

APPEAL NUMBERS 23-CV-933 & 24-CV-201
IN THE DISTRICT OF COLUMBIA COURT OF APPEALS



Clerk of the Court
Received 03/28/2024 03:03 PM
Filed 03/28/2024 03:03 PM

CARL BERNSTEIN

Appellant-Defendant,

vs.

LARRY HUANG, *et al.*

Appellees-Plaintiffs.

**On appeal from the Superior Court of the District of Columbia
(Judge Yvonne Williams)
2018-CA-006949-B**

APPELLANT-DEFENDANT CARL BERNSTEIN'S OPENING BRIEF

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CARL BERNSTEIN
v.
LARRY HUANG, et al.
23-CV-933 & 24-CV-201

LIST OF PARTIES AND COUNSEL

Parties

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2. Larry Huang (Appellee-Plaintiff)
3. Jim Huang (Appellee-Plaintiff)
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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant-Defendant Carl Bernstein is a human being, and therefore, Rule
26.1 does not apply.

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JURISDICTION¹

This appeal is from the order dated April 17, 2019 that denied Carl’s motion to dismiss the Huangs’ amended complaint, the order dated October 20, 2020 that denied Carl’s motion for summary judgment with regard to all claims in the Huangs’ amended complaint, the order on liability after trial dated August 30, 2023, and the monetary judgment dated November 3, 2023. These are final orders. On November 7, 2023, Carl filed a notice of appeal with regard to these orders. The Court of Appeals Appeal Number for these orders is 23-CV-933.

On March 4, 2024, the trial court entered an order granting the Huangs’ motion for attorneys’ fees based on its prior findings (in the August 30, 2023 and November 3, 2023 post-trial orders). This order is also a final order. That same day, March 4, 2024, Carl filed a notice of appeal of that order and the Court of Appeals Appeal Number for this order is 24-CV-201.

¹ This Brief will follow the naming convention used by the Superior Court with regard to the parties: “Carl” is Appellant-Defendant Carl Bernstein and “the Huangs” [Appellees-Plaintiffs] are the collective members of the Huang Family – Jim (the father), Yungshi (the mother), Larry (the son) and Samira (Larry’s wife). The individual members of the Huang family will be referred to by their first names. Geoffrey Kuck (who also managed the project) will be referred to as “Geoffrey.” The 1436 Foxhall Road, L.L.C. will be referred to as the “1436 Foxhall Road LLC.” The Consumer Protection Procedures Act will be referred to as the “CPPA.”

The numbers inside brackets indicate the page number of the Joint Appendix that supports the statement immediately preceding the brackets.

On March 14, 2024, the Court of Appeals issued an order, *sua sponte*, that consolidated the two appeals (23-CV-933 and 24-CV-201).

The parties' Joint Appendix filed on March 6, 2024 contains all docket entries (including all docket entries related to the attorneys' fee award) and the parties' briefs will address all issues presented in both Appeal Numbers (23-CV-933 and 24-CV-201).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May a claim for fraud or for violations of the CPPA survive where the complaint failed to specify what exactly the defendant said or did not say that led to the claims?
2. Must a plaintiff prove each and every element of claims for fraud and for violations of the CPPA?
3. May a plaintiff be held liable for fraud or for violations of the CPPA where the contract at issue contained an integration clause?
4. Must a plaintiff in a CPPA case address all elements of this claim at trial?
5. May the seller of a home be held responsible for the negligence of a third-party settlement agent in recording liens?
6. May a judgment for fraud or for violations of the CPPA be based on payments made by the plaintiff pursuant to the contract at issue where the trial

court did not find that the defendant committed fraud or violated the CPPA with regard to these payments?

STATEMENT OF THE CASE

This case involves the sale of a to-be-constructed home from the 1436 Foxhall Road LLC to Larry Huang and his wife, Samira Huang, and Larry Huang's parents, Jim Huang and Yunzhi Shi Huang. The 1436 Foxhall Road LLC was owned in equal shares by FWI Development, LLC and Cheshire Homes, LLC. FWI Development, LLC is owned by Geoffrey Kuck. Cheshire Homes, LLC is owned by Carl Bernstein and his wife. Carl and Geoffrey, through their LLCs, were both "managers" of the 1436 Foxhall Road LLC who would share in the profits and losses of the 1436 Foxhall Road LLC. The sale of this home was governed by a contract dated April 21-26, 2017. Carl was not listed as the "seller" of this home, nor was he a party to this contract. This contract contained an integration clause that stated:

¶34. ENTIRE AGREEMENT: This Contract will be binding upon the parties and each of their respective heirs, executors, administrators, successors and permitted assigns. The provisions not satisfied at Settlement will survive the delivery of the Deed and will not be merged therein. This Contract, unless amended in writing, contains the final and entire agreement of the parties and the parties will not be bound by any terms, conditions, oral statements, warranties or representations not herein contained. The interpretation of this Contract will be governed by the laws of the jurisdiction where the Property is located.

After the 1436 Foxhall Road LLC and the Huangs executed this contract, the parties entered into several “change orders” that covered items such as payment terms, additional items to be constructed on or in the home, and other upgrades. These “change orders” occurred over several months beginning in April 2017 and ending in May 2018. Carl was the project manager of this construction on behalf of the 1436 Foxhall Road LLC until mid-2018 when Geoffrey took over as project manager. Thus, Carl was not liable for Geoffrey’s failure to deliver the home to the Huangs as he was no longer managing the property. Nevertheless, Carl attempted to negotiate with the Huangs to increase the sales price of the home in order for them to take clear title to the property, and/or to negotiate with secured lien holders and sub-contractors to adjust the liens, but the Huangs’ attorney, Vernon Johnson, would not permit his clients to negotiate with Carl.

When the 1436 Foxhall Road LLC did not close on the home as required by the parties’ contract, the Huangs filed suit against the 1436 Foxhall Road LLC, Carl, Geoffrey, and various entities owned by them resulting in the amended complaint that was the subject of the trial in this action. This amended complaint requested monetary damages and declaratory relief and set forth various causes of action, including for fraud, breach of contract, violations of the District of Columbia Consumer Protection Procedures Act, breach of fiduciary duty, conversion, and conspiracy. The filing of this complaint resulted in the 1436

Foxhall Road LLC filing for bankruptcy protection. Carl filed a motion to dismiss the Huang's complaint. The trial court denied this motion to dismiss. The parties proceeded to discovery and narrowed the claims for trial by dismissing all defendants except for Carl, by voluntarily withdrawing Samira Huang as a plaintiff, and by dismissing all claims except for fraud and violations of the CPPA. After the remaining parties took depositions of Larry Huang, Jim Huang, Carl, Geoffrey, and several other individuals, discovery closed. Carl then filed a motion for summary judgment. The trial court denied this motion for summary judgment and the parties proceeded to a two-day bench trial on November 2-3, 2022.

After the filing of post-trial briefs, the trial court entered judgment for the Huang's in the amount of \$1,275,193.00 and awarded \$287,966.51 in attorney's fees. Carl filed notices of appeal with regard to the orders denying the motion to dismiss and the motion for summary judgment, the memorandum opinion on liability, the monetary judgment, and the judgment for attorneys' fees.

STATEMENT OF FACTS

General Background of the Case

This case involves the sale of a to-be-constructed home from the 1436 Foxhall Road LLC to the Huang's. The 1436 Foxhall Road LLC was owned in equal shares by FWI Development, LLC and Cheshire Homes, LLC. [697]. FWI Development, LLC is owned by Geoffrey Kuck. [698]. Cheshire Homes, LLC is

owned by Carl Bernstein and his wife. [697-698]. Carl and Geoffrey, through their LLCs, were both “managers” of the 1436 Foxhall Road LLC who would share in the profits and losses of the 1436 Foxhall Road LLC. [851].

The Parties’ Contract

The sale of this home was governed by a contract dated April 21-26, 2017. [328-362]. This contract does not list Carl as the “seller” of this home, nor was he a party to this contract. [328-362]. No provision of this contract prohibits the 1436 Foxhall Road LLC (or Carl individually) from using funds provided by the Huangs on projects unrelated to the home at issue. [328-362]. This contract did not prohibit Carl from taking a “salary” or “draw.” [328-362]. This contract did not prohibit paying off any prior liens on this or any other project in which Carl had a financial interest. Rather, this contract only required the 1436 Foxhall Road, LLC to deliver clear title to the Huangs at closing. [328-362].

This contract contained an integration clause that stated:

¶34. ENTIRE AGREEMENT: This Contract will be binding upon the parties and each of their respective heirs, executors, administrators, successors and permitted assigns. The provisions not satisfied at Settlement will survive the delivery of the Deed and will not be merged therein. This Contract, unless amended in writing, contains the final and entire agreement of the parties and the parties will not be bound by any terms, conditions, oral statements, warranties or representations not herein contained. The interpretation of this Contract will be governed by the laws of the jurisdiction where the Property is located. [335].

After the 1436 Foxhall Road LLC and the Huangs executed this contract, the parties entered into several amendments and “change orders” that covered items such as payment terms, additional items to be constructed on or in the home, and other upgrades [363-375]. These “change orders” occurred over several months beginning in April 2017 and ending in May 2018. [363-375].

The Huangs’ Complaint

When the 1436 Foxhall Road, LLC did not close on the home as required by the parties’ contract, the Huangs filed suit against the 1436 Foxhall Road LLC, Carl, Geoffrey, and various entities owned by them resulting in the amended complaint that was the subject of the trial in this action. [443]. [For simplicity, the amended complaint will hereinafter be referred to as “the complaint.”]. This complaint requested monetary damages and declaratory relief, and set forth various causes of action, including for fraud, breach of contract, violations of the CPPA, breach of fiduciary duty, conversion and conspiracy. [443]. The filing of the Huangs’ original complaint resulted in the 1436 Foxhall Road, LLC filing for bankruptcy. [1-3].

Carl’s Motion to Dismiss

Carl filed a motion to dismiss the Huangs’ complaint based on the grounds that (1) the complaint failed to state with particularity the circumstances constituting fraud; (2) the contract at issue had an integration clause; and (3) any

statement Carl made was an opinion or prediction of a future event upon which a plaintiff may not legally rely. [71-94]. In an order dated April 17, 2019, the trial court denied Carl's motion to dismiss on the grounds that the complaint "sets forth that [Geoffrey] and [Carl] made representations that funds advanced by the Plaintiffs would be put towards either the construction of the home or purchase of the real property [order 5], but a review of the pages of the complaint cited by the Court [pages of complaint found at 13-14] fails to reveal any specific statement by Carl that would expose him to liability for fraud or violations of the CPPA. [153-163].

Carl's Motion for Summary Judgment

The parties proceeded to discovery and narrowed the claims for trial by dismissing all defendants except for Carl, by voluntarily withdrawing Samira Huang as a plaintiff, and by dismissing all claims except for fraud and violations of the CPPA. [95-97, 147-152]. After the remaining parties took depositions of Larry Huang, Jim Huang, Carl, Geoffrey, and several other individuals, discovery closed. [183-274].

After the parties completed discovery, which included depositions of the parties, Carl filed a motion for summary judgment. [183-274]. Carl argued in his motion for summary judgment that (1) the contract at issue did not preclude him from taking funds paid by the Huangs for his "salary" or "draw" (a fact that the

Huang conceded) and (2) the contract at issue did not preclude him from “commingling” funds received from the Huangs with funds used by him to construct other homes (a fact that the Huangs conceded). [183-197]. Carl’s motion for summary judgment listed admissions of Larry Huang during his deposition, including the following:

a. Q: “Are you aware of any facts that indicate that Carl had knowledge that his statements were false?” A: “Yes.” Q: “And what is that based on?” A: “Based on the discoveries. They knew that before this house was even sold, I **think** [emphasis added] there was an e-mail that came out from the bank that says – I **think** [emphasis added] Carl mentioned to [Geoffrey] something about I think we found a solution, doing, you know, some kind of solution for our issues so . . . [ellipsis in original].” [224].

b. “I called my dad and we had a discussion and says we need to give this another try because we were going to walk away because of this lack of an agreement, and I was saying that, hey, listen, I **think** [emphasis added] Carl told me that he can deliver, he seems to be genuine and honest about his intentions, so let’s talk to him again. Let’s make a deal.” [223].

c. Q: “Moving on to paragraph 23 [of the 1st amended complaint], can you tell me which statements that Carl made that were made to trick you into believing that he and [Geoffrey] would ‘take good care of the plaintiffs’ funds, that they would manage the construction appropriately to protect those funds and apply them properly, that the purchase price would cover all of the cost incurred prior to the execution of the sales contract, and that they would ensure a genuine and sincere business relationship.” A: “**I’m sure it’s in an email somewhere.** [emphasis added]. I mean. . . [ellipses in original]. Q: “I direct your attention to [Deposition Exhibit 1]. That is the notice of deposition. In the notice of deposition I asked you to bring any and all documents that you believe support your claims against [Carl] and any other documents that you will seek to introduce into evidence at trial. Do you have any documents today that you want to rely on?” MR. CHARDIET: “We

have such documents.” MR. SZYMKOWICZ: “Okay. Do you want to go through the documents and tell me if any of the documents, you know, reflect any misstatements that Carl made?” THE WITNESS: “Okay.” MR. CHARDIET: “While he's looking at it, I would object on the issue of -- I'll let him answer. The deposition is not a memory contest. He can't -- he's capable of telling you which documents are going to refute what you're saying. But as far as he can come up with it, I will allow him to respond, of course.” MR. SZYMKOWICZ: “Thank you. And, Mr. Chardiet, I will agree that after the deposition is over that you can look through everything in conjunction with Mr. Huang, and if there's anything that you want to supplement the record, I will be happy to do so.” [NOTE: **It is important to add that Larry Huang never supplemented his response**]. [226-227].

d. Q: “And what were the encumbrances on the house that you discovered?” A: “We discovered that there was at least \$2 million from I **believe** [emphasis added] Washington Bank or Sandy Spring Bank, another I think \$130,000 from this guy who is Carl’s friend, Lance Estes.” Q: “E-s-t-e-s?” A: “E-s-t or something. He had **some type** [emphasis added] of second trust on it from another – I **think** [emphasis added] like Fox Farm or something like that, LLC.” [228-229].

Carl’s motion for summary judgment also noted that the Huangs had no proof that he managed the project after Geoffrey took over as project manager. Moreover, Carl’s reply to the Huangs’ opposition to his motion for summary judgment pointed out that the Huangs did not file a statement of material facts in dispute pursuant to D.C. SCR-Civil 56(b)(2)(B) or citations to the record pursuant to D.C. SCR-Civil 56(c)(1). [289-290]. Nevertheless, the trial court denied Carl’s motion for summary judgment. [320-327].

Non-Jury Trial – November 2-3, 2022

The parties proceeded to a two-day non-jury trial on November 2-3, 2022.

During this trial, only two individuals testified – Larry Huang and Carl. Testimony taken at trial is summarized as follows.

A. Who is Carl Bernstein?

Carl Bernstein is 87 years old, has been involved in the field of home building for 60 years and has built over 4,000 homes. [845-846]. Other than by the Huangs, Carl has never been sued by a homebuyer or had a case filed against him for fraud. [846].

B. Carl's Multiple Statements that He Did Not Commit any Fraud²

During the trial, Carl testified numerous times about the fact that he did not commit any fraud when dealing with the Huangs, and the following exchange highlights this testimony:

Q: At the time that money came in, did you make any statements to any of the Huangs that were untrue? A: No. Q: Did you make any false representations to them concerning your abilities or the fact that you were going to build them a house? A: No. Q: Did you make any statements that were untrue as to any material fact to that contract? A: No. Q: If you didn't make any false statements, then there was no falsity or intent in your mind, was there? A: Absolutely not. Q: And you had no intention to deceive anyone? A: Absolutely not. [759]. [See also 714-715, 763-766, 768-770, 774-779, 842, 855, 864-869, 882].

² The Court ruled that this case is a fraud and CPPA case, not a fraudulent inducement case. [631-632].

C. The Construction Budgets that Carl Prepared

Carl “prepared 50 budgets” “over the life of the [the project]” and kept editing them along the way. [858]. These budgets had “profit from the beginning and there was a profit at the end. At the 50th budget, there was still a \$200,000 profit. [858-859].

D. The Amendments to the Contract, the Huangs’ Monetary Deposits and the 1436 Foxhall Road LLC’s Monetary Withdrawals

Carl testified as to the purpose of each amendment to the contract and what was done with the funds received from the Huangs, and also testified that he did not commit fraud with regard to the money received from the Huangs. [864-869].

E. The Contract Did Not Require the 1436 Foxhall Road LLC to Disclose Liens on the Property to the Huangs

At the time the contract was signed, the 1436 Foxhall Road LLC owned the land, subject to an “acquisition loan” and an “investor loan.” [701]. In total, there was approximately \$1.5 Million in debt on the property prior to the Huangs entering into the initial contract in April 2017. [758-763]. Carl testified that the “acquisition loan would have to be modified” after the contract with the Huangs was signed, “to include the construction of the house.” [701]. At the time of the contract, the 1436 Foxhall Road LLC had already started construction on the house, which was then modified to the Huangs’ specifications. [702]. After the Huangs made their initial deposit, the 1436 Foxhall Road LLC repaid an existing \$120,000 loan from the 2812

University Terrace LLC to the 1436 Foxhall Road LLC. Carl and Geoffrey (through their LLCs) moved money from one housing project that they were working on to another using an accounting system called “due to and due from,” where “we would loan money from one project to another, depending on where it was needed.” [758-763]. Carl testified that it was not normal for him to disclose any existing liens on properties with the buyer, but that Larry Huang’s father, who was a “very seasoned, acute, intelligent businessman who understands how these projects work,” “understood that there was financing involved,” and that “there was a construction loan.” [702, 763]. In any event, the contract provided that the 1436 Foxhall Road LLC would deliver “[f]ee simple title to the Property,” “free of liens,” but did not require the 1436 Foxhall Road LLC to disclose any such liens. [331].

F. The Contract did not Prohibit the 1436 Foxhall Road LLC from Shifting Money to Other Projects

Plaintiffs’ Trial Exhibit 36 was a document that the Huangs prepared for litigation that purports to be a spreadsheet showing funds moving from the 1436 Foxhall Road LLC to other entities affiliated with Carl and Geoffrey. [504-518]. During cross-examination on this exhibit, Carl testified that there were five LLCs and six houses that he and Geoffrey were working on at the same time as the Huangs’ house, and funds flowed as loans between and among these projects. [730-732]. Carl testified that Plaintiffs’ Trial Exhibit 36 is incomplete as it only “shows primarily cash out and their cash in. It doesn’t show cash in from other sources,” for example, construction loans and investor funds or payoffs of mechanics’ liens as evidenced by

Defense Trial Exhibits 5 and 6. [504-518, 534-537, 831-834, 840-842]. Carl was asked “[w]hat was the purpose of the loans into [the 1436 Foxhall Road LLC] which are reflected on [Plaintiffs’ Trial Exhibit 36] prior to the execution of the contract?” to which he responded, “There was excess cash from some of the other entities that were loaned to 1436 prior to the Huang’s contract during 2015 and 2016.” “So that was income coming in. For example, we sold 2812 [University Terrace]. We made \$500,000 to \$600,000. Some of that money was loaned to [the 1436 Foxhall Road LLC].” [504-518, 840-842]. Since the home was already under construction at the time the Huangs signed the contract, Plaintiffs’ Trial Exhibit 36 does not account for the funds used for “preparatory work.” [840-842]. Carl testified that “there wasn’t any comingling of money. It was loans back and forth to entities under the same umbrella.” [770-773].

G. The Bank’s Failure to Release Funds to the 1436 Foxhall Road LLC

Carl was asked “And during the course of construction of 1436, because of or in spite of these payments, did they have any effect on your ability or your belief that you would be able to deliver [the home] to the Huangs as originally contracted with the change orders?” to which he responded, “Absolutely not.” [770-773]. In response to the trial court judge’s questions, “[W]ere you overleveraged on all these houses?” and “Were you using the money from Mr. Huang that he was giving to you or sent for [the home] and using it on these other projects that you had?” Carl responded:

‘No.’ ‘late in the summer, there was some of his money that went to the other projects, but mostly it was construction money and/or the investor money. Now, the investor had \$250,000, which is in addition to the bank loan. So we had two million from the bank plus the investor.’ [749-754].

In response to the trial judge’s question, “[I]t was around the time of summer of 2018 that you started using some of the money that Mr. Huang had paid to pay for the costs relating to other contracts?” Carl responded, “Yes. We loaned to other entities.” [750-751]. The trial judge then asked, “So you were overleveraged?” to which Carl responded:

‘[t]he reason why these loans went out to other entities – other homes, other projects,’ was because ‘Sandy Spring Bank financed six houses. They only released three. They promised to release all six. . . . There were three houses they didn’t release for production. . . . So those are sitting there with loans on them, investors, real estate taxes and whatever. And the bank promised me if I sold 1436 that they would release these other three houses for production. They didn’t. We sold the house at a discount at 2.6, it should have been 2.9 or more. We made the deal and the bank still renege[d], would not release those three other houses. So we had to keep those three houses from going into default. We had the loans on them and investors are getting 15 percent. They had real estate taxes, insurance, maintenance, whatever.’ [751-752].

In response to the trial judge’s question, “[W]ith respect to the money that Mr. Huang, which was for the building of [the home] by the summer of 2018, you did not tell Mr. Huang that you were now using his money to pay for the other properties, did you not?” to which Carl responded, “I didn’t think I had any restriction. The contract [or the amendment] “did not restrict [use of the money].” [752]. In conclusion, had Sandy Spring Bank continued to fund the other projects as Carl

expected, there would have been no reason for Carl and Geoffrey to use money from the 1436 Foxhall Road LLC to fund these other projects in order to keep them going. [749-754].

H. The Contract did not Prohibit the 1436 Foxhall Road LLC from Paying Carl as Project Manager

The 1436 Foxhall Road LLC paid Carl \$88,500 for working as project manager on the project for a year and a half, “including weekends.” [523, 715, 862-864]. Carl testified that he did not receive any payments other than those set forth in Defense Exhibit 2. [862-864]. Carl testified that the money used as his draw was “the LLC’s money.” [715]. The contract at issue does not preclude Carl from taking a fee for his work in physically managing the project. [328-362]. Larry Huang admitted that if Carl had not physically been managing the project in person that a third party would need to and the third party would have been entitled to payment for performing that job. [640-641, 632-634]. Carl testified that the initial draws that he took came from the bank loan and the investor funds, and not from the Huangs’ funds (since the Huangs initial deposit was escrowed). [859-861]. Carl defined the term “draw” as “drawing against future profits” for “supervision, oversight, for being on the job every day,” and that in his 60 years in the construction business, this was “normal” and “how builders function.” [859-861].

I. Stewart Title’s Failure to File Liens Benefitting the Huangs

At the time the contract was entered into, there was a deed of trust on record in favor of an entity named 11326 Fox Creek Farm with a balance of \$250,000,

which was in the Second Position behind Sandy Spring Bank. [736-737, 806-814, 834-839]. An investor named Lance Estes had a recorded security interest behind 11326 Fox Creek Farm. [806-814, 834-839]. Carl informed Larry Huang of the existence of the 11326 Fox Creek Farm Deed of Trust and offered to pay off that loan in exchange, receive \$40,000 as construction upgrades, and thus, Carl intended to replace the investor [11326 Fox Creek Farm].” [779, 454-455]. There was confusion at trial whether the two “Security Second Deed[s] of Trust” (Defense Exhibits 3 and 4) related to the Huangs’ two \$250,000 payments were in the Second or Third Positions (*e.g.*, in front of or behind Lance Estes). [524-533]. At all times, Carl believed that the Huangs (and not Lance Estes) were in the Second Position based on instructions he gave to Stewart Title (which recorded the Deeds of Trust) – “[i]t says it’s the second deed of trust. I don’t know how it could be anything more than a second.” [736-737, 806-814]. It was Carl’s intention that the Huangs would be in Second Position ahead of Lance Estes. [834-842].

J. Geoffrey Took Over Management of the Project and It Was His Failures that Harmed the Huangs

Carl’s relationship with Geoffrey was not good and the pair decided to terminate their business relationship after finishing the four or five on-going projects (including the Huangs’ home). [774, 848, 850-851]. Around two or three months before the scheduled closing, Carl informed Geoffrey of a “deficiency” that could prevent closing on the Huangs’ home, to which Geoffrey responded, “[D]on’t worry, I’ll take over the project. I’ll manage it. I’ll finish it. I’ll work with Larry. If I

have to spend my own cash, I'll do it.” [711-713]. Therefore, Carl was no longer the project manager. [713-714]. By the end of the project, Sandy Spring Bank empowered Geoffrey to make decisions with regard to the 1436 Foxhall Road LLC and other projects, and Geoffrey took over the 1436 Foxhall Road LLC bank account. [713-714, 850-851]. Larry Huang admitted that Carl was “sidelined” by Geoffrey at the end of the project. [670-671, 869-871]. Carl testified that “once [Geoffrey] took over the project, the Huangs wouldn’t talk to me” and that Geoffrey told the Huangs that he (and not Carl) was managing the project. [376, 869-874]. Moreover, Plaintiffs’ Trial Exhibit 33 contains two communications from Geoffrey to Carl. The first states, in relevant part, “I can offer a solution and personally bridge the gap with our cash flow over the coming three months.” The second states:

I look forward to finishing the construction and closing the sale of [the Huangs’ home]. Although you have been managing this project, I understand that there is still work to be done to get the property finished, and [the 1436 Foxhall Road LLC] does not have sufficient funds to complete the work and close the sale. . . . I am proposing the following solution . . . :

3. The buyer wants me to finish this work, and I intend to get it done ASAP – and I have given the buyer such assurances.

[Emphasis added] . . .

5. In the event that [Carl’s LLC] cannot and does not assist in payment of the Unpaid Cost Obligation, I assume that I have [Carl’s LLC’s] consent to (1) personally loan [the 1436 Foxhall Road LLC] [Carl’s LLC’s] 50% share of the Unpaid Operating Costs, and (2) to obtain payment of this loan, upon closing of the sale of the Property prior to any distributions to [the members of the 1436 Foxhall Road

LLC] or any other remaining LLC entities that we continue to own and operate. [498-500].

K. Carl's Efforts to Deliver the House to the Huangs after Geoffrey Took Over as Project Manager

On September 26, 2018, Carl received a letter from Vernon Johnson, the Huangs' lawyer, demanding that the 1436 Foxhall Road LLC proceed to closing. [519-522]. After Carl received this letter, he called Mr. Johnson and said, "I've got solutions. I've got to meet with the family. Larry is my friend. There's a way to do this. I've got the experience. I know how to deal with the banks, with the subcontractors. My friend is Lance Estes, I can reduce the deficiency, get them into settlement," to which Mr. Johnson responded, "I want you to settle," to which Carl responded, "I've got to resolve the deficiency with both my partner, the bank with the loans, with the subs, with Estes. You know, I've got to make it work so that Larry and Samira can get in," to which Mr. Johnson responded, "No, no, no." [717-721]. Carl told Mr. Johnson, "I need to talk to [the Huangs] and come up with a solution. Otherwise, they're going to litigate and cost everybody a lot of money." [875-877]. Carl then tried to call and email Mr. Johnson again, and even "cc'd" Larry Huang, but no one called him back. [717-721].

L. How Carl Would Have Delivered the Home to the Huangs

Carl testified that "I could have closed [on the house]," but "[Larry Huang] wouldn't talk to me. He wouldn't answer my calls. I pleaded with his attorney, please let's get together. I have a solution." [709]. Carl further testified that he never met

with Larry Huang after Geoffrey indicated that the 1436 Foxhall Road LLC could not go to closing.” [710]. Carl testified that:

The big reason for the debt, the biggest reason was Sandy Spring Bank. They were at fault. Again, [Geoffrey] and Bruce [Wilmarth] of Sandy Spring were running the show. I was out of it. But the reason why we were funding other projects is because of Sandy Spring Bank. They forced us to do it in order to keep these projects from going into default where they had promised to fund and then renege[d]. So for whatever reason, whether it was my relationship with [Geoffrey] or what, we had to keep those jobs funded otherwise they'd go into default and everything. The whole umbrella would go under. [882-884].

Carl testified concerning the bank’s failure to release funds to start building houses on the lots that he and Geoffrey owned (through their LLCs). If the bank had fulfilled its commitment to fund the three projects they were holding back, then there would not have been a need to use money from the 1436 Foxhall Road LLC to keep these three projects from going into default. [882-884]. Carl testified that:

“[i]t was all timing. So if we had been able to have those houses under production, yes, it would have been cash coming out of those houses” that could have been used to pay off the deficiency that prevented closing on the Huangs’ house.” [885].

Carl had a plan to get the Huangs into their house:

Q: Prior to [Geoffrey] taking over was 1436, to use a vernacular, under water? A: At the point that I wanted to meet there was going to be a deficiency. I don't know if you call that under water. There wasn't under water in the sense that there were, in my opinion just to make a difference, that there were costs that exceeded our budget. We had funding that we were doing outside that project. THE COURT: You had the money. THE WITNESS: Right. It was a cash issue. Your Honor got it right. It was just cash flow. So what I wanted to do was put the cash back where it belonged. Reduce that loan that the bank had and put that cash where it belonged. That day where it belonged. .

. . Q: And did the bank ever permit you to do that? A: We never got to that point because [Geoffrey] didn't take over and finish the job and pay the bills. Q: And [Geoffrey] had the relationship with the bank? A: He had the empowerment. Right. I no longer. The ten years, twelve years that I had with the bank was gone. [Geoffrey] took it over. [886-887].

Carl had a plan to deliver the house to the Huangs even after Geoffrey said that the 1436 Foxhall Road LLC could not go to closing:

So what I would have done was brought the bank in and say look, there's 3 to \$400,000 here that we have to keep other projects which essentially was an advance on those other projects. Move those funds out of here. Reduce the debt, the pay off so that we can deal with the rest of it. I would have taken Lance Estes who is a very close friend. Moved his trust out of there. And we would have been left with contractors very few of whom would have had lien rights. I mean, very few had lien rights. We could have gotten insurance, the title insurance company to issue a mechanics lien policy to the Huangs protecting them against any future mechanics liens. [Geoffrey] and I could have guaranteed that personally. Larry has already testified that he was ready to come up with some money. [Geoffrey] and I spent hundreds of thousands on legal bills. We could have -- it was easy. It was easy. [883-884].

Carl was asked, “[a]t the time [Geoffrey] took over the project did you believe that you, you meaning [the 1436 Foxhall Road LLC], were capable of closing [on the Huangs’ home] in the near term?” to which Carl testified, “Oh, absolutely.” [887]. The following exchange shows that Carl had a good faith belief that he would have been able to deliver the home to the Huangs as promised by the 1436 Foxhall Road LLC:

Q: At each point in time when the Huangs paid funds into the project was it your belief that the [Huangs’ home] could have been delivered to them in accordance with the terms of the contract? A: Yes. Q: And for not one penny more I think was the term used? A: Not one penny

more. My phrase of one penny more had to do with something else. That's out of context. Q: We're not talking about the -- A: Oh, okay. Q: But you could have delivered? A: Yes. Q: When they put the money in it was your belief that the project would have been completed and they would have received their house? A: I would have done it. If it wasn't for [Geoffrey] wanting to take over and finish it himself I would have done it. I would have met with Larry and Jim and we would have resolved it. [890].

M. The Bankruptcy Proceeding

It was after the Huang's lawyer refused to discuss settlement that the 1436 Foxhall Road LLC filed for bankruptcy. [877-878]. Neither Carl's LLC nor Carl individually filed a bankruptcy proceeding. [877-878]. Although the bankruptcy trustee could have filed an action against Carl or his LLC, for fraud, conversion, clawbacks of cash draws taken by Carl or CPPA violations, he did not do so, and instead settled any and all claims against Carl for \$10,000. [879-880]. Carl felt that the refusal to discuss options with the Huang's lawyer, gave the 1436 Foxhall Road LLC no option other than to file for bankruptcy protection. [889-890]. Carl testified that the \$2.6 million at which the house sold at bankruptcy was a "distress sale" "without the benefit of marketing and a proper real estate agent." [748-749, 880-882].

Post-Trial Briefs

After the trial concluded, the trial court ordered the parties to file post-trial briefs, which they did after receiving the transcript of the proceedings. These post-trial briefs were filed in February 2023. [958-1109, 1110-1123].

The Trial Court's Order on Carl's Liability

After post-trial briefing, the trial court entered an order dated August 30, 2023 that found that Carl was liable to the Huangs for fraud and for violating the CPPA. [1124-1152]. The trial court made several findings:

- a. According to the Contract, 1436 Foxhall Road LLC agreed to deliver the Huangs a custom-made home that the Huangs would self-finance with incremental payments throughout the building process. To ensure the Property was customized to the Huangs' preferences, the Parties executed various contract amendments, addendums, and change orders over the course of construction where the Huangs agreed to make additional payments or to release escrow funds to 1436 Foxhall Road LLC that were not anticipated in the original Contract. [1126].
- b. The change orders were written documents reflecting the difference between a speculation in the Contract and the cost of the item that was ultimately installed in the home." [1126].
- c. Each time the need for an amendment, addendum, or change order arose, Carl typically approached Larry and represented that he needed more money for the Property because the costs for certain contractors were more expensive than expected or because paying certain amounts would accelerate construction. The Huangs would then authorize the Parties' escrow agent, Stewart Title Group, LLC ("Stewart Title"), to release escrow funds to 1436 Foxhall Road LLC, or the Huangs would pay additional funds into escrow that Stewart Title would then immediately release to 1436 Foxhall Road LLC. [1127].
- d. Over the course of the project, the Huangs paid at least \$1,081,092.76 for the amendments, addendums, and change orders as they arose." [1127].
- e. Often, Carl and Geoffrey would divert the money released from Stewart Title to 1436 Foxhall Road LLC to their other construction projects or their salaries. Carl commonly used a system he called "due

to and from” to move money from one project to another depending on each project’s need. Carl also testified that, through Cheshire Homes, he paid himself \$88,500 from 1436 Foxhall Road LLC for his management services. However, Carl neither told nor thought he was obligated to tell the Huangs that he would use their money for the other projects or to pay his salary because the Contract did not restrict his use of the funds. [1127].

f. Contemporaneously and unbeknownst to the Huangs, Carl and Geoffrey’s relationship was deteriorating. While they presented professionally to the Huangs, Carl and Geoffrey didn’t like each other, they were not friendly, and they were no longer compatible or loyal business partners by April 2017. [1128].

g. Geoffrey claimed that 1436 Foxhall Road LLC needed at least \$200,000 to complete the work necessary to go to settlement with the Huangs. Carl claimed that 1436 Foxhall Road LLC was overleveraged because the Bank only released funding for three of their six construction projects. Carl also testified that he wanted to discuss the cash deficiency problems with the Huangs and negotiate a resolution, but Geoffrey would not let him. [1128].

h. Because of his acrimonious relationship with Carl and the continued cash flow problems, in June 2018, Geoffrey assumed day-to-day management at the Property, which, by this time, was between 85 to 90 percent complete. Carl’s relationship with the Huangs also began to deteriorate. Larry began texting and emailing Carl, questioning the project delays and Carl and Geoffrey’s ability to deliver the Property, which by July 21, 2018, was over 120 past the delivery date anticipated in the Contract. Carl and the Huangs completely stopped communicating by August 2018. [1129].

i. In September 2018, Geoffrey and the Huangs began discussing a final settlement date of October 23, 2018. By now, the Huangs had started moving their furniture into the Property, Larry and Samira had contracted to sell the house they were living in, and the Huangs had wired \$1.5 million into the escrow account to cover the outstanding Purchase Price. The Huangs were ready, willing, and able to proceed to closing. Despite Carl’s consistent assurances that the Property would be ready for closing on September 20, 2018, approximately one

month before the proposed new settlement date, Geoffrey emailed the Huangs, copying Carl, that settlement would not occur because the project's expenses were far higher than expected and there was insufficient funding. Geoffrey claimed that there was a \$1 million gap between the agreed-upon purchase price and the home's value after construction, such that he and Carl would need to sell 1436 Foxhall Road at a higher price. [1129].

j. Because the Huangs were unwilling or unable to pay an additional \$1 million to complete the sale, they counter-offered an additional \$200,000 to proceed to closing. [1129].

k. On September 26, 2018, Plaintiffs' former counsel, Vernon W. Johnson at Nixon Peabody LLP, sent Carl and 1436 Foxhall Road LLC a letter requesting confirmation that Carl and Geoffrey were ready, willing, and able to comply with their obligations under the Contract and go to closing. Upon receiving the letter, Carl called Mr. Johnson to inform him of the cash deficiency issue and gave Mr. Johnson contact information for Bruce Wilmont at the Sandy Spring Bank to discuss a deed in lieu of foreclosure. [1130].

l. Carl was under the assumption that he could negotiate a resolution of the cash deficiency and 'put the cash back where it belonged.' [1130].

m. Ultimately, 1436 Foxhall Road LLC failed to deliver the Property by the agreed upon closing, and the Huangs initiated the instant litigation. [1130].

n. At Trial, Larry testified that Defendant Carl Bernstein made false representations before signing the Contract and concerning Addendum #1, Amendments #1, 2, 8, 9, and 10 to the Contract, and Change Orders # 1, 2, 3, 5 6, 7, 9, 10, and 11. Summarily, the Huangs claim that they would not have entered the Contact or paid over \$1 million to 1436 Foxhall Road LLC had they known they would not go to closing. Carl denied making any material misrepresentation and maintained that he believed he could have closed on the Contract if given the opportunity to resolve the cash deficiency problems. [1133-1134].

o. The Huangs allege that, before executing the Contract, Carl falsely represented that 1436 Foxhall Road LLC owned the Property free and clear, and no encumbrances existed. Larry also testified that Carl falsely represented that he had already sold 2905 University Terrace or had a ready and willing buyer. [1134].

p. Carl also testified that he did not normally discuss property liens with his buyers. During the Contract negotiations between Carl and Jim, Carl believed Jim to be an astute businessman who understood that there was financing involved because the house was under construction before the Parties executed the Contract, and the Huangs were only revising the original plans. Carl acknowledged that he was responsible for building the Huangs a house according to their specific requests and asserted that each time he drew money from 1436 Foxhall Road LLC he fully intended to deliver the home at closing. Carl further asserted that, if the Bank had not reneged on its agreement to fund all six home construction projects, the other projects would have been completed and sold, Carl would not have had to transfer money from 1436 Foxhall Road LLC to the other projects, 1436 Foxhall Road LLC would have been fully funded, and the Parties would have closed on the Contract without the Huangs having to pay a 'single penny more.' [1135].

q. The Parties executed an addendum simultaneously with the Contract and agreed to various amendments and change orders throughout their contractual relationship. The Huangs agreed to make certain deposits or release funds from escrow in exchange for Carl and Geoffrey making revisions to the original construction plans. The Huangs allege that Carl made material misrepresentations concerning Addendum #1, the First, Second, Eight, Ninth, and Tenth Amendments to the Contract, and Change Orders # 1, 2, 3, 5, 6, 7, 9, 10, and 11. Through each of these documents, the Huangs allowed Stewart Title to release money to 1436 Foxhall Road, in reliance on Carl's representations that he would use the money to speed up Property construction or to pay contractors for work completed at the Property. Instead, Carl diverted the funds from 1436 Foxhall Road to other projects, thereby creating a cash deficiency. Larry testified, that had the Huangs known that the money they advanced would not be used towards the Property or to pay contractors who completed work at the Property, they never would have agreed to release the funds.

Carl maintained that he did not make any misstatements or false representations, especially in reference to the documents that all Parties signed and mutually agreed to. [1135-1136].

r. Finally, on June 19, 2018, the Parties executed the Tenth Amendment to the GCAAR Sale Contract (“Tenth Amendment”). Joint Ex. 7. The Tenth Amendment added an Eighth Deposit to the Contract of \$50,000 to be immediately released to 1436 Foxhall Road LLC to speed up construction and to pay for landscaping services pursuant to a June 6, 2018 proposal from Francis Lawn, and was to be applied to the purchase price at settlement. Larry testified that Francis Lawn was never paid, and the Tenth Amendment was another attempt by Carl to induce the Huangs into putting more money into 1436 Foxhall Road LLC. [1139].

s. Change Order #9 released \$6,000 to pay Action Fabricators on March 5, 2018. [1140].

t. [B]y executing the First and Second Amendments, 1436 Foxhall Road LLC agreed to replace the existing Second Deed of Trust on the Property with a Security Second Deed of Trust for \$250,000 in favor of the Huangs and to raise the amount secured in favor of the Huangs to \$500,000. Plaintiffs asserted that they were never actually given a second lien position and remained unsecured creditors. Carl insisted that he intended to provide the Huangs with the second lien position. Specifically, Carl claims that he prepared the Modified Deed of Second Trust to move the Huangs to the second security position, that he sent a copy of the document to Larry, and that it was Stewart Title’s fault for not ensuring that the Huangs were in the second lien position. On the last day of Trial, November 3, 2022, Carl filed a Motion for Judicial Notice of Documents Contained in the Files of the District of Columbia Recorder of Deeds (‘Motion for Judicial Notice’), requesting that the Court take judicial notice of the following four documents: (1) the “Security Second Deed of Trust’ in favor of the Huangs, recorded with the Office of the Recorder of Deeds for the District of Columbia (“Recorder of Deeds”) on August 17, 2017, at 9:46 a.m.; (2) the ‘Modification of Security Second Deed of Trust’ in favor of the Huangs, recorded with the Recorder of Deeds on September 11, 2017; (3) R. Archie Burgess, LLC’s Release of a \$4,190.00 Mechanic’s Lien, recorded with the

Recorder of Deeds on February 1, 2018; and (4) Reico Kitchen's Release a \$36,696.04 Mechanic's Lien, recorded with the Recorder of Deeds on August 3, 2018. Carl testified that Stewart Title filed each of these documents on behalf of 1436 Foxhall Road LLC. However, Larry allegedly saw these documents for the first time at Trial. The Court granted the Motion for Judicial Notice in open Court on November 3, 2022, and took judicial notice of each of the four documents, subsequently labeled as Defendant's Exhibits 3, 4, 6, and 7, respectively. [1140-1141].

After establishing its findings of fact, the trial court set forth its conclusions of law:

a. Upon consideration of the evidence presented at trial and the representations made in the Parties' post-trial briefing, the Court finds that Defendant Carl Bernstein committed common law fraud and violated the CPPA by (1) misrepresenting that there were no encumbrances on the Property and that 2905 University Terrace had already sold, and (2) promising to pay contractors for work completed when he knew 1436 Foxhall Road LLC did not have sufficient funds to pay them. The Huangs advanced over \$1 million to 1436 Foxhall Road LLC in incremental payments over the course of the Parties' relationship. Although the Huangs expected Carl to direct their money toward their property, it was common practice for Carl to shift money from one construction project to another. However, when the Bank refused to fund three of the six construction projects Carl and Geoffrey managed during the relevant time frame, 1436 Foxhall Road LLC encountered significant cash flow issues. Both Carl and Geoffrey acknowledged that, even with the money the Huangs advanced, 1436 Foxhall Road LLC did not have the funds to complete construction in accordance with the contract amendments and change orders and to deliver the Property for the Purchase Price. **Carl may have believed that he could have worked with the Huangs to cure the deficiencies and close on the Contract**, [emphasis added], but as late as April 2018, he knew that 1436 Foxhall Road LLC did not have the funding to fulfill its obligations by the closing date, and, by August 2018, the Huangs were not speaking to him due to their deteriorated relationship. [1141-1142].

b. Larry's testimony, alongside Carl's admission that 2905 University Terrace had not yet sold when the Contract was signed and considering that Carl had at least constructive notice of the liens on the Property, show that it is **highly probable** [emphasis added] that Carl made these oral representations to induce the Huangs to buy the Property. [1144].

c. Plaintiffs failed to prove their claims that Carl committed common law fraud by making promises in Addendum #1, the First, Second, Eighth and Ninth Amendments, and Change Order #1, 2, 3, 5, 6, 7, 10, and 11. [1145].

d. Plaintiffs failed to establish that Carl made misrepresentations regarding Addendum #1, the First, Second, Eighth and Ninth Amendments, and Change Order #1, 2, 3, 5, 6, 7, 10, and 11 for the same reasons the Court found they failed to establish common law fraud. [1151].

In conclusion, the trial court found that Carl "violated D.C. Code §28-3904(e) by telling the Huangs that there were no encumbrances on the Property and that 2905 University Terrace was already sold or had a buyer before they signed the Contract." [1150]. Thus, the trial held Carl liable for fraud and under the CPPA with respect to Carl's "pre-contractual representations concerning the encumbrances on the Property and the sale status of 2905 University Terrace." [1152]. The trial court also held Carl liable for fraud and under the CPPA with respect to the Tenth Amendment to the Contract and Change Order #9. [1152]. The trial court then ordered the parties to file a brief on the issue of monetary damages to be assessed against Carl. [1152].

The Trial Court's Monetary Judgment

After the trial court entered its order on liability, it issued an order awarding damages to the Huangs that stated:

the court shall award Plaintiffs \$1,383,193 in actual damages under common law and \$168,000 in trebled damages under the CPPA, less \$276,000 Plaintiffs already received from former Defendant Geoffrey Kuck and the bankruptcy trustee. As such, Plaintiffs are hereby awarded \$1,275,193 for Defendant's common law fraud and violations of the CPPA, plus attorneys' fees [1172-1176].

The Trial Court's Order on Attorneys' Fees

After briefing on attorney's fees, the trial court entered an order awarding \$287,966.51 in attorneys' fees to the Huangs. [1393-1399]. Carl does not contest the trial court's mechanical computation of these fees, and appeals only as to the attorneys' fee award in the event that the underlying judgments are reversed.

Carl's Notices of Appeal

This appeal is from the order dated April 17, 2019 that denied Carl's motion to dismiss the Huangs' amended complaint, the order dated October 20, 2020 that denied Carl's motion for summary judgment with regard to all claims in the Huangs' amended complaint, the order on liability after trial dated August 30, 2023, and the monetary judgment dated November 3, 2023. These are final orders. On November 7, 2023, Carl filed a notice of appeal with regard to these orders. [1177-1180]. The Court of Appeals Appeal Number for these orders is 23-CV-933.

On March 4, 2024, the trial court entered an order granting the Huangs' motion for attorneys' fees based on its prior findings (in the August 30, 2023 and November 3, 2023 post-trial orders). This order is also a final order. That same day, March 4, 2024, Carl filed a notice of appeal of that order. [1400-1402]. The Court of Appeals Appeal Number for this order is 24-CV-201.

On March 14, 2024, the Court of Appeals issued an order, *sua sponte*, that consolidated the two appeals (23-CV-933 and 24-CV-201).

The parties' Joint Appendix filed on March 6, 2024 contains all docket entries (including all docket entries related to the attorneys' fee award) and the parties' briefs will address all issues presented in both Appeal Numbers (23-CV-933 and 24-CV-201).

SUMMARY OF THE ARGUMENT

The Huangs' complaint failed to set forth specific statements that Carl made that could support claims for fraud and for violations of the Consumer Protection Procedures Act. Therefore, the trial court should have granted Carl's motion to dismiss and motion for summary judgment. At trial, the Huangs failed to address all of the elements of the causes of action for fraud and for violations of the CPPA. The contract at issue contained an integration clause, yet the trial court based its findings on Carl's pre-contractual statements. Carl cannot be held liable for the failure of a third-party settlement agent to record the Huangs' lien or in failing to

obtain a subordination agreement from a prior lien holder. The trial court improperly factored into its monetary award, funds paid by the Huangs with regard to amendments and change orders for which Carl was not found to have committed fraud or to have violated the CPPA. Finally, in the event that the Court of Appeals dismisses the claims against Carl and vacates the monetary award against him, it must also strike the award for attorneys' fees.

ARGUMENT

I. The trial court erred in denying Carl's motion to dismiss when Plaintiffs' complaint failed to specify what exactly Carl said or did not say that could lead to liability for fraud or for violations of the Consumer Protection Procedures Act.

In *In re Estate of Curseen v. Ingersoll*, 890 A.2d 191, 192 (D.C. 2006), the court stated “[b]ecause a motion to dismiss a complaint under Rule 12(b)(6) presents questions of law, our standard of review is *de novo*.” “To survive a motion to dismiss under D.C. Super. Ct. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *District of Columbia v. Holfgard*, No. 2015 CA 003354B at *6 (D.C. Sup. Aug. 15, 2015). In evaluating a motion to dismiss, the court must determine: (1) whether the complaint includes well-pleaded factual allegations, and (2) whether such allegations plausibly give rise to an entitlement for relief. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-52 (U.S. 2009); *See also Mazza v. House Craft LLC*, 18 A.3d 786, 790-91 (D.C. 2011), *vacated as moot*, 22 A.3d 820, 821

(D.C. 2011) (*per curiam*). The complaint need not include “detailed factual allegations,” but must include “more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Mazza*, 18 A.3d at 790 (*quoting Iqbal* at 1949).

When considering a motion to dismiss, the reviewing court must construe all facts and inferences in favor of the non-moving party. *See Greenpeace, Inc. v. Dow Chemical Co.*, 97 A.3d 1053, 1059 (D.C. 2014). The allegations must, however, be sufficient “to raise a right to relief above the speculative level.” *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 709 (D.C. App. 2013). Further, the complaint must provide more than mere labels and conclusions. *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009).

A. Elements of a Cause of Action for Fraud

To prevail on a common law fraud claim, a plaintiff must establish by clear and convincing evidence that there was (1) a false representation (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation. *Pearson v. Soo Chung*, 961 A.2d 1067, 1074 (D.C. 2008). A plaintiff may establish a false representation by providing either an affirmative misrepresentation or a failure to disclose a material fact when a duty to disclose that fact has arisen. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 438 (D.C. 2013). A misrepresentation is an assertion that is not in accord with the facts. *Id.* A misrepresentation is material

if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. *Id.* at 439.

A promise or a representation regarding a future event should only be considered a misrepresentation of fact where the evidence shows that the promise was made without the intent to perform, or that the promisor had knowledge that the events would not occur. *Bennett v. Kiggins*, 377 A.2d 57, 60-61 (D.C. 1977). As such, opinions or predictions of future events do not constitute representations of material fact upon which a plaintiff may successfully place dispositive reliance. *Howard v. Riggs National Bank*, 432 A.2d 701, 706 (D.C. 1981). Plaintiffs may prove that a defendant had knowledge of the falsity of their representations by showing that the statements were recklessly and positively made without knowledge of their truth. *Id.*

Evidence of common law fraud is clear and convincing if it will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 426 n.7 (D.C. 2006). In other words, the truth of factual contentions must be highly probable or substantially more likely to be true than untrue. *In re Gaskins*, 265 A.3d 997, 1002 (D.C. 2021).

B. Elements of a Cause of Action for Violations of the Consumer Protection Procedures Act

The Consumer Protection Procedures Act, D.C. Code §28-3901, *et seq.*, prohibits any person from engaging in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby. *See* D.C. Code §28-3904. The purpose of this law is to protect consumers from a broad spectrum of unscrupulous practices by merchants. *Modern Management Co. v. Wilson*, 997 A.2d. 37, 63 (D.C. 2010). This law defines a “merchant” as a person who, in the ordinary course of business, does or would sell, lease, transfer, or supply, either directly or indirectly, consumer goods or services, or which supplies goods or services in the ordinary course of business that are the subject matter of a trade practice. *See* D.C. Code §28-3901(a)(3). A person is indirectly involved in the sale of goods and services if they are sufficiently connected with the “supply” side of a consumer transaction. *Howard*, 432 A.2d at 709. A “consumer” is defined as a person who purchases, leases, or receives consumer goods or services or who provides the economic demand for a trade practice. *See* D.C. Code §28-3901(a)(2). A “trade practice” is any act which does or would create, alter, repair, furnish, make available, provide information about, or directly or indirectly solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services. *See* D.C. Code §28-3901(a)(6). Finally, the term “goods and services” is defined as any and all parts of the economic output of society, at any stage or related or necessary

point in the economic process, and includes consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types. *See* D.C. Code §38-3901(a)(7). A plaintiff need not allege or prove intentional misrepresentation or failure to disclose to prevail on a claimed violation of D.C. Code §28-3904(e) or D.C. Code §28-3904(f) of the CPPA.

While it is established that the burden of proof for intentional misrepresentations is the clear and convincing proof standard, *Osbourne v. Capital Mortgage Corp.*, 727 A.2d 322, 325 (D.C. 1999), the Court of Appeals of the District of Columbia has not yet established the burden of proof for unintentional misrepresentations and omissions claims pursuant to the CPPA. *See Caulfield v. Stark*, 893 A.2d 970, 976 (D.C. 2006), finding that the Court of Appeals did not address whether the CPPA embraces claims of unintentional misrepresentation.

Carl believes that the clear and convincing standard should apply in a case of unintentional misrepresentation under the CPPA. The preponderance of the evidence standard requires the court to merely determine who has the most competent evidence. *In re E.D.R.*, 772 A.2d 1156, 1160 (D.C. 2001).

Preponderance of the evidence is further defined as evidence which is of greater weight or more convincing than the evidence presented in opposition to it; that is evidence which is as a whole shows that the fact sought to be proved is more probable than not. Clear and convincing evidence, on the other hand, is defined as

the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt. *Pearson*, 961 A.2d at 1076 n.10.

In any event, the trial court should have granted Carl's motion to dismiss the Huang's' complaint due to the fact that they failed to provide any specific statements made by Carl that met the elements of causes of action for fraud or violations of the CPPA. The Huang's' complaint spoke in mere generalities and not with the specificity required in a fraud case (or even a case alleging violation of the CPPA). The Huang's failed to set forth any false representation made by Carl in reference to a material fact that Carl made with knowledge of its falsity with the intent to deceive the Huang's, and which led to the Huang's relying on such statements to their detriment. Even under the lower standard set forth in a CPPA claim, the Huang's fell far short of providing notice to Carl of the statements or actions underlying their claim. Thus, the Court of Appeals should remand this matter to the trial court with instructions to dismiss the case.

II. The trial court erred in denying Carl's motion for summary judgment when Plaintiffs' complaint failed to specify what exactly Carl said or did not say that could lead to liability for fraud or for violations of the Consumer Protection Procedures Act.

“Summary judgment is a remedy that entitles the moving party to judgment as a matter of law when no genuine issue of material fact is present at the time the motion is made.” *Sturdivant v. Seaboard Service System, Ltd.*, 459 A.2d 1058, 1059

(D.C. 1983). The purpose of summary judgment is “to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.” *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996).

To prevail on a motion for summary judgment, “[t]he moving party must first establish that there is no genuine issue of material fact.” *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310, 313 (D.C. 1982). A material fact is “one which, under the applicable substantive law, is relevant and may affect the outcome of the case.” *Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1321 (D.C. 1994). “Any doubt as to whether or not an issue of fact has been raised is sufficient to preclude a grant of summary judgment.” *McCoy v. Quadrangle Development Corp.*, 470 A.2d 1256, 1259 (D.C. 1983).

If the moving party carries its initial burden, “the burden shifts to the non-moving party to show the existence of an issue of material fact.” *Landow*, 454 A.2d at 313. To meet this requirement, the non-moving party must proffer “some significant probative evidence” that supports his or her contentions “so that a reasonable fact-finder would return a verdict for the non-moving party.” *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (quoting *1836 S Street Tenants Association v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009)). The non-moving party must do more than rely on conclusory allegations or denials in

his or her pleadings and must establish more than a ‘metaphysical doubt’ or a ‘scintilla of evidence.’ *Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010).

“There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”

Barrett v. Covington & Burling, LLP, 979 A.2d 1239, 1245 (D.C. 2009).

In considering the merits of the moving party's request, the court reviews the record in the light most favorable to the non-moving party, ‘drawing all reasonable inferences from the evidence in the non-moving party's favor.’ *Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011). The court may not ‘resolve issues of fact or weigh evidence at the summary judgment stage.’ *Barrett*, 979 A.2d at 1244. In ruling upon a motion for summary judgment, the court reviews ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact.’ *District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982).

Despite engaging in extensive discovery, including the taking of depositions, the Huangs failed to set forth statements that could lead to the conclusion that Carl made false statements to the Huangs that could lead to liability under theories of fraud or violations of the CPPA. Thus, for the same reasons as with regard to the

motion to dismiss, the Court of Appeals should remand this matter to the trial court with instructions to dismiss the case.

III. The trial court erred in finding Carl liable for fraud or for violations of the CPPA at trial where the Huangs failed to address all of the elements of these causes of action.

In *Hickey v. Bomers*, 28 A.3d 1119, 1123 (D.C. 2011), the court stated, “[W]e review mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the ‘clearly erroneous’ or ‘substantial evidence’ standard of review) and apply *de novo* review to the ultimate legal conclusions based on those facts.”

The Huangs never presented testimony at trial that clearly addressed each and every element of the causes of action for fraud or violations of the CPPA. There was never a point during this trial where the Huangs recited all of the elements of the cause of action for fraud under *Pearson*, 961 A.2d at 1074, such as:

(1) What false representation did Carl make? (2) To what material fact did this false representation relate? (3) What facts support your contention that Carl made this false representation with the knowledge of its falsity? (4) What facts support your contention that Carl made this false representation with knowledge of its falsity? (5) What facts support your contention that Carl made this false statement with the intent to deceive? and (6) What action did the Huangs take in reliance upon the representation?

Similarly, the Huangs never specifically addressed the CPPA during the trial, either through testimony or argument. Thus, there was no questioning of Larry Huang in the following manner as required under D.C. Code §28-3901, *et seq.*:

(1) What statements did Carl make that leads to liability under the CPPA? (2) What facts support a finding that Carl is a “merchant” under the CPPA? Thus, there can be no finding that Carl committed fraud.

A. The trial court ruled that this is not a fraudulent inducement case during the trial, but its order on liability nevertheless found Carl liable for pre-contractual statements concerning liens on the property at the time of the contract.

The trial court ruled that this case is a fraud and CPPA case, not a fraudulent inducement case when it stated, “[y]ou’re talking about fraudulent inducement, like he’s being induced, he induced him into a fraudulent contract. But that is not the claim that I’m charged with resolving here. I am just charged with resolving fraud.” The trial court further declared, “[J]ust because he made statements that were false prior to signing the contract, that could be a claim, but that is not a claim here. That could be an issue, but it’s not an issue here. We don’t have a false misrepresentation claim or fraudulent inducement claim. As far as I can tell I’ve got two claims, fraud and CPPA. So we can just stick with the elements of fraud and stick with the elements of CPPA.” [631-632]. However, the trial court’s order on liability turned the Huangs’ claims into a claim of fraudulent inducement when it rested its judgment on a finding that Carl made false statements regarding prior liens on the property that he made prior to the 1436 Foxhall Road LLC entering into the contract with the Huangs.

B. The trial court appeared to acknowledge that the Huangs failed to meet their burden of proving all of the elements of the causes of action for fraud and for violations of the CPPA when it gave instructions to the parties after the conclusion of the trial for post-trial briefing.

After the conclusion of evidence at trial, the court directed the parties to file briefs, and it was apparent from the instruction given by the court to the Huangs that the court was troubled at the lack of clarity in providing facts that support the elements of causes of action for fraud and violations of the CPPA:

I just need to know clearly on behalf of the plaintiffs what factual evidence do you have to support your claims of fraud obviously in violation of the CPPA and under what circumstances. [954].

C. The trial court used an incorrect “Highly Probable” standard when evaluating Carl’s liability under the causes of action for fraud and for violations of the CPPA.

The trial court used an incorrect “Highly Probable” standard when evaluating Carl’s liability under the causes of action for fraud and for violations of the CPPA. In its order on liability, the trial court found that:

Larry’s testimony, alongside Carl’s admission that 2905 University Terrace had not yet sold when the Contract was signed and considering that Carl had at least constructive notice of the liens on the Property, show that it is highly probable that Carl made these oral representations to induce the Huangs to buy the Property. [1144].

There is no evidence that, at the time the original contract was signed, Carl did not intend to proceed to settlement once the home was fully built. Rather, common sense dictates that Carl always wanted the 1436 Foxhall Road LLC to proceed to

closing with the Huangs, because that was where the 1436 Foxhall Road LLC would receive its profit from the sale of the house (which would be passed on to Carl and Geoffrey via their LLCs). Therefore, the court found Carl liable for fraud and for violations of the CPPA based on an incorrect legal liability standard.

In conclusion, the fact that the Huangs never specifically addressed each and every element of these causes of action prevented the trial court from supporting a finding that Carl was liable to the Huangs under either theory (fraud or violations of the CPPA). Thus, the Court of Appeals should remand this matter to the trial court with instructions to dismiss the case.

IV. The trial court erred in holding Carl liable for pre-contract statements because the contract contained an integration clause.

In *Hickey*, 28 A.3d at 1123, the court stated, “[W]e review mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the ‘clearly erroneous’ or ‘substantial evidence’ standard of review) and apply *de novo* review to the ultimate legal conclusions based on those facts.” In *Drake v. McNair*, 993 A.2d 607, 622 (D.C. 2010), the court found that “[i]n the absence of a showing that a parol representation made during negotiations by a party to a completely integrated contract was omitted from the contract by fraud, mistake, or accident, the opposing party is barred from relying on such a representation as material to its acceptance of the deal and from claiming that its reliance on it was reasonable.” In *Drake*, the court found that “[u]nless the

plaintiffs allege that the representation omitted from the contract was omitted by fraud, mistake or accident, an integration clause bars representations not contained in the contract even when the plaintiffs allege fraudulent inducement to enter the contract.” *Id.* Silence in a final agreement containing an integration clause – in the face of prior representations – must be deemed an abandonment or excision of those earlier representations. *Id.*

Accordingly, even if the trial court had reason to find that Carl made statements concerning prior liens, such statements were not material as the 1436 Foxhall Road LLC only had the duty to deliver the property to the Huangs at closing free of liens. In almost every real estate transfer, there is some sort of lien on the property – a mortgage, a construction loan, a mechanics’ lien. The contract at issue itself contemplates that there would be liens on the property that would need to be satisfied at closing:

¶25. SELLER RESPONSIBILITY: Seller agrees to keep existing mortgages free of default through Settlement. All violations of requirements noted or issued by any governmental authority, or actions in any court on account thereof, against or affecting the Property at Settlement, shall be complied with by Seller and the Property conveyed free thereof. [332].

Unless the contract required the seller to disclose the existence of liens, there is no duty for the seller to do so. Rather, the duty is for the seller to deliver clear title to the buyer at closing. Therefore, the trial court should not have considered any statements that Carl allegedly made before the 1436 Foxhall Road, LLC entered

into the contract with the Huangs since the contract contained an integration clause and this case did not include a fraud in the inducement count. Thus, since the contract at issue contains an integration clause, the Court of Appeals should remand the case to the trial court with instructions to dismiss all claims arising outside the express requirements memorialized in the parties' final agreement.

V. The trial court erred in holding Carl liable for his opinion or belief that he could deliver the home to the Huangs.

In *Hickey*, 28 A.3d at 1123, the court stated, “[W]e review mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the ‘clearly erroneous’ or ‘substantial evidence’ standard of review) and apply *de novo* review to the ultimate legal conclusions based on those facts.” The Huangs’ claim for fraud against Carl should be dismissed because the allegations of fraud were opinions or predictions of future events, and thus, do not constitute representations of material fact upon which Plaintiffs successfully may place dispositive reliance. In *Howard*, 432 A.2d at, 706, the court found that “[o]pinions or predictions of future events do not constitute representations of material fact upon which a plaintiff successfully may place dispositive reliance.” In *Bennett*, 377 A.2d at 61, the court found that “[a] promisor’s representation or a representation as to future events asserted in a common law fraud action, should only be considered a misrepresentation of fact where the evidence shows that the promise was made without the intent to perform, or that the promisor had

knowledge that the events would not occur. When a person positively states that something is to be done or is to occur, when he knows the contrary to be true, the statement will support an action in fraud. On the other hand, a prophecy or prediction of something which it is merely hoped or expected will occur in the future is not actionable upon its nonoccurrence.” As previously stated, the trial court noted that this is not a fraudulent inducement case. [631-632]. Thus, the Huangs’ claims against Carl should be dismissed because the allegations of fraud were opinions or predictions of future events, and thus, do not constitute representations of material fact upon which the Huangs successfully may place dispositive reliance.

The Huangs did not prove, and the trial court did not find, that Carl did not have a sincere belief that the 1436 Foxhall Road LLC could have delivered the home to the Huangs at closing by working with lienholders and subcontractors to eliminate the funding shortfall. Therefore, the Court of Appeals should remand this matter to the trial court with instructions to dismiss all claims against Carl.

VI. The trial court erred in holding Carl liable for the failure of a third-party settlement agent in recording the Huangs’ lien and in failing to obtain a subordination agreement from a prior lien holder.

In *Hickey*, 28 A.3d at 1123, the court stated, “[W]e review mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the ‘clearly erroneous’ or ‘substantial evidence’ standard of

review) and apply *de novo* review to the ultimate legal conclusions based on those facts.” There was no evidence taken at trial with regard to Carl’s liability for the negligence of the third-party settlement agent in failing to record the Huang’s lien or to obtain, from a prior lien holder, a document that subordinated that prior lien to the Huang’s new lien. Therefore, the Court of Appeals should remand this matter to the trial court with instructions that it amend its findings to reflect that Carl cannot be held responsible for the negligent actions of the third-party settlement agent.

VII. The trial court erred in awarding a monetary judgment to the Huangs based on money paid by them with regard to amendments and change orders for which Carl was found not to have committed fraud or to have violated the Consumer Protection Procedures Act.

In *Hickey*, 28 A.3d at 1123, the court stated, “[W]e review mixed questions of law and fact under our usual deferential standard of review for factual findings (applying either the ‘clearly erroneous’ or ‘substantial evidence’ standard of review) and apply *de novo* review to the ultimate legal conclusions based on those facts.” By suing in tort, the defrauded party claims sufficient compensation to make his position as good as it would have been had he not entered into the transaction at all. *Ludwig & Robinson, PLLC v. BiotechPharma, LLC*, 186 A.3d 105, 115 (D.C. 2018). Under a different formulation, the measure of damages is what the defrauded party lost as a result of the fraud. *Id.*

The trial court only found that Carl committed fraud or violated the CPPA with regard to the original contract, the Tenth Amendment, and Change Order #9. However, the trial court included, in its monetary award, money paid by the Huangs for other amendments and change orders. Therefore, if any judgment of liability should remain after appeal, the Court of Appeals should remand this matter to the trial court with instructions to remove, from any award of damage therefor all money paid by the Huangs with regard to amendments and change orders where Carl was not found liable for fraud or for violating the CPPA.

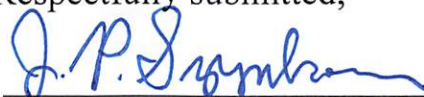
VIII. The trial court erred in awarding attorneys' fees to the Huangs.

Carl does not contest the trial court's mechanical calculation of attorneys' fees, but should the Court of Appeals reverse the trial court's judgment on liability, it should also require the trial court to vacate the award of attorneys' fees.

CONCLUSION

Appellant-Defendant Carl Bernstein respectfully requests that this Honorable Court reverse the Superior Court's orders and judgments in this case and remand for dismissal of the Huang's claims against Mr. Bernstein in its entirety.

Respectfully submitted,



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District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

(1) the acronym “SS#” where the individual’s social-security number would have been included;

(2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;

(3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;

(4) the year of the individual’s birth;

(5) the minor’s initials; and

(6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

23-CV-933

Case Number(s)

John Paul Slynkiewicz DCB-462946

Name

March 28 2024


Date

JP@Slynkiewicz.com

Email Address

Certificate of Service

I hereby certify that on March 28, 2024, a copy of Appellant-Defendant Carl Bernstein's brief was sent via the Court's electronic filing system to Juan Chardiet (D.C. Bar #399250), Chardiet Law, LLC, 6628 Madison McLean Drive, McLean, Virginia 22101 (703) 622-7995, juanchar@verizon.net, attorney for Appellees-Plaintiffs.



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