1995).

Both sides here argue that justifiable reliance should be decided as a matter of law. Euclid Realty and its members assert that Euclid Business Park and its contractor, Sestech, had control over the process of getting the covenant not to sue so they had to wait "patiently for

Euclid Park and Lichter to obtain the CNS,"[33] while Euclid Business Park and Lichter note that "the status of the CNS was readily discernible and ascertainable from public records of the Ohio EPA."[34] Under the evidence of record in this case, either side might prevail. In other words, there is a genuine issue of material fact about whether Euclid Realty and its members justifiably relied on Euclid Business Park's representations about the progress being made toward the CNS and neither side is entitled to summary judgment on this element.

The same can be said for damages, the final element of the fraudulent inducement claim. Euclid Realty and its members have produced the report of a financial expert who opines that getting the CNS within the time designated in the contract would have allowed Euclid Realty and the co-makers to refinance the property on "much better terms" than they were ultimately able, thus causing a loss.[35] At the same time, Euclid Business Park notes that the amended note actually saved money for Euclid Realty and its members because the interest rate was lowered. These are issues of fact for resolution at a trial.

Fraud

At count 19 of their affirmative pleading, Euclid Realty and the co-makers set forth a fraud claim distinct from the fraudulent inducement claim at count 18. Having read and re-read the affirmative pleading and all of the summary judgment briefing, I am nearly unable to discern how this claim, as it relates to misrepresentations about the progress toward obtaining the CNS, is different from the fraudulent inducement claim. The one thing that stands out is this assertion by Euclid Realty:

[33] Euclid Realty's motion for summary judgment on the fraud claims, p. 17.
[34] Euclid Business Park's 11/19/2009 motion for summary judgment, p.33.
[35] Omnibus exhibits, Exhibit 22, report of David J. Deusch, p. 4.

> Had the Euclid Realty Parties truly known the lack of effort that had been put into obtaining the CNS, they could have retained their own environmental consultant to perform the OEPA required fieldwork and move forward with obtaining the CNS.[36]

Couched in those terms, it appears the fraud claim is asserted as an alternative to the fraudulent inducement claim. In other words, if Euclid Realty and its members fail to convince a finder of fact that they were fraudulently induced into entering into the settlement and the amended note so that those contracts can be rescinded (should they elect that remedy), they might still succeed in proving that their justifiable reliance on the false representations caused a detriment other than obligating them under the new contracts. 'Tis but a twig to support the weight of an entire claim. Still, having found that issues of fact preclude summary judgment on the cause of action for fraudulently inducing the settlement agreement and amended note, I am constrained to reach the same conclusion here since the only appreciable difference is the damages element.

Negligent misrepresentation

There are not cross-motions for summary judgment on Euclid Realty and its members' claim for negligent misrepresentation in count 17 of the affirmative pleading. Only Euclid Business Park and Lichter have moved for summary judgment on the alternative grounds that the claim is barred by the economic loss rule or its elements cannot be proved on the record evidence as a matter of law.

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Delman v. City of Cleveland*

[36] Euclid Realty's opposition brief to Euclid Business Park's motion for summary judgment, p. 28.

Heights, 41 Ohio St. 3d 1, 4 (1989). In connection with the fraudulent inducement claim I have already decided that based upon the record evidence there are issues of fact on the elements of false representation, justifiable reliance and damages. Furthermore, Euclid Business Park's pecuniary interest in the transactions here is patent. That leaves the question of whether Euclid Business Park was providing information "for the guidance of" Euclid Realty and its members.

Euclid Realty and Euclid Business Park were two sides in a business transaction, each looking out for their own interests. That transaction necessarily included the exchange of information and the concomitant duty not to lie to the other party. But the information supplied in this ordinary business transaction was not given "for the guidance" of the other party. "Guidance" implies assistance, advice and counsel: it connotes recommending a proper course of action. Parties across from each other at a negotiating table might rely on each other for accurate information but they do not rely on each other for "guidance" about what decisions to make in light of the information conveyed.

It seems to me that the tort of negligent misrepresentation is intended to ensure that those in the business of providing information are careful to give accurate information when they know, or should expect, that others will rely on the information in conducting their own affairs. In this case Euclid Business Park was selling land, not information. Any information provided was incidental to the sale of the land and Euclid Business Park did not owe a duty of reasonable care in addition to the duty to act honestly and in good faith. Accordingly, Euclid Business Park and Lichter's motion for summary judgment on the negligent misrepresentation claim is granted.

Fraud statute of limitations

In their motion for summary judgment, Euclid Business Park and Lichter assert that the fraudulent inducement to contract (count 18) and the fraud (count 19) causes of action are time-barred by the applicable statute of limitations. Under R.C. 2305.09(C) and (E), a cause of action for fraud must be brought within four years of the date the fraud is discovered.

The first affirmative pleading of the co-makers was filed on May 12, 2006, and included counterclaims against Euclid Business Park and a third-party complaint against Lichter. The counterclaims and the third-party complaint have separate causes of action for fraudulent inducement and fraud.[37]

On July 24, 2006, an amended third-party complaint was filed. That pleading included Euclid Realty as a party and its effect was to include Euclid Realty as a plaintiff on claims of fraudulent inducement to contract and fraud against Euclid Business Park and Lichter.[38] That pleading remained the operative pleading until Euclid Realty and its members filed a pleading captioned "second amended claims and cross-claims against Sestech Environmental, Massoud Tabrizi and Charles Hall" on June 5, 2008.

That affirmative pleading did not include any claims against Euclid Business Park and Lichter. Accordingly, by an entry journalized on September 16, 2008, the court deemed that pleading to have voluntarily dismissed the claims against Euclid Business Park and Lichter that had been pending since July 24, 2006.[39] Thereafter, on September 24, 2008, Euclid Realty and the co-makers filed the omnibus amended claims, etc. That pleading – which, as noted above, is still the operative affirmative pleading of Euclid Realty and its members – had the effect of

[37] May 12, 2006, answer, etc., counts six and seven of the counterclaims and counts six and seven of the third-party complaint.
[38] July 24, 2006, amended third-party complaint, counts six and seven.
[39] The entry only mentions "Stuart" (i.e., Lichter) but should have included Euclid Business Park too, since no affirmative claims were made against it (although Euclid Business Park remained a party for its own claims).

re-filing the fraudulent inducement to contract and fraud claims against Euclid Business Park and Lichter.

Euclid Business Park and Lichter now argue that, for purposes of a statute of limitations calculation, "September 24, 2008, constitutes the point in time at which the Euclid Realty Parties commenced their putative fraud and fraudulent inducement claims,"[40] so that the fraud claims are barred if the conduct amounting to fraud was discovered before September 24, 2004. But this argument ignores what was effectively a voluntary dismissal of the fraud claims on June 5, 2008. Once the fraud claims were voluntarily dismissed, then Euclid Realty and its members were entitled to the benefit of the one-year savings statute, R.C. 2305.19. That section provides, in pertinent part:

> In any action . . ., if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after the date of the . . . failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

Furthermore, a voluntary dismissal constitutes a failure otherwise than upon the merits within the meaning of the savings statute. *Frysinger v. Leech*, 32 Ohio St. 3d 38 (1987), syllabus 2.[41]

Therefore, for a statute of limitations analysis, Euclid Realty and its members' fraudulent inducement to contract and fraud claims against Euclid Business Park and Lichter were brought on July 24, 2006. Considering that the contracts that were allegedly fraudulently induced were made in May 2003, that claim was brought well within the four-year statute of limitations. As for count 19, the fraud claim, although it is premised at least in part on representations made in June 2002 – i.e., more than four years before the claim was first

[40] Motion for summary judgment, p. 24-25. By "commenced," I assume they mean "brought" as used in R.C. 2305.09.

[41] Even if the decision to deem the June 5, 2008, affirmative pleading as a voluntary dismissal is wrong, and the fraud claims were abandoned, as posited by Euclid Business Park and Lichter, then abandoned claims are still claims that have failed otherwise than upon the merits.

brought – it is also supported with reference to representations made in connection with the settlement agreement and amended note. Additionally, Euclid Realty and the co-makers aver that they were told the CNS would be in place by August 2004, so it would have been nearly impossible to discover before then that they had been defrauded. At a minimum, there is a question of fact about when the fraud was, or should have been, discovered and summary judgment on the affirmative defense of statute of limitations is not warranted.

No fraud possible where the parties have a contract

As another reason why Euclid Business Park and Lichter are entitled to summary judgment on the fraud claims, they argue, in essence, that the only duties owed to Euclid Realty and the co-makers arise from contract so that the fraud claims are based on a duty they never had toward Euclid Realty and its members. In support, they assert that the "claims for fraud and fraudulent inducement are predicated upon the same actions as their alleged breach of contract claim against EBP – a contractual obligation to obtain a CNS for the Property."[42] That misstates the claim. Euclid Realty and the co-makers don't just allege the failure to get the CNS, they allege that they were defrauded into agreeing to the settlement and the new note by false statements about the efforts being undertaken to obtain the CNS. Not only that, but a party who fraudulently induces another to enter into a contract has already committed a tort before any contractual duties ever arise.

This argument in support of summary judgment is not well-taken.

Lichter's personal liability

Lichter, for himself, argues that he is entitled to summary judgment on the fraudulent inducement and fraud claims because the claimants "have not identified a single

[42] Motion for summary judgment, p. 27, and March 29, 2010, reply brief, p. 22.

misrepresentation allegedly made by Lichter" in his individual capacity.[43] Instead, according to Lichter,

> their fraud claims are based on alleged "misrepresentations" in the Purchase Agreement and the Settlement Agreement – both of which contracts were not signed by Lichter in his individual capacity – and alleged "misrepresentations" contained in letters written by EBP's counsel to the Euclid Realty Parties' counsel.[44]

Euclid Realty and the co-makers concede that the only statements attributable to Lichter that constitute misrepresentations are contained in the settlement agreement.[45] Otherwise, they offer nothing in the way of factual support. For legal authority, they simply cite, without analysis, to two decisions: *Centennial Ins. Co. v. Vic Tanny International, Inc.*, 46 Ohio App. 2d 137 (1975) and *Heritage Funding & Leasing Co. v. Phee*, 120 Ohio App. 3d 422 (1997).

Page 11 of the settlement agreement shows a signature for Euclid Business Park, LLC by Lichter as president of the limited liability company's manager, S.L. Properties, Inc.[46] Page 17 is a notary's attestation that Lichter acknowledged signing the settlement agreement "in the name of and on behalf of" Euclid Business Park. Generally, an individual officer or shareholder will not be held liable for the acts of a corporation. *Prymas v. Kassai*, 168 Ohio App. 3d 123, 2006-Ohio-3726 , ¶55 (8th Dist.). The corporate veil can be pierced, and personal liability imposed, however, when (1) control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id*. But Euclid Realty and

[43] March 29, 2010, reply brief, p. 12.
[44] April 5, 2010, brief in opposition, p. 22.
[45] See 1) their motion for partial summary judgment on the fraud claims, p. 11, footnote 14 (Lichter signed the May 2003 Settlement Agreement and is personally responsible for the false statements he made therein.) and their April 21, 2010, reply brief, p. 9-10.
[46] Nobody has raised, and I thus need not address, the fact that Lichter is not a member of Euclid Business Park, LLC.

the co-makers have not even alleged, much less offered any evidence, that Lichter's control over Euclid Business Park was so complete that the company was merely his alter ego.

Yet *Prymas* cites to one of the cases relied on by Euclid Realty and its members, *Centennial Ins. Co. v. Vic Tanny International, Inc.*, 46 Ohio App. 2d 137 (6th Dist. 1975), as supporting "the proposition that directors and corporate officers generally may be personally liable for fraud even though the corporation may be liable also." *Prymas*, supra, 141. In *Centennial Ins.*, a man named Balough was an officer of Cricket Corporation. Cricket sold a sauna heater to Vic Tanny with express and implied warranties that the heater was safe. After the heater caught fire, Vic Tanny's insurance company sued Cricket and Balough alleging fraud by misrepresenting that the equipment was safe. In reversing summary judgment in Balough's favor, the court of appeals said the following:

> If Balough was acting solely as an officer and agent of Cricket Corporation, then the question arises: what is Balough's liability personally for breach of warranty or for fraud committed by the corporation upon Vic Tanny? The answer is that Balough is personally liable to Vic Tanny if fraud is proven. Directors and corporate officers generally may be personally liable for fraud even though the corporation may be liable also. *Bartholomew v. Bentley*, 15 Ohio 659; *Merchant's National Bank v. Thoms*, 11 Ohio Dec. Rep. 632; *State v. Stemen*, 90 Ohio App. 309; 12 Ohio Jurisprudence 2d 669, Corporations, Sections 545, 546. *Id*.

The underlying principle is that, in the case of fraud, "it would appear impossible to reconcile [such] conduct with honesty and good faith, and [the officer] would be liable to all persons injured." *Bartholomew v. Bentley*, 15 Ohio 659, 667 (1846).

The other case Euclid Realty and its members rely on, *Heritage Funding & Leasing Co. v. Phee*, 120 Ohio App. 3d 422 (1997), provides additional support. In that case, defendant Phee was an officer of the corporate defendant. Both were sued for fraud in connection with a sale and leaseback agreement with the plaintiff for equipment that the corporate defendant never owned or possessed. The appeals court reversed a dismissal of the claims. The court

acknowledged that corporate employees are usually protected by the corporate shield doctrine for acts in their corporate capacity but "a corporate agent may be held personally liable for torts committed in the corporate capacity." *Id*., at 430.

Because the record evidence, construed most favorably toward Euclid Realty and the co-makers, raises a genuine issue of material fact about whether Lichter knew the statements in the settlement agreement were false and intended the claimants to act on them, Lichter's motion for summary judgment on the fraud claims on the basis that he cannot be personally liable is denied.

Civil conspiracy

Euclid Business Park and Lichter have moved for summary judgment on the civil conspiracy cause of action, by which Euclid Realty and its members allege that Euclid Business Park, Lichter "and others combined, conspired and acted in concert with other persons and entities to effectuate and perpetrate this fraud."[47] In their briefing, Euclid Realty and its members expand on that allegation by asserting that Euclid Business Park, Lichter, Sestech and its employees "conspired to perpetrate the scheme to coerce the Euclid Realty Parties into executing and delivering" the settlement agreement and amended note by misrepresenting their progress in getting the CNS.[48]

In order to establish the tort of civil conspiracy, the following elements must be proven: (1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself. *Cleveland Constr., Inc. v. Roetzel & Andress, L.P.A.*, 8th Dist. No. 94973, 2011-Ohio-1237, ¶41. I have already determined there are genuine issues of material fact precluding summary

[47] Omnibus claims, etc., ¶134.
[48] March 1, 2010, brief in opposition, p. 32.

judgment on most of the fraudulent inducement claims and the fraud claim. For those same reasons, there are issues of material fact on the civil conspiracy elements of the existence of an unlawful act (fraud) and damages. But the record contains no evidence of a malicious combination.

Initially, it is debatable whether Lichter, in making misrepresentations in the settlement agreement, can ever be said to have "conspired" with the corporate entity so that the two of them can be held liable in this case for fraud and civil conspiracy. But more substantively, there is no evidence that anybody combined or conspired with another to commit the fraud because there is no evidence – direct or circumstantial – of an agreement to commit the fraud, and an agreement or understanding is essential to the notion of a "malicious combination."

Euclid Business Park and Lichter's motion for summary judgment on the civil conspiracy cause of action is granted.

Breach of contract: elements

As outlined above, Euclid Realty and its members allege that Euclid Business Park breached the parties' contract in three ways: failing to obtain the covenant not to sue in a reasonable amount of time, failing to obtain the lot split, and not paying rent for the self-storage parcel. In order for Euclid Realty to prevail on any of its claims that Euclid Business Park breached a contract, it must prove that (1) a contract existed; (2) Euclid Realty fulfilled its obligations; (3) Euclid Business Park failed to fulfill its obligations; and (4) damages resulted from the failure. *Kirkwood v. FSD Dev. Corp.*, 8th Dist. No. 97371, 2012-Ohio-2922, ¶13.

Breach of contract: the covenant not to sue

Euclid Realty is making two breach of contract claims in connection with the failure to timely obtain the CNS. By the purchase agreement, the parties originally agreed that the CNS

would be obtained within one year of the May 2001 closing date, subject to delays caused by the state or other conditions outside Euclid Business Park's reasonable control. By the May 31, 2003, settlement agreement, Euclid Business Park agreed to "continuously and diligently pursue" the CNS. The CNS was not issued until August 21, 2008, and Euclid Realty asserts that the purchase agreement and settlement agreement were therefore breached.

If only the purchase agreement is enforceable – i.e., if the settlement agreement was fraudulently induced – then evidence of Euclid Business Park's failure to exercise diligence between May 2001 and May 31, 2003, is relevant. If both agreements are enforceable – i.e., if the settlement agreement was not fraudulently induced – then only evidence of a failure to exercise diligence after May 31, 2003, can be considered, since the settlement agreement had the effect of extinguishing any claim to strictly enforce the one-year period to get the CNS as well as any claim, to that date, for breach of the duty of diligence, yet the settlement also ratified and confirmed "the terms and conditions of the Purchase Agreement,"[49] which included the duty of diligence. Because both claims are still viable, the merits of summary judgment on both claims will be addressed here.

The parties have devoted many pages to a discussion of the appropriateness of summary judgment on the claims that Euclid Business Park breached one or both agreements by not exercising diligence in getting the CNS, and I do not want to convey the impression that each side's arguments and evidence have not been thoroughly considered. They have. But all that can be said on this subject is that genuine issues of material fact exist about whether the efforts undertaken by Euclid Business Park to get the CNS constitute "diligence" under either, or both, contracts and summary judgment is not warranted for either side on these claims.

[49] Settlement agreement, p. 7, ¶5(d).

Breach of contract: the lot split

Euclid Realty claims in its motion for partial summary on the failure to obtain a lot split that "Euclid Realty agreed to obtain a lot split"[50] and in its brief in opposition to Euclid Business Park's motion for summary judgment that the purchase agreement includes a provision that Euclid Business Park "would complete the lot split after closing."[51] Based on those terms of the contract, and the fact that no lot split was ever done, they seek summary judgment in their favor on this claim. But the contract does not impose a duty on Euclid Business Park to "obtain a lot split" or "complete the lot split."

Paragraph 6(f)(i) on page 3 of the purchase agreement provides that the buyer and seller agree to "cooperate with each other and with Self-Storage to obtain a legal subdivision or lot split of the Self-Storage Premises from the Property (the "Subdivision") as soon as reasonably practicable after the Closing."[52] Nothing here imposes a unilateral duty on Euclid Business Park to accomplish the lot split. By the plain language of the contract there is only a duty on both sides to cooperate in doing what is necessary to get the lot split. Because the duty on which this claim rests does not exist, Euclid Realty's motion for summary judgment on this aspect of the case is denied and Euclid Business Park's is granted.

Breach of contract: rent for the self-storage area

The same part of the purchase agreement that addresses the lot split has terms pertaining to the rental of, and sharing of proportionate expenses for, the self-storage area. In particular, paragraph 6(f)(iv) says that "until such time as the Self-Storage Premises is conveyed by Buyer to Seller (or its nominee), Seller shall collect and retain all rent under the Self-Storage Lease, but shall remit to Buyer" the part of the self-storage rent constituting taxes, insurance and

[50] Motion for partial summary judgment, p. 3.
[51] Brief in opposition, p. 17.
[52] Omnibus exhibits, Exhibit 1.

common area maintenance. Although there is evidence that Euclid Business Park did pay these amounts for a short period of time, there is no real dispute that Euclid Business Park has not "collected" rent or "remitted" to Euclid Realty any "portion of the rent." It is also true that Self-Storage America never occupied the premises or paid rent.

Euclid Realty's argument here is simple: the contract "requires Euclid Park to collect and pay the rent."[53] Since it has neither collected nor paid the rent, it is in breach. Euclid Business Park's position is that receiving the rent was a condition precedent to any obligation to pay the rent, and since it didn't receive rent then its duty under the contract to pay some of it over to Euclid Realty was never triggered.

It is a fundamental principle in contract construction that contracts should be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *Shelly Co. v. Karas Props.*, 8th Dist. No. 98039, 2012-Ohio-5416, ¶16. A reviewing court should give the contract's language its plain and ordinary meaning unless some other meaning is evidenced within the document. *Id.* If the terms of the contract are determined to be clear and unambiguous, the interpretation of the language is a question of law. *Id.* But if a contract is reasonably susceptible to more than one meaning, then it is ambiguous and the court may consider parol evidence to determine the parties' intent. *Kauffman Family Trust v. Keehan*, 8th Dist. No. 99423, 2013-Ohio-2707, ¶12.

Under the contract, Euclid Business Park "shall collect" rent and "shall remit" part of it to Euclid Realty. These terms are unambiguous if there is rent to be collected and remitted. But the contract does not address the parties' duties and rights if there is no rent to be paid, a proposition out of the control of the parties since it depended on whether Self-Storage America complied with the terms of the lease. Did the parties intend that "rent" be collected, and a part

[53] Motion for partial summary judgment, p. 7.

of it turned over to Euclid Realty by Euclid Business Park, even if Self-Storage America wasn't paying it? While unlikely, that intent is possible because, from Euclid Realty's perspective, Euclid Business Park retained the benefit of the self-storage area and should have thus retained the costs associated with it, including the risk of a defaulting tenant. But possible or not, such an intent can't be discerned from the language of the contract alone and summary judgment in Euclid Realty's favor on this claim is not justified by the state of the evidence.

At the same time, the existence of a rent-paying tenant is not clearly and unambiguously a condition precedent to Euclid Business Park's obligation to pay to Euclid Realty the amount of tax, insurance and common area maintenance attributable to the self-storage area. A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises. *White v. Lawler*, 8th Dist. No. 85199, 2005-Ohio-3835, ¶9. It is the happening of some event, or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties. *Id*. Typically, a contract will specify that it is not binding until the condition occurs: often the word "condition" is used. For example, in *Perhavec v. Rosnack*, 11th Dist. No. 2003-L-157, 2005-Ohio-138, the parties' purchase agreement provided explicitly that "this transaction is conditioned upon buyer obtaining a commitment for a first mortgage loan." Once the buyer did not obtain a commitment within the time specified in the agreement, the court, correctly in my view, found that the contract was null and void. Yet no such unambiguous language was used in the purchase agreement here. Adding to the ambiguity is the accompanying language in the agreement that the parties intend for Euclid Business Park to "retain all of the benefits of" the self-storage area. That implies that Euclid Business Park would also retain all of the responsibilities for that area.

Since the provision at issue is not unambiguously a condition precedent it is left for a finder of fact to decide whether Euclid Business Park was obligated to remit the proportionate expense of the self-storage area to Euclid Realty, and Euclid Business Park's motion for summary judgment is denied.

Breach of the promissory note

A promissory note is a contract. *Cranberry Fin., LLC v. S&V P'ship,* 186 Ohio App. 3d 275, 2010-Ohio-464, ¶ 9 (6th Dist.). If the amended note was not fraudulently induced, then a contract exists and the co-makers have not paid as required by the contract. The dispute here is over whether Euclid Business Park fulfilled its contractual obligations and whether there was fraud by Euclid Business Park to induce the contract so as to make the amended note voidable. Because there is enough evidence on the fraudulent inducement claim to allow a jury to decide it, any conclusion about the amended note's enforceability has to come after (or with) a verdict on the fraudulent inducement claim. Hence, Euclid Business Park's motion for summary judgment on the promissory note is denied insofar as it depends on the resolution of disputed facts on the fraudulent inducement claim.

CONCLUSION

Consistent with the foregoing: Euclid Realty and the co-makers' motion for partial summary judgment as to liability on their claims for fraud and fraudulent inducement to contract, filed March 1, 2010, is denied; Euclid Realty's motion for partial summary judgment on liability for Euclid Business Park, LLC's breach of contract – failing to exercise reasonable diligence and to continue to continuously and diligently pursue the CNS, filed March 1, 2010, is denied; Euclid Realty's motion for partial summary judgment for Euclid Business Park, LLC's breach of contract – failure to obtain lot split and pay expense, filed March 1, 2010, is

denied; and Euclid Business Park and Stuart Lichter's motion for summary judgment, filed November 19, 2009, is granted with respect to any claim by Euclid Realty and the co-makers that they were fraudulently induced to entering into the purchase agreement and the original note, and is granted with respect to Euclid Realty and the co-makers' claim for negligent misrepresentation, and is granted with respect to Euclid Realty and the co-makers' claim for civil conspiracy, but is otherwise denied; and Euclid Business Park, LLC's motion for summary judgment on the promissory note, filed October 28, 2009, is denied.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

SERVICE

A copy of this journal entry was sent by email to the following on December 30, 2013:

J. Kurt Denkewalter, Esq.
Kurt.denkewalter@verizon.net
Attorney for Euclid Realty and the co-makers

Bruce J. L. Lowe, Esq.
blowe@taftlaw.com
Stephen H. Jett, Esq.
sjett@taftlaw.com
Julie A. Crocker, Esq.
jcrocker@taftlaw.com
Judson D. Stelter, Esq.
jstelter@taftlaw.com
David S. White, Esq.
dwhite@fms-law.com
Attorneys for Euclid Business Park and Stuart Lichter

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Judge John P. O'Donnell