STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: June 6, 2018]

BRIAN GOLDNER and BARBARA GOLDNER,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-2015-0661**
	:	
ROBERT KREFT and MARY ANN KREFT,	:	
Defendants.	:	

DECISION

STERN, J. This matter came before this Court, sitting without a jury, on Buyers Brian Goldner and Barbara Goldner's (Plaintiffs) complaint against Sellers Robert Kreft and Mary Ann Kreft (Defendants) for breach of contract, breach of good faith and fair dealing, and for declaratory judgment. Plaintiffs' claims arise out of an alleged breach of a Purchase and Sales Agreement (the PSA) for real property and release of Plaintiffs' deposit of $326,250 (the Deposit). In response, Defendants counterclaimed for breach of contract, breach of good faith and fair dealing, and specific performance of the PSA. At the conclusion of their case, Defendants moved for judgment as a matter of law pursuant to Super. R. Civ. P. 52(a). This Court reserved Decision and at the conclusion of testimony instructed the parties to file post-trial memoranda. Decision is herein rendered. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13, 8-2-14, and 9-30-1 *et seq.*, and Super. R. Civ. P. 52(a).

I

Facts and Travel[1]

On or about November 4, 2014, Plaintiffs and Defendants entered into the PSA for the purchase of Defendants' residence located at 306 Rumstick Road in Barrington, Rhode Island (the Rumstick Property). *See* Trial Ex. 1; Trial Tr. 15:21-16:16. During their search for a property and the closing, they worked with Midge Berkery (Berkery), a real estate agent. Trial Tr. 12:20-13:13. Section 3 of the PSA provided that the purchase price for the Rumstick Property was $4,350,000 of which the Deposit was to be paid on or before November 4, 2014. *Id.* Plaintiffs paid the Deposit on or before November 4, 2014, and a notice of wire transfer to the escrow account was sent to the realtors on November 5, 2014. *See* Trial Ex. 6. The Deposit is still in escrow due to Defendants' refusal to authorize its release to Plaintiffs. *See* Trial Tr. 31:2-20. Pursuant to the PSA, the closing on the Rumstick Property was to be held on March 2, 2015. *See* Trial Ex. 1.

As part of the PSA, § 16 granted Plaintiffs a right to cancel the PSA if issues related to the inspections of the Rumstick Property had not been resolved by the Inspections Contingency deadline set forth therein. *See* Trial Ex. 1. In full, § 16 provides:

> "Inspection Contingency: *Time is of the essence as it applies to Section 16.*
>
> "(a) Buyers shall have a ten (10) day period, *exclusive of Saturdays, Sundays and holidays* ("Inspections Contingency Deadline"), from the date of this Agreement to conduct and complete inspections, obtain inspection reports, deliver to Seller or listing Licensee any and all requests relating to inspections, obtain Seller's response, and resolve all such requests with Seller in writing or this contingency shall be deemed waived.

[1] Plaintiffs and Defendants stipulated to the admission of Trial Exhibits 1 through 42.

> "(b) The inspections shall be conducted at Buyer's expense by a recognized inspector(s) or inspection company of Buyer's choice. Inspections may include, but are not limited to, pest, cesspool/septic/sewer, radon, well water, lead, physical/mechanical, hazardous substances, wetlands and flood plain.
>
> "(c) If Buyer wishes to terminate this Agreement because of the following:
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> > "(1) Buyer is not satisfied with the results of the inspections; or
> >
> > "(2) Buyer and Seller have not resolved any and all issues relating to inspections to Buyer's satisfaction; or
> >
> > "(3) Seller has not responded to Buyer's requests on or before the Inspections Contingency Deadline,
>
> "then Buyer shall deliver a written notice of termination to Seller or Listing Licensee on or before the Inspections Contingency Deadline or any mutually agreed extensions of such Deadline. If Buyer fails to deliver such notice, this Contingency shall be deemed waived and Buyer will forfeit Buyer's right to terminate this Agreement based on the Inspections Contingency." *Id.*

Section 16 also included an "Additional Provisions" subsection which provided that "[n]ot withstanding the 10 day inspection period terms set forth herein, the inspection period shall be extended through and including November, 22nd, 2014." *Id.*

In accordance with § 16 of the PSA, Plaintiffs hired Cornerstone Home Inspection (Cornerstone) to conduct an inspection of the Rumstick Property. Trial Tr. 17:1-22. Plaintiffs were very specific with Berkery that they wanted an inspection both of the main house as well as of a barn on the Rumstick Property because the barn appeared to be very old and was a very large structure. Trial Tr. 17:17-22; 24:21-25:2.

The Rumstick Property was inspected by Chip Grassie (Grassie), the owner of Cornerstone, on November 12, 2014. Trial Tr. 69:12-21. Grassie is a professional home

inspector with over twenty-five years of experience, during which time he has completed over 15,000 home inspections. Trial Tr. 68:10-11; 69:5-7. He produced the Cornerstone Inspection Report (the Inspection Report). *See* Trial Ex. 3; Trial Tr. 70:12-71:5. In all of his inspection reports, Grassie identifies items as fitting within one of five categories: acceptable, not present, not inspected, marginal, or defective. *See* Trial Ex. 3; Trial Tr. 70:12-71:5. The Inspection Report revealed several items that needed to be repaired, including the foundation of the barn situated on the Rumstick Property. Trial Ex. 3. Subsequently, at trial, Plaintiff Brian Goldner (Mr. Goldner) testified that he was concerned with the defects listed in the Inspection Report and had discussions with Grassie after the Inspection Report was made to discuss the barn and its foundation. Trial Tr. 24:21-25:2. Specifically, it was Mr. Goldner's understanding that the barn's foundation "had very loose stone, that it was dilapidating and that [Grassie] could pull stones out from the foundation of the barn and felt that it needed to be addressed and that it was a defective item." Trial Tr. 22:6-14.

On page six of the Inspection Report and listed as item (7) in the summary report attached to the Inspection Report, the barn's foundation was checked as "defective." Trial Ex. 3. Grassie also provided an explanation in addition to the grade, which stated the following: "Foundation: Stone Loose stone noted. A qualified masonry contractor is recommended to evaluate and estimate the cost of parging the foundation walls." *Id.* In the definitions section of the Inspection Report, "defective" is defined as "[i]tem needs immediate repair or replacement. It is unable to perform its intended function." *Id.* In addition to the barn, there were also other items on the Rumstick Property that were labeled "defective."[2] *See id.*

[2] The items listed as "defective" in the Inspection Report and subsequently numbered in the attached summary report were the following: (1) a missing top coat on the driveway; (2)

In response to the findings of the Inspection Report, Plaintiffs and Defendants executed a "Repair Addendum" on November 21 and 22, 2014 (the Repair Addendum).[3] *See* Trial Ex. 4; Trial Tr. 25:3-26:12. The Repair Addendum, under a section titled "Other," stated the following: "Items 2, 3 . . . 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 found on the attached inspection summary report from Cornerstone Inspection to be completed by seller by December 1st, 2014."[4] *Id.* Item (7) listed in the "Other" section to the Repair Addendum refers to the barn's foundation. *See id.*; Trial Ex. 3; Trial Tr. 25:3-26:12. The Repair Addendum further provided:

> "The Buyer has the right to have the work inspected within 5 calendar days after Seller notifies Buyer in writing that the work has been completed, or prior to closing, whichever comes first. If Buyer fails to reinspect, Buyer accepts the work in its repaired condition 'as is' and waives his right to reinspect." *Id.*

At trial, Defendant Robert Kreft (Mr. Kreft) testified that prior to the signing of the Repair Addendum, he advised his real estate agent Marybeth Frye (Frye) in an email that the "barn items are not getting fixed. It's a barn from 1860." Trial Ex. 7; *see also* Trial Tr. 112:6-13. However, according to Defendants, his refusal to repair was based on the fact that in 2013, Mr. Kreft had an engineer assess the stability of the barn since it was his intention to store

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uninstalled caps at the top of the porch columns; (3) woodpecker damage to the fascia of the house; (4) a bee infestation in the roof of the house; (5) a damaged asphalt shingle on the roof; (6) a damaged piece of flooring in the loft of the barn; (7) loose stone in the barn's foundation; (8) electrical problems in the barn; (9) missing gutters on the house; (10) discolored hardwood finish in the house's rear hallway; (11) a broken damper in the house's family room fireplace; (12) an inoperable gas log in the house's living room fireplace; (13) a discharging relief valve on the house's heating system; (14) an unplugged humidifier to the house's heating system; (15) an inoperable dishwasher in the basement kitchen; and (16) damaged plaster to a bedroom wall in the house.

[3] On November 22, 2014, the Parties also executed Amendment B to the PSA, which provided that § 16 of the PSA was amended to include the following: "Inspection period shall be extended through and including December 2nd, 2014 to conduct additional Radon test. Radon test results must be acceptable to buyer." Trial Ex. 1.

[4] Items 4 and 5 were originally included, but crossed off and acknowledged as so by the parties' signatures. *See id.*

motor vehicles on the first floor and furniture on the second floor. Trial Tr. 226:11-23. Steven A. Bogle, P.E. produced an engineering report for that assessment (the Bogle Report). *See* Trial Ex. 12. Meridian Custom Homes (Meridian)—the contractor charged with renovating the barn at that time—received the Bogle Report and created a change order (the Change Order) to include the barn as part of the work to ensure its stability. *See* Trial Tr. 226:19-23; 229:1-3; Trial Ex. 17. The Change Order reported approximately $60,000 in renovations that Defendants performed on the barn's foundation in 2013. *See* Trial Ex. 17. According to Defendants, Mr. Kreft forwarded both the Bogle Report and the Change Order to Frye, so she could then forward them to Berkery and inform Plaintiffs that presenting both documents would satisfy any obligations Defendants owed to Plaintiffs with respect to the barn's foundation under the Repair Addendum. Trial Tr. 112:20-25.

After completing his initial inspection in November 2014, Grassie performed a re-inspection of the Rumstick Property on December 1, 2014. Trial Tr. 69:24-70:1. During this time period, Mr. Goldner was undergoing medical treatment: he underwent surgery on December 1, 2014 and returned home on the evening of December 2, 2014. Trial Tr. 27:8-21. Plaintiffs were thus unable to attend Grassie's reinspection of the Rumstick Property on December 1, 2014. Trial Tr. 29:10-17. Berkery and Frye, however, were present. *Id.* Grassie reported that no work had been completed on the barn foundation, and when Plaintiffs returned home, they realized that time was passing and they "only had a few more days left" to timely terminate. Trial Tr. 28:16-19; 69:24-70:1.

Moreover, Defendants admit that "[b]etween November 21, 2014 and December 5, 2014, [Defendants] did not obtain any evaluation or estimate of the cost of parging the foundation walls of the barn outbuilding foundation . . . ." Trial Exs. 21, 22. In addition, Defendants admit

that "[b]etween November 21, 2014 and December 5, 2014, [Defendants] did not cause any work to be performed on any loose stone in the barn outbuilding foundation . . . ." Trial Exs. 21, 22. According to Defendants, no additional repairs needed to be done to the barn's foundation because it had been repaired sometime around April 15, 2013. *See* Trial Exs. 12, 17. Furthermore, even though Plaintiffs executed the Repair Addendum on November 22, 2014, Mr. Kreft testified that it was a "mistake" that he had executed the "Satisfaction of Reinspection Inspection Contingency" of the Repair Addendum on November 21, 2014—before any of the identified repair work described in the "Other" section commenced. *See* Trial Ex. 4.

On December 5, 2014, Plaintiffs sent Defendants a termination letter, citing to § 16(c) of the PSA, to cancel the PSA due to issues related to inspections that Defendants had not resolved by December 1, 2014. *See* Trial Ex. 13. Additionally, Plaintiffs demanded Defendants release to Plaintiffs the Deposit held in escrow, and Defendants refused. *See id.* Plaintiffs now seek release of the Deposit, prejudgment interest dating from the date of Defendants' breach of contract, and attorney's fees. In response, Defendants seek specific performance of the PSA as well as consequential damages.

II

Standard of Review

"When a trial justice presides over a nonjury trial, Rule 52(a) of the Superior Court Rules of Civil Procedure requires that he or she 'find the facts specially and state separately [his or her] conclusions of law thereon.'" *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 210 (R.I. 2015) (quoting *JPL Livery Services, Inc. v. R.I. Dep't of Admin.*, 88 A.3d 1134, 1141 (R.I. 2014)). "It is well established that 'a trial justice sitting without a jury must often make credibility determinations in order to arrive at the necessary findings of fact.'" *Gregoire v. Baird*

Properties, LLC, 138 A.3d 182, 193 (R.I. 2016) (quoting *D'Ellena v. Town of E. Greenwich*, 21 A.3d 389, 391-92 (R.I. 2011)). Therefore, in a non-jury trial, this Court sits as the trier of fact as well as of law, and "'weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006) (quoting *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984)). "Yet, this requirement does not mandate an expansive analysis by the trial justice." *A. Salvati Masonry Inc. v. Andreozzi*, 151 A.3d 745, 748 (R.I. 2017) (citing *S. Cty. Post & Beam, Inc.*, 116 A.3d at 210). "'Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" *Hilley v. Lawrence*, 972 A.2d 643, 651 (R.I. 2009) (quoting *Donnelly v. Cowsill*, 716 A.2d 742, 747 (R.I. 1998)). "[I]f the decision reasonably indicates that [the trial justice] exercised [his or her] independent judgment in passing on the weight of the testimony and the credibility of the witnesses it will not be disturbed on appeal unless it is clearly wrong or otherwise incorrect as a matter of law." *A. Salvati Masonry Inc.*, 151 A.3d at 748 (quoting *JPL Livery Services, Inc.*, 88 A.3d at 1141).

III

Analysis

A

Breach of the PSA

Plaintiffs argue that they properly exercised their right to terminate the PSA because Defendants did not take any measures to correct the defects in the barn's foundation that were revealed in the Inspection Report. Defendants counter that with respect to the Inspection Report identifying the barn's foundation as an issue, it mentioned that "[a] qualified masonry contractor is *recommended* to evaluate and estimate the cost of parging the foundation walls." Trial Ex. 3

(emphasis added). Defendants argue that this "recommended" language meant that the barn's foundation just "needed to be addressed," and not that repairs were required.

When reviewing a purchase and sales agreement, this Court looks to contract interpretation law. *See Danforth v. More*, 129 A.3d 63, 68-69 (R.I. 2016); *Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 62-63 (R.I. 2005). "'The determination of whether a contract's terms are ambiguous is a question of law . . . .'" *High Steel Structures, Inc. v. Cardi Corp.*, 152 A.3d 429, 433-34 (R.I. 2017) (quoting *JPL Livery Servs., Inc.*, 88 A.3d at 1142). "When there is only one reasonable interpretation of a contract, the contract is deemed unambiguous." *Roadepot, LLC v. Home Depot, U.S.A., Inc.*, 163 A.3d 513, 519 (R.I. 2017) (citing *Botelho v. City of Pawtucket Sch. Dep't*, 130 A.3d 172, 176 (R.I. 2016)). "In determining whether language in a contract is ambiguous, '[the Court] give[s] words their plain, ordinary, and usual meaning.'" *Botelho*, 130 A.3d at 176 (quoting *DiPaola v. DiPaola*, 16 A.3d 571, 576 (R.I. 2011)). "However, a reviewing court should not seek out ambiguity where there is none." *Roadepot, Inc.*, 163 A.3d at 519 (citing *Botelho*, 130 A.3d at 177). "The court should consider 'whether the language has only one reasonable meaning when construed . . . *in an ordinary, common sense manner*.'" *Id.* (quoting *Sturbridge Home Builders, Inc.*, 890 A.2d at 63). "[I]f the contractual language is unambiguous, the intention of the parties must govern 'if that intention can be clearly inferred from the writing and . . . can be fairly carried out in a manner consistent with settled rules of law.'" *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 258 (R.I. 2004) (quoting *W.P. Assocs. v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)). Furthermore, "'in situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.'" *Botelho*, 130 A.3d at 176-77 (quoting *JPL Livery Servs., Inc.*, 88 A.3d at 1142).

Upon reviewing the PSA and the Repair Addendum, this Court finds that both documents are clear and unambiguous. *See Roadepot, Inc.*, 163 A.3d at 519. This Court also finds that the Inspection Report listing the barn foundation as defective along with a note that "recommend[s]" a qualified masonry contractor to evaluate and estimate the cost of parging the foundation walls refers to the extent to which Defendants needed to repair the foundation walls of the barn. *See McNulty v. Chip*, 116 A.3d 173, 176-77 (R.I. 2015) (recognizing, in real estate purchase dispute, that an inspection report indicated evidence of water damage and recommended that a new sump pump be installed); *Fracassa v. Doris*, 814 A.2d 357, 358 (R.I. 2003) (recognizing, in real estate dispute, that an inspection report indicated the property needed repair); Trial Ex. 3. Thus, the Inspection Report recommended that Defendants take adequate measures to repair the barn's foundation, but by entering into the Repair Addendum, contract law required Defendants to have the repairs to the barn's foundation completed by December 1, 2014. *See Danforth*, 129 A.3d at 69-70 (noting that purchase and sales agreement that parties entered into allowed purchasers to treat it as null and void if purchasers found the property to have any unsatisfactory condition by the agreed-upon inspection contingency date); Trial Exs. 3, 4.

It is undisputed that Defendants did not complete all of the agreed-upon repairs—*i.e.*, the barn's foundation—in the Repair Addendum by December 1, 2014. *See* Trial Exs. 21, 22. Mr. Goldner testified that he and his wife were concerned about the condition of the barn from the first time that they inspected the Rumstick Property. *See* Trial Tr. 24:22-25:2 ("The other [item] that was very concerning to us was the barn, the foundation of the barn. The barn is huge. Probably a bigger footprint of [sic] the house. So we were concerned about the condition of the foundation especially given the defective report and the discussion I had with the inspector."). Furthermore, Grassie observed that the barn's foundation stones were loose and could be

removed by hand, and flagged this issue in the Inspection Report. Trial Tr. 73:14-74:5; *see also* Trial Exs. 3, 28-35. He further testified that he has inspected "thousands" of stone foundations of this type, and that the foundation at issue here was defective. Trial Tr. 79:7-80:21. His report, as he testified, was a "starting point" for the parties, so they could retain the services of a "qualified mason" to further evaluate and undertake the appropriate repair. Trial Tr. 83:23-84:19.

Moreover, Defendants contend Plaintiffs did not act in good faith to terminate the PSA because even if the Repair Addendum required Defendants to repair the barn's foundation by December 1, 2014, Defendants provided the Bogle Report and the Change Order—which purportedly showed fixes that were made to the barn's foundation—to Plaintiffs before December 1, 2014. *See* Trial Exs. 12, 17. Plaintiffs counter that they did not receive the Bogle Report and the Change Order. Further, even if Plaintiffs did receive those documents, Plaintiffs contend that the alleged repairs to the barn's foundation were implemented about eighteen months before the parties entered into the PSA and the Repair Addendum at issue in this case.

"'Virtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" *Dovenmuehle Mortg., Inc. v. Antonelli*, 790 A.2d 1113, 1115 (R.I. 2002) (quoting *Centerville Builders, Inc. v. Wynne*, 683 A.2d 1340, 1342 (R.I. 1996)). "The implied covenant of good faith and fair dealing ensures that contractual objectives may be achieved, and that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *McNulty*, 116 A.3d at 185 (internal citations omitted). However, a claim for breach of the implied covenant of good faith and fair dealing does not create an independent cause of action separate and apart from a claim for breach

of contract. *Id.* (citing *A.A.A. Pool Serv. & Supply, Inc. v. Aetna Cas. & Sur. Co.*, 121 R.I. 96, 99-100, 395 A.2d 724, 725-26 (1978)).

This Court finds that even if those documents were provided to Berkery,[5] the Bogle Report and the Change Order were generated *before* the parties entered into the PSA on November 4, 2014 and the subsequent Repair Addendum on November 21 and 22, 2014. *See* Trial Ex. 1, 4. Thus, the Bogle Report and the Change Order do not show that Defendants took any adequate measures to repair the barn's foundation because the Repair Addendum was executed, in part, in order for Defendants to adequately repair the barn's foundation. *See Danforth*, 129 A.3d at 69-70.

Moreover, the Bogle Report recommends that the barn foundation walls be "chinked," which accepting Grassie's testimony, is a substantially similar repair to what Grassie recommended in the Inspection Report.[6] *See* Trial Tr. 88:15-25; Trial Exs. 3, 12. Grassie testified that "maybe 50, 60 years ago," someone had attempted to parge a portion of the foundation wall, but besides that, no one parged the wall since. *See* Trial Tr. 73:14-74:3, 79:2-6, 90:1-14, 101:1-11. Additionally, the Change Order did not specify any parging or other stonework that was completed on the barn's foundation. *See* Trial Ex. 17. This Court notes that Defendants came to the conclusion—before entering into the Repair Addendum—that they would not repair the barn's foundation. *See* Trial Tr. 115:12-16; Trial Ex. 7. Therefore, Plaintiffs did not breach their duty of good faith and fair dealing by not accepting the Bogle

[5] This Court has found Berkery's testimony to be credible that she received the Change Order but not the Bogle Report. Trial Tr. 133:3-9.

[6] "Parging," according to Grassie, is when mortar is installed over and in between stones in a foundation; "chinking" is when mortar is applied only in between the stones. Trial Tr. 75:16-18, 88:15-25. Grassie indicated that the only difference between parging and chinking is its aesthetic appeal; the purpose with both parging and chinking is the same: to "lock the stone in." *See id.*

Report and the Change Order as adequate measures to repair the barn's foundation. *See McNulty*, 116 A.3d at 185.

Based on the following—Defendants' own admissions, the fact that the Bogle Report and the Change Order predate the Repair Addendum's requirements, an "ordinary, common sense" reading of the Repair Addendum, and insufficient evidence to prove otherwise—Defendants were required to take adequate action to repair the barn's foundation and failed to conduct any repairs of such foundation from November 22, 2014 to December 1, 2014.[7] *See Danforth*, 129 A.3d at 69-70; Trial Tr. 112:6-9; Trial Exs. 3, 7, 12, 17, 21, 22. For these reasons, this Court finds that Defendants breached the PSA and the Repair Addendum.[8]

[7] This Court also notes that Berkery prepared the Repair Addendum that specifically identified the repairs to be undertaken by Defendants and upon which the parties agreed. Trial Tr. 124:12-18. She testified that she never told Frye anything regarding these repairs other than that Plaintiffs wanted all identified items repaired. Trial Tr. 128:12-14. Nor did she ever communicate that Plaintiffs would accept anything less than a repair of the items. Trial Tr. 128:15-18. She also testified that Mr. Goldner continuously told her that he wanted the foundation fixed and she informed Frye of these intentions. Trial Tr. 135:7-12. Moreover, she testified that providing the Change Order was not an adequate measure to fix the barn's foundation. Trial Tr. 133:21-134:7. In making this finding, this Court also finds Berkery's testimony to be consistent with the facts presented before it and therefore credible.

[8] Defendants also contend that the reason that Plaintiffs terminated the PSA was not because certain items were not repaired on the Rumstick Property, but that the sale of their home at the time on 309 Benefit Street in Providence, Rhode Island (the Benefit Property) was potentially in jeopardy. However, Mr. Goldner credibly testified that he and his wife were looking for a "turn-key home" after his home on the Benefit Property required significant repairs. Trial Tr. 35:22-37:14. Plaintiffs believed they found such a home in the Rumstick Property. Furthermore, after the termination of the Rumstick Property transaction, Plaintiffs eventually purchased a home in Barrington, Rhode Island and conducted renovations on such home while they still owned and were in the process of selling the Benefit Property. Trial Tr. 64:12-65:20. Therefore, the Rumstick Property transaction was not a financial decision for Plaintiffs to own two homes and neither did they intend to make it conditioned on the sale of the Benefit Property; rather, their intention was to purchase a home that was "turnkey" and in move-in condition. Trial Tr. 39:15-23; 65:17-20. Thus, any issue with the sale of the Benefit Property was of no consequence to the sale of the Rumstick Property.

B

Termination of the PSA Pursuant to § 16(c) of the PSA

Defendants argue the termination was not timely because according to § 16(c) of the PSA, the "time is of the essence" provision conditions Plaintiffs' right to terminate upon their delivery of a written notice of termination to Defendants "on or before the Inspections Contingency Deadline." *See* Trial Ex. 1. Defendants contend that that deadline was extended to December 2, 2014, and that the Repair Addendum did not extend the Inspections Contingency Deadline. Therefore, according to Defendants, § 16(c) of the PSA obligated Plaintiffs to deliver written notice of termination prior to December 2, 2014. In response, Plaintiffs claim that a plain reading of the Repair Addendum indicates that reinspection occurs after repairs are completed, and not prior. Thus, Plaintiffs maintain the five-calendar day reinspection period did not begin until Plaintiffs received written notice of the completion of repairs from Defendants, which Defendants failed to do. For these reasons, Plaintiffs argue that the December 5, 2014 termination letter was timely.

The Repair Addendum states that pursuant to the Inspections Section,[9] Defendants and Plaintiffs agreed that Defendants would have certain repairs from the Inspection Report completed by a specific date. Trial Ex. 4. Specifically, the Repair Addendum included standard language that provided the following:

> "The Buyer has the right to have the work inspected within 5 calendar days after Seller notifies Buyer in writing that the work has been completed, or prior to closing, whichever comes first. If

[9] This Court notes that the Repair Addendum does not specifically reference the origin of this "Inspections Section." However, based on a reasonable interpretation of this standard language in the Repair Addendum and the facts in this case, it is clear to this Court that it is referring to § 16(c) of the PSA. *See Roadepot, Inc.*, 163 A.3d at 519; Trial Exs. 1, 4.

> Buyer fails to reinspect, Buyer accepts the work in its repaired condition 'as is' and waives his right to reinspect." *Id.*

This Court finds that this section in the Repair Addendum—one that the Parties initialed—supplemented and therefore extended the Inspections Contingency Deadline to its own terms. *See Sturbridge Home Builders, Inc.*, 890 A.2d at 66 (citing *Fracassa*, 814 A.2d at 362) ("[A] written agreement setting forth performance dates may be amended by the parties."). However, the Parties added their own language to the PSA under a section titled "Other": "[i]tems 2, 3, [4 and 5 crossed off], 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 found on the attached inspection summary report from Cornerstone Inspection to be completed by seller by December 1st, 2014." Trial Ex. 4. This Court finds this provision leads to one reasonable interpretation: that Defendants were to complete the listed items, which are in reference to the Inspection Report, by December 1, 2014. *See Roadepot, Inc.*, 163 A.3d at 519. Furthermore, in reading the Repair Addendum in its entirety, this Court also finds that the deadline for Plaintiffs to receive written notice that the repairs were completed was by December 1, 2014. *See Danforth*, 129 A.3d at 70 (holding that PSA gave buyers until a specific date—April 4, 2011—to notify seller in writing that they were electing to terminate PSA, and that buyers' failure to notify seller by April 4, 2011 meant their right to terminate the contract expired). Had Defendants properly notified Plaintiffs that the repairs were completed, Plaintiffs would then have five calendar days from the date that notification was made to Plaintiffs to reinspect the Rumstick Property. *See* Trial Ex. 4. However, because Defendants never notified Plaintiffs in writing that the requested repairs were completed, Plaintiffs had until March 2, 2015—the agreed-upon closing date in the PSA—to

reinspect the Rumstick Property.[10] *See* Trial Tr. 56:13-18; 105:19-23; Trial Ex. 4. Therefore, Plaintiffs' reinspection of the Rumstick Property on December 2, 2014 was timely, and as Defendants failed to complete the requested repairs by December 1, 2014, Plaintiffs timely terminated the transaction on December 5, 2014 under § 16(c) of the PSA.

C

Defendants' Refusal to Release Deposit from Escrow Account

As a result of Defendants' breach of the PSA, Plaintiffs request a return of the Deposit currently held in escrow. "[The Rhode Island Supreme Court] consistently has held that in the absence of 'fraud, bad faith, illegality, misconduct, or any other factor that might alter the legal relationship of these parties,' damages for the breach of a contract to purchase real estate are limited in accordance with the terms of the contract." *Kooloian v. Suburban Land Co.*, 873 A.2d 95, 100 (R.I. 2005) (quoting *Chapman v. Vendresca*, 426 A.2d 262, 264 (R.I. 1981)).

The Parties agreed in the PSA to the following: "If Seller defaults in the performance of this Agreement, Buyer shall have the right to the Deposits in accordance with Section 5, and Buyer may pursue any and all remedies available at law or equity, including but not limited to specific performance." Trial Ex. 1, § 19. Due to Defendants' breach, this Court finds that Plaintiffs are entitled to the return of the Deposit. *See Chapman*, 426 A.2d at 264 (holding that buyer was entitled to "the return of his deposit according to the terms of the agreement"); *see also DiBiasio v. DiFazio*, 103 R.I. 565, 571, 239 A.2d 719, 722 (1968) ("[W]here a vendor fails

[10] As previously found by this Court, Defendants not only failed to complete the repairs and send written notification of such completion by December 1, 2014, but they also had no intention—prior to executing the Repair Addendum—of repairing the barn's foundation. *See* Trial Tr. 112:6-9; Trial Ex. 7. Moreover, Defendants admitted that in between November 21, 2014—the date the Parties entered into the Repair Addendum—and December 5, 2014, they did not obtain an estimate of the cost of parging the barn's foundation walls and did not cause any work to be performed on the loose stone of the barn's foundation. Trial Exs. 21, 22.

or refuses to perform his [or her] contract or is unable to do so, the vendee may maintain an action to recover earnest money paid in the form of a deposit.").

By initialing and signing the Repair Addendum, Defendants agreed that they would repair every listed item—including the barn's foundation—by December 1, 2014. Defendants did not repair the barn's foundation, and the Bogle Report and Change Order—even if sent to Plaintiffs—were not adequate measures since they predated the Repair Addendum. Moreover, in an email to Berkery, Frye indicated that Defendants expressed concern about the structural integrity of the barn—even after entering into the Repair Addendum—but nonetheless still insisted that they were not repairing it. *See* Trial Ex. 16. Defendants therefore first agreed to repair the barn's foundation, but then subsequent to executing the Repair Addendum, made a knowing determination that they were not going to make the repairs as agreed. *See id.* There is also no evidence before this Court that Plaintiffs indicated to Defendants that they would be satisfied with anything less than the agreed-upon repairs. *See Haydon v. Stamas*, 900 A.2d 1104, 1113 (R.I. 2006) ("[The Rhode Island Supreme Court] will not lightly infer, to the extent that the record supports such an inference, the waiver of contractual provisions; evidence supporting an inference of waiver must be manifest and apparent."); *Sturbridge Home Builders, Inc.*, 890 A.2d at 65 (quoting *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991) m*odified on denial of reh'g* (Feb. 3, 1992)) (noting that "'[i]implied waiver of a legal right [in a purchase and sales agreement] must be proved by a clear, unequivocal, and decisive act of the party who is alleged to have committed waiver'" and that plaintiff produced no evidence showing waiver of contract terms). For these reasons, Plaintiffs are entitled to the Deposit currently held in escrow.

D

Prejudgment Interest

In addition to their Deposit, Plaintiffs also seek prejudgment interest running from the date of breach to the date of judgment. Section 9-21-10(a) provides, in pertinent part:

> "In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action is accrued, which shall be included in the judgment entered therein." Sec. 9-21-10(a).

Our Supreme Court has consistently recognized that prejudgment interest "'is a ministerial act which does not allow for any discretion by the judge or the jury.'" *Danforth*, 129 A.3d at 71 (quoting *King v. Huntress, Inc.*, 94 A.3d 467, 499-500 (R.I. 2014)). Furthermore, "'[t]he dual purpose of prejudgment interest is to encourage early settlement of claims and to compensate an injured plaintiff for delay in receiving compensation to which he or she may be entitled.'" *Oden v. Schwartz*, 71 A.3d 438, 457 (R.I. 2013) (quoting *Metropolitan Prop. & Cas. Ins. Co. v. Barry*, 892 A.2d 915, 919 (R.I. 2006)). Prejudgment interest for breach of a purchase and sales agreement does not focus on the Defendants' ability to benefit from the Deposit, but rather on Plaintiffs' delay in receiving compensation. *Danforth*, 129 A.3d at 71.

Our Supreme Court has recently stated that "'[t]he return of a deposit is simply a reimbursement rather than an award of pecuniary damages, and thus [the prevailing party is] not entitled to the addition of statutory interest.'" *Andrews v. Plouff*, 66 A.3d 840, 843 (R.I. 2013) (quoting *Bogosian v. Bederman*, 823 A.2d 1117, 1121 (R.I. 2003)). However, its holding "[did] not preclude every plaintiff from recovering prejudgment interest whenever a deposit is at issue. For example, if a plaintiff were awarded damages in a breach of contract case involving a deposit, then that plaintiff might well be entitled to statutory interest under . . . § 9-21-10(a)." *Id.*

at n.2. Nonetheless, in *Andrews*, the Rhode Island Supreme Court did not award prejudgment interest on the deposit award because "(1) plaintiffs' complaint simply requested the return of their deposit and (2) the jury's verdict form stated only that plaintiffs were entitled to the return of their deposit. The complaint did not include any allegations that plaintiffs were entitled to pecuniary damages, nor did the jury make any such findings." *Id.*; *see also Bogosian*, 823 A.2d at 1119 (holding that plaintiffs were not entitled to prejudgment interest because after a bench trial, plaintiffs were eventually awarded the return of their deposit).

Here, Plaintiffs requested this Court, in the prayers for relief of their Complaint, for "the full amount of their damages plus interest, fees, and costs." Compl. at 5-6. Additionally, Plaintiffs also pleaded that "[a]s a result of the Krefts' actions, the Goldners have suffered damages, including, costs, expenses, and attorneys' fees." *Id.* at ¶ 39. However, no other allegations are made with respect to these damages, and almost all of the allegations in the Complaint address the return of the Deposit. *See id.* at ¶ 32 ("Having rightfully terminated the [PSA], the Goldners are entitled to a prompt return of the Deposit Money."); *id.* at ¶ 38 ("The Krefts' refusal to return the Deposit Money and/or Coleman Realtors to return the Deposit Money to the Goldners is a breach of the implied covenant of good faith and fair dealing."); *id.* at 5-6 ("WHEREFORE, Plaintiffs respectfully request that this Honorable Court . . . order the Defendants to authorize the release of the Deposit Money to the Plaintiffs . . . and whatever other relief this Honorable Court deems appropriate.").

Plaintiffs have specifically requested in their post-trial memorandum the release of the Deposit, prejudgment interest, and attorneys' fees. This Court, in making its ruling, is only awarding Plaintiffs the return of the Deposit that they seek; no other evidence has been presented to this Court for any pecuniary damages. *See Andrews*, 66 A.3d at 843 n.2; *Bogosian*, 823 A.2d

at 1119. Based on the evidence before it, this Court finds that the Deposit awarded to Plaintiffs herein is one for reimbursement, and not for pecuniary damages. Plaintiffs are therefore not entitled to prejudgment interest on the return of the Deposit.[11]

E

Attorney's Fees

Plaintiffs argue that they are entitled to attorney's fees because there has been no justiciable issue of law or fact raised by the losing party. Specifically, Plaintiffs contend that Defendants' positions—(1) that "repair" does not mean "fix" but rather "address," and "address" means providing a letter from two years earlier reiterating the need for repair; (2) that re-inspection must occur before the required written notice of completion of work, otherwise the right to inspect is waived; and (3) that the Repair Addendum, which is expressly entered into pursuant to the inspection section of the PSA, does not entitle the potential purchaser to any recourse should the agreed-upon repairs not be performed to their satisfaction—fail pursuant to

[11] In making this finding, this Court also finds that the facts from this case are distinguishable from those in *Danforth*. *See* 129 A.3d at 71. In that case, our Supreme Court awarded prejudgment interest to the seller, the prevailing party, after the buyer breached the agreed-upon purchase and sales agreement. *Id.* The buyers failed to invoke their right to terminate the agreement prior to the agreed-upon inspection contingency date; therefore, according to the agreement, the seller had the right to retain the buyer's deposit for her own use, "which right shall be [her] sole remedy for such default." *Id.* at 65. The Rhode Island Supreme Court held that "[t]he case before us unquestionably does not involve the return of a deposit, but, instead, involves the retention of a deposit as a form of damages, as this was [the seller's] sole remedial measure under [the agreement]." *Id.* at 71. Here, although the PSA lists the return of the Deposit as a remedy for Plaintiffs when Defendants are in breach, it was not their "sole remedy" as the Rhode Island Supreme Court was faced with in *Danforth*. Rather, the PSA stated, in addition to recovering the Deposit, that "Buyer may pursue any and all remedies available at law or equity, including but not limited to specific performance." Trial Ex. 1, § 19. Plaintiffs did not present any evidence at trial or argue in their post-trial brief in support of pecuniary damages; they only sought and successfully tried the case for the return of the Deposit.

the PSA and the Repair Addendum by the clear language of the various standard form agreements, the applicable law, and the trial testimony.

The Rhode Island Supreme Court has "staunch[ly] adhere[d] to the 'American rule' that requires each litigant to pay its own attorney's fees absent statutory authority or contractual liability." *Shine v. Moreau*, 119 A.3d 1, 8 (R.I. 2015) (quoting *Moore v. Ballard*, 914 A.2d 487, 489 (R.I. 2007)). "However, in certain circumstances, the Legislature has determined that attorney's fees should be available to the prevailing litigant." *Danforth*, 129 A.3d at 72. "One such circumstance is provided in § 9-1-45(1), which provides that a trial justice may award reasonable attorney's fees to a prevailing party 'in any civil action arising from a breach of contract in which the court . . . [f]inds that that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.'" *Id.* (quoting § 9-1-45). As our Supreme Court has interpreted, "the decision to grant or deny attorney's fees is vested within the sound discretion of the trial justice." *Id.* (citing *Greensleeves, Inc. v. Smiley*, 754 A.2d 102, 103 (R.I. 2000) (mem.); *Bucci v. Anthony*, 667 A.2d 1254, 1256 (R.I. 1995)).

Defendants have refused to release the Deposit from escrow because they believe (1) they did not breach the PSA and (2) that Plaintiffs did not timely terminate the PSA. This Court finds that there was a justiciable issue with respect to these two arguments. First, there was an issue raised by Defendants regarding the language in the Inspection Report and the Repair Addendum. Specifically, the word "recommended" used by Grassie in the Inspection Report created a dispute as to the extent of Defendants' performance under the Repair Addendum. *See* Trial Ex. 3. Additionally, there was a dispute as to whether the Repair Addendum extended the Inspections Contingency Deadline, which this Court found it did. Although this Court is essentially finding Defendants' claims are without merit, they nonetheless raised these justiciable

issues before this Court. *See Danforth*, 129 A.3d at 72 (affirming trial justice's decision to deny award of attorney's fees because he determined that a termite problem and damage to the front door of the house, discovered after inspection contingency deadline passed, were justiciable issues even though he ultimately concluded that buyer's arguments in that regard were meritless).

In sum, Defendants presented justiciable issues before this Court in interpreting the language of the Inspection Report and for disputing the timeliness of Plaintiffs' termination of the PSA. Accordingly, this Court denies Plaintiffs' request for attorney's fees.[12]

IV

Conclusion

Based on the testimony, evidence and memoranda submitted and for the reasons stated above, this Court finds that Defendants breached the PSA and that Plaintiffs properly terminated the PSA. Plaintiffs are therefore entitled to the return of the Deposit of $326,250 held in escrow.

[12] In making this ruling, this Court is also mindful that on May 24, 2016, the Superior Court denied Plaintiffs' motion for summary judgment on all counts in their complaint and concluded that at that time, there were genuine issues of material fact that still existed. *See Pichardo v. Stevens*, 55 A.3d 762, 766 (R.I. 2012) (quoting *Gliottone v. Ethier*, 870 A.2d 1022, 1027 (R.I. 2005)) ("It is well established that, '[w]hen a genuine issue of fact exists [in determining a motion for summary judgment]. . . the trial justice must not decide the issue.'"). Therefore, had this Court awarded attorney's fees to Plaintiffs, it would have only awarded such fees after May 24, 2016 to the present date if additional discovery revealed that no justiciable issue existed. This Court does note that on June 1, 2016—shortly after this Court rendered its Decision on the summary judgment motion—Plaintiffs sent Defendants a request for admissions, and Defendants subsequently admitted in those requests that they did not perform any work or perform an estimate of the cost to parge the foundation walls of the barn. *See* Trial Exs. 21, 22. It therefore could be argued that at that point, it no longer became a justiciable issue that Defendants breached the PSA because they admitted that they never conducted repairs on the barn's foundation. Even if this were true, however, there was still a justiciable issue—even throughout trial—with respect to whether Plaintiffs timely terminated the PSA. For this reason, this Court is satisfied that attorney's fees should not be awarded in this case.

Additionally, Plaintiffs' requests for prejudgment interest and attorney's fees are denied. Counsel shall present the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Brian Goldner and Barbara Goldner v. Robert Kreft and Mary Ann Kreft
CASE NO:	PC-2015-0661
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 6, 2018
JUSTICE/MAGISTRATE:	Stern, J.

ATTORNEYS:

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For Defendant:	Scott Partington, Esq. Jeffrey S. Brenner, Esq. (Attorney for non-party witness)