NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

CITY OF CAMDEN and the CITY OF CAMDEN REDEVELOPMENT AGENCY	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION - CAMDEN COUNTY : DOCKET NO. CAM-L-4612-18
Plaintiffs, v.	: CIVIL ACTION / CBLP ACTION
VICTOR URBAN RENEWAL, LLC; VICTOR ASSOCIATES, LP; VICTOR GP CORP.; DRANOFF PROPERTIES, INC.; CARL E. DRANOFF; and JOHN DOES 1-10 Defendants.	: **OPINION**

Decided: March 29, 2021

William M. Tambussi, Esquire, Mark P. Asselta, Esquire and Michael J. Watson, Esquire, Brown & Connery, LLP, Counsel for Plaintiffs

Aaron Krauss, Esquire, Thomas A. Leonard, Esquire and Philip G. Kircher, Esquire (Admitted Pro Hac Vice), Cozen O'Connor, Counsel for Defendants

STEVEN J. POLANSKY, P.J.Cv.

I. INTRODUCTION

Defendants move for summary judgment and Plaintiffs cross move for partial summary judgment pursuant to R. 4:46-2. This case involves three contracts. The first contract is a Payment in Lieu of Taxes Agreement ("PILOT") or ("Financial Agreement") between the City of Camden ("City") and Victor Urban Renewal, LLC ("Victor Urban Renewal") relating to the Victor Building. The second contract is a ground lease between Victor Urban Renewal and Victor Associates, L.P. ("Victor Associates"). The third contract at issue is an Option Agreement ("Option") entered into between the Camden Redevelopment Authority ("CRA") and Dranoff Properties, Inc. ("Dranoff Properties") granting an option to redevelop property known as Radio Lofts.

II. FACTUAL BACKGROUND

A. The PILOT Agreement and Ground Lease

Carl Dranoff ("Dranoff") is a real estate developer who specializes in renovating older buildings for use as apartments, condominiums, and office space. In 1999 Thomas Corcoran approached Dranoff about redeveloping the Victor Building. At that time, Corcoran was the Chief Executive Officer of Cooper's Ferry Development Association ("Cooper's Ferry"). Cooper's Ferry is a non-profit organization that was designated by CRA to oversee and coordinate the development of the Camden downtown waterfront area (including the Victor building) between 1999 and 2003. The CRA during the relevant period was, and still is, Camden's lead agency for redevelopment. Between 1999 and 2002 the CRA owned the Victor building (also known as the Nipper building). The Victor building had been abandoned and had not produced tax revenue for the City since 1990.

Dranoff asserts it faced challenges in securing financing for the Victor project due to poverty in the City and the uncertainty surrounding Camden's government. Dranoff, in his PILOT Application to the City, claimed that it would not be possible to redevelop the Victor building without a PILOT. Prior to entering into the PILOT agreement, Dranoff's attorney, David Lebor, Esquire, advised Dranoff that New Jersey's Long-Term Tax Exemption Law (the "LTTEL") required an "urban renewal entity" entering into a PILOT to pay any "excess profits" to the municipality.

On April 20, 2001, Lebor and his colleague Julian Rackow, Esquire wrote a memo ("the Memo") to Corcoran explaining how a financial agreement could be structured under the LTTEL that would make the Victor project financially viable. Rackow represented Dranoff and Victor Urban Renewal in connection with the Application and the proposed Financial Agreement. The memo authored by Lebor and Rackow explained that:

> Concurrently, the LD [Limited Dividend] Entity would enter into a Lease Agreement with another Dranoff affiliate, which affiliate would be the developer and operator of the Project. The Lease Agreement would be a "net" Lease and provide for payments by the tenant-operator of the LD Entity of amounts not less than the payments pursuant to the Financial Agreement. Accordingly, the LD Entity's revenue would be limited to the rent payments under the lease. [Dranoff Ex. 1].

The Memo does not indicate the amount of expenses that would be allocated to Victor Urban Renewal, the percentage of expenses that would be allocated to Victor Urban Renewal, the total revenue projected for the Victor Project, the amount of expenses that were projected to be incurred for the Victor Project, or the total project costs projected for the Victor project under the "Ground Lease". The Memo did not attach a copy or draft of the Ground Lease nor did it reference Excess Net Profits. Norton Bonaparte, former City Administrator, does not recall receiving the Memo at any time prior to his deposition. Corcoran has no recollection of sending the Memo to Bonaparte.

Corcoran subsequently wrote to Dennis Kille, Esquire, City Attorney for Camden from 2000 to 2013, stating that Kille "need[s] to be comfortable with the legal structure proposed by Mr. Lebor[,]" and reminded Camden that "lenders will require proof that a tax agreement exists that corresponds to the number shown in the pro formas[1] for the project." [Dranoff Ex. 13]. Corcoran testified that he did not have authority to bind the City at any time. Corcoran further testified that he does not recall being involved with City Council's approval of the project application. Dranoff testified that he did not know whether Cooper's Ferry had the legal authority to bind the City in connection with the Application or the Financial Agreement. Dranoff's attorneys did not believe Corcoran had the authority to bind the City in connection with the Application or the Financial Agreement. Camden City Council is the only entity that had the authority to approve Victor Urban Renewal's Application, and to bind the City to the terms of the Financial Agreement. Corcoran testified that he does not believe that he saw the numbers referenced in Exhibit D.[2]

On June 20, 2001 the CRA unanimously approved a "Resolution Authorizing the Execution of a Redevelopment Agreement with Dranoff Properties, Inc." for the Victor Building (the "CRA Victor Resolution"). [Dranoff Ex. 2]. The CRA Victor Resolution acknowledges that the limited dividend entity "intends to ground lease the Property to a New Jersey limited partnership … [that] will develop the Property in the manner contemplated hereby." Id. On August 6, 2001, Dranoff sent an application to Camden ("Application") for a tax exemption under the LTTEL for the Victor project. [Dranoff Ex. 3]. The Application explained that Victor Urban Renewal would enter into a ground lease of the property with Victor Associates (the "Ground Lease") "to construct the improvements of the Property." [Dranoff Ex. 3 at CITY 001682, ¶ 1(c)]. The Application stated that "[w]ithout a tax exemption the Project will not provide sufficient income to make it economically viable which will prevent [Victor Urban Renewal] from proceeding to develop the Project." [Dranoff Ex. 3 at CITY001685, ¶ 1(k)].

The Application also stated:

> As outlined above [Victor Urban Renewal] is entering into a Ground Lease with [Victor Associates] for the Project. Therefore, the overwhelming majority of expenses, costs and income for the construction and operation of the Project will be borne and received by

---

[1] The parties state that Pro forma has a distinct, technical sense in accounting, and a different meaning in trade business. Pro forma accounting of transactions and balances is a projection or statement that excludes unique or unusual events to depict routine and annual business. Pro forma financial statements are estimates of the results of a transaction's expenses, savings, and revenues. Bouvier Law Dictionary, Pro Forma (2012). Defendants have provided the Court with a copy of the pro forma they sent to the Delaware River Port Authority in June of 2002. *See* Dranoff Exs. 166-67. Specifically, Dranoff Ex. 167 sets forth the projected expenses and revenues for the Victor project.

[2] Exhibit D to the Application is titled "The Victor; Schedule of Income and Expenses." [Watson Cert., Ex. A, PILOT Application at CITY 001696 to CITY-001697]. Section 3 of the Application "Project Costs", states that Exhibit D "is the Applicant's [Victor Urban Renewal's] development and projected operational budget for the Project reflecting the Applicant's [Victor Urban Renewal's] income under the Ground Lease and the allocation of project expenses to the Applicant [Victor Urban Renewal] as landlord under the Ground Lease. [Id., at CITY-001685].

> [Victor Associates]. Attached as Exhibit "D" is [Victor Urban Renewal's] income under the Ground Lease and the allocation of project expenses to [Victor Urban Renewal] as landlord under the Ground Lease. [Dranoff Ex. 3 at CITY001685, ¶ 3].

Exhibit D to the Application does not include any percentage allocation of costs to Victor Urban Renewal in connection with the Victor Project. It further does not indicate the percentage of revenue and expenses that are to be allocated between Victor Urban Renewal, Victor Associates, or Victor G.P.. Dranoff has acknowledged that the numbers in Exhibit D of the Application are only projections and estimates. Defendants' expert Marin testified that Exhibit D does not contain a methodology for allocation of expenses between Victor Urban Renewal and Victor Associates, and it is not an agreement of how the expense allocation would be handled annually.

Dranoff asserts this information put the City on notice that Victor Associates would be bearing expenses for the project. The rent payment that Victor Urban Renewal received from Victor Associates was $1,333,333, which provided for a $200,000 PILOT payment. Under the version of the LTTEL that was in effect in 2001, the annual service charge for the PILOT that an urban renewal entity owed to a municipality was a maximum of 15 percent of the urban renewal entity's annual gross revenue. N.J.S.A. § 40A:20-12(b)(1) (1992). Fifteen percent of $1,333,333 is $199,999.95.

On August 7, 2001, Rackow sent the application to Kille noting that Dranoff is "requesting the Annual Service Charge be fixed at $200,000." [Dranoff Ex. 16]. Camden's goal for entering into a PILOT agreement was to maximize the money Camden would receive from the PILOT. [Banks-Spearman Deposition Day 1, Pg. 5, Lns. 17-22]. Dr. Edward Williams served as the City's Director of Planning and Urban Development when Victor Urban Renewal submitted its Application and when the City and Victor Urban Renewal executed the August 21, 2002 Financial Agreement. Edward Williams testified that Camden's PILOT committee would "review PILOTs to ensure that the City can get the most bang for its buck," "the best deal for the City in terms of revenue." [Dr. Williams Deposition, Pg. 10 Lns. 17-25]. Kille designated Assistant City Attorney Michelle Banks-Spearman, Esquire to handle the Application and Financial Agreement for the Victor project. [Banks-Spearman Dep. Day one, Pg. 41, Lns. 19-22; Kille Dep. Pg. 83 Ln. 19 – Pg. 84 Ln. 12]. The Application does not include a draft of the referenced Ground Lease. Caryn Connelly was employed as the Controller of Dranoff Properties on August 6, 2001. Connelly testified that a reader of the Application would not know how the Applicant, Victor Urban Renewal, was proposing to allocate expenses other than what is in Exhibits D and E of the Application.

Victor Urban Renewal attached its Certificate of Formation as Exhibit G to the Application. That certificate states "The purpose for which the Limited Liability Company [Victor Urban Renewal] is formed shall be to operate under the Long-Term Tax Exemption Law (<u>N.J.S.A.</u> 40A:20-1, <u>et seq.</u>) …." [Watson Cert., Exhibit A, Application at CITY-001721]. The Certification of Formation also provides that "[Victor Urban Renewal] shall be subject to regulation by the municipality in which the project is situated, and to a limitation or prohibition, as appropriate, on profits or dividends for so long as it remains the owner of a project subject to the Act." [Id. at CITY-001722].

Bank-Spearman's role was to make sure that the Financial Agreement comported with the LTTEL and that Camden's interests were protected. Banks-Spearman understood that "there was going to be an entity that was going to own the land and then there was going to be another entity that was going to operate the building. Camden was going to be receiving a PILOT against the rent that was paid by the operator to the owner of the land." She knew when she reviewed the Application, that Victor Urban Renewal was using a ground lease "to limit the amount of the PILOT payment." Banks-Spearman, does not know the details of how the City and Victor Urban Renewal agreed upon the initial $200,000 Annual Service Charge in the Financial Agreement. [Banks-Spearman Dep. Day 1, Pg. 24 Lns. 17-22, Pgs. 74, Lns. 5-10].

Victor Urban Renewal's lenders were provided with *pro formas* for the Victor Project. The lenders were also provided with a copy of the ground lease. Corcoran is sure that he was provided a copy of the *pro forma*. The Application did not include a "*pro forma*" for the Victor project, although the Application should have included a *pro forma* for the Victor project. On August 15, 2001 Banks-Spearman made a request to Rackow for a *pro forma* for the Victor project. Rackow advised Banks-Spearman that he would provide her with the *pro forma* and the architect certification. Banks-Spearman testified "I got the impression …they weren't willing to give it to me" with regard to her request for a *pro forma* to Lebor and Rackow. Victor Urban Renewal's counsel believed the City was entitled to the *pro forma* for the Victor Project. Banks-Spearman was not provided the *pro forma*.

Rackow stated in an August 16, 2001 memo to Dranoff his belief that Banks-Spearman "understands the 'landlord/tenant' arrangement." On August 20, 2001, Bank-Spearman wrote a memo to Camden City Council stating that Victor Urban Renewal "will lease [the Nipper Building] to Victor Associates, L.P. [.] a New Jersey limited partnership who will develop and operate the project." She further stated in that memo that "[f]or the first fifteen (15) years of the tax exemption [Victor Urban Renewal] proposes to pay a service fee in the amount of $200,000 or approximately 15% of the gross revenue it will receive under its ground lease with Victor Associates, L.P."

On August 20, 2001, Lebor sent correspondence to Banks-Spearman enclosing an August 20, 2001 "cost certification", prepared by William Schwartz of Intech ("Architect Cost Certification"). The Architect Cost Certification states "We understand such project costs are to be expended by or on behalf of Victor Associates as tenant pursuant to a Ground Lease to be entered with the owner of the property, Victor Urban Renewal, as landlord."

Kille did not have an understanding why Victor Urban Renewal was entering into the Ground Lease with Victor Associates. Banks-Spearman presently does not recall whether she asked for a copy of the Ground Lease. On August 23, 2001, Camden City Council approved the Application. Kille also does not recall any discussions about Excess Net Profits with respect to Victor Urban Renewal or the Victor project. The resolution approving the Application did not include a copy of a draft of the Ground Lease, or the Ground Lease itself, nor did it provide a summary of the intended allocation of expenses between Victor Associates and Victor Urban Renewal. The City is not a party to the Ground Lease.

A June 6, 2002 *pro forma* discloses that Dranoff Properties received a Development Fee, a Project Management Fee, and a Property Management Fee of 3% of gross revenues. These amounts were not disclosed in the Application.

B. <u>The Financial Agreement</u>

On August 21, 2001, the City requested that Paragraph 4(e) of the proposed Financial Agreement attached to Victor Urban Renewal's Application be revised to read: "To submit annually, within ninety (90) days after the close of each of its fiscal years, its report of income and costs related to the Project as certified by Certified Public Accountant, to the City Attorney, which reports shall remain confidential, except as otherwise provided by law." That same day the City further requested that the last three lines of Paragraph 8 of the Proposed Financial Agreement attached to Victor Urban Renewal's Application be revised. Additional revisions were then incorporated into Financial Agreement.

On July 26, 2002, in response to the City's request for revisions to the Proposed Financial Agreement, Victor Urban Renewal's counsel provided a "revised clean and blacklined version of the Financial Agreement" which incorporated changes to Paragraph 8 to reflect a citation to N.J.S.A. 40A:20-15. On August 20, 2002, Victor Urban Renewal's counsel provided a "revised and blacklined Financial Agreement," which included revisions to Paragraph 4(k) as requested by the City. The August 20, 2002 revisions to the Financial Agreement did not alter or modify the requirement for Victor Urban Renewal to report excess net profits within ninety days of the end of each fiscal year.

On August 21, 2002, Victor Urban Renewal and Camden executed a financial agreement for the Victor Project ("Financial Agreement"). Paragraph 1 of the Financial Agreement provides:

> [T]his Agreement shall be governed to the extent not expressly provided for herein, by the terms and provisions of the Long Term Act, it being expressly understood and agreed that the City relies upon the facts, data and representations contained in the Application, and Redeveloper [Victor Urban Renewal] covenanting and agreeing to use its reasonable best efforts to cause Victor [Associates] to conform in the development, construction and operations of the [Victor] Project to the matters set forth in said Application." [Krauss Cert., Dranoff Ex. 3, CITY-001663-CITY001664].

The Financial Agreement requires Victor Urban Renewal to submit annually within ninety (90) days after the close of each fiscal year reports of income and costs related to the Project, as certified by a Certified Public Accountant, to the City Attorney. [Dranoff Ex. 3, ¶ 4(e)] It further requires Victor Urban Renewal "[t]o submit annually, within one hundred and twenty (120) days after the close of each of its fiscal years, the calculation of all amounts due under this Agreement, such calculations attested to by the Certified Public Accountant of [Victor

Urban Renewal] as to the accuracy of the computation and the compliance with this Agreement." [Dranoff Ex. 3, ¶ 4(f)].

The required calculations of amounts due under Paragraph 4(f) of the Financial Agreement include the calculation of Excess Net Profits. Pursuant to Paragraph 4(k) of the Financial Agreement, Victor Urban Renewal agreed to pay to the City, within ninety (90) days after the end of each fiscal year, any Excess Net Profits in accordance with the LTTEL. The Financial Agreement at Paragraph 2(b) further provided that the Victor Project was to be completed on April 28, 2004.

The Financial Agreement also provides that any potential transfer of the Victor project and Financial Agreement requires Camden's approval. Specifically:

> Unless it shall first terminate this Agreement and relinquish its tax exemption status, [Victor Urban Renewal] shall not voluntarily transfer the Project to anyone other than a qualified urban renewal association or corporation. Any transfer to a qualified urban renewal association or corporation other than [through default] shall be subject to the reasonable approval of the City on the condition that the transferee shall assume all of [Victor Urban Renewal's] obligations under this Financial Agreement and on the further condition that the transferee is otherwise qualified under all other applicable requirements of law. If such transferee shall assume [Victor Urban Renewal's] obligations hereunder and shall otherwise qualify under all other applicable requirements of law, the City shall consent to such transfer. [Dranoff Ex. 3, ¶ 6(a).]

The Financial Agreement provided in the event of default "that before taking any step which [Camden] may be entitled to take, it will provide [Victor Urban Renewal's mortgage company] a reasonable opportunity to cure the same in light of the nature of the default and the available means to correct it, but in any event shall allow not less than fifteen (15) days from the date [Victor Urban Renewal] was required to cure such default…." [Dranoff Ex. 3, ¶ 10(c)]. A draft of the Ground Lease was not attached to the Financial Agreement.

Pursuant to the Long-Term Act, the Financial Agreement granted Victor Urban Renewal a tax exemption for all real property comprising the Victor project for a term commencing on August 21, 2002 and extending for a period not to exceed thirty-five years. In the event that the Financial Agreement is terminated, Victor Urban Renewal "shall pay to the City a sum equal to the amount of reserve, if any, maintained pursuant to N.J.S.A. § 40A:20-15, as well as the excess profit, if any, payable pursuant to N.J.S.A. § 40A:20-15. Paragraph 9 of the Financial Agreement provides as follows:

> Subject to the provisions of paragraphs 10(c) and 13(b), in the event of default in or breach of this Agreement by Redeveloper, if such default or breach is not cured within ninety (90) days after receipt by Redeveloper of written demand by the City to do so, then the City may terminate this Agreement and such termination shall be deemed to be a termination of tax exemption as herein provided. [Dranoff Ex. 3, ¶ 9].

The closing of the sale of the property to Victor Urban Renewal from the CRA occurred on October 17, 2002. Victor Urban Renewal and Victor Associates executed the Ground Lease at the same closing. Dranoff executed the Ground Lease on behalf of Victor Urban Renewal and Victor Associates. The Ground Lease requires that Victor Associates "shall construct, or cause to be constructed" the improvements to the Victor building. [Dranoff Ex. 33 at § 3.1]. The Ground Lease provides that Victor Associates owns any improvements made to the Victor Building during the term of the Ground Lease, but Victor Urban Renewal will own the improvements upon the expiration of the Ground Lease at no cost to Victor Urban Renewal. [Id. at § 3.4]. The Ground Lease further provides that the improvements will be constructed at the sole expense of Victor Associates. The Ground Lease term is 50 years, and provides for an annual base rent from Victor Associates to Victor Urban Renewal of "One Million Three Hundred Thirty Three Thousand Three Hundred Thirty-Four dollars ($1,333,333.00) [sic] per annum …" [Id. at § 6.1]. The Ground Lease also provides:

> In consideration of the Improvements to be constructed on the Land by [Victor Associates], [Victor Urban Renewal] shall contribute and pay to [Victor Associates] annually … seventy-five percent (75%) of the Operating Expenses of the Project (the "Operating Expense Reimbursement") … Notwithstanding the foregoing, (a) in no event shall [Victor Urban Renewal] be obligated to reimburse [Victor Associates] for any Operating Expenses in excess of the amount of the Base Rent received by [Victor Urban Renewal] from [Victor Associates] hereunder less the aggregate of (i) the amount of the PILOT Taxes and, if any, other taxes or amounts required to be paid by [Victor Urban Renewal] …, plus (ii) the actual payment by [Victor Urban Renewal] of the sum listed as expenses in Exhibit "C" attached hereto … [Dranoff Ex. 33, § 7.2].

A Memorandum of Ground Lease was recorded with the Camden County Clerk's Office thirteen years after the lease was signed on November 2, 2015 [Dranoff Ex. 34]. This document does not set forth the rent or the expenses to be paid under the Ground Lease.

C. The AIMCO Sale

The Victor project was completed on April 28, 2004. Between April 28, 2004 and March 21, 2018, Victor Urban Renewal did not provide the City with any annual audited financial statement or the annual calculation of any amount due required under the Financial Agreement. The original permanent mortgages on the Victor project came due in 2014, at the end of their ten year term. A company named Spirit Bascom made a formal offer to purchase the Victor building in 2015. Spirit Bascom offered to purchase the property for $55.25 million, which was approximately $17.3 million more than the existing mortgages. On January 5, 2015, Matthew Wait, Esquire, an attorney for Dranoff, emailed Vincent Basara, a Camden official, and informed him that Victor Urban Renewal was attempting to sell the Victor building to Spirit Bascom. On January 13, 2015, Wait emailed Jason Asuncion, then counsel to Camden City Council, regarding potential approval by Camden City Council of the transfer of the Financial Agreement to Spirit Bascom. On January 16, 2015, Wait asked Terri Paglione, Camden's Tax Assessor, to confirm that Camden had never received any excess profits payments from Victor Urban Renewal.

The sale of the Victor building to Spirit Bascom did not go through because the buyer reportedly got cold feet. On February 3, 2015, Wait emailed Banks-Spearman and informed her that the sale of the Victor building to Spirit Bascom was "not currently active." [Dranoff Ex. 73]. Victor Urban Renewal ultimately refinanced the Victor project. On February 26, 2015, Victor Urban Renewal and Victor Associates received a mortgage from Cantor Commercial Real Estate Lending, L.P. ("Castor") for $42.75 million. The mortgage was recorded in the Camden County Clerk's Office on March 11, 2015.

In February 2018, Dranoff agreed to sell six of his properties to AIMCO, a Fortune 500 real estate investment company. The Victor building was included in this package. AIMCO was willing to pay $71.2 million for the Victor building. While performing its due diligence for the sale of the Victor building to AIMCO, Victor Urban Renewal discovered that it had not submitted the annual financial reports to Camden that were required under the Financial Agreement. Dranoff's attorney then contacted Banks-Spearman, now the City Attorney, and alerted her to this issue. On March 21, 2018 Victor Urban Renewal sent financial reports for Victor Urban Renewal for fiscal years 2002 through 2017 to Patrick Keating, the City Finance Director. These reports were titled "Independent Accountants' Report[s]" and were dated March 19, 2018. They were prepared by the accounting firm Mayer Hoffman McCann ("MHM"). These reports purportedly contained "Victor Urban Renewal's reports of income and costs pertaining to the Victor project, for the years ended December 31, 2002 through December 31, 2017." [Watson Cert., Ex. RR, Mar. 19, 2018 Independent Accountants' Report by Mayer Hoffman McCann, P.C., MHM-Victor00000138-00000143]. The March 21, 2018 correspondence providing these reports stated, "[i]t has come to our attention that we may have been remiss in filing the annual reports required under the Financial Agreement for the Victor [project]." [Dranoff Ex. 75]. These Independent Accountants' Reports noted that Victor Urban Renewal "is allocated expenses shared jointly with LP [Victor Associates] in normal management and operation of the [Victor] Project" and "[t]he allocation is based upon the Company's [Victor Urban Renewal's] ratable share of total operation." [Id. at MHM-VICTOR00000143].

Connelly testified that Patrick McKie of MHM originated the idea of allocating expenses based on a pro-rata share of revenue, and that they accepted the idea because they viewed McKie as someone who had experience with PILOTs. According to the Independent Accountants' Report prepared by MHM, Victor Urban Renewal had zero project costs in connection with the Victor Project. The Report further indicated that VUR's net profit for the entire period was $9,746,897. This Report does not include a calculation of Excess Net Profits.

AIMCO's purchase of the Victor building was contingent on the transfer of the Financial Agreement to the urban renewal entity that AIMCO created for the sale. On April 13, 2018, AIMCO requested that Camden consent to the transfer of the Financial Agreement. Under paragraph 6(a) of the Financial Agreement, "If such transferee shall assume [Victor Urban Renewal's] obligations hereunder and shall otherwise qualify under all other applicable requirements of law, the City shall consent to such transfer." [Dranoff Ex. 3, at ¶ 6(a)]. The AIMCO urban renewal entity agreed to assume all of Victor Urban Renewal's obligations under the Financial Agreement. The AIMCO urban renewal entity was a qualified urban renewal entity under the LTTEL. The closing date of the sale of the Victor building to the AIMCO urban renewal entity was originally scheduled to occur on May 7, 2018. On May 3, 2018, Barbara Casey, an attorney for AIMCO, emailed Banks-Spearman with correspondence from the State of New Jersey regarding the Department of Community Affairs' approval of the AIMCO urban renewal entity's documentation.

Banks-Spearman testified that upon learning of the proposed $71.2 million sale price for the Victor Building to AIMCO, she was concerned that there were excess profits. On May 9, 2018, the City requested the proposed security management plan for the Victor Building. The next day, Banks-Spearman requested that rent rolls from the Victor Building be provided with AIMCO's application to transfer the Financial Agreement. Banks-Spearman asked Casey to submit a new application for the transfer of the Financial Agreement. AIMCO submitted its new application for the transfer of the Financial Agreement on May 14, 2018. Camden met with AIMCO on May 18, 2018. On May 25, 2018 Banks-Spearman emailed Casey and stated that Asuncion "asked me to reach out to you. Due to the holiday and vacation schedules the Mayor was unable to schedule a meeting this week." [Dranoff Ex. 147 Victor0086526].

On June 20, 2018, Victor Urban Renewal filed a lawsuit against the City, Asuncion, and Banks-Spearman alleging breach of contract for failing to consent to the transfer of the Financial Agreement to AIMCO. This suit was filed in the U.S. District Court for the District of New Jersey, captioned Victor Urban Renewal Group LLC et al. v. City of Camden et al., No. 1:18-CV-10841-NLH-AMD (D.N.J. June 20, 2018). Banks-Spearman testified that communications between the parties ceased after the Defendants filed the lawsuit in U.S. District Court against the City. Asuncion had been hired by the City as an Assistant City Attorney in 2002. Asuncion was not employed by the City when Victor Urban Renewal submitted its Application to the City, nor when the City passed the resolution approving the Application in August 2001. He was not involved with the City and Victor Urban Renewal's negotiations of the Financial Agreement.

On August 21, 2018, AIMCO sent a letter to Camden Mayor Francisco Moran that reiterated AIMCO's request that Camden consent to the transfer of the Financial Agreement, and notified the Mayor that AIMCO would terminate its contract to purchase the Victor building if the transfer is not approved by September 4, 2018.

On August 28, 2018, Banks-Spearman wrote to Victor Urban Renewal and alleged that Victor Urban Renewal had not submitted the annual financial reports required by the Financial Agreement. The correspondence had the subject "Financial Agreement Dated August 21, 2002 by and between the City of Camden and Victor Urban Renewal Group, LLC." The same day, Banks-Spearman responded to AIMCO's August 21, 2018 letter, alleging that Camden was missing information on the proposed sale of the Victor building, and stating that Camden believed Victor Urban Renewal was in default under the Financial Agreement. The letter stated:

> A review of City records indicates the Redeveloper has not submitted the required report under Subparagraph 4(e) for any of the years in which the Financial Agreement has been in effect and has not submitted the required calculation under Subparagraph 4(f) for any of the years in which the Financial Agreement has been in effect. Accordingly, the

> Redeveloper has been and remains in breach and default of the above obligations. [Watson Cert., Ex. YY, August 28, 2018 Correspondence from Michelle Banks-Spearman, Esq. to Carl Dranoff].

On August 30, 2018, Dranoff's attorney responded to Banks-Spearman's letter of August 28, 2018, denying the assertion that Victor Urban Renewal had not submitted the annual financial reports, and provided her with copies of the March Financial Reports and Keating's acknowledgment that they were received. On September 4, 2018, Banks-Spearman asserted in a letter to Howard Grossman, Victor Urban Renewal's counsel, that the March Financial Reports were incomplete. She claimed Victor Urban Renewal remained in default of the Financial Agreement, and the City would not withdraw its August 28, 2018 Notice of Default. On September 7, 2018 Victor Urban Renewal provided the City with corrected annual financial reports for 2002-2017. These corrected reports, also prepared by MHM, explained the need to correct the March 2018 reports and advised "the statements of income and costs were restated for the years ended December 31, 2004 to 2017 to correct an error in the allocation of operating expenses to Victor Urban Renewal Group, LLC … Our report originally dated March 19, 2018 should therefore not be relied upon." [Watson Cert., Ex. AAA, Sept. 2018 Restated MHM Report, MHM-Victor00000170]. The same letter providing the corrected annual financial reports also asserted that Victor Urban Renewal was now in compliance with its requirements under the Financial Agreement.

On September 11, 2018, Banks-Spearman demanded that Victor Urban Renewal produce "financial statements that provide all revenue and expenses for the Project for all entities for all years covered by the Financial Agreement." [Dranoff Ex. 82]. The letter stated that: (i) the City was not aware of the 75% expense allocation to Victor Urban renewal in the Ground Lease, (ii) the City had never received a copy of the Ground Lease until September 7, 2018, (iii) the City was not aware of the Ground Lease's material terms, and (iv) the March 2018 MHM report conflicts with the Ground Lease, as the MHM accountants did not apply the 75% expense allocation to Victor Urban Renewal in the Ground Lease. That letter disputed Victor Urban Renewal's claim that it did not owe excess net profits to the City.

On September 20, 2018 Victor Urban Renewal sent the City consolidated financial statements and information for the entire Victor project and operations of the Victor building, including calculations of net profits and excess net profits for the Victor building.

D. The Option Contract

When Dranoff first agreed to undertake redevelopment of the Victor building, he recognized that if the Victor project was successful, demand would grow for further development in the Camden waterfront area. Dranoff therefore sought to obtain the rights to acquire a nearby building known as Radio Lofts. On August 20, 2002, the CRA and Dranoff Properties executed an option agreement for Radio Lofts (the "Option Agreement"). In the Option Agreement, the CRA granted Dranoff Properties an exclusive option to enter into a redevelopment agreement with the CRA to purchase and redevelop Radio Lofts (the "Radio Lofts Redevelopment Agreement"). The Option Agreement provides that the Radio Lofts Redevelopment Agreement "shall provide [that] …. environmental remediation with respect to [Radio Lofts] as may be required by the New Jersey Department of Environmental Protection … shall have been completed …" [Dranoff Ex. 28, at ¶ 3(b)(i)]. That agreement also provides that "if the aforesaid environmental remediation work shall not be completed …, [Dranoff Properties] shall have no obligation to proceed with the closing for the acquisition of the Property." [Dranoff Ex. 28 at ¶ 3(b)(i)]. The completion of the environmental remediation of the Radio Lofts building was therefore a condition precedent to Dranoff Properties taking title to the building. The Option Agreement further provides that time is of the essence for performance.

The CRA and Dranoff Properties executed a project management agreement for the environmental remediation of Radio Lofts on January 28, 2005 (the "Project Management Agreement"). The Project Management Agreement states that Dranoff Properties exercised its option to enter into the Radio Lofts Redevelopment Agreement. The CRA was not compelled to pay for the remediation of Radio Lofts with its own funds. Rather, the Project Management Agreement authorized Dranoff to contract for remediation work on the Radio Lofts Property with funds obtained by the CRA through various grants. The Project Management Agreement had an outside term of three years.

The CRA and Dranoff Properties executed the Radio Lofts Redevelopment Agreement on May 3, 2006. That agreement provides:

> [Dranoff Properties] shall be obligated to complete the settlement for the conveyance of the Property in accordance with, and subject to the satisfaction of, the provisions of Paragraph 3(b) of the Option Agreement …, provided however that if such settlement shall not have occurred within five (5) years after the date of this Agreement, the [CRA] shall have the right to terminate this Redevelopment Agreement thirty (30) days after written notice of such intention to [Dranoff Properties], unless [Dranoff Properties] shall certify to the reasonable satisfaction of the [CRA], that it is proceeding with all due diligence to satisfy any remaining conditions to such settlement (as set forth in said Option Agreement) within such reasonable additional period of time as [Dranoff Properties] shall specify. [Dranoff Ex. 47 ¶ 2.2].

Dranoff had no obligation to pay for the remediation of the Radio Lofts building. The Redevelopment Agreement incorporated the environmental obligations set forth in the Option Agreement. It also incorporated the conditions for closing set forth in the Option Agreement.

The New Jersey Department of Environmental Protection (the "DEP") did not approve the start of remediation efforts on Radio Lofts until January 26, 2009. The initial grant money was believed to be insufficient to cover the costs of the remediation of Radio Lofts. On October 28, 2010, Sandra Ross Johnson, then the Executive Director of the CRA, sent a letter to Dranoff's attorney explaining a strategy to obtain additional funding for the environmental remediation of Radio Lofts. Johnson confirmed in that letter that "although Dranoff properties ('Dranoff') has always been willing to attempt to identify and secure funds for environmental testing and remediation at [Radio Lofts], … Dranoff has no obligation actually to secure funds or to manage or complete such work in the absence of same." [Dranoff Ex. 6 at CRA000019].

Remediation of the Radio Lofts Property stalled because the CRA was unable to obtain sufficient funding to continue that work.

The DEP has not issued a No Further Action letter nor a Covenant Not To Sue for Radio Lofts because the environmental remediation has not been completed. One of the contaminants at Radio Lofts is dioxin. The DEP had not previously set a standard for remediation of dioxin. The DEP set the standard for Radio Lofts to be the lowest amount of concentration detectable. The DEP also required post-construction testing. Dranoff Properties, the CRA, and the companies they retained to assist with the remediation of Radio Lofts all pushed the DEP to ease its standards for the concentration of detectable dioxin. Dranoff also sought a meeting to ask the City to allow commercial, as opposed to residential, development of Radio Lofts. The City did not meet with Dranoff. Due to the DEP's position, Dranoff Properties was allegedly prevented from obtaining construction financing and was not willing to take title to the property. This also prevented Dranoff Properties from obtaining a release of a prior deed restriction that prohibited residential use.

The remediation of Radio Lofts remains incomplete. On April 20, 2018, Simpson, then the Interim Director of the CRA, sent a letter to Dranoff Properties stating that "the CRA is hereby providing Dranoff with the formal notice of the termination of all of Dranoff's rights obtained through the exercise of the Option [Agreement]. Dranoff shall no longer have any right to redevelop [Radio Lofts]." [Dranoff Ex. 76 at Victor0017921]. Simpson's letter further stated that:

> We recognize that Dranoff is not required to take title to [Radio Lofts] until several contingencies have been satisfied, including the remediation of the Property and the receipt of a No Further Action ("NFA") letter (Remedial Action Outcome ("RAO")). Notwithstanding this requirement, Dranoff cannot in perpetuity delay the date on which it is required to commence and complete redevelopment of [Radio Lofts] by failing to remediate [Radio Lofts] and obtain a NFA/RA for [Radio Lofts]. [Id.]

On May 11, 2018, Dranoff responded, asserting that "at no point over the last sixteen years has the CRA taken the position or notified Dranoff that it would no longer seek funding for the remediation work and that Dranoff was required to close the acquisition of [Radio Lofts] and commence redevelopment thereof" and "reject[ing] CRA's attempt to terminate the Option and Redevelopment Agreements." [Dranoff Ex. 146]. Dranoff's letter states that "Dranoff certifies that it remains committed to redeveloping [Radio Lofts] subject to the satisfaction of all remaining conditions upon completion of the remediation." [Id.]. On June 1, 2018, a meeting was held to discuss Radio Lofts with Dranoff, his attorney Jonathan Korn, Simpson, the Director of Economic Development for the CRA, James Harveson, and an attorney for the CRA. A June 8, 2018 letter reiterated Dranoff's position regarding the purported termination of Dranoff's rights regarding Radio Lofts. The same letter further stated that "as discussed Friday, Dranoff is willing to step aside from the redevelopment of [Radio Lofts] if it is fully compensated for its efforts to date. Yesterday, Dranoff forwarded to the CRA its compilation of costs totaling $3,274,104." [Dranoff Ex. 149 – 150 at Victor 0086827].

III. LEGAL STANDARD

Summary judgment is appropriate when there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The Court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Summary Judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of" cases when the "pleadings, depositions and admissions on file, together with the affidavits submitted on the motion" clearly show the absence of "any genuine issue of material fact requiring disposition at a trial." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641 (1995). On a motion for Summary Judgment, the court must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'." Brill, 142 N.J. at 533 (citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)). When weighing the evidence, the Court is to follow "the same evidentiary standard of proof … that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact." Id. at 533-34.

IV. ANALYSIS

Defendants seek summary judgment on all claims asserted by Plaintiffs. Plaintiffs' cross motion for summary judgment seeks to have the Court determine that the Financial Agreement and the Long Term Tax Exemption Law ("LTTEL") required Victor Urban Renewal to pay excess net profits to the City, that Defendants' breached the Financial Agreement based on their asserted failure to comply with the reporting requirements under the Financial Agreement and the LTTEL, and that the CRA's April 20, 2018 Notice of Termination lawfully terminated the rights of Defendant Dranoff Properties in the Radio Lofts property.

A. THERE IS A GENUINE ISSUE OF MATERIAL FACT WHETHER VICTOR URBAN RENEWAL OWES THE CITY OF CAMDEN EXCESS NET PROFITS

1. PROJECT COSTS UNDER THE LTTEL MEAN THOSE COSTS INCURRED BY THE URBAN RENEWAL ENTITY ITSELF

Defendants contend that the LTTEL as it existed in 2001 – 2002 should govern the disposition of this case. They rely upon EQR-LPC Urban Renewal North Pier, LLC v. City of Jersey City, which found based on the express terms of the Financial Agreement there that the LTTEL prior to its amendment in 2003 governed. 452 N.J. Super. 309, 319-21 (App. Div. 2016). The Appellate Division there explained that it was contrary to fundamental public financing concepts for the Legislature to adjust the terms of municipal tax abatement contracts after the fact. Id. at 321 (citing N.J.S.A. § 40A:20-2; N.J.S.A. § 40A:12A-2). The Appellate Division further explained that "courts and legislatures are loath to apply the effect of a statute retroactively." Id. at 322 (quoting Chase Manhattan Mortg. Corp. v. Spina, 325 N.J. Super. 42, 48 (Ch. Div. 1998) aff'd by 325 N.J. Super. 1 (App. Div. 1999)). See also Kopczynski v. Camden Cty., 2 N.J. 419, 424 (1949) (holding the same, finding that the statute at issue in that case explicitly intended to be applied prospectively). "Settled rules of statutory construction favor prospective rather than retroactive application of new legislation." Pisack v. B & C Towing, Inc., 240 N.J. 360, 370 (2020) (quoting James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014)). There are only three situations "that justify retroactive application of a legislative amendment: '(1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant.'" Id. (further citation omitted). With the exception of N.J.S.A. § 40A:20-22, which will be discussed later, the Court is satisfied that none of the other sections of the LTTEL fit into any of the three situations contemplated by the Pisack court for retroactive application of a statute. *See* Id. and N.J.S.A. § 40A:20-3 (1995); N.J.S.A. §§ 40A:20-1 to -21 (1992).

Defendants assert that Plaintiffs conception of project costs have no basis in law or practice. As it existed in 2001-02, the LTTEL's purpose was "to revise, consolidate and clarify the law in [the area of urban redevelopment]." N.J.S.A. § 40A:20-2 (1992). To accomplish the redevelopment of blighted areas, the legislation allowed municipalities and urban redevelopment entities to enter into financial agreements. N.J.S.A. § 40A:20-4 (1992). These financial agreements allowed qualified urban renewal entities, rather than paying taxes on their property, to pay an annual service charge. N.J.S.A. § 40A:20-12(b) (1992). The annual service charge could be set at fifteen percent of an urban renewal entity's annual gross revenue. N.J.S.A. § 40A:20-12(b)(1) (1992). Here, the annual service charge was set to fifteen percent of Victor Urban Renewal's projected annual gross revenue during the first 15 years of the project. See Dranoff Ex. 3, p.4 ¶ 3(b)(i).

Gross revenue under the LTTEL was defined as:

> [A]nnual gross revenue or gross shelter rent or annual gross rents, as appropriate, and other income, for each urban renewal entity designated pursuant to this act. The financial agreement shall establish the method of computing gross revenue for the entity, and the method of determining insurance, operating and maintenance expenses paid by a tenant which are ordinarily paid by a landlord, which shall be included in the gross revenue. N.J.S.A. § 40A:20-3(a) (1995).

The Financial Agreement defined Victor Urban Renewal's gross revenue as "based on the total rent payable to the Redeveloper under the Ground Lease … (such annual total rent being $1,333,333) and assumes that insurance, operating and maintenance expenses ordinarily and customarily paid by a landlord under a lease is included in the Gross Revenue Amount." Dranoff Ex. 3, p. 4, ¶ 3(a).

The annual service charge could be adjusted upward if the urban renewal entity exceeded its allowable net profits. N.J.S.A. § 40A:20-15 (1992). Allowable net profits are arrived at by "applying the allowable profit rate to … the total project cost … for the period commencing on the date on which the construction of the … project is completed, and terminating at the close of the fiscal year of the entity preceding the date on which the computation is made." N.J.S.A. § 40A:20-3(b) (1995). The allowable profit rate "means the percentage per annum arrived at by adding 1 1/4% to the annual interest percentage payable on entity's initial permanent mortgage financing." Id. Project is defined as "any work or undertaking pursuant to a redevelopment plan adopted pursuant to the 'Local Redevelopment and Housing Law', … which has as its purpose the redevelopment of all or any part of a redevelopment area …" N.J.S.A. § 40A:20-3(e) (1995). Total project costs are defined as follows:

> the aggregate of the following items as related to a unit of a project, if the project is undertaken in units, or to the total project, if the project is not undertaken in units, all of which as limited by, and approved as part of the financial agreement: (1) cost of the land and improvements to the entity, whether acquired from a private or a public owner, with cost in the case of leasehold interests to be computed by capitalizing the aggregate rental at a rate provided in the financial agreement; (2) architect, engineer and attorney fees, paid or payable by the entity in connection with the planning, construction and financing of the project; (3) surveying and testing charges in connection therewith; (4) actual construction costs which the entity shall cause to be certified and verified to the municipality and the municipal governing body by an independent and qualified architect, including the cost of any preparation of the site undertaken at the entity's expense; (5) insurance, interest and finance costs during construction; (6) costs of obtaining initial permanent financing; (7) commissions and other expenses paid or payable in connection with initial leasing; (8) real estate taxes and assessments during the construction period; (9) a developer's overhead based on a percentage of actual construction costs, to be computed at not more than the following schedule:

$500,000 or less	-	10%
$500,000 through $1,000,000	-	$50,000 plus 8% on excess above $500,000 BWS
$1,000,001 through $2,000,000	-	$90,000 plus 7% on excess above $1,000,000 BWS
$2,000,001 through $3,500,000	-	$160,000 plus 5.6667% on excess above $2,000,000 BWS
$3,500,001 through $5,500,000	-	$245,000 plus 4.25% on excess above $3,500,000 BWS
$5,500,001 through $10,000,000	-	$330,000 plus 3.7778% on excess above $5,500,000
over $10,000,000	-	5%

> If the financial agreement so provides, there shall be excluded from the total project cost actual costs incurred by the entity and certified to the municipality by an independent and qualified architect or engineer which are associated with site remediation and cleanup of environmentally hazardous materials or contaminants in accordance with State or federal law. N.J.S.A. § 40A:20-3(h) (1995).

The parties do not dispute the legality of the ground lease structure between Victor Urban Renewal and Victor Associates. In reaction to the Tax Court's decision in Town of Secaucus v. City of Jersey City, 20 N.J. Tax 384 (Tax 2002), the legislature amended the LTTEL. See N.J. Sen. Econ. Growth, Agric. & Tourism Comm., Stmt. To S. 2402, at 1 (Mar. 17, 2003) and N.J.

Gen. Ass. Comm. and Econ. Growth Comm., Stmt. To S. 2402, at 1 (May 1, 2003) (both indicating that the LTTEL was being amended in reaction to recent court decisions). Town of Secaucus held that project revenue had to be determined based on the entirety of the project, regardless of any revenue allocation between parties in a ground lease. 20 N.J. Tax at 406-10. In response, the New Jersey legislature amended the LTTEL to ratify and validate all financial agreements under the LTTEL that had previously been agreed upon. N.J.S.A. § 40A:20-22. Such ratification included "the structure and methods used to calculate excess profits and annual service charges, including the limitation of revenue, expenses and total project costs, to those of the urban renewal entity, regardless of any other entity, whether affiliated or unaffiliated with the urban renewal entity." Id.

For purposes of this motion, the parties agree that the allowable profit rate for Victor Urban Renewal is 7.42%. The parties vigorously disagree how to determine project costs. Defendants contend that the total project costs for the Victor Project were $50,631,091. Defendants argue that the LTTEL does not require the urban renewal entity to incur those costs for them to be included in the calculation of excess net profits. Defendants base this argument on the fact that the statute does not explicitly define which entity must incur the total project costs. Rather, they contend that the statute allows for the project costs incurred by any entity, not just the urban renewal entity that is defined in the immediately preceding subparagraph to be used when determining the urban renewal entity's obligations. Plaintiffs read the statute differently. They contend, based on a reading of the definition of total project costs, that the costs must meet two separate tests: (1) the costs must be approved as part of the financial agreement; and (2) the costs must be expended by the urban renewal entity itself.

What are "total project costs" is a question of law, appropriate for resolution on summary judgment. The question is one of statutory interpretation. "In the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent." Young v. Schering Corp., 141 N.J. 16, 25 (1995). The New Jersey Supreme Court explained:

> [W]e have emphasized that the best indicators of that intent are the plain words of the statute. *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). In reviewing the statutory language, courts should "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole." *Ibid*. (citation omitted). We have cautioned against "'rewrit[ing] a plainly-written enactment of the Legislature or presum[ing] that the Legislature intended something other than that expressed by way of the plain language.'" *Ibid.* (quoting *O'Connell v. State*, 171 N.J. 484, 488, 795 A.2d 857 (2002)).
>
> However, if there is ambiguity in the statutory language, the court may "utiliz[e] extrinsic evidence" for assistance in determining the correct interpretation. *Lozano v. Frank DeLuca Constr*., 178 N.J. 513, 522, 842 A.2d 156 (2004). Moreover, extrinsic evidence may be considered when "a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." *DiProspero, supra*, 183 N.J. at 493, 874 A.2d 1039.
>
> Hardy ex rel. Dwodell v. Abdul-Matin, 198 N.J. 95, 101 (2009).

"Where [the Legislature] includes particular language in one section of the statute but omits it in another section of the same [a]ct, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion." Shipyard Assocs., LP v. City of Hoboken, 242 N.J. 23, 38 (2020) (quoting DCPP v. R.L.M., 236 N.J. 123, 148 (2018). Where a term is used in one portion of a statute and excluded in another, the excluded term "should not be implied where excluded." Feuer v. Merck & Co., 455 N.J. Super. 69, 79 (App. Div. 2018) (quoting GE Solid State, Inc. v. Dir, Div. of Taxation, 132 N.J. 298, 308 (1993)). The Court "will not 'write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment,' or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" N. Jersey Media Grp., Inc. v. State, Office of Governor, 451 N.J. Super. 282, 304 (App. Div. 2017) (quoting Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230 (1952) and In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)).

The parties arguments concerning how to determine total project costs largely turn on defining the term "entity" in N.J.S.A. § 40A:20-3(h). A reading of that particular section of the statute shows that the term "entity" is used in isolation. See N.J.S.A. § 40A:20-3(h) (1995). That section of the statute is devoid of any mention of "urban renewal entity", "limited dividend entity", and "non-profit entity", terms that are specifically defined in earlier portions of the statute. See Id., N.J.S.A. §§ 40A:20-3(b), (d), (g) (1995). Thus, the Court must look for further context within this statute and statutory scheme to determine the meaning of the term "the entity" when used in N.J.S.A. § 40A:20-3(h). The entirety of N.J.S.A. § 40A:20-3 identifies only three types of entities to which this term could refer; urban renewal entities, limited dividend entities, and non-profit entities. See N.J.S.A. §§ 40A:20-3(b), (d), (g) (1995). The definition of "urban renewal entity" is revealing. That definition explains that such entities are "a limited-dividend entity or a nonprofit entity which enters into a financial agreement under this act with a municipality …" N.J.S.A. § 40A:20-3(g). A careful reading of the statute reflects that limited dividend entities and nonprofit entities are but two subclasses of potential organizations that could be urban renewal entities. *See* N.J.S.A. §§ 40A:20-3(b), (d), (g) (1995). Further it is only urban renewal entities that can enter into financial agreements with municipalities by statute. *See* N.J.S.A. §§ 40A:20-3(g) and 40A:20-4 (1995) (providing that a municipality and an urban renewal entity can enter into financial agreements).

The definition of "total project costs" quoted above provides that the financial agreement itself defines and limits the total project costs of the party that enters into the financial agreement, namely the urban renewal entity. N.J.S.A. § 40A:20-3(h) (1995). Since only urban renewal entities can enter into financial agreements, and since the statute itself only identifies three possible types of entities (which in reality is a single type of entity divided into sub-types), "the entity" in N.J.S.A. § 40A:20-3(h) must mean an urban renewal entity.

Defendants in their reply brief argue that the omission of the term "urban renewal", "limited dividend", or "nonprofit" from the term "entity" is fatal to any assertion that project costs be assessed against an individual entity, rather than as the whole "project." The Court rejects that position. The cases cited by defendant do not support this conclusion. In Shipyard Assocs. the New Jersey Supreme Court held that N.J.S.A. § 40:55D-52(a) did not "provide an exception for municipalities to retroactively apply changes in zoning laws relating to public health and safety to final approvals" in its plain language. 242 N.J. at 43. Examining another case that analyzed a separate section of the Municipal Land Use Law contained in a separate statute, the Court there "decline[d] to read the exceptions from Sections 10.5 and 49 [N.J.S.A. §§ 40:55D-10.5, 49] – allowing municipalities to retroactively apply zoning ordinances affecting public health and safety into Section 52(a) [Sections 10.5 and 49]. By their own terms, these sections apply only to 'application[s] for development' and 'preliminary approval[s],' not final approvals." Id. at 44 (quoting N.J.S.A. §§ 40:55D-10.5, 49). The Court refused to "import an exception into Section 52(a) where the Legislature did not apply one." Id. at 45. In Shipyard Assocs. the Court was dealing with a party trying to read entirely different statutes together, an attempt the Court rejected.

N. Jersey Media Grp., Inc. deals with a similar issue to Shipyard Assocs., the Appellate Division addressed a question of statutory construction of the Open Public Records Act's ("OPRA") civil penalty provision. N. Jersey Media Grp., Inc., 451 N.J. Super. at 303-07. At issue was whether the Government Records Council ("GRC") was the sole agency charged with ordering civil penalties against government officials for violations of OPRA. Id. at 301. The Court found that the plain language of N.J.S.A. § 47:1A-11 allowed the Superior Court to impose and enforce civil penalties. Id. at 302-04. The Court explained that "[t]he Legislature established only two forums with jurisdiction to make the findings necessary for an award of a civil penalty under N.J.S.A. 47:1A-11: the Superior Court and the GRC. N.J.S.A. 47:1A-6." Id. Further, the Court explained that the Legislature could have chosen to limit the forum in which civil penalties could be pursued, but chose not to do so in the OPRA. Id. at 304-07. The Court rejected the argument to depart from the statute's plain intent to allow both the GRC and the Superior Court to enter civil penalties against offending parties.

In Feuer, Plaintiff shareholder appealed the dismissal of his complaint that sought various records from Defendant corporation. Feuer, 455 N.J. Super. at 72-73. Plaintiff relied upon N.J.S.A. § 40A:5-28(4), which allows a shareholder to request "books and records" of a company, and to request a variety of documents. Id. at 74-75. To determine the records Plaintiff was entitled to receive, the Court had to define the term "books and records" in this statute. Id. at 73. The Appellate Division undertook a statutory construction analysis which began by examining the first three subsections of the statute. Id. at 76-77 (citing DiProspero, 183 N.J. at 492). Examining the subsection at issue in its entirety, the Court found the plain language of the first sentence of the statute authorized a "significantly narrower universe of corporate documents" than Plaintiff demanded. Id. at 78. Further, the Court explained "the phrase 'books and records of account' appears not only in the fourth paragraph, which describes inspection rights, but also in the first paragraph, which describes the corporation's record-keeping obligation." Id. at 79. The court explained "[w]e must presume the phrase means the same in both subsections absent a clear indication to the contrary." Id. (citing Oldfield v. N.J. Realty Co., 1 N.J. 63, 69 (1948)). The Court limited the phrase "books and records" to the definition in the first section of the statute, equating a corporation's record-keeping obligations and a shareholders inspection rights. Id.

A similar logic to that expressed in Feuer governs this case. Under N.J.S.A. § 40A:20-3(h) (1995), the phrase "the entity" is linguistically different than "urban renewal entity," "limited dividend entity" or "nonprofit entity". Reading the statute in its entirety leads to the conclusion that "the entity" is referring to the only three types of "entity" defined in that section of the statute. Just as the Court in Feuer read the full statute together to ascertain the meaning of the phrase "books and accounts", this Court does so here to define the term "the entity". Further, as the New Jersey Supreme Court explained "the general rule is that where a word or phrase occurs more than once in a statute, it should have the same meaning throughout, unless there is a clear indication to the contrary. Oldfield, 1 N.J. at 69. Thus, regardless of the linguistic difference between the entity, and the three types of entity defined in the statute, the proper application of this statute requires that the phrase "the entity" in N.J.S.A. § 40A:20-3(h) means the types of entities defined earlier in the same statute.

Defendants contend that if the Court were to adopt such an interpretation it would run afoul of the legislative intent of N.J.S.A. § 40A:20-22. Specifically, they argue that the Court would be undermining the commonly accepted industry practice in the same manner as the Tax Court in Town of Secaucus. That is not the case. That statute explicitly provides that it ratifies "the structure and methods used to calculate excess profits and annual service charges, including the limitation of … total project costs." N.J.S.A. § 40A:20-22. The plain meaning of this statute was to affirm that urban renewal entities could limit their expenses, specifically through ground leases like the one at issue in this case. An urban renewal entity and another corporation may enter into a ground lease, and as part of that agreement allow the urban renewal entity to limit its own expenses by allocating them with the other entity. But this statute does not permit an urban renewal entity to limit its total project costs, such that this limitation would not have an impact on the calculation of allowable net profits. This Court's interpretation of N.J.S.A. § 40A:20-3(h) is the only one that could preserve the legality of Defendants' transaction with Plaintiffs', provided that it was part of the financial agreement. To accept Defendants' argument would allow an urban renewal project to avoid the excess profits tax required by the statute in all instances, which is contrary to the legislative intent.

Defendants contention that total project costs should be calculated on an aggregate basis is based on the same rationale that the Town of Secaucus Court based their decision. There the Court explained why revenues had to be calculated based on the total revenue of the project since "only by including all project revenues can a fair calculation of net profits be made, and the legislatively mandated limitation on net profits be effectuated." Town of Secaucus, 20 N.J. Tax at 408. The Court reasoned that the limitation of revenue to the urban renewal entity did not represent the true revenue of the project, and because it was not disclosed in the financial agreement, it was an improper circumvention of the LTTEL. Id. at 409. Were the Court to adopt Defendants position concerning the definition of the term "the entity" in N.J.S.A. § 40A:20-3(h), this would be contrary to the Legislature's intent to affirm the industry wide practice of allowing urban renewal entities to structure their transactions with municipalities in such a way as to gain the maximum possible tax advantage allowable under the statutory scheme. This Court concludes that total project costs under N.J.S.A. § 40A:20-3(h) means the total project costs incurred by the urban renewal entity itself.

The Court must determine whether Project Costs under the LTTEL must be approved as part of the Financial Agreement. The LTTEL's definition of project costs explains that project costs are "limited by, and approved as part of the financial agreement." N.J.S.A. § 40A:20-3(h) (1995). Further, "[t]he financial agreement shall contain detailed representations and covenants by the urban renewal entity as to … the estimated total project cost." N.J.S.A. § 40A:20-9

(1992). Such clear and unambiguous language defining project costs compels the Court to hold that project costs in the LTTEL must be approved as part of the Financial Agreement. *See* Hardy ex rel. Dwodell, 198 N.J. at 101 (explaining that the best indicators of legislative intent "are the plain words of the statute").

2. **CALCULATION OF PROJECT COSTS**

The Court must analyze whether there is a genuine dispute of material fact regarding the calculation of total project costs included as part of the financial agreement entered into between Victor Urban Renewal and the City of Camden. This factual issue is critical to the determination of whether Victor Urban Renewal owes payment of excess net profits under the LTTEL. *See* N.J.S.A. § 40A:20-15 (1992) (providing that excess net profits must be paid to the City as an additional service charge); N.J.S.A. § 40A:20-3(b) (1995) (providing that total project costs are part of the allowable net profits calculation); N.J.S.A. §40A:20-3(h) (1995) (indicating that project costs must be included in the financial agreement).

The financial agreement reflects that Victor Urban Renewal disclosed that it was entering into a ground lease with Victor Associates. Dranoff Ex. 3, p.2. The Financial Agreement explains that while Victor Urban Renewal was entering the ground lease, the "Associates will construct or renovate the Improvements" on the land. Id. The Application further states that the City relied on Defendants representations in their application. Id. at p. 3, ¶ 1. Exhibit D to the application shows that Victor Urban Renewal's revenue would be limited to $1,333,333, and its expenditures would equal its revenue, thus leading to no profits. Dranoff Ex. 3, at CITY – 001697.

Defendants point to the financial agreement and Ex. D to their application in support of their argument that project costs were authorized by the financial agreement. They further contend that they informed Thomas Corcoran, the CEO of the Cooper's Ferry Development Association, of their intent to limit the revenue of Victor Urban Renewal using a ground lease structure. Defendants communicated this intention through an April 2001 memo sent to Corcoran. They further contend that Corcoran was an agent of the City of Camden through his employment with the Camden Redevelopment Authority.[3] Regardless of any alleged agency

---

[3] The parties dispute whether Corcoran was an agent in their briefs and in their statement of material facts. Whether an entity or person is acting as an agent is a legal determination. But this legal determination is fact sensitive. As the New Jersey Supreme Court has explained:

> An agency relationship is created "when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006) (internal quotation marks omitted). Generally, an agent may only bind his principal for such acts that "are within his actual or apparent authority." *Carlson v. Hannah*, 6 N.J. 202, 212, 78 A.2d 83 (1951) (citation omitted). Actual authority exists "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the

relationship, Defendants assert that Mr. Corcoran informed officials in the City government concerning the ground lease structure, including the Business Administrator and the City Attorney at the time, Dennis Kille.

Plaintiffs respond by conceding that they knew of a ground lease and its revenue limiting provisions. However, they assert that the 75% expense allocation included in the executed Ground Lease was not disclosed to the City before the financial agreement was signed. Further, they argue that Mr. Corcoran was not an agent of the City and that reliance on the April 2001 memo, when it comes to expenses, is misplaced because the document was preliminary in nature and is either unclear, or does not indicate the project costs for the Victor project. With respect to Ex. D of the PILOT Application, Plaintiff contends that it was only a projection of what expenses might be for Victor Urban Renewal, whereas net profits under the Financial Agreement are to be based on actual expenses, not projections. Further they contend that since Victor Urban Renewal never provided a project wide *pro forma* for the Victor Project prior to the parties entering into the Financial Agreement, they were not on notice of actual expenses. They argue that the intentional skewing of expense to Victor Urban Renewal that was needed to wash out income would violate Victor Urban Renewal's representation that Victor Associates would bear the overwhelming majority of operating expenses for the Project.

The gist of the factual dispute is Plaintiffs' contention that any project costs represented in the Application were merely an estimate of those project costs. To divine the actual project costs, Camden asserts Victor Urban Renewal was required to submit annual reports to the City of Camden so that a determination of project costs would then be made. Defendants respond that their representations in the Application were the final calculation of yearly project costs that Victor Urban Renewal would incur.

> principal's manifestations to the agent, that the principal wishes the agent so to act." *Restatement (Third) of Agency, supra*, § 2.01. Apparent authority arises "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* § 2.03. The doctrine of apparent authority "focuses on the reasonable expectations of third parties with whom an agent deals." *Id.* § 7.08 comment b. Therefore "a court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent." *Sears, supra*, 134 N.J. at 338, 634 A.2d 74.
>
> New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010).

Based on the facts presented concerning Mr. Corcoran, it is apparent that he did not act with actual authority. Thus, the question whether he was an agent of the City of Camden turns on whether he acted with apparent authority. A determination of apparent authority hinges on the acts of the principal itself, not the agent. Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App. Div. 2003) (further citation omitted). These are issues of fact.

The Court concludes that the legislative intent was to have the calculation of net profits based upon actual costs and actual revenue to the urban renewal entity. An undisclosed agreement that would never allow excess net profits despite the profitability of the project is contrary to the legislative intent, and potentially a fraud upon the municipality and its residents.

3. <u>THE CALCULATION OF EXCESS NET PROFITS ARE CUMULATIVE, BUT THE CALCULATION OF NET PROFITS, AND BY EXTENSION OF ALLOWABLE NET PROFITS, IS MADE ON A YEARLY BASIS</u>

The parties dispute whether allowable net profits under the Financial Agreement are calculated on an annual basis or on a cumulative basis. Defendants contend that the allowable profit rate should be calculated on a cumulative basis, and that cumulative calculation of the allowable profits should be applied to all applicable years of the Financial Agreement. In support they point to the language of N.J.S.A. §§ 40A:20-3, 40A:20-15 (1995) and an unpublished Law Division decision. Plaintiffs read the language of N.J.S.A. § 40A:20-15 differently. They assert that the statutory language calls for both the determination of net profits and the determination of Allowable Net Profits to be calculated on a cumulative basis, but reviewed annually. They further contend that the same unreported decision is inapplicable to this issue since they assert that the parties in that case stipulated to the amount of allowable net profits to be used in the calculation. Even if the decision is applicable they contend that the case supports their position since Plaintiffs take the same position as the Court in that case did concerning the definition of "one accounting period."

Based upon an examination of the relevant statutes, the Court concludes that project costs are calculated on a cumulative basis under the LTTEL for the purpose of the excess net profit calculation. However, the Court further holds that the LTTEL requires an annual calculation of net profits, which includes an amortization of total project costs in the financial agreement. This is based upon the language of the applicable statutes. The relevant statute provides "[w]henever the net profits of the entity for the period, taken as one accounting period, commencing on the date on which the construction of the … project is completed … and terminating at the end of the last full fiscal year, shall exceed the allowable net profits for the period…" then the entity must pay said excess net profits within 90 days. N.J.S.A. § 40A:20-15 (1992). The Court concludes that N.J.S.A. § 40A:20-15 (1995), expressly restricts net profits for the period commencing on the date of project completion and terminating at the end of any fiscal year, taken as one accounting period, in excess of allowable net profits.

The only published decision to substantively address this topic is the <u>Town of Seacaucus</u> decision. The New Jersey Legislature responded to the Tax Court's decision requiring calculation of the revenue of the project based on the revenue of all entities associated with the project together by enacting N.J.S.A. 40A:20-22. That legislation did not in other respects change or impact the Tax Court's decision to the extent it interpreted other provisions of the statute. The <u>Town of Secaucus</u> court explained "[i]f the net profits of the entity exceed the allowable net profit for each fiscal year, within ninety days after the end of the fiscal year the entity must pay the excess net profit to the municipality…". 20 N.J. Tax at 404 (citing N.J.S.A. §§ 40A:20-15, 40:55C-66). Examining the language of the statute, the Tax Court made clear that excess net profits are a calculation that is to be made annually but on a cumulative basis. This means that if an entity does not exceed their allowable net profit number for a given year, they can carry the balance over to the next year and vice versa. However, if the entity exceeds the allowable net profit for any year, the entity must pay excess profits to the municipality.[4]

Pursuant to the statute, the allowable net profit calculation is made:

> by applying the allowable profit rate to … the total project cost … for the period commencing on the date on which the construction of the unit or project is completed, and terminating at the close of the fiscal year of the entity preceding the date on which the computation was made."
>
> N.J.S.A. § 40A:20-3(b) (1995).

Net profits are defined as gross revenues of the entity less all operating and non-operating expenses. Included in such expenses are all annual services charges paid, all payments to the municipality of excess profits pursuant to N.J.S.A. § 40A:20-15 or 16, an annual amount sufficient to amortize the total project cost over the life of the improvements set forth in the financial agreement and all reasonable operating expenses. N.J.S.A. § 40A:20-3(c)(1)(a)-(d). The calculation of net profits must be made annually in "an … audited statement which clearly identifies the calculation of net profit for the urban renewal entity during the previous year." N.J.S.A. § 40A:20-3(c)(2). To make a reliable calculation of net profits as required by the LTTEL, a proper estimate of the project costs has to be included in the Financial Agreement. *See* N.J.S.A. § 40A:20-3(c)(1)(c). Given that the Court has held that there is a genuine issue of material fact regarding calculation of project costs under this Financial Agreement, the Court cannot determine on motion what if any excess net profits are owed to the City. At this point there is a missing variable to the equation, creating an issue of fact for the jury.

B. PLAINTIFFS CLAIMS BASED ON VICTOR URBAN RENEWAL'S FAILURE TO REPORT OR PAY EXCESS NET PROFITS FOR FISCAL YEARS 2004, 2005, 2006, AND 2007 ARE TIME BARRED

1. THE DISCOVERY RULE DOES NOT APPLY IN THIS CASE

Defendants contend that even if Plaintiffs have presented valid claims, such claims are barred by the statute of limitations. The City of Camden is subject to a ten-year statute of limitations for any of its claims against Defendants. N.J.S.A. § 2A:14-1.2. Defendants argue that Plaintiffs claims for excess net profits prior to fiscal year 2007 are time barred. Plaintiffs respond by arguing that they are asserting two separate breaches by Defendants, specifically (1) failure to submit annual reports of net profits and amounts due under the Financial Agreement; and (2)

---

[4] The only other published New Jersey case to discuss this topic is EQR-LPC Urban Renewal North Pier, LLC. In that case the Court did not analyze the issue, but rather was quoting the applicable Financial Agreement. EQR-LPC Urban Renewal North Pier, LLC, 452 N.J. Super. at 315.

failure to pay Excess Net Profits. They assert that Defendants' statute of limitations argument only applies to the excess net profits breach, not the breach of their failure to submit annual reports.

The parties place substantial reliance on Midland Funding, LLC v. Theil. There the Appellate Division explained "a cause of action will accrue on the date that the 'right to institute and maintain a suit first arose,' and 'generally coincides with 'the date on which the statutory clock begins to run.'" Midland Funding, LLC v. Thiel, 446 N.J. Super. 537, 548 (App. Div. 2016). In determining when a cause of action accrues "the relevant question is when did the party seeking to bring the action have an enforceable right." Metromedia Co. v. Hartz Mt. Assocs., 139 N.J. 532, 535 (1995). In a breach of contract action, an enforceable right requires the aggrieved party to have suffered a breach of the contract. *See* Sodora v. Sodora, 338 N.J. Super. 308, 312-13 (Ch. Div. 2000) (explaining that a contract cause of action typically accrues when the breach occurs). New Jersey courts, primarily in personal injury actions or negligence actions, have applied the discovery rule to soften the harsh application of statutes of limitations to certain claims. Cty. of Morris v. Fauver, 153 N.J. 80, 109-10 (1998). "The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." O'Keefe v. Snyder, 83 N.J. 478, 491 (1980).

The Cty. of Morris Court held that the discovery rule generally does not apply to contract actions. 153 N.J. at 110. The Court explained that "most contract actions presume that the parties to a contract know the terms of their agreement and a breach is generally obvious and detectable without any reasonable diligence." Id. Further "[b]ecause the discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action" it generally bars recovery against those who had "reason to know" of their injuries. Id.

The Chancery Division applied the discovery rule in the Sodora case. There the issue was when a breach of contract claim accrued for a third party beneficiary of the contract. Sodora, 338 N.J. Super. at 311. The Court, applying the discovery rule, held that "the discovery rule applies to third-party beneficiaries of contracts." Id. at 316. In that case the contract at issue was a property settlement between the mother and father of plaintiffs, where funds distributed after the sale of property would be invested in a business owned by their father. Id. at 311-12. At the time the agreement was entered into Plaintiffs had not reached the age of majority, and only learned about the agreement after their father died more than 20 years after the sale of the property. Id. As soon as Plaintiffs learned about the agreement, Plaintiffs pursued their claim. Id. at 312.

The Court in Gibbins v. Kosuga also applied the discovery rule to a breach of contract action. 121 N.J. Super. 252, 253-54 (Law Div. 1972). In that case, plaintiff and defendant contracted for the sale of real property. Plaintiffs brought a breach of contract and misrepresentation claim after it was discovered that a well defendant believed was on the property was not located on the property. Id. at 254. The parties did not discover that the well was not located on the property until nearly a decade after the sale. Id. The Court allowed Plaintiffs to pursue their claim, applying the discovery rule. The Court explained that Plaintiffs "had no reason to know of the lack of their own water supply until 1970 [nine years after the sale]. They could not be charged, therefore, with sleeping on their rights until they had reason to know those rights had been violated." Id. at 256.

Unlike the trial courts in Sodora and Gibbins, the New Jersey Supreme Court in Cty. of Morris refused to apply the discovery rule to a breach of contract claim. 153 N.J. at 109. The contract at issue was between the State Department of Corrections and the County of Morris. In exchange for money to improve the Morris County Jail, the State was allotted cells to house forty minimum or medium security State prisoners. Id. at 90. At issue was the per diem reimbursement rate payable to Morris County for housing State prisoners. Id. at 90-91. The Court, finding the discovery rule was not applicable, explained:

> The present situation involves a contract with clear and explicit payment provisions. The actual payments due under the contract were readily discoverable through public information and calculation. Not only could the County have discovered the lack of adherence to the contractual reimbursement rate through the exercise of reasonable diligence, but the County probably had actual knowledge that there existed a difference in payment as early as 1989, the time at which the Commissioner stated that the cost to house a State prisoner in Trenton was $63. Upon finding that a difference existed, the County should then have investigated the proper differential amount. The fact that the State overpaid for the first few years of the contract suggests that the incorrect payments were not entirely the fault of nor purposeful on the part of the State. Because both parties mutually erred and the County, as well as the State, should have discovered the mistake at an earlier time, the discovery rule is not appropriate.
>
> Id. at 110-11.

Plaintiffs assert two breaches of contract here, the breach in the reporting requirement and Victor Urban Renewal's alleged nonpayment of excess net profits. The Court finds that N.J.S.A. § 2A:14-1.2 acts as a bar to any claims asserting a breach of contract that accrued prior to 10 years before suit was filed. Plaintiffs' claims accrued when Defendants allegedly failed to satisfy their reporting requirements, explicitly spelled out in the contract. These circumstances are far closer to the Cty. of Morris case then to Sodora or Gibbins. Similar to Cty. of Morris, the provisions that Defendants allegedly breached were clearly laid out in the contract, and reasonable investigation would have led to the discovery that Defendants were in breach of the reporting requirement. Unlike Gibbins or Sedora the material information that would lead one to believe their rights had been violated was in the possession of the City. These two breaches are also dependent upon one another. The City could only know that its right to excess net profits had been violated if they pursued their right to receive the financial reports from Victor Urban Renewal required under the Financial Agreement. Their ability to determine whether their right to receive excess net profits was violated was wholly dependent on their diligence in pursuing their right to receive the financial reports. Therefore, the Court concludes that the discovery rule is inapplicable to the breach of contract claims presented in this case. The Court concludes that any breach of contract claim occurring prior to 10 years before the initiation of this suit is barred by the statute of limitations.

With respect to portions of Plaintiffs claims alleging misrepresentation or fraud, the Court finds that a portion of these claims are time barred. While these claims are the type of claim that the discovery rule is meant to protect, the discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action. Cty. of Morris, 153 N.J. at 109. Courts in this State have applied the discovery rule to a misrepresentation claim. *See* Gibbins, 121 N.J. Super. at 256. The rule has also been applied to common-law fraud claims. Cty. of Morris, 153 N.J. at 110 (citing Interlox Punch & Die Corp. v. Insilco Corp., 174 N.J. Super. 175, 176 (Law Div. 1980)). *See also* Catena v. Raytheon Company, 447 N.J. Super. 43, 54 (App. Div. 2016) (in fraud cases "the victim's lack of awareness of the fraud is the wrongdoer's very object"). Here, with respect to Defendants obligations to report and pay excess net profits, Plaintiffs cannot show they used reasonable diligence to investigate or pursue these claims, particularly where Plaintiffs had a contractual (and statutory) right to obtain information from Defendants with respect to profitability but sat on those rights. N.J.S.A. § 40A:20-9(d) (1992) (requiring Financial Agreements between urban renewal entities and municipalities to contain a provision compelling the urban renewal entity to submit auditor's reports to the municipality annually). Therefore, to the extent that Plaintiffs tort claims are based on Victor Urban Renewal's breach of its reporting and payment requirements for fiscal years 2004, 2005, 2006, and 2007 these claims are time barred.

2. EQUITABLE TOLLING IS NOT AVAILABLE TO TOLL THE STATUTE OF LIMITATIONS WITH RESPECT TO THE BREACH OF CONTRACT CLAIM

Equitable tolling has generally been applied in three circumstances:

> (1) [where] 'the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass' . . .
>
> (2) where a plaintiff has 'in some extraordinary way' been prevented from asserting his rights [and] . . .
>
> (3) where a plaintiff has timely asserted his rights mistakenly by either defective pleading or in the wrong forum.

Binder v. Price Waterhouse & Co., L.L.P., 393 N.J. Super. 304, 312 (App. Div. 2007) (quoting Freeman v. State, 347 N.J. Super. 11, 31 (App. Div. 2002)).

"Absent a showing of intentional inducement or trickery by a defendant, the doctrine … should be applied sparingly and only in the rare situation where it is demanded by sound legal principles and in the interest of justice." Id. at 313.

Equitable tolling is inapplicable in this case. Plaintiffs did not file their case in the wrong forum, nor are their pleadings defective. Plaintiffs were not prevented in some extraordinary way from asserting their rights. Plaintiffs themselves are partially to blame for not investigating these claims sooner, particularly where they had the contractual and statutory right to obtain the information that would have put them on notice that their rights were potentially being violated.

Further, Plaintiff's assertion that the failure of a party to perform an independent duty is a circumstance that could result in an equitable tolling is accurate, but inapplicable in the present case. See Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div. 2001); Dunn v. Borough of Mountainside, 301 N.J. Super. 262 (App. Div. 1998).

Here, the nonperformance of this contractual duty to provide financial reports was known or should have been promptly recognized by the city. The agreement had a specific deadline for submission of this information. The breach occurred when timely reports were not submitted. This is not the type of duty envisioned by the Dunn court. Since none of the circumstances for applying the doctrine of equitable tolling apply, the statute of limitations precludes the claims through 2007.

C. THERE IS A FACT QUESTION WHETHER DEFENDANTS WERE IN BREACH OF THEIR REPORTING REQUIREMENT DURING THE PENDENCY OF THE AIMCO SALE

1. VICTOR ASSOCIATES AND VICTOR GP CORP. ARE NOT PARTIES TO THE CONTRACT

Defendants contend that Plaintiffs cannot bring a breach of contract claim against Victor Associates and Victor GP Corp. because the Financial Agreement was only entered into between the City of Camden and Victor Urban Renewal. Defendants correctly point out that as a general rule an action on a contract cannot be maintained against someone who is not a party to the contract. Comly v. First Camden Nat'l Bank and Trust Co., 22 N.J. Misc. 123, 127 (Sup. Ct. 1944). Therefore, to the extent that Plaintiffs are attempting to assert claims against Victor Associates and Victor GP Corp. for breach of contract, those claims fail as a matter of law.

2. THE LACK OF NOTICE AND AN OPPORUNITY TO CURE DOES NOT PRECLUDE THIS COURT FROM FINDING THAT DEFENDANTS BREACHED THE FINANCIAL AGREEMENT

Defendants argue that Plaintiffs never gave them notice of breach and an opportunity to cure any alleged breach as required by ¶ 9 of the Financial Agreement. They argue they cannot be found in breach of the Financial Agreement without such notice. The agreement provides that "in the event of a default in or breach of this Agreement by [Victor Urban Renewal], if such default or breach is not cured within ninety (90) days after receipt by [Victor Urban Renewal] of written demand by the City to do so, then the City may terminate this Agreement." Dranoff Ex. 3, Pg. 10, ¶ 9. The New Jersey Supreme Court has explained "[i]t is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 615-16 (2020) (quoting Matter of Cty. of Atlantic, 230 N.J. 237, 254 (2017) (alterations in original)). "The plain language of the contract is the cornerstone of the interpretative inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Id. at 616 (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

The plain language of ¶ 9 of the Financial Agreement requires that a breach or default by Victor Urban Renewal is required in order for the City to send notice of breach in the first instance. Therefore, to the extent that Defendants attempt to argue that since the City of Camden did not give notice and an opportunity to cure, there was no breach of the Financial Agreement on their part, this argument fails. Defendant was in breach of the agreement when it failed to supply each required financial report. As discussed below, there is an issue of fact whether Defendant cured any breach after receiving notice.

3. THERE IS A FACT QUESTION WHETHER DEFENDANTS FAILED TO SUBMIT CONFORMING FINANCIAL REPORTS TO THE CITY OF CAMDEN BETWEEN MAY 18, 2018 AND SEPTEMBER 4, 2018

The Court concludes that there is a question of fact whether Defendants failed to submit sufficient financial reports as required under the Financial Agreement during the pendency of the sale of the Victor to AIMCO. Plaintiffs focus in their brief on the period between May 14, 2018 to September 4, 2018. Plaintiffs assert that although Defendants submitted a financial report on March 21, 2018, this report did not meet the reporting requirements under the Financial Agreement. Defendants assert the opposite is true. They argue that Victor Urban Renewal sent reports that comply with the requirements of the LTTEL. They further assert that Plaintiffs have not sent a notice of default for any of these reports. Given this Court's ruling on the calculation of project costs, and the parties vigorous factual dispute as to whether any of the reports submitted by Victor Urban Renewal comported with the Financial Agreement and the LTTEL, the Court finds that there is a genuine issue of material fact whether the financial reports submitted by Victor Urban Renewal were sufficient and in compliance with the Financial Agreement.

4. PLAINTIFFS DID NOT, AND CANNOT, WAIVE THE FINANCIAL REPORTING PROVISIONS OF THE FINANCIAL AGREEMENT

Defendants contend that even if there was a breach of the reporting requirements, Plaintiffs waived the enforcement of that provision. Traditionally, "[w]here a party fails to declare a breach of contract, and continues to perform under the contract after learning of the breach, it may be deemed to have acquiesced in an alteration of the terms of the contract, thereby barring its enforcement." Garden State Bldgs., L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 524 (App. Div. 1997). Further, "[w]aiver, under New Jersey law, involves the intentional relinquishment of a known right, and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Id. at 523 (quoting Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988)). Our Courts have held that "[w]here [a] statute sets forth the procedure to be followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure." MEPT Journal Square Urban Renewal, LLC v. City of Jersey City, 455 N.J. Super. 608, 624 (App. Div. 2018). "[A] contract provision that is contrary to the requirements of a statute is void." Bryant v. Atlantic City, 309 N.J. Super. 596, 629 (App. Div. 1998).

The LTTEL requires by law that Financial Agreements between municipalities and urban renewal entities contain a yearly reporting provision. *See* N.J.S.A. § 40A:20-9(d) (1992). For

Plaintiffs to waive the reporting requirement, they would have to violate the LTTEL. The Appellate Division considered the power of a municipality to act outside the scope of the LTTEL in MEPT Journal Square Urban Renewal, LLC v. City of Jersey City. At issue in that case was whether the municipality could condition their assent to a Financial Agreement on a prepayment of a portion of the annual service charge to the City. MEPT Journal Square Urban Renewal, LLC, 455 N.J. Super. at 622-26. Interpreting N.J.S.A. § 40A:20-9, the Appellate Division found that the municipality overstepped its bounds by conditioning the tax abatement on this prepayment agreement. Id. at 625. The Court explained that "'a municipality is a creature of the Legislature, and as such is a government of enumerated powers which can act only by delegated authority.' … Thus, 'while a public body may make contracts as an individual, it can only do so within its express or implied powers.'" Id. (quoting Inganamort v. Ft. Lee, 72 N.J. 412, 417 (1977) and Kress v. La Villa, 335 N.J. Super. 400, 410 (App. Div. 2000)). Since the prepayment method at issue in that case "was not envisioned, or even remotely contemplated, by the Legislature when it adopted the LTTEL," the Appellate Division found that the municipality could not enter into such an agreement. Id. at 626.

A similar principle governs this situation to accomplish the intended purpose of the LTTEL. Here, the municipality could not waive its right to receive the financial reports required by N.J.S.A. § 40A:20-9. As discussed in MEPT Journal Square Urban Renewal, LLC, a municipality can enter contracts only to the extent and on terms that the legislature permits. Were the Court to accept Defendants argument that the municipality could waive the requirement to receive yearly financial reports from the Urban Renewal Entity, it would allow municipalities to act contrary to the LTTEL, something New Jersey law forbids. Therefore, Plaintiffs could not as a matter of law waive the requirement for submission of these reports, since this is mandated by the LTTEL.

D. PLAINTIFFS' UNJUST ENRICHMENT CLAIM

Defendants move for summary judgment on Plaintiffs claims for unjust enrichment against Victor GP Corp. and Victor Associates. For a party "[t]o establish a claim for unjust enrichment, [they] must demonstrate that the opposing party 'received a benefit and that retention of that benefit without payment would be unjust.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016). This quasi-contract doctrine also "requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." Id. "[T]he most common circumstance for application of unjust enrichment is when a plaintiff has not been paid despite having a reasonable expectation of payment for services performed or a benefit conferred." Cty. of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 550 (App. Div. 2004). *See also* Wanaque Borough Sewage Auth. v. Twp. of W. Milford, 144 N.J. 564, 574 (1996) ("In the case of actual contracts the agreement defines the duty, while in the case of quasi contract the duty defines the contract"). Unjust enrichment claims have been employed "when corrupt means have been employed to obtain a governmental contract," Cty. of Essex, 373 N.J. Super. at 550. In those cases "the concept of unjust enrichment has been used to deny the wrongdoer any profit from the transaction and thereby deter such conduct." Id.

Defendants contend that the Ground Lease structure was completely disclosed to Plaintiffs and that Plaintiffs understood that the Victor Project could not go forward without the Financial Agreement. Since the City knew exactly what it was getting into and knew the consideration that they were receiving in exchange for entering into this agreement, the $200,000 Annual Service Charge, Defendants assert that Plaintiffs cannot sustain an unjust enrichment claim. Plaintiffs contend that to the extent that Victor Associates or Victor GP Corp. received the Excess Net Profits the City was entitled to receive, the City would have expected payment from those entities, and the fact that they retained those monies is unjust. Plaintiffs support this contention by asserting that 1) the Application and Financial Agreement represented that Victor Associates was the sole member of Victor Urban Renewal, and Dranoff signed all of the relevant documents as the head of Victor GP Corp., Victor Associates, and Victor Urban Renewal; 2) that Victor Associates breached its own operating agreement with Victor Urban Renewal by failing to maintain separate records for both entities and attempting to conceal financial data from the City; and 3) that Victor Associates and Victor GP Corp. submitted consolidated financial statements to the City in September 2018 in an effort to further conceal Victor Urban Renewal's Excess Net Profits from the City.

Similar to the tort claims alleged, there is a dispute of material fact precluding summary judgment. The parties dispute revolves around whether it was unjust for Victor GP Corp. and Victor Associates to retain any alleged Excess Net Profits owed to the City of Camden, but diverted to these entities. The parties dispute Camden's knowledge of Victor Associates and Victor GP Corp.'s role in the Victor Project. The parties also dispute the propriety of Defendants failure to submit financial reports and the alleged lack of separateness between Victor Associates and Victor Urban Renewal. These fact issues preclude the Court from determining as a matter of law that Plaintiffs cannot sustain an unjust enrichment claim.

E. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Defendant moves for summary judgment on Plaintiff's claims alleging a breach of the implied covenant of good faith and fair dealing. Defendants also move for summary judgment as to all claims asserted against Victor GP Corp. or Victor Associates since they are not parties to the Financial Agreement between the City of Camden and Victor Urban Renewal. Since these entities were not parties to the Financial Agreement, the Court will grant partial summary judgment to these parties on the breach of contract claims and the breach of implied covenant claims only. Cumberland Farms, Inc. v. New Jersey Dept. of Environmental Protection, 447 N.J. Super. 423, 443 (App. Div. 2016) (holding that where there is no contract, there can be no breach of the implied covenant of good faith and fair dealing).

Every contract in New Jersey has an implied covenant of good faith and fair dealing to which every party to a contract is bound. Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 191 (App. Div. 2017) (citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001); Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005)). Though "this covenant 'cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term.'" Id. (quoting Wilson, 168 N.J. at 244). "The covenant requires that parties to a contract refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the benefits of the contract." Id. (quoting Brunswick Hills Racquet Club, Inc., 182 N.J. at 224-25).

To establish that a party breached the covenant, a party must prove "bad motive or intention" on the part of breaching party. Brunswick Hills Racquet Club, Inc., 182 N.J. at 225 (quoting Wilson, 168 N.J. at 251). Further, "[t]he party claiming a breach of the covenant of good faith and fair dealing 'must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.'" Id. Generally "'[s]ubterfuges and evasions' in the performance of a contract violate the covenant of good faith and fair dealing 'even though the actor believes his conduct to be justified.'" Id. (quoting Restatement (Second) of Contracts, § 205 cmt. d (Am. Law Inst. 1981)). A determination of whether a party has breached the covenant of good faith and fair dealing is a fact-sensitive determination. Id.

Defendants assert that they could not have breached the covenant because they have been honest with Plaintiffs throughout their contractual relationship, and Defendants have acted according to their representations. In support of this contention they assert that Victor Urban Renewal disclosed in the Application and the Financial Agreement that it did not intend to earn a profit. They further assert that did not intend to deprive Plaintiffs of anything since the parties negotiated a flat $200,000 annual service charge, and Victor Urban Renewal openly structured the project so that would be the case. Much like the fraud and misrepresentation claims, Plaintiffs contend the opposite. They point to the factual record and assert that:

> the record demonstrates [Victor Urban Renewal] ignored its reporting obligations under the Financial Agreement for 14 years, submitted financial records demonstrating the Excess Net Profits owed to the City, submitted "revised" and "corrected" financial reports after realizing it owed Excess Net Profits to the City, failed to provide a copy of the Ground Lease to the City until it unilaterally relied on the Ground Lease to eliminate Excess Net Profits, and waited 16 years to advise the City for the first time that "its sole financial obligation" to the City was "to make payment of the Annual Service Charge." Pls.' Br. at 51.

Plaintiffs set forth a 12-bullet point list of other factual allegations and assertions in support of their argument that summary judgment on this claim should be denied. Given the fact-sensitive nature of this type of claim, and given that the parties have two conflicting interpretations of the facts in this case, the Court cannot grant summary judgment on this claim. *See* Brunswick Hills Racquet Club, Inc., 182 N.J. at 225-26 ("[w]e cannot catalogue the myriad forms of conduct that may constitute a violation of the covenant of good faith and fair dealing. Each case is fact sensitive").

F. TORT CLAIMS

1. PLAINTIFFS' FRAUD AND MISREPRESENTATION CLAIMS

Plaintiffs' complaint asserts fraud in the inducement, fraud, and misrepresentation against Victor Urban Renewal. Defendants argue that Plaintiffs cannot state a claim for fraud or misrepresentation for two reasons. First, they claim Defendants did not misrepresent any material facts. Second, Defendants contend that they did not intend to deceive Plaintiffs. For the reasons set forth below, there are genuine issues of material fact precluding summary judgment.

For a party to prove fraud they must show "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Bove v. AkPharma Inc., 460 N.J. Super. 123, 144 (App. Div. 2019) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). A party must establish these elements through clear and convincing evidence. Stoecker v. Echevarria, 408 N.J. Super. 597, 617 (App. Div. 2009) (quoting Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)).

Defendants first contend that Victor advised Tom Corcoran, the CEO of Cooper's Ferry, that Victor Urban Renewal would be entering a net lease to ensure that Victor Urban Renewal would not earn profits, and that this was sufficient to put the City on notice of the ground lease. They base this contention on their assertion that Mr. Corcoran shared this information with officials in Camden's administration, which is disputed by the City. They further assert that Camden officials admit Victor Urban Renewal's Application stated that it did not expect to earn a profit. Plaintiffs counter these assertions by arguing that Victor Urban Renewal's representations in the PILOT application indicated that Victor Associates would bear the overwhelming majority of expenses, leaving open the possibility that Victor Urban Renewal could earn a net profit. They contend that this representation was contradicted by the Ground Lease entered into between Victor Urban Renewal and Victor Associates. They assert the ground lease prevented Victor Urban Renewal from ever being able to earn a profit. Plaintiffs further contend that Defendants omission of the nature of the Ground Lease during the negotiation of the Financial Agreement was a material omission. Regarding the assertion that Victor Associates did not bear the overwhelming majority of project costs, Defendants respond that Victor Associates did so to the tune of $78.8 million, or 83% of the construction and operating expenses of the project. Defendants assert that even if construction costs were not included, Victor Associates still paid the majority of the operating expenses for the project.

This factual dispute is stark. Defendants allege that they informed the City that they intended to make no profit and that Victor Associates bore at a minimum the majority of the project costs. Plaintiffs contend that Defendants represented the opposite to the City respecting Victor Urban Renewal's ability to make a profit. This is the type of fact dispute that the Court cannot resolve on summary judgment.

Defendants' second argument is that it did not intend to mislead Plaintiffs. To satisfy the intent element of a fraud claim, plaintiff must prove that a defendant sought to obtain an undue advantage from their misrepresentation. Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 624-625 (1981). To prove scienter one must show 1) knowledge of the falsity of the representation, and 2) intention to obtain an undue advantage from the false representation. Id.

In support of their argument that they did not intend to mislead Plaintiffs, Defendants assert that eight Camden officials admitted that Victor Urban Renewal stated their intent to not earn a profit when it submitted its application. Defendants further dismiss the import of the claim that Victor Urban Renewal never sent a copy of the ground lease to Camden prior to entering into the ground lease. Defendants argue this is the case because either Camden had the ground lease and lost it, or that Camden had knowledge that the purpose of the ground lease was to lock the annual service charge payable to the City at $200,000. Lastly, Defendants argue that such an intent to deceive is undercut because they sent project pro formas to potential lenders, including the Delaware River Port Authority.

Plaintiffs respond to these assertions by contending that while Dranoff was negotiating the Financial Agreement with the City, he was also negotiating the ground lease that Victor Urban Renewal and Victor Associates would be entering into with himself. Further they assert that Victor Urban Renewal intentionally withheld the ground lease and the pro forma for the Victor project from the City despite providing it to various lenders. They assert that the withholding of the pro forma from the City was critical because it showed the various ways the Victor Project would be profitable for Dranoff. Finally, Plaintiffs argue that Defendants failure to provide the City with financial reports during the entire life of the Victor Project prior to March 2018 prevented the City from discovering the expense allocation contained in the ground lease.

Giving the non-moving party the benefit of all possible favorable inferences, the alleged conduct could be found to be part of a scheme to hide this information from the City. This factual dispute is sufficient to preclude summary judgment.

2. THE CIVIL CONSPIRACY CLAIMS

Defendants move for summary judgment on Plaintiffs civil conspiracy claims with respect to both the Victor Project and Radio Lofts. The New Jersey Supreme Court has defined this cause of action as follows:

> In New Jersey, a civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." *Morgan v. Union County Bd. of Chosen Freeholders*, 268 N.J. Super. 337, 364, 633 A.2d 985 (App.Div.1993), *certif. denied,* 135 N.J. 468, 640 A.2d 850 (1994)(quoting *Rotermund v. U.S. Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir.1973)(internal quotations omitted)). "It is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988). Most importantly, the "gist of the claim is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" *Morgan*, *supra*, 268 N.J. Super. at 364, 633 A.2d 985 (quoting *Bd. of Educ. v. Hoek*, 38 N.J. 213, 238, 183 A.2d 633 (1962)); *see also Weil v. Express Container Corp.*, 360 N.J. Super. 599, 614, 824 A.2d 174 (App.Div.), *certif. denied,* 177 N.J. 574, 832 A.2d 324 (2003).

Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177-78 (2005).

To prove a civil conspiracy, plaintiff must establish an underlying tort, since civil conspiracy is not an actionable claim in and of itself. Tynan v. GM Corp., 248 N.J. Super. 654, 668 (App. Div. 1991) rev'd on other grounds, 127 N.J. 269 (1992); Morgan, 268 N.J. Super. at 364 (quoting Bd. of Educ. v. Hoek, 38 N.J. 213, 238 (1962)) (further citation omitted). See also LoBiondo v. Schwartz, 199 N.J. 62, 102 (2009) (analyzing civil conspiracy generally and finding that conduct of an attorney assisting a client with violating the Uniform Fraudulent Transfer Act could be a basis for the victimized bank to pursue the attorney on a civil conspiracy theory).[5]

Defendants contend that Plaintiffs have not offered evidence that Dranoff committed an underlying tort. Plaintiffs respond by asserting that their complaint asserts that Dranoff acted in concert with the other Defendants, Victor Urban Renewal, Victor Associates, and Victor GP Corp. to deprive the City of Excess Net Profits. Plaintiffs then set forth 12 point bullets with factual allegations underpinning their theory of civil conspiracy against Dranoff, Victor Urban Renewal, Victor GP Corp., and Victor Associates. Pls.' Br. at 56-57.

---

[5] New Jersey law recognizes "the applicability of the participation theory of personal liability for the tortious conduct of corporate officers." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). There the Court explained:

> [T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.
>
> New Jersey cases that have applied the participation theory to hold corporate officers personally responsible for their tortious conduct generally have involved intentional torts. More specifically, the majority of the cases have involved fraud and conversion. *See, e.g.*, *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J.Super. 372, 382, 652 A.2d 1238 (App.Div.1995)(holding that defendants could be personally liable for alleged conversion even if they were acting in corporate capacity); *Van Dam Egg Co. v. Allendale Farms*, 199 N.J.Super. 452, 457, 489 A.2d 1209 (App.Div.1985) (declining to dismiss fraud complaint against corporate officer even though it did not allege that he personally benefitted from allegedly wrongful acts); *Robsac Indus., Inc. v. Chartpak*, 204 N.J.Super. 149, 156, 497 A.2d 1267 (App.Div.1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation notwithstanding that liability also was imposed on corporation); *McGlynn v. Schultz*, 95 N.J. Super. 412, 417, 231 A.2d 386 (App.Div.1967)(finding corporate officers personally liable for knowingly acquiescing in and ratifying alleged conversion).

Id. at 303-04.

Dranoff argues that the pleadings only assert claims against the entities, and not against him individually. The allegations throughout this case have been directed against both Dranoff individually and the entities. To the extent the complaint and subsequent amendments are unclear, the claims set forth in earlier motions and discovery were directed to Dranoff and the defendant entities. Dranoff has been aware of the individual claims against him and conducted discovery on this issue. To the extent the pleadings are deficient, this can be cured pursuant to R. 4:9-2.

The Court finds that there are genuine issues of material fact that preclude summary judgment.[6] Defendants first argue that the Court should grant summary judgment because the torts alleged by Plaintiffs against Defendants do not survive scrutiny. For the reasons discussed earlier in this decision, those claims survive this summary judgment motion. Defendants further argue that the ground lease structure at issue was lawful, and thus Defendants did not commit an unlawful act. The lawfulness of the ground lease structure is not at issue in this case. Rather, the issue is whether this ground lease structure was properly disclosed in the Financial Agreement,

---

[6] New Jersey law recognizes "the applicability of the participation theory of personal liability for the tortious conduct of corporate officers." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). There the Court explained:

> [T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.
>
> New Jersey cases that have applied the participation theory to hold corporate officers personally responsible for their tortious conduct generally have involved intentional torts. More specifically, the majority of the cases have involved fraud and conversion. *See, e.g.*, *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J.Super. 372, 382, 652 A.2d 1238 (App.Div.1995)(holding that defendants could be personally liable for alleged conversion even if they were acting in corporate capacity); *Van Dam Egg Co. v. Allendale Farms*, 199 N.J.Super. 452, 457, 489 A.2d 1209 (App.Div.1985) (declining to dismiss fraud complaint against corporate officer even though it did not allege that he personally benefitted from allegedly wrongful acts); *Robsac Indus., Inc. v. Chartpak*, 204 N.J.Super. 149, 156, 497 A.2d 1267 (App.Div.1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation notwithstanding that liability also was imposed on corporation); *McGlynn v. Schultz*, 95 N.J. Super. 412, 417, 231 A.2d 386 (App.Div.1967)(finding corporate officers personally liable for knowingly acquiescing in and ratifying alleged conversion).
>
> Id. at 303-04.

and whether the calculation of project costs was adequately disclosed in the Financial Agreement. With these factual issues present, the civil conspiracy claims against Defendants cannot be resolved on motion.

Defendants further contend that they are entitled to summary judgment for any conspiracy claims arising from the Radio Lofts Option. They assert they are entitled to summary judgment on the basis that Plaintiffs have not alleged an underlying tort related to the Option. They argue that Plaintiffs are asking the Court to find that Victor Urban Renewal's refusal to allow the CRA to terminate the agreement is a tort. They claim that CRA's attempted termination of the Option was unlawful because 1) CRA was responsible to obtain funding to remediate the Radio Lofts building and could not terminate the Option because it was unable to secure such funding; and 2) the CRA never gave the proper notice and time to cure for such a termination. Plaintiffs respond contending that they had the right to terminate the option. They assert that the CRA was not obligated to use its own funds to remediate Radio Lofts, and that the Option set conditions including obtaining authorizations from the NJ DEP and the removal of a deed restriction from Lockheed-Martin that encumbered the property. Plaintiffs contend that an associated agreement, a Redevelopment Agreement, was entered into between the parties that facilitated the Option to purchase Radio Lofts. Plaintiffs assert that if settlement on the property did not occur five years after entry into the Redevelopment Agreement, then the CRA had the right to terminate the Redevelopment Agreement. Plaintiffs then set forth a series of factual allegations that led to the alleged failure of Radio Lofts as a residential project, which led to the termination of the Option by the CRA.

Plaintiffs do not allege an underlying tort committed by Defendants with respect to the Radio Lofts Option itself. An underlying tort is a requirement to prove a civil conspiracy. See Tynan, 248 N.J. Super. at 668; Morgan, 268 N.J. Super. at 364. Plaintiffs do not allege that Defendants engaged in tortious conduct with respect to the Radio Lofts Option. Rather they allege that Defendants failed to comply with the terms of the Option. This cannot be the basis for a civil conspiracy claim. Plaintiff does allege that tortious conduct related to the Financial Agreement provides a basis to terminate the option. They assert that the two agreements are interrelated. This ignores that the Option Agreement is with the CRA. These were separate agreements. There were no reporting requirements related to the CRA, only the City. The Option was not conditioned upon the Victor Building project. There are no facts presented that would support a civil conspiracy claim related to the Radio Lofts Option, and summary judgment will be granted limited to the Option Agreement.

F. TERMINATION OF THE OPTION

Plaintiffs moves for summary judgment on the issue whether the Radio Lofts Option was lawfully terminated. They contend that they had the right to terminate the Redevelopment Agreement between CRA and Dranoff Properties because settlement did not occur in a timely fashion, and Defendants could not satisfy conditions required to avoid termination under the Option. Plaintiffs rely on ¶ 2.2 of the Redevelopment Agreement. That Paragraph provides as follows:

> [Dranoff Properties] shall be obligated to complete the settlement for the conveyance of the Property in accordance with, and subject to the satisfaction of, the provisions of Paragraph 3(b) of the Option Agreement …, provided however that if such settlement shall not have occurred within five (5) years after the date of this Agreement, the [CRA] shall have the right to terminate this Redevelopment Agreement thirty (30) days after written notice of such intention to [Dranoff Properties], unless [Dranoff Properties] shall certify to the reasonable satisfaction of the [CRA], that it is proceeding with all due diligence to satisfy any remaining conditions to such settlement (as set forth in said Option Agreement) within such reasonable additional period of time as [Dranoff Properties] shall specify. [Dranoff Ex. 47 ¶ 2.2].

Plaintiffs argue that Defendants could not certify to the reasonable satisfaction of the CRA that Defendants were proceeding with diligence with respect to the Radio Lofts project. They make a variety of factual allegations they claim lead to the conclusion that the Radio Lofts building failed as a residential project.

Defendants argue that Plaintiffs could not lawfully terminate the option. They contend that Plaintiffs could not terminate the option due to the inability of Dranoff Properties to seek funds to remediate Radio Lofts, and assert that Plaintiffs did not provide them with proper notice and an opportunity to cure. Defendants argue that the contract supports their position.

The issue here is not whether proper notice and an opportunity to cure were given, nor whether CRA or Dranoff Properties was obligated to fund the environmental remediation of Radio Lofts. Rather, the issue is whether the CRA acted lawfully when it decided to terminate the Option after receiving correspondence from Dranoff on May 11, 2018. Over five years had passed since the parties entered the Redevelopment Agreement in 2006 at the time the CRA sought to terminate the agreement. Thus, based on the provisions of ¶ 2.2 of the Redevelopment Agreement, the only question that remains is whether the letter Dranoff submitted to the CRA reasonably satisfied them that Dranoff Properties was working to satisfy the remaining conditions with due diligence, and whether the reasonable time offered by Dranoff Properties satisfied the CRA.

What precludes summary judgment on the question whether the Option was lawfully terminated is the word "reasonably". That term, in the context of this paragraph, limits the ability of the CRA to terminate the Option. Thus it must act in accordance with reason when it determines whether or not they believe that Dranoff Properties is able to carry out its obligations under the Redevelopment Agreement and the Option. Plaintiffs set forth in detail their argument why they believe the CRA acted reasonably in its termination of the Option. Defendants do not directly address this issue. Despite this divide, the material facts that Plaintiffs rely upon in making their argument that the CRA acted reasonably in terminating the Option are mostly in dispute. <u>See</u> Pls. Br. at 61-62; Pls.' Stmt. of Material Facts ¶¶ 316-17, 319-23, 325-26, 330; Defs.' Resp. to Pls.' Stmt. of Material Facts ¶¶ 316-17, 319-23, 325-26, 330. Given the fact sensitive nature of a determination of what is reasonable under these circumstances, the different inferences which can be drawn from those facts, and the factual disputes which are present, issues of fact preclude summary judgment.

V. CONCLUSION

The Court finds that there is a factual dispute whether Victor Urban Renewal owes Plaintiffs excess net profits under the LTTEL. The Court holds that project costs to be included in the allowable net profit calculation requires 1) that they must be expended by the entity itself and, 2) that such project costs are authorized by the Financial Agreement. The Court also concludes that the calculation of excess net profits is a cumulative calculation that is recalculated on a yearly basis. Further, the Court holds that Plaintiffs claims prior to 2008 are barred, and equitable tolling cannot save their claims with respect to any claim of breach of the reporting requirements or of excess net profits.

The Court also finds there are material facts in dispute on the issue whether Victor Urban Renewal breached its reporting requirements to the City of Camden. Plaintiffs' claims of unjust enrichment, fraud, and misrepresentation present fact questions sufficient to survive summary judgment. Plaintiffs' claims of civil conspiracy relating to the Victor Building, survive summary judgment. Plaintiffs' claims alleging civil conspiracy arising out of the Radio Lofts Option Agreement do not survive summary judgment and are dismissed. Finally, the Court concludes that there are genuine issues of material fact whether Plaintiffs acted reasonably when they attempted to terminate the Option Agreement, and whether Dranoff Properties acted with due diligence to satisfy all requirements and conditions under the Option.