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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5839-12T1

GARY S. GOODMAN and
ADRIENNE S. GOODMAN

Plaintiffs-Appellants,

v.

JOHN R. MERLINO, JR., and
MERLINO & GONZALEZ,

Defendants-Respondents.

Argued October 15, 2014 – Decided October 20, 2015

Before Judges Fisher, Nugent and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-30-11.

Barry A. Kozyra argued the cause for appellants (Kozyra & Hartz; Mr. Kozyra, of counsel and on the briefs; Michael J. Rankin, on the briefs).

David M. Blackwell argued the cause for respondents (Graham Curtin, attorneys; Christopher J. Carey, of counsel; Mr. Blackwell and Anthony Longo, on the brief).

The opinion of the court was delivered by

NUGENT, J.A.D.

Plaintiffs Barry S. Goodman and Adrienne S. Goodman[1] appeal from a June 21, 2013 order dismissing on summary judgment their legal malpractice action against defendant John R. Merlino, Jr.,[2] and his former law firm. Defendant did not represent plaintiffs; he prepared notes, mortgages, and other documents for a client, Antoinette Hodgson, with whom plaintiffs invested nearly $3,000,000, believing Hodgson was operating a real estate investment business when she was actually operating a Ponzi scheme.[3]

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[1] We refer to Mr. Goodman as "plaintiff" and to Mr. and Mrs. Goodman as "plaintiffs."

[2] We refer to Mr. Merlino as "defendant."

[3] According to the U.S. Securities and Exchange Commission's website, "[a] Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors to create the false appearance that investors are profiting from a legitimate business." According to the same website, "[t]he schemes are named after Charles Ponzi, who duped thousands of New England residents into investing in a postage stamp speculation scheme back in the 1920s. At a time when the annual interest rate for bank accounts was five percent, Ponzi promised investors that he could provide a 50% return in just 90 days. Ponzi initially bought a small number of international mail coupons in support of his scheme, but quickly switched to using incoming funds from new investors to pay purported returns to earlier investors." Ponzi Schemes, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/answers/ponzi.htm (last modified Oct. 9, 2013).

On appeal, plaintiffs contend the trial court: misapplied the law concerning an attorney's duty to a non-client as well as the law concerning negligent misrepresentation; overlooked plaintiffs' expert's report; overlooked circumstantial evidence from which a jury could have inferred defendant committed fraud; and did not resolve disputed facts in favor of plaintiffs.

Having considered plaintiffs' arguments in light of the record and applicable legal principles, we affirm the summary judgment in part. We reverse the judgment only insofar as the judgment dismisses plaintiffs' claims that they refrained from taking legal action against Hodgson sooner than they did based on certain representations from defendant, representations a jury could have inferred were knowingly misleading.

We derive the following facts from the summary judgment motion record,[4] which we view in the light most favorable to plaintiffs, the non-moving parties. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

For approximately one year, beginning in July 2008 and ending on June 12, 2009, plaintiffs invested their own money and

[4] Following the filing of this appeal, plaintiffs moved to supplement the record with additional transcript pages. A decision on the motion was reserved "for the panel hearing the case." We grant the motion because the supplemental material is discussed in plaintiff's expert report, which was submitted to the trial court as part of the summary judgment motion record.

money in business accounts plaintiff controlled by making loans of nearly three million dollars to Antoinette Hodgson. They had been referred to Hodgson by mutual acquaintances who had been investing with her for seven years. The acquaintances told plaintiff that Hodgson was worth twenty-five million dollars and they claimed to live a great lifestyle because of her.

Plaintiff met with Hodgson. She told him she invested in real estate and "did flips." She also claimed to own sixty-five properties, mostly in Montclair. Plaintiff gave Hodgson an initial $300,000 loan, which was to be repaid with thirty percent interest. Throughout the ensuing year plaintiff made twenty-one additional loans to Hodgson, most repaid at interest rates of twenty percent or higher. The loans were either money paid by plaintiff from personal or business accounts, or "rollovers" of previous loans.

Before investing with Hodgson, plaintiff, a certified public accountant, conducted no due diligence with respect to Hodgson's background or investment portfolio. He made no attempt to determine whether she owned any properties and he did not know whether she was a licensed realtor or licensed investment advisor.

During the time plaintiff invested with Hodgson, defendant performed legal services for her. He also performed title work

for her through a title company in which he had an ownership interest. Defendant had been performing legal work for her since 2002 or 2003. He had loaned money to Hodgson's daughter, and his parents had loaned money to Hodgson. Defendant had prepared the promissory note for his parents' transaction. Although defendant had prepared notes and mortgages for Hodgson throughout the entire time he represented her, he only billed her for those transactions in which a closing occurred. He explained there was "a decent volume of fees coming in associated with those closings," so he prepared "ancillary documents" without charging her.

Defendant prepared the notes evidencing plaintiff's loans to Hodgson. Of the twenty-two loans, Hodgson executed mortgage notes for the first three, promissory notes for seventeen others, and no notes for two others. The last clause of each mortgage note (the mortgage clause) referred to properties in Montclair as securing the loan, one property securing two loans, a second property securing the third loan. The mortgage clauses read: "Maker agrees that this Note shall be secured by premises known as [street address], Montclair, New Jersey and that Payee may, on demand, require that Maker execute a Mortgage to effectuate same." The three mortgage notes and most of the promissory notes also contained a life insurance clause: "Maker

agrees to maintain life insurance covering its principal(s) in an amount sufficient to satisfy this indebtedness for the benefit of the Payee until the indebtedness is satisfied in full."

Although plaintiff made seventeen of the twenty-two loans from July 2008 through March 2009, he never asked for a mortgage or any other security for those loans. Plaintiff's loans to Hodgson were unsecured through March 2009. In March 2009 Hodgson sought additional loans, but plaintiff would not invest more money unless he "was collateralized," so Hodgson agreed to give him a mortgage. In April 2009, Hodgson provided plaintiff with a "first" mortgage on a North Caldwell property.

Defendant prepared the mortgage for Hodgson and she delivered it to plaintiff. According to defendant, the document he prepared "was very preliminary. She just wanted a draft of something to look at that she could show them, . . . I guess to sort of dialog with them about whatever they were negotiating at that point." Defendant prepared the draft document and "it was never brought up again after [he] faxed it to her."

The mortgage included this representation: "The mortgagor warrants that the mortgagor has good and indefeasible title to the premises, in fee simple; that the premises [are] free from all liens, claims and encumbrances except as may be expressly

provided herein." Defendant did not conduct a title search on the property before preparing the mortgage nor did he include a disclaimer in the mortgage to this effect. Had he done so, he would have learned the North Caldwell property was encumbered by a prior mortgage.

Hodgson delivered the mortgage to plaintiff before she signed it. Plaintiff asked a lawyer who rented office space in plaintiff's building "to take a look at it." The lawyer told plaintiff the document was in recordable form, but he did not suggest plaintiff do a title search. Plaintiff insisted that the lawyer was not, and never had been, his attorney. Hodgson returned to plaintiff's office on April 8, 2009, and executed the mortgage. The lawyer in plaintiff's office, who plaintiff had previously consulted about the mortgage, notarized Hodgson's signature.

According to plaintiff, the mortgage covered "close to" all the money he had loaned Hodgson. Although the mortgage obviously did not cover loans he made to Hodgson after she executed it, once she executed the mortgage plaintiff "felt more comfortable to not pull the money back and to give her more money." He felt more comfortable because he saw the property. As noted, the mortgage was dated April 8, 2009. Between then and June 22, 2009 — the date of a title report disclosing the

prior mortgage — plaintiff made five more loans to Hodgson. In opposing defendant's summary judgment motion, plaintiff averred: "In reliance on this 'first mortgage' . . . rather than request payment of past loans from Hodgson as they came due, we reinvested, or 'rolled over' our investments . . . . In addition, we invested more money with Hodgson."

Plaintiff ordered a title search near the end of June, 2009. He could not recall whether someone suggested the idea or he decided to order it, but he "thought it was a good idea to do it." The title search, dated June 22, 2009, disclosed Hodgson had purchased the North Caldwell property on December 23, 2008, and executed a first mortgage to a company named CCJ Global Trading, LLC (CCJ), on December 15, 2008. The mortgage was recorded January 9, 2009 — four months before Hodgson executed the mortgage to secure plaintiff's past loans. Plaintiff made his last loan to Hodgson on June 12, 2009 — ten days before the date of the title report.

After receiving the title search and learning that CCJ held a first mortgage on the North Caldwell property, plaintiff called Hodgson and asked her about it. According to plaintiff, "first she told me that she owned CCJ Global. Then she said, 'Oh, I'm going to have . . . [defendant] get that subordinated.'" He believed her.

Plaintiff "had one telephone conversation with [defendant] toward the end of July 2009." That was the only time they spoke. Plaintiff first asked about an unrelated property and then asked if defendant knew anything about CCJ. Defendant said he did not. Defendant also said he knew nothing about CCJ having a first mortgage on the property. Plaintiff also asked defendant: "Does she have enough net worth to pay me what's due me?" Defendant responded: "Absolutely."[5] From that point, plaintiff loaned Hodgson no more money.

Defendant's July 2009 denial of any knowledge about the CCJ mortgage was contradicted by an email he wrote to CCJ's attorney on June 2, 2009. In the email, defendant asked for payoff figures for existing mortgages, including the mortgage on the North Caldwell property. Yet, in a letter defendant sent to plaintiffs two months later in August 2009, defendant told them he was representing Hodgson "with regard to the refinance of [six enumerated] properties," and that they would receive the proceeds. One of the enumerated properties was the North Caldwell property.

The motion record also includes evidence that defendant knew by May 2009 that Hodgson was not repaying substantial amounts she owed other investors. CCJ's attorney wrote to

[5] Defendant denied making the statement.

defendant on May 28, 2009 about a fax defendant had sent earlier that day accusing CCJ of harassing Hodgson. CCJ's attorney denied the accusation, stating:

> Ms. Hodgson took over $6,000,000 from CCJ . . . and its investors/lenders. Over the past year, Ms. Hodgson . . . made numerous representations . . . about how the money they were advancing would be invested by her, and the security that she would be providing for the loans that she received. Now, at our last meeting, Ms. Hodgson refused to explain how she used the proceeds of the loans, and will not now account for the whereabouts of the money. Furthermore, she obviously did not use most of the money for purposes that she represented to CCJ . . . and to its investors. CCJ does not have mortgages to secure over $2,000,000 of its loans made to Ms. Hodgson. According to CCJ's investors/lenders, Ms. Hodgson represented that the money sold be used to purchase real estate in New Jersey and that CCJ would be given first mortgages on the properties to secure the loans. This did not appear to have happened.

Defendant and CCJ's attorney continued to exchange emails and letters during June, all of which made clear that Hodgson was no longer meeting substantial financial obligations to CCJ.

Plaintiffs' opposition to defendant's motion included a certification from Hodgson, which she apparently signed while incarcerated in a Connecticut federal penitentiary. She said she had paid defendant "tens of thousands of dollars . . . in his representation of me as a lawyer and through his title company." She also paid him quarterly interest on a $100,000

loan he and his father had made to her. Hodgson confirmed that after she executed the mortgage on the North Caldwell property, defendant learned of the CCJ mortgage and unsuccessfully tried to have it discharged. She said defendant "continued to draw up mortgages and promissory notes for me even after I began to default on my loan obligations." According to Hodgson, when plaintiff called defendant to inquire about certain properties, defendant knew Hodgson had begun to default on a number of her loan obligations; he knew, or should have known, she was unable to pay all of her debts.

Hodgson asserted defendant "was unaware of, and made no attempts to ascertain, my personal net worth while he was acting as my attorney." She also stated: "I would not have been able to get money from the [plaintiffs] or others without [defendant's] assistance. [Defendant] made it easy for me." She did not claim, however, that defendant had any knowledge she was running a Ponzi scheme or any knowledge about the first CCJ mortgage when she had him prepare the mortgage on the North Caldwell property to secure plaintiff's previous loans.

Plaintiff's liability expert opined in his report that defendant owed plaintiffs a "third party duty," which he breached. The expert suggested defendant was obliged to conduct a title search not only with respect to the mortgage on the

North Caldwell property, but also on the properties identified in the first three mortgage notes. The expert also suggested that defendant lied when he denied in July 2009 knowing anything about the CCJ mortgage, lied again when he told plaintiff in July 2009 that Hodgson "absolutely" had the ability to repay plaintiff's loans, and lied yet a third time when he wrote to plaintiffs in August 2009 and told them he was representing Hodgson "with regard to the refinance of [six enumerated] properties," and that they would receive the proceeds. The expert opined that defendant's misrepresentations forestalled plaintiffs from taking action to protect their interests. [6]

The trial court granted defendants' summary judgment motion, finding plaintiffs had produced no evidence as to whether defendant knew the representations in the mortgage he drafted were false or whether defendant had a duty to make a title search before drafting the mortgage. The court found significant plaintiff's testimony that he understood defendant was not his attorney, but rather was Hodgson's attorney, and that plaintiff gave the mortgage to an attorney to review before signing it. Lastly, the court found that after plaintiff

[6] Plaintiffs also produced an accounting expert's report, which stated plaintiff made loans totaling $2,976,000 and was repaid $1,035,000, sustaining a net unpaid loss of $1,941,000 and lost interest on unpaid loans of $1,416,000.

conducted his own title search and learned that the mortgage purporting to be a first mortgage was not a first mortgage, it would not have been reasonable for plaintiff to rely on statements with respect to his security, because he knew it was non-existent.

Well-known principles guide our review of the trial court's decision. When a party appeals from an order granting summary judgment, our review is de novo and we apply the same standard as the trial court under Rule 4:46-2. Liberty Surplus Ins. Corp. v. Nowell Amoroso P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In doing so, we view the evidence in the light most favorable to the non-moving party, Brill, supra, 142 N.J. at 540, and review the legal conclusions of the trial court de novo, without any special deference, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiffs first contend the trial court erred in finding defendant owed them no duty. To the extent plaintiffs suggest defendant owed them a duty based merely on his preparation of documents containing warranties or representations made by his client, we disagree. Rather, we conclude defendant's obligation to plaintiffs, if any, depends upon the facts extant at the time defendant prepared any given document. Finding no evidence from which a jury could conclude defendant knew or should have known that Hodgson's representations in the mortgage were false, we affirm the trial court's decision dismissing plaintiffs' complaint based on defendant's drafting the mortgage document.

Preliminarily, we emphasize that "[t]he determination of the existence of a duty is a question of law for the court," not an issue to be decided by an expert. Petrillo v. Bachenburg, 139 N.J. 472, 479 (1995) (citing Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991); Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 529 (1988)). Thus, we give no credence to plaintiffs' expert's opinions about the duty defendant owed to plaintiffs, at least insofar as such opinions are unsupported by judicial pronouncement.

Our Supreme Court has explained that "[w]hether an attorney owes a duty to a non-client third party depends on balancing the attorney's duty to represent clients vigorously, [RPC 1.3],

with the duty not to provide misleading information on which third parties foreseeably will rely, [RPC 4.1]." Ibid. The Court further recognized "that attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys' representations and the non-clients are not too remote from the attorneys to be entitled to protection." Id. at 483-484.

An attorney's liability to a third party is dependent upon the attorney's actions being "intended to induce a specific non-client[']s reasonable reliance on his or her representations." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 180 (2005). It is necessary for the attorney to engage in conduct intended to induce a non-client's reasonable reliance because those factors create "a relationship between the attorney and the third party." Ibid. But "if the attorney does absolutely nothing to induce reasonable reliance by a third party, there is no relationship to substitute for the privity requirement." Ibid.

Thus, we have imposed third-party liability on an attorney for negligent acts or omissions when third-party reliance on such acts was foreseeable. See e.g., Atl. Paradise Assocs. v. Perskie, Nehmad & Zeltner, 284 N.J. Super. 678, 685 (App. Div. 1995) (finding cause of action by plaintiff-purchasers against law firm where plaintiffs relied on misrepresentations in a

public offering statement); R.J. Longo Constr. Co. v. Schragger, 218 N.J. Super. 206, 207-08 (App. Div. 1987) (holding cause of action existed against municipal attorneys who had prepared bid documents referencing easements the attorneys had failed to obtain); Albright v. Burns, 206 N.J. Super. 625, 632-33 (App. Div. 1986) (holding attorney liable to decedent's estate where attorney knowingly facilitated improper transactions); Stewart v. Sbarro, 142 N.J. Super. 581, 586-87 (App. Div.) (holding cause of action existed against attorney for buyers of a corporation where attorney agreed but failed to obtain the buyers' signatures on bond and mortgage indemnifying sellers against liability for corporate debt), certif. denied, 72 N.J. 459 (1976).

On the other hand, in Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 186 (App. Div.), certif. denied, 161 N.J. 335 (1999), we found no duty where a non-client did not rely on a law firm's discovery violation and no misrepresentation had occurred. And in Banco, supra, the Supreme Court found no liability for negligence on the part of an attorney who had assisted a client in transferring assets "in order to place them beyond [a creditor]'s reach." 184 N.J. at 167.[7]

[7] The Court did hold that a cause of action existed against the attorney for conspiracy to violate the Uniform Fraudulent (continued)

With these principles in mind, we turn to plaintiffs' first argument. Plaintiffs assert that the trial court erred by finding defendant owed no duty to them when he prepared the April 2009 mortgage containing Hodgson's representation that it was a "first mortgage" and the property was "free of all liens, claims and encumbrances." Plaintiffs maintain defendant should have known of their expected reliance on the representation.

We begin by noting Hodgson, not defendant, made the representation that the mortgage was a first mortgage and the property was free and clear of all liens. Defendant drafted the document containing the representation, but did not make the representation. Although plaintiffs tend to blur this distinction, the distinction is important. Defendant did not make an affirmative representation, give an opinion, or assume an undertaking "intended to induce a specific non-client[']s reasonable reliance on his or her representations." Banco, supra, 184 N.J. at 180. In fact, he made no statement of his own and gave no opinion that was either communicated to plaintiffs or reasonably could have been expected to be communicated to plaintiffs. Consistent with the scope of his

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(continued)
Transfer Act (UFTA), N.J.S.A. 25:23-20 to -34. Banco, supra, 184 N.J. at 177-78.

engagement by Hodgson, he drafted a document containing her representations.

These facts distinguish this case from cases in which attorneys express opinions in public offering statements or say they will have transactional documents signed or filed and fail to do so. We do not interpret our Supreme Court's pronouncements as extending attorneys' malpractice liability to non-client third parties when the attorneys have done nothing more than draft documents containing representations or warranties, without reason to believe the representations are false. Many transactional documents and contracts contain representations, express or implied. Imposing liability on an attorney for merely drafting such a document — if the client's representation turns out to be untrue — contravenes fundamental notions of fairness and policy considerations underpinning the imposition of such a duty in the first instance.

Finding no duty arising when an attorney merely drafts a document containing a client's representation, we turn to plaintiffs' arguments that defendant should have told them to obtain independent legal advice, and that defendant should have known Hodgson's representation was false.

Plaintiffs assert that an indirect relationship existed between them and defendant "as a result of [defendant]'s

preparation of loan documents . . . which were intended to evidence Hodgson's indebtedness to [them]." Plaintiffs further assert that because defendant was never contacted by an attorney on their behalf while they were dealing with Hodgson, he "should have surmised from these facts that [they] were never represented by counsel in their dealings with him and Hodgson, including with regard to the 'first mortgage' [he] was preparing." From those assertions, plaintiffs reason that defendant should have advised them that he represented only Hodgson and they should seek independent counsel, and he should have obtained a conflict-of-interest waiver from them. Plaintiffs maintain defendant's failure to advise them to seek counsel "amounts to an invitation to . . . rely on and accept his work as accurate." They also suggest defendant should have conducted a title search.

We find plaintiffs' arguments flawed for several reasons. First, even giving plaintiffs the benefit of all reasonable inferences, there is no competent evidence on the motion record that defendant either assumed plaintiffs were unrepresented or had reason to believe he was obliged to advise them to retain counsel or sign a conflict waiver. As plaintiffs have admitted, plaintiff Gary Goodman was the only one to speak with defendant, and he spoke with defendant only once, in July 2009, after the

mortgage had been executed by Hodgson. Thus, there was neither an attorney-client relationship between plaintiffs and defendant nor any communication that reasonably would have caused them to believe defendant was representing them.

Second, plaintiff acknowledged at his deposition that he knew defendant was Hodgson's lawyer. He also testified that he had another attorney review the mortgage and notarize Hodgson's signature. Regardless of plaintiff's explanation of the limited role played by the attorney he consulted, it is plain plaintiff was aware not only that defendant did not represent him, but also that defendant was not acting in any way on his behalf.

Third, plaintiffs have neither cited authority for the proposition that an attorney who prepares mortgage documents must have a title search conducted nor offered expert testimony that such is standard practice somewhere in New Jersey. Unsupported assertions are a poor substitute for legal precedent and a poor foundation for the creation of a legal duty.

Plaintiffs next argue that defendant "should have known" his client's representation in the mortgage was false. They point out that defendant "made no attempt to verify this representation[,] accepting Hodgson's statement as true[,]" and insist "[t]his was all the factual evidence required to demonstrate that a negligent misrepresentation had been made."

They reiterate that "[a] simple title search by [defendant], who ironically co-owned a title search company with his law partner, would have revealed the existence of the . . . first mortgage." Plaintiffs' circular reasoning is unpersuasive.

Plaintiffs' assertions — that defendant made no attempt to verify Hodgson's representation and "[t]his was all the factual evidence required to demonstrate that a negligent misrepresentation had been made" — are implicit concessions there was no evidence from which defendant "should have known" Hodgson's representation was false. Thus, the arguments are nothing more than reiterations of plaintiffs' previous arguments, which we have rejected, that defendant had a duty to do more than accept Hodgson's representations. Specifically, plaintiffs again suggest that defendant had a duty to conduct a title search. For the reasons previously expressed, we reject that argument. Absent facts on the motion record from which a jury could conclude defendant should have known his client's representations were false, defendant breached no duty to plaintiffs by drafting the mortgage.

We have considered plaintiffs' remaining arguments attempting to impose a duty on defendant and find them to lack sufficient merit to warrant extended discussion in a written

opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

Plaintiffs' citation to their expert's opinion is unavailing, at least with respect to defendant's preparation of the mortgage. Those expert report sections cited by plaintiffs essentially embody the arguments we have addressed; defendant could not have known without a current title search whether the mortgage was a first mortgage, and by making false statements of material fact defendant violated numerous rules of professional conduct. As we have explained, defendant neither made nor vouched for his client's representation that the mortgage was a first mortgage; and, nothing in the motion record suggests defendant knew or should have known that the statement was false when he drafted the mortgage document.

Plaintiffs next argue that during his July 2009 telephone conversation with plaintiff, and in correspondence thereafter, defendant committed common law fraud by making misrepresentations that plaintiffs relied upon to their detriment by delaying legal action against Hodgson. During the telephone conversation, defendant denied knowing anything about the CCJ first mortgage and, according to plaintiff, said Hodgson "absolutely" had sufficient assets to repay his loans. Thereafter, defendant wrote to plaintiff and led him to believe

Hodgson was refinancing several properties, including the North Caldwell property, and that plaintiff would be repaid from the refinancing. By then, defendant knew about the CCJ first mortgage, knew Hodgson had defaulted on the CCJ loans, and either knew or should have known it was unlikely plaintiffs would be paid from Hodgson's refinancing properties. It is inferential that defendant knew the statements he made to plaintiff were misleading. Plaintiffs claim "[t]his trickery lulled [them] into doing nothing and allowed Hodgson to dissipate assets which could have been used to repay [plaintiffs]." We find some merit in these contentions.

To prove common-law fraud, a plaintiff must prove a defendant made a material misrepresentation of a presently existing or past fact; knowing or believing the fact to be false, with the intent that the plaintiff rely on it; and, that the plaintiff reasonably relied on the misrepresentation, resulting in damages. Banco, supra, 184 N.J. at 172-173; Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997). During the July 2009 telephone conversation, defendant denied knowledge of the CCJ mortgage and allegedly responded "absolutely" to plaintiff's question regarding whether Hodgson had sufficient wealth to repay him. In later correspondence, defendant claimed he was representing Hodgson with respect to

refinancing properties, the proceeds of which would be used to repay plaintiff. There is ample evidence in the motion record that defendant knew when he allegedly made these statements that they were false. And if a jury believes he made them, the jury can readily conclude he made them with the intent plaintiff rely on them. There appears to be no other discernable reason he would make them. The closer issue is whether a factual dispute exists as to whether plaintiff's reliance was reasonable.

Plaintiff could not have reasonably relied on defendant's denial of knowledge of the CCJ mortgage, because plaintiff had a title report and new the CCJ mortgage had priority over his mortgage. Moreover, plaintiff does not explain how he could possibly have relied upon a denial. But, plaintiff could have — as he claims — relied upon defendant's assurance that Hodgson had sufficient wealth to repay the loans, as well as defendant's subsequent written representations that he was representing Hodgson with respect to refinancing properties, the proceeds of which would be used to repay plaintiff.

To be sure, there was evidence from which one could conclude that such reliance was unreasonable, and that plaintiff should not have delayed taking legal action against Hodgson. Hodgson had defaulted on plaintiff's loan, had made a misrepresentation in the mortgage she gave plaintiff, and said

she would have defendant subordinate the CCJ mortgage, which defendant said he knew nothing about when plaintiff asked him about it. Yet, plaintiff had received a substantial amount of money from Hodgson for nearly a year, had heard from others about her wealth, and knew defendant had represented her for a significant period of time. Under those circumstances, we conclude a jury could reasonably infer plaintiff's reliance on defendant's assurance about Hodgson's ability to repay the loans was reasonable.

Similarly, we conclude plaintiff's asserted reliance on defendant's representations concerning Hodgson refinancing properties presented a factual issue as to whether the reliance was reasonable. Those representations included defendant's representation of Hodgson in connection with the refinancing, and Hodgson's present intention to repay plaintiff from the proceeds of the refinancing.

We recognize the difficulty with plaintiff's damage claim. If Hodgson's Ponzi scheme had collapsed by July 2009, which appears to be the case, defendant's telephonic and subsequent written representations may have caused plaintiff no damage. Defendant has also raised the issue of the timeliness of plaintiff's service of an expert report. Those issues, however, were not addressed by the trial court. For that reason, we

reverse the summary judgment motion only as to the affirmative representation defendant allegedly made to plaintiff during the July 2009 telephone conversation and in the later written communications concerning Hodgson's attempt to refinance properties. This opinion should not be construed to preclude additional motion practice with respect to the issues not previously addressed by the trial court.

Affirmed in part, reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.