

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0142-09T2

DEBRA ANN LOMBARDI,

Plaintiff-Appellant,

v.

CHRISTOPHER J. MASSO, JOHN
M. TORRENCE, MTG PROPERTIES,
LLC, JENNIFER LYNCH, and
PRUDENTIAL FOX & ROACH REALTORS,

Defendants-Respondents,

and

JAMES GITHENS and TARA CONSTRUCTION
SERVICES, INC.,

Defendants.

Argued May 19, 2010 - Decided June 29, 2010

Before Judges Fisher, Sapp-Peterson and
Espinosa.

On appeal from the Superior Court of New
Jersey, Law Division, Burlington County,
Docket No. L-110-04.

Mary Claire Wolf argued the cause for
appellant (Walter T. Wolf, LLC, attorneys;
Mr. Wolf, on the brief).

Jeffrey P. Resnick argued the cause for
respondents Christopher J. Masso, John M.
Torrence and MTG Properties, LLC (Sherman,

Silverstein, Kohl, Rose & Podolsky, P.A., attorneys; Alan C. Milstein, Mr. Resnick and Leily Schoenhaus, on the brief).

Andrew J. Luca argued the cause for respondents Jennifer Lynch and Prudential Fox & Roach Realtors (Reger, Rizzo & Darnall, LLP, attorneys; Mr. Luca, of counsel; Mr. Luca and Justin P. Harrison, on the brief).

PER CURIAM

At the heart of this appeal lies a summary judgment entered in favor of nearly all defendants that the trial judge later vacated prior to entry of final judgment. Complicating matters is our decision in a prior interlocutory appeal wherein this court concluded the judge had no right to revisit summary judgment. Now that finality in the trial court has been achieved, plaintiff has appealed the earlier summary judgment. In parting company from our own earlier decision, we conclude that the trial judge was authorized to revisit and vacate summary judgment and, as a result, we remand for further proceedings.

I

A

Plaintiff commenced this action for damages resulting from her purchase of a home in Medford Lakes. Her complaint sought damages from three groups of defendants: the sellers, i.e.,

defendants Christopher J. Masso, John M. Torrence, and MTG Properties, LLC (hereafter referred to at times collectively as "the sellers"); the sellers' listing broker, Prudential Fox & Roach Realtors, and Prudential Fox's representative, Jennifer Lynch (hereafter referred to at times collectively as "the brokers"); and defendants James Githens and Tara Construction Services, Inc., the parties involved in completing construction on the home in question.

The sellers and brokers moved for summary judgment. Plaintiff's opposition, when examined according to the Brill standard,¹ revealed the following.

In early 2003, plaintiff, a recently divorced mother of school-aged twins desirous of moving from New York City to reside closer to members of her family in New Jersey, retained a realtor to search for homes in the Medford area. In April 2003, the realtor contacted defendant-brokers about a listing for a "totally remodeled home" located in Medford Lakes. A few days later plaintiff visited the property.

When plaintiff and her realtor arrived, the structure was in total disrepair. As plaintiff's realtor said in her opposing certification, "the house was 'gutted' and a mess; there were

¹Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

workers present and it was obvious that the house was uninhabitable." Among other things, plaintiff and her realtor noticed the kitchen was unfinished, the living room needed a complete renovation, the dining room was in shambles, and the pool needed to be re-equipped.

Nevertheless, plaintiff and her realtor took a look around and met with Lynch as well as Githens, who introduced himself as "a contractor and co-owner of" the property. Githens explained "what he was going to do with the house." He said he was in the process of a complete renovation of almost every room and, when finished, the structure would resemble a newly-constructed home. He also promised plaintiff she could have input regarding certain aspects of the renovations, such as carpeting, room colors, and appliances.

Although plaintiff was concerned about the property's condition, she made an offer, which Masso and Torrence accepted. A contract was executed on April 30, 2003. The contract, however, appeared to call for the transfer of the property "as is," because Lynch failed to include an addendum outlining the work to be completed. At plaintiff's insistence the parties executed an addendum on May 15, 2003, which listed the "items [to] be completed by [s]eller by settlement," including, among other things, new cabinets, a new dishwasher, refinished

hardwood floors, a new fireplace, new windows, a reconditioned pool, a new laundry tub, new toilets, new closets, new vanities, and a new roof. The addendum also substituted MTG Properties, LLC (MTG), in the place of Masso and Torrence, as the seller. The addendum was signed by Masso and Torrence individually; MTG did not execute the addendum.

On July 16, 2003, plaintiff and her realtor walked through the property prior to closing. According to the realtor, "it took longer than an hour to document all of the work that still need[ed] to be completed not to mention the work that needed to be redone due to bad workmanship." Because of the property's poor condition, plaintiff and her realtor demanded that \$60,000 be placed in escrow to guarantee completion of the repairs. Masso rejected this. Plaintiff testified at her deposition that Masso "gave [her] a hug and said that he would take care of everything and that he would never let a single mom with twins live in a house in that condition." At his deposition, Masso acknowledged he told plaintiff the work would be completed. To guarantee those promises, Masso agreed to place \$10,000 in escrow. Although her realtor advised against it, plaintiff accepted those terms and closed on the property.

At the closing, an escrow agreement was executed by plaintiff and Masso.² Pursuant to the escrow agreement, \$10,000 of the purchase price was to be held by the title agency as collateral for the sellers' successful completion of a "punch list" of items to be completed "to buyer[']s satisfaction" by August 1, 2003. The escrowed funds were not to be released except "upon written authorization of buyer & seller."

August 1 came and went, and the work required by the escrow agreement was far from complete. On August 5, Githens visited plaintiff, claiming he was not being paid by Masso; according to plaintiff, Githens was "crying" and "begged" plaintiff to release the escrow money so "he could finish the work." Plaintiff relented. As collateral for her release of the funds, Githens gave plaintiff a \$10,000 check drawn on Tara Construction's bank account to be held subject to completion of the work. Plaintiff signed a release, which contained her promise "that the escrow of \$10,000.00 b[e]ing held . . . is released this date to the [s]ellers." Apparently, Githens later convinced the sellers to release the funds; the release bore the signature of Masso above the typed names of MTG and Masso.

²Masso signed without indicating that he was signing on behalf of MTG, although the document otherwise refers to MTG as the party to the agreement.

The promised work on the home was not completed. Plaintiff later unsuccessfully attempted to negotiate the \$10,000 check she had received from Githens. This suit followed.

B

The trial judge granted summary judgment in favor of the sellers and brokers.

As for the claims against the sellers, the judge reasoned that the wrong committed by Githens could not be laid at the sellers' doorstep because there was no agency relationship between Githens and MTG. In addition, the judge determined that the sellers did not breach any terms of the contract because, in accepting a deed, plaintiff had relieved sellers of any further liability concerning the condition of the property. The judge also rejected plaintiff's claims that MTG's corporate veil should be pierced because it had engaged in fraud or that any of the sellers had violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, or otherwise engaged in a common law fraud or misrepresentation.

The judge similarly dismissed the action insofar as it sought relief from the brokers. In rejecting the fraud claims against the brokers, the judge determined that the CFA had no application to real estate agents and brokers.

The judge later denied plaintiff's motion for reconsideration. On August 3, 2007, the same day he denied reconsideration, the judge conducted a proof hearing in order to fix liability and damages in plaintiff's case against the defaulted defendants, i.e., Githens and Tara Construction. While hearing plaintiff's proofs, the trial judge became uneasy about having granted summary judgment in favor of the sellers and brokers. He did not enter an order with respect to the claims against Githens and Tara Construction that would have resulted in a final disposition of the last remaining parties and issues, but instead gave notice to the other defendants about his misgivings. The judge wrote to counsel at the conclusion of the proof hearing, stating:

The plaintiff testified, as did her expert and portions of Mr. Githens' deposition were read into the record. Numerous exhibits were marked into evidence (most if not all of the exhibits have been previously provided [to] the [c]ourt in prior motions).

Recognizing the testimony was not cross examined, but still under oath, as well as rereading my previous decisions in this case, I have concluded that the summary judgment motion should be re-argued, so that I can determine whether my decision from the bench was appropriate.

The dynamics of this case appear[] to be far more complicated th[a]n the various briefs, certification[s] and perhaps my prior decisions may demonstrate. Thus, in

the interest of justice, a second argument will be very important.

Defendants were provided with the audiotapes of the proof hearing.

On November 16, 2007, the judge heard argument, which largely consisted of defense counsel's inquiries and the judge's patient responses as to what it was he heard during the proof hearing that prompted his change of mind. The trial judge reconsidered and vacated his earlier summary judgment for reasons provided in a written decision filed that same day.

C

The brokers moved for leave to appeal. A different panel of this court granted that motion and remanded with directions that the judge prepare supplemental findings. The trial judge issued a written decision on February 4, 2008, in accordance with the court's mandate. The brokers again moved for leave to appeal, which the other panel granted.

By way of an unpublished opinion, the court reversed the November 16, 2007 order, finding the procedure employed by the judge "was unauthorized and unwarranted," and concluding that the trial judge had no right to "vacate [his] earlier decision on the basis of evidence presented against another party in a

later hearing." Lombardi v. Masso, No. A-3514-07 (App. Div. Jan. 28, 2009) (slip op. at 9, 12).

D

Following this court's decision, which reversed the November 16, 2007 order that vacated summary judgment, but prior to the execution of a judgment in favor of plaintiff and against the defaulted defendants, plaintiff moved for reconsideration of the summary judgment of December 1, 2006, relying only on the evidential materials submitted to the judge at the time he granted summary judgment. The judge denied reconsideration for the reasons expressed in a written opinion filed on June 12, 2009.

On July 13, 2009, the judge entered a monetary judgment in favor of plaintiff and against Githens³ that brought finality to the proceedings in the trial court. Plaintiff thereafter filed this appeal, seeking reversal of the December 1, 2006 order of summary judgment entered in favor of the sellers and brokers, and reversal of the judge's order of June 12, 2009, which denied reconsideration. Plaintiff also argued in her brief that we are not bound by this court's earlier decision. At oral argument,

³The order does not refer to Tara Construction. We assume for present purposes that plaintiff's claim against that entity was abandoned somewhere along the way.

we invited the parties to file briefs as to whether we are required to adhere to the earlier panel's ruling. The parties timely filed supplemental briefs, which we have considered.

II

Contrary to the earlier opinion of our colleagues on the interlocutory appeal, we conclude there was no procedural impediment to the trial judge's revisitation of summary judgment. In addition, we conclude -- as the trial judge himself recognized -- that the summary judgment in favor of the sellers and brokers was erroneous.

A

As we have observed, while hearing the proofs offered by plaintiff in support of her claim against Githens, the judge began harboring misgivings about his prior decision. No final judgment having been rendered, the judge was free to revisit his earlier interlocutory order "in [his] sound discretion" and "in the interest of justice." R. 4:42-2; see, e.g., Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 356 (App. Div. 2004) (holding that judges are not "obligate[d] to slavishly follow an erroneous or uncertain interlocutory ruling"), aff'd, 184 N.J. 415 (2005), cert. denied, 546 U.S. 1092, 126 S. Ct. 1042, 163 L. Ed. 2d 857 (2006); Johnson v. Cyklop Strapping

Corp., 220 N.J. Super. 250, 264 (App. Div. 1987) (holding that the power to revisit interlocutory orders prior to the entry of final judgment is "endowed with an unmistakable substantive content by the common understanding which underlies our jurisprudence of what is fair, right and just in the circumstances"), certif. denied, 110 N.J. 196 (1988); Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983) (holding that, prior to entry of final judgment, a judge "has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so").⁴

We discern from their arguments that, with the entry of summary judgment, defendants harbored a sense of finality, which they believe restricted later reconsideration. However, "[i]t is a contradiction in terms to say that an interlocutory decree should be a finality." Fidelity Union, supra, 119 N.J. Eq. at 516. As Judge Michels said for this court in Ford, "[t]he policy that litigation must have an end is not threatened in such a case, because litigation has not yet terminated." 188 N.J. Super. at 619. Defendants' feeling of freedom from further

⁴This power has long existed. See Lyle v. Staten Island Terra Cotta Lumber Co., 62 N.J. Eq. 797, 805 (E. & A. 1901). In Fidelity Union Trust Co. v. Petchensky, 119 N.J. Eq. 514, 516 (Ch. 1936), the court viewed the power to revisit an interlocutory order as "so familiar and so well understood that we see no occasion for citing authorities in support of it."

risk, which they would ask us to exalt over the power of trial judges to revisit interlocutory orders, remained ephemeral until the entry of final judgment and, even then, of little weight given plaintiff's ultimate right to appellate review.

In addition, defendant's request that we invoke the law of the case doctrine in this setting is not persuasive. That doctrine "operates as a discretionary rule of practice and not one of law." Brown v. Twp. of Old Bridge, 319 N.J. Super. 476, 494 (App. Div.), certif. denied, 162 N.J. 131 (1999). Accordingly, it does not serve as a complete bar to the power trial judges possess, in the exercise of their sound discretion, to re-examine interlocutory rulings at any time prior to the entry of final judgment.

In essence, the right of a trial judge to revisit an interlocutory order may come at any time prior to final judgment and may be triggered literally by anything. Although here the thought that the earlier decision was incorrect struck the judge while he was involved in another aspect of the same case, it is a mistake to think the right to revisit an interlocutory order may be initiated only by events that occur in the same case let alone a proceeding in the case devoted to that particular subject. Because it is fallacious to assume that judges contemplate their past, present or future decisions only while

in the court house or only during business hours, it would be unduly short-sighted to conclude that lawful revisitation of an interlocutory order may only occur if the judge's sense of wrongness in an earlier decision is activated by a specific and related event in the case itself. A judge may be struck by the wrongness of an earlier interlocutory order while perusing the latest volume of New Jersey Reports or while exploring T.S. Eliot's Four Quartets; the thought may occur to the judge while listening to counsel's argument on some other case or while stretching during the seventh inning at Yankee Stadium. Our Court Rules do not bar a judge's sua sponte decision to reconsider an interlocutory order, and for good reason. It is ultimately far more efficient to allow judges full rein to acknowledge and correct a past error than perpetuate it through a rigid view of Rule 4:42-2, or by adopting a broad view of the law of the case doctrine. Our judicial system recognizes that mistakes will be made; our court rules wisely do not leave all errors to be caught by the net of appellate review but instead incorporate procedures that permit the correction of errors in the trial court once realized.⁵

⁵It is helpful in any such instance to be clear about the interplay of the rules that authorize the correction of error or injustice prior to resort to appellate review. Rule 4:42-2 permits the correction of interlocutory orders at any time prior

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Certainly, we are mindful that appellate review of a summary judgment must be based on what was cognizable at the time of the ruling, and nothing we have said should be interpreted as authorizing an expansion of the record on summary judgment to facts not presented to the judge in the manner provided by court rule. See R. 4:46-2(c) (declaring that the summary judgment record consists of "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any"); Herman v. Coastal Corp., 348 N.J. Super. 1, 18-19 (App. Div.), certif. denied, 174 N.J. 363 (2002). Had the judge never decided to revisit his earlier order, we would be limited in reviewing the summary judgment to examining what was presented in support of and in opposition to that motion, or contained in the court's file, when the judge ruled on December 1, 2006. See Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188 (1963). However, once the judge lost confidence in his own ruling, regardless of how he came to that epiphany, the overarching goal of the court rules -- the fair

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to final judgment without limitation other than "the interest of justice"; Rule 4:49-2 permits reconsideration of final orders or judgments within twenty days of their entry. And Rule 4:50-1, which permits relief on certain enumerated grounds, like Rule 4:49-2, applies only to final orders and judgments, see Pressler, Current N.J. Court Rules, comment 2 on R. 4:50-1 (2010), but authorizes the granting of relief beyond the twenty days permitted by Rule 4:49-2.

and efficient administration of justice, Ragusa v. Lau, 119 N.J. 276, 283 (1990) -- warranted his acting on that uneasiness.

We are satisfied, and no party has convincingly claimed to the contrary, that the judge provided defendants with a full and fair opportunity to reargue the adequacy of summary judgment. He advised the parties in writing that the realization came to him during the proof hearing and defendants were provided with audiotapes of that hearing in advance of oral argument on the judge's sua sponte reconsideration.⁶ Indeed, months passed from the time the judge advised the parties of his second thoughts and more than sufficient time was given for defendants to convince the judge he was right the first time. No injustice resulted and no party prejudiced from these unusual events.⁷

⁶Defendants rely on Zieger v. Wilf, 333 N.J. Super. 258, 269-70 (App. Div.), certif. denied, 165 N.J. 676 (2000), where plaintiff sought reconsideration of an earlier summary judgment in favor of one defendant based upon proofs later offered at trial as to other defendants -- a process we found inappropriate. Here, the judge sua sponte decided to revisit an interlocutory order because what he heard at a later proceeding made him question his earlier ruling and, to the extent he viewed the new evidence as supportive of his change of mind, the judge gave the parties a full and fair opportunity to address that evidence. To the extent Zieger may be read as prohibiting what occurred here, we disagree with it.

⁷Our decision should not be viewed as inviting litigants to withhold evidence in responding to summary judgment only to later spring it by way of a later motion for reconsideration. We are not sure how it would behoove a litigant to engage in such conduct, but surely -- if a litigant were to unnecessarily
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To summarize, judges are free, in the exercise of their sound discretion, to revisit their interlocutory orders in the interest of justice at any time prior to the entry of final judgment. R. 4:42-2. This is precisely what occurred here. The judge, having grown uneasy with his earlier summary judgment, corrected rather than perpetuated his error. It is not a sign of weakness in a judge -- or anyone else, for that matter -- to confess a recognized error and correct it before it festers and causes further damage. Such action should not be deterred; it should be applauded.

And so, "the end of all our exploring" is an arrival at "where we started." T.S. Eliot, Four Quartets: Little Gidding (1943). That a different panel -- in an earlier interlocutory decision -- reached a different conclusion about the scope of the trial judge's discretion, does not preclude us from reaching a contrary conclusion. If we perceive error in our earlier interlocutory rulings in a given case, we are not precluded from taking a different course in the same way, as we have held, the trial judge was entitled to correct his own interlocutory

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compound or frustrate normal procedures in such a manner -- the answer should not necessarily be a ban on reconsideration. Instead, any litigant who has been subjected to such protracted procedures may seek the imposition of sanctions. See Lyons v. Twp. of Wayne, 185 N.J. 426, 435-36 (2005).

rulings. Although language in prior decisions suggests the law of the case doctrine binds an appellate court to its own earlier interlocutory rulings, see, e.g., Brown, supra, 319 N.J. Super. at 494, in the final analysis that doctrine is understood to be "a non-binding decisional guide addressed to the good sense of the court in the form of 'a cautionary admonition' against relitigation 'when the occasion demands it,'" State v. Hale, 127 N.J. Super. 407, 411 (App. Div. 1974) (quoting Ross Prods., Inc. v. N.Y. Merch. Co., 242 F. Supp. 878, 879 (S.D.N.Y. 1962)). In short, the law of the case doctrine has never been understood to require blind adherence to an erroneous decision of a co-equal court. For the reasons already expressed, we conclude the trial judge was fully empowered to revisit his earlier summary judgment and find that he exercised that authority in a proper manner by providing the parties with a full and fair opportunity to be heard.⁸

⁸The sellers and brokers also argue that we should not revisit our earlier interlocutory ruling because plaintiff did not refer to it in her notice of appeal. In this unusual circumstance, we find it sufficient that plaintiff included in her appeal brief a point dedicated to arguing that we are not bound by the earlier interlocutory appellate ruling. Moreover, even if plaintiff had not given notice of such an argument, we are empowered to expand the scope of the appeal and, as noted, we have given the parties a full and fair opportunity to be heard on this issue.

B

Although unnecessary to our disposition of the appeal, we also conclude that the judge erred in granting summary judgment in favor of defendants. Ironically, we reverse the order of summary judgment entered in favor of the sellers and brokers substantially for the reasons expressed by the trial judge in his written decisions of November 16, 2007 and February 4, 2008. We need only add the following brief comments.

As for the sellers' motion, the judge concluded the contract of sale was not breached. We reject the judge's rationale for concluding that the contract called for a transfer of the property "as is." As recounted earlier, the property was unfinished at the time the contract was formed, and the contract's initial addendum required the structure's completion prior to closing. And, when the sellers were unable to complete renovations, plaintiff only closed when an escrow agreement, which called for the sellers' completion of the items on a punch list, was executed. The judge's reliance on the "as is" provision of the contract of sale misapprehended the sellers' other promises to the contrary.

The judge also seems to have viewed the requirements of the escrow agreement as having been imposed only on Githens. This too was mistaken. Although the punch list was the product of

discussions between plaintiff and Githens, the sellers⁹ were parties to the escrow agreement, which called for the completion of the items on the attached punch list "to buyer[']s satisfaction" by August 1, 2003. Whether the punch list items were not completed due to some failing on Githens' part is of no moment; it was the sellers who agreed with plaintiff that those items would be completed. That promise survived the closing and was actionable.

Moreover, as the judge later observed in his November 16, 2007 written decision, the record suggested that plaintiff never received a certificate of occupancy from the sellers. That failure could be understood as a material breach of the contract of sale as well.

The judge appears to have originally concluded that the breach of contract claim could not stand in light of plaintiff's execution of a release of the escrowed funds. This was also erroneous. Those funds were held by a third party in order to

⁹As the judge later noted, there is considerable confusion and uncertainty about the identity of the party who might rightfully be called the "seller," particularly in light of questions as to whether MTG was even formed by the time of the transaction. For simplicity's sake, we will continue to refer to the potentially liable party as "sellers" without attempting to determine whether the seller was actually MTG, or Masso, or Torrence, or some combination thereof. Questions regarding the identification of the responsible party may ultimately have to be resolved by the factfinder at trial.

ensure the performance of the work required by the escrow agreement. That plaintiff may have foolishly released the funds does not mean she also released the sellers from their promise to complete the punch list items. The release itself permits no such expansive understanding of what had occurred. That document states only that plaintiff agreed to release the \$10,000 to the sellers; it does not state -- and may not be plausibly interpreted to mean -- that plaintiff released the sellers from the obligation to complete the work identified in the punch list. Notwithstanding plaintiff's release of the security, the sellers continued to be bound to the remaining terms of the escrow agreement.

Plaintiff's theory that Githens was the agent of the seller, whether the seller was Masso, Torrence, MTG or some combination thereof, also should have survived summary judgment. The circumstances as outlined earlier reveal that Githens -- at a time when he and Lynch were present at the property -- identified himself as a co-owner and, with the sellers' acknowledgement, engaged in discussions with plaintiff regarding the renovation of the property to be conveyed by sellers. At the very least, the circumstances outlined in the original papers submitted in opposition to summary judgment gave rise to an arguable claim that Githens had the implied or apparent

authority to act on behalf of the sellers. See Sears Mortgage Corp. v. Rose, 134 N.J. 326, 337-38 (1993). Indeed, the very name of the limited liability company, which was later nominated by Masso and Torrence as the seller, could have suggested to plaintiff that Githens was -- as he had said -- a co-owner since MTG would appear to be an acronym based on the names Masso, Torrence and Githens.¹⁰

There was also considerable doubt about the liability of the individuals who were the original sellers, namely, Masso and Torrence. As the judge observed in his later decision vacating summary judgment, some of the contractual documents were executed in such a manner as to call into question whether the individual defendants continued to be personally liable because there was often no careful delineation of the relationship between the individuals and MTG. Moreover, the record does not demonstrate -- again, as the judge later recognized -- that MTG was even formed at the time some or all of these documents were executed.

We also conclude that the judge mistakenly granted summary judgment in favor of the brokers. First, the judge concluded that the CFA had no application to real estate brokers or

¹⁰That it was not Githens, but his wife, Meg Githens, who was a member of MTG, only further suggests that Githens was more than MTG's mere hired hand.

agents. He later realized that this conclusion was erroneous. See N.J.S.A. 56:8-2 (declaring that the CFA applies to fraud and misrepresentation "in connection with the sale or advertisement of any merchandise or real estate"); see also Nobrega v. Edison Glen Assocs., 167 N.J. 520, 534 (2001) (recognizing exceptions, which are not applicable here, to the CFA's application to nondisclosures by realtors in certain specific transactions). The brokers have not challenged that issue here, stating in their appeal brief that "[f]or the limited purpose of this appeal, [the brokers] do not oppose [p]laintiff's argument that the CFA is applicable to real estate agents."

In addition, the undisclosed relationships among the sellers, brokers and Githens provide sufficient indicia of fraud as to warrant the reversal of the summary judgment on both the common law fraud and CFA claims. The record reveals that (1) Githens' wife was a member of MTG, a fact that would suggest Githens had a greater role than a mere hired contractor; (2) Lynch was Githens' sister; and (3) Lynch was related to Masso. Lynch was also aware to some extent of Githens' past criminal conduct -- he had previously been convicted of forgery -- but did not disclose those facts to plaintiff or her realtor.

We thus reverse the order of summary judgment under review for these reasons, as well as substantially for the reasons set

forth in the trial judge's written opinion of November 16, 2007, which granted reconsideration and vacated summary judgment, and in his written opinion of February 4, 2008, which was issued pursuant to the direction of this court on the earlier motion for leave to appeal.

III

To summarize, we conclude that the trial judge properly revisited summary judgment on November 16, 2007. In addition, although not necessary to our disposition of this appeal, we find the judge erred in granting summary judgment on December 1, 2006 and, therefore, reverse that order. As a result of our disposition, we need not consider whether the judge erred in denying reconsideration of summary judgment following our earlier remand.

Invoking again Little Gidding, "[t]o make an end is to make a beginning." The end we have made requires a return nearly to the beginning so the judge may resume with this matter where it once stood long ago. We turn the calendar back in this case to November 16, 2007 and direct the judge to resume where the case was the moment after he vacated summary judgment on that date. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

ESPINOSA, J.A.D., concurring

This case raises the question of what procedure is available to a judge who has granted summary judgment to certain parties and subsequently arrives at the conclusion - before final judgment - that summary judgment was improvidently granted. I concur with the result in the majority opinion but choose to clarify my reasons for doing so.

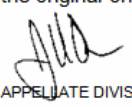
Our de novo review of summary judgment motions is guided by the same principles as apply to the trial court. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491 (2005); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). In deciding and reviewing summary judgment motions, both the trial court and this court are limited to "the case only as it had been unfolded to that point" and the evidential material submitted on the motion. Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188 (1963). See also Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000); Pressler, Current N.J. Court Rules, comment 3.2.1 on R. 2:10-2 (2010) ("Neither the trial nor the appellate court may consider evidence that was developed only after the motion was decided."). It is, therefore, generally inappropriate to grant

summary judgment when discovery is incomplete. Velantzas, supra, 109 N.J. at 193. See e.g., Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 409 (2003).

These principles provide guidance for the trial court's exercise of discretion in determining whether reconsideration of a prior summary judgment is appropriate and the limitations applicable to such reconsideration. Because the trial court acted within these parameters, I find no abuse of discretion. Although the trial judge here came to the conclusion that summary judgment was improvidently granted while hearing testimony at a proof hearing, he did not rely upon evidence presented at that hearing to come to a contrary result. Rather, he was reminded that there were disputed facts in the certifications submitted in support of and in opposition to the summary judgment motions and he concluded that, in light of the inferences to be drawn in favor of the plaintiff, it was inappropriate to grant summary judgment based upon those conflicting certifications. In his letter opinion of November 17, 2007, the judge explained his sua sponte reconsideration as "this court recognizing that it failed to recognize the real conflict of material facts, particularly when providing all inferences to the plaintiff." Since the reconsideration was based upon an application of the correct legal standard to

evidence received at the time of the summary judgment motion, rather than evidence developed at the proof hearing, this case is distinguishable from Zeiger v. Wilf, 333 N.J. Super. 258, 270 (App. Div.) certif. denied, 165 N.J. 676 (2000), and I find no reason to disagree with that opinion. Finally, for the reasons set forth in the majority opinion, I am also satisfied that the application of Rule 4:46-2(c) to the evidence presented at the time of the original summary judgment motion required the denial of the motions to the sellers and brokers.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION