UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CATHERINE BREEN,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 18-315JJM
	:	
LINDA GREEN and	:	
HOWLAND GREEN,	:	
Defendants.	:	

REPORT AND RECOMMENDATION[1]

Patricia A. Sullivan, United States Magistrate Judge.

Plaintiff Catherine Breen has moved to reopen this settled case, to vacate the Consent Order entered pursuant to the settlement and instead to enter the Consent Judgment that the settlement provided would be destroyed if Defendants Howland and Linda Green[2] complied with all of the settlement's less draconian terms. ECF No. 31. The practical ramifications of granting Ms. Breen's prayer for relief are as follows: the case will terminate, but by a Consent Judgment in Ms. Breen's favor rather than by a stipulation of dismissal; the Greens will be subject to execution of a Judgment for the additional sum of $130,000 (the Consent Judgment's $250,000 less the $120,000 that the Greens have already paid); the Judgment amount will be for punitive damages, which the Greens will be unable to discharge in bankruptcy; the case will no longer be sealed; and Ms. Breen is entitled to recovery of her reasonable attorneys' fees and costs as the prevailing party on the motion to reopen.

[1] Although the pending motions were referred to me for determination, I address them through a report and recommendation because the practical consequences of resolving them involves dispositive decision-making. See, e.g., Yunik v. McVey, Civil Action No. 2:08-cv-1706, 2013 WL 3776794, at *2 (W.D. Pa. July 17, 2013) (finding motion to reopen dispositive, construing magistrate judge order as report and recommendation).

[2] Defendant E*Trade Financial Corporation was originally a defendant, but it was separately dismissed from the case and is not implicated by the pending motion to reopen.

Ms. Breen filed her motion to reopen immediately upon discovering from the South Kingstown Land Records that, between the day that the settlement was entered and the signing of the settlement agreement, the Greens discharged the so-called Liberty Lane Property mortgage and forgave the underlying loan worth $100,000. The Greens had pledged both of these assets as security in the settlement; their materiality to the parties' bargain is expressly stated in the agreement. Ms. Breen contends that this conduct unambiguously amounts to a "transfer [of] assets which have been pledged as collateral" under the settlement agreement, which entitles her to access the larger recovery of punitive damages provided by the Consent Judgment. She also argues that this conduct amounts to a breach and fraud in the inducement.

The Greens responded to Ms. Breen's motion by immediately sending her a cashier's check for $117,000, the balance owed in the absence of a transfer of pledged security or a breach, for a total of $120,000 paid. Among other arguments, they contend that, whatever may have happened with the Liberty Lane Property mortgage and the related $100,000 loan, their payment in full of the $120,000, which Ms. Breen accepted, satisfies all of their obligations under the settlement agreement, entitling them to compel the destruction of the Consent Judgment, the filing of the stipulation of dismissal and the release of the remaining security. For the same reasons, the Greens have filed a counter motion to enforce the settlement. ECF No. 35.

The motions of Ms. Breen and the Greens have been referred to me and I address both through a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Based on the parties' submissions and the argument presented at a hearing, I found that the facts derived from the public record and Mr. Green's deposition in another case (the authenticity of which are not in issue), coupled with the plain meaning of the unambiguous language of the settlement agreement, permit the Court to determine the motions without the need for an evidentiary

hearing. For the reasons that follow, I recommend that Ms. Breen's motion be granted and that the Greens' motion be denied.

I. BACKGROUND

A. Underlying Litigation and Settlement Agreement

On June 13, 2018, Ms. Breen sued the Greens, her aunt and uncle, on whom she had relied as a child for love, care and advice. ECF No. 1. She alleged that, when her husband, who was serving in the military, died unexpectedly, leaving her with three young children, the proceeds of a $200,000 life insurance policy and a wrongful death recovery, she turned to the Greens for help. She claimed that Mr. Green made representations to induce her to turn over some or all the insurance proceeds and wrongful death recovery to him for investment, that he invested inappropriately, misappropriated some of the funds and lied to cover up his malfeasance and that his wife, Mrs. Green, aided and abetted in what amounted to reckless and criminal fraudulent conduct. Ms. Breen's sixteen Count complaint asserted securities fraud, breach of contract and common law fraud (among other claims) against the Greens; it alleged an injury in the amount of $300,000, and claimed entitlement to interest, punitive damages, double and treble damages, attorneys' fees, civil penalties and disgorgement. The Greens vigorously denied all of her allegations. ECF No. 25.

After the Court entered a temporary attachment based on consent (ECF No. 17), the parties chose a mediator (Patricia Rocha, Esq., of Adler Pollock & Sheehan PC) and entered mediation. On December 6, 2018, the parties signed a handwritten memorialization of their agreement to enter into a mutually acceptable settlement agreement. ECF No. 38-1 ("Mediation Agreement"). This document roughly outlined terms, including the requirement that a punitive damage-based Consent Judgment (then described to be in the amount of $200,000) would be

held in escrow and that any proceeds from the sale of what has become known as the Liberty Lane Property would go immediately to Ms. Breen. The parties then turned to the negotiation of what became the Settlement Agreement and Mutual Release. ECF No. 31-2 at 2-45 ("Settlement Agreement"). Reciting December 6, 2018, as its date of formation (the day when the parties reached their agreement with the mediator), the Settlement Agreement was fully drafted and ready for execution by the end of December 2018. It was signed by Ms. Breen on December 31, 2018. Id. at 2, 21. The Greens signed it on January 15, 2019. Id. at 22.

In Section 1 of the Settlement Agreement, the Greens agreed to pay Ms. Breen $130,000, over a three-year period, with the right to pay less ($120,000) if paid within fifteen months. Settlement Agreement § 1. Because of the risk posed by such extended payment period, much of the Settlement Agreement is focused on security: as pertinent here, the Greens pledged a mortgage they held on the Liberty Lane Property given by an individual named Angelo Capra, together with Mr. Capra's related promise to pay the Greens $100,000 by May 10, 2019. Id. § 5; ECF No. 38-2. The Capra loan was secured by the Liberty Lane Property mortgage. ECF No. 38-2. The Settlement Agreement specifically recites that if either of these assets should be monetized or liquidated, all proceeds would go immediately to Ms. Breen, and that the "[f]ailure of the [Greens] to pay any money received by them from the Liberty Lane Property or Angelo Capra shall be a material breach of the agreement." Settlement Agreement § 5.

The Settlement Agreement includes the agreement of the Greens to a Consent Judgment in the amount of $250,000 in punitive damages (reduced by any payments) to be held in escrow by the mediator. Id. § 9; ECF No. 31-2 at 40-41. Section 9 of the Settlement Agreement sets out the three circumstances in which the Consent Judgment may be withdrawn from escrow and filed:

- Breach and failure to cure the breach of the Greens' obligation to pay $130,000 (or $120,000 if paid sooner);

- Bankruptcy, receivership or other liquidation proceeding initiated by the Greens; or

- "[I]n the event the [Greens] shall transfer or attempt to transfer assets which have been pledged as collateral under this Agreement."

Settlement Agreement § 9. If none of these three events intervenes, and after the Greens comply fully with the payment obligations in Section 1, the Settlement Agreement requires that the Consent Judgment be destroyed, and the case be dismissed with prejudice. Id.

B. Greens' Simultaneous Dealings with Jane and Angelo Capra, Maureen and Edward Grove and the Liberty Lane Property[3]

On March 1, 2019, acting for the executors for the Estate of Edward Grove, Attorney Thomas Tarro filed In re Grove as a miscellaneous petition in Kent County Superior Court seeking leave to conduct the depositions of the Greens for the perpetuation of testimony. ECF No. 31-2 at 69-75. As grounds, the petition alleged that, since early 2017, the Greens had handled the financial affairs of the decedent, Mr. Grove (who died on January 4, 2019), and his deceased wife, Maureen Grove, and that they had withdrawn approximately $400,000 from the Groves' accounts. Among the topics of concern, the petition notes that Mr. Grove's name appears on a December 28, 2018, deed for real estate located on Liberty Lane, purporting to transfer to him a one-third interest in the Liberty Lane Property just days before his death, with

[3] This section of the background exposition is derived from Rhode Island Superior Court filings and a transcript from a totally unrelated matter – In re Estate of Edward A. Grove, No. KM-2019-0245 ("In re Grove"). ECF No. 31-2 at 69-75; ECF No. 38-4 ("Green Depo."). These were filed in this Court by Ms. Breen because they shed light on the identity of some of the individuals whose names appear in the documents related to the Liberty Lane Property mortgage and related loan of Mr. Capra, which were pledged as security by the Greens as required by the Settlement Agreement, as well as because the deposition of Mr. Green contains material admissions regarding the Liberty Lane Property mortgage and the Capra loan. It must be emphasized that, apart from reliance on Mr. Green's admissions in his deposition, the authenticity of which is not disputed, the Court makes no findings regarding the accuracy of any of the allegations made in this Superior Court proceeding.

the other two-thirds going to the Greens. Id. at 70-71, 79-80. The petition states, "[t]he circumstances surrounding the transfer are in question." Id. at 71.

Pursuant to this petition, the deposition of Mr. Green was taken on June 14, 2019. The transcript of his testimony (but not the exhibits) is in the record. See Green Depo. The documents that Mr. Green discusses in his testimony include the following:

- ECF No. 38-2 (May 31, 2018, mortgage for Liberty Lane Property from Angelo Capra to Howland Green based on loan of $100,000 to be paid by May 10, 2019);
- ECF No. 38-5 (December 18, 2018, discharge of mortgage for Liberty Lane Property given by Howland Green); and
- ECF No. 31-2, 66-67 (December 28, 2018, trustee's deed of Jane Capra, wife of Angelo Capra, as Trustee of Jane Capra Trust, conveying Liberty Lane Property to Greens and Edward A. Grove).

The lattermost document (trustee's deed) recites that the consideration for the conveyance of the Liberty Lane Property by Angelo Capra's wife (as trustee of her own trust) to the Greens and Edward Grove was the forgiveness of a debt of $150,000 owed by Angelo Capra to Howland Green. ECF No. 31-2 at 67.

The deposition of Mr. Green is a confusing muddle. To the extent that it makes sense, it appears to establish that, purporting to act pursuant to powers of attorney, the Greens were deeply involved in the financial affairs of at least four senior citizens seemingly nearing the end of their lives – Jane and Angelo Capra, and Maureen and Edward Grove.[4] It also establishes that, since 2014, the Greens had been deeply invested in a tree cloning operation to develop deer-resistant evergreen trees and that they had been working on a plan to use the Liberty Lane Property for this endeavor. Green Depo. at 27-28. However, until the end of December 2018, apart from Mr. Green's interest as mortgagee, the Greens did not own the Liberty Lane Property;

[4] As of the date of Mr. Green's deposition in In re Grove (June 14, 2019), only Jane Capra was still alive. Green Depo. at 42.

rather, the Property was owned by Angelo Capra. He and his wife, Jane, had lived in a residence located on the Property. Green Depo. at 12, 21.

Pertinent to this case, Mr. Green testified that he had a power of attorney for Mr. Capra (the mortgagor on the Liberty Lane Property mortgage and the ostensible recipient of the $100,000 loan referenced in the Settlement Agreement), and that he used the money of Mrs. Grove, for whom he also had a power of attorney, to pay Mr. Capra's nursing home and other expenses, and further that all of the $100,000 supposedly loaned to Mr. Capra had come from Mrs. Grove. Id. at 12, 15, 17-18, 42-43, 48-49. Mr. Green explained that, after Mrs. Grove's death, Mr. Grove (whose power of attorney the Greens also held) was put on the Liberty Lane Property deed to expunge the debt owed by the Greens to the Groves. Id. at 50-51. Further, even though Mr. Green held powers of attorney for both Angelo and Jane Capra, he professed ignorance regarding how the Liberty Lane Property was transferred from Mr. Capra to his wife as Trustee for the Jane Capra Trust, before being transferred by Jane Capra, as Trustee, to the Greens and Mr. Grove. Id. at 51-52. Regarding the discharge, Mr. Green testified, "that mortgage was – was discharged before the property was put – was transferred to Jane. Laura [Angelo Capra's attorney] discharged that mortgage. She couldn't transfer it to Jane, unless the mortgage was discharged. . . . I had to discharge it so the property can be transferred." Id. at 52. And in addition to the recitation in the trustee's deed that the transfer of the Liberty Lane Property was in consideration for the forgiveness by Mr. Green of a $150,000 debt owed by Mr. Capra, Mr. Green also testified that the plan was for him to use the "value" derived from Liberty Lane Property to continue to pay for Mr. Capra's nursing care and to pay a "gift" of a share of the Liberty Lane Property income to Mrs. Capra. Id. at 48. It is unknown how much of this promised "value" Mr. Capra received from the transfer of the Liberty Lane Property, as he died

in the Spring of 2019. Id. at 42. However, Mr. Green testified that, as of the date of the deposition in June 2019, "I give her [Jane Capra] money every month," $400, "just to gift," to "[h]elp her support herself." Id. at 48.

This testimony reveals that Mr. Green was intimately involved in planning the complex sequence of transfers culminating in the end of 2018 to solve the problem of the money he had taken from Maureen and Edward Grove and to get control of the Liberty Lane Property on which he had been planning to continue the nursery business. Id. at 27-28, 53. Thus, he arranged for Jane Capra to include Mr. Grove (just days before his death) on the Liberty Lane Property deed to expunge whatever financial obligations the Greens owed to the Groves (amounting to at least $128,000). Id. at 49-51. Mr. Green acquired control of the Liberty Lane Property for himself and his wife in consideration for forgiveness of a $150,000 debt owed by Mr. Capra, coupled with the commitment to pay some of the "value" or "income" from the Liberty Lane Property to Mr. Capra so he can "self-pay his nursing care" and to pay some to "gift a share of income" to Mrs. Capra "for the rest of her life." Id. at 48. The latter payment stream was already flowing to Mrs. Capra at the rate of $400 per month. Id. And Mr. Green arranged for and discharged the Liberty Lane Property mortgage to allow the Liberty Lane Property title to be cleared to facilitate these transactions.

C. Sequence of Events – Liberty Lane Property and Breen Settlement

What follows is the single sequence created by merging the parallel events described above. The sequence begins with the Mediation Agreement signed on December 6, 2018. This handwritten document memorializes that the Greens had reached an agreement to settle with Ms. Breen. Among the security for the payment obligation, the document references the Liberty Lane Property. As of that date, the Land Record in South Kingstown confirmed the existence of

a mortgage on the Liberty Lane Property, signed by Angelo Capra as mortgagor in May 2018 and held by Mr. Green as mortgagee, to secure a loan owed by Mr. Capra to Mr. Green worth $100,000 and due to be paid in full on May 10, 2019. ECF No. 38-2. Twelve days after the Mediation Agreement was signed, on December 18, 2018, Mr. Green executed the discharge of the Liberty Lane Property mortgage, which recited that he had "received full payment and satisfaction of that certain Mortgage Agreement." ECF No. 38-5 at 2. Ten days after that, on December 28, 2018, Jane Capra signed the trustee's deed transferring two-thirds of the Liberty Lane Property to the Greens and one-third to Edward Grove. ECF No. 31-2 at 66-67. As noted above, this trustee's deed recites that it is given in consideration of forgiveness of a debt of $150,000 (up from the $100,000 reflected in the mortgage signed seven months prior) owed by Mr. Capra to Mr. Green. Id. at 67. Neither of the December 2018 documents was contemporaneously recorded. Thus, they were not yet of record when the Settlement Agreement was tendered to Ms. Breen for execution.

During the exact same period that the Liberty Lane Property mortgage was being discharged and the Angelo Capra loan was being forgiven, the Settlement Agreement was being finalized, including the "material" provision that "[i]t is the intention of this Section 5 to insure that the Liberty Lane Property Mortgage . . . and any promise to pay money by Angelo Capra to the [Greens] shall serve as collateral for the [Greens'] obligations to [Ms. Breen] under this Agreement." Settlement Agreement § 5. The Settlement Agreement further mandates that if these assets are "in any way . . . monetized or liquidated," the proceeds shall be paid to Ms. Breen. Id. The opening sentence of the Settlement Agreement makes clear that, for an effective date, it looks back to the date of the Mediation Agreement, stating that "[t]his Settlement Agreement and Mutual Release . . . is entered into on this 6th day of December, 2018." Id. at 2.

On December 31, 2018, Ms. Breen signed the Settlement Agreement. Id. at 21. A week later, on January 7, 2019, the Liberty Lane Property mortgage discharge and the trustee's deed conveying the Liberty Lane Property to the Greens and Edward Grove (who had already died) were both finally recorded in the Land Records for South Kingstown. ECF Nos. 31-2 at 66, 38-5 at 2. Eight days after that, on January 15, 2019, the Greens finally signed the Settlement Agreement. Settlement Agreement at 22. They did so despite the Settlement Agreement's express statements that it was effective as of December 6, 2018, and that the "Liberty Lane Property Mortgage . . . and any promise to pay money by Angelo Capra to the [Greens] shall serve as collateral." Yet, at the time their signatures were placed on the Settlement Agreement, they knew that the Liberty Lane Property mortgage and the Angelo Capra obligation to pay $100,000 referenced in Section 5 no longer existed because they had been respectively discharged and forgiven as part of the tangled web of financial machinations described by Mr. Green in his deposition in In re Grove.[5]

D. Motion to Reopen

After the Settlement Agreement was executed, the Greens began to make the minimal required $500 monthly payments. Some months later, aware that the Angelo Capra loan of $100,000 must be paid by May 10, 2019, and having heard nothing from the Greens, Ms.

[5] At the hearing, through counsel, the Greens argued that there may have been a disclosure of the true status of the Liberty Lane Property during the negotiations of the Settlement Agreement. Attorney Indeglia, who participated on behalf of Ms. Breen in the mediation, represented that there was no such disclosure. The Greens have made no factual proffer to rebut Attorney Indeglia's representation; in particular, they have not provided a declaration from the attorney who represented them at the mediation, Michael J. Daly, Esq., of Pierce Atwood LLP. I find that there is no need to for the Court hear testimony from the attorneys and the mediator because the unambiguous language of the Settlement Agreement (analyzed in full below) clinches the issue. Dated as an agreement "entered" on December 6, 2018, it refers to the Liberty Lane Property mortgage and Capra loan as assets currently in existence. It further recites that it is entered "without reliance on any promise, representation, agreement or understanding, oral or written, by or between the parties relating to the subject matter of this Agreement, other than those expressly contained herein." Settlement Agreement § 26. In light of this language, there is no need for a time-out for discovery and an evidentiary hearing.

Breen's counsel checked the South Kingstown Land Records. When they did, they were stunned to learn what had happened. This motion to reopen was filed immediately thereafter, on June 6, 2019.

The Greens responded swiftly. On June 11, 2019, their counsel advised of their intent to pay the balance owed ($117,000, as they contend) in full, but Ms. Breen made clear that she would not accept $117,000 as payment in full in light of the alleged breach and pending motion to reopen; she unambiguously advised that she intended to seek leave to file and execute the Consent Judgment. On June 19, 2019, the Greens tendered $117,000. ECF No. 39-4. On June 21, 2019, Ms. Breen accepted the tender after reconfirming that she did so as a reduction of the amount that she claims is now owed to her pursuant to the Consent Judgment. ECF No. 39-6 at 1.

In opposition to the motion to reopen, the Greens marshal three arguments. First, they contend no breach occurred because Section 5 of the Settlement Agreement does not prohibit the "transfer or attempt to transfer" the Liberty Lane Property mortgage or the Angelo Capra loan so that there was no breach. Rather, they contend that there was simply a property swap in which the transferor was Jane Capra, as trustee, who conveyed the deed to Edward Grove and to the Greens, who were mere recipients.[6] Second, citing ADP Marshall, Inc. v. Noresco, LLC, 710 F. Supp. 2d 197, 234 (D.R.I. 2010), the Greens attack the Consent Judgment as imposing a punitive contractual penalty that is unenforceable under Rhode Island law. Third, the Greens invoke accord and satisfaction pursuant to R.I. Gen. Laws § 6A-3-311 based on Ms. Breen's acceptance

[6] To the extent that the Greens contend that Mrs. Capra is the person who made a "transfer" and the Greens were just passive recipients of the Liberty Lane Property who did not "transfer" anything in breach of the Settlement Agreement, the Court is particularly troubled in light of Mr. Green's testimony in In re Grove, which makes clear that Mr. Green held powers of attorney for both Jane Capra and Angelo Capra, and that the latter was in a nursing home and nearing death.

of their tender of $117,000. Their counter motion to enforce (ECF No. 35) is based on the same arguments. ECF No. 35 (incorporating arguments opposing the motion to reopen).

II. LAW

The Rhode Island Supreme Court has determined that a settlement agreement is a contract and therefore governed by contract law. Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 557-58 (R.I. 2009). As with any contract, when a settlement agreement is determined to be clear and unambiguous, then "the meaning of its terms constitutes a question of law for the court." Cassidy v. Springfield Life Ins. Co., 262 A.2d 378, 380 (R.I. 1970). In determining whether a contract is ambiguous, the court should read the contract "in its entirety, giving words their plain, ordinary, and usual meaning." Mallane v. Holyoke Mut. Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995). While carrying out this task, the court should "refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity . . . where none is present." Id.

When a settlement agreement is at issue, courts may reopen a settled case without harm to the finality of judgments; to the contrary, when a settlement agreement has been flouted, the breach offends the public policy favoring settlements as an efficient way of resolving disputes. Huynh v. City of Worcester, Civil Action No. 08-40240-TSH, 2010 WL 3245430, at *4 (D. Mass. Aug. 17, 2010). Because a settlement agreement is a voluntary surrender of the right to have one's day in court, Bandera v. City of Quincy, 344 F.3d 47, 52 (1st Cir. 2003), parties to settlement agreements should expect that they will be honored and enforced by the courts. Sch. Comm. of the Town of W. Warwick v. Giroux, No. KC-2010-1106, 2012 WL 683172 (R.I. Super. Ct. Feb. 28, 2012). Federal courts treat settlement agreements as "solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable

effort to see that the agreed terms are fully and timely carried out." Abdullah v. Evolve Bank & Tr., No. CA 14-131 S, 2015 WL 4603229, at *5 (D.R.I. July 29, 2015) (citing Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976)). Where, as here, the bargain struck is proved by a fully executed and integrated[7] Settlement Agreement, "summary enforcement of arm's-length settlements is a useful device to hold litigants to their word." Malave v. Carney Hosp., 170 F.3d 217, 222 (1st Cir. 1999).

III. ANALYSIS

A. Discharge of Liberty Lane Property Mortgage and Forgiveness of Capra Loan Trigger Reversion to Consent Judgment

Mindful of the ancient aphorism commonly known as "Occam's Razor," I begin by focusing on the simplest solution – the one that flows directly from the plain meaning of the words used in the Settlement Agreement – that the discharge of the Liberty Lane Property mortgage and the forgiveness of the Angelo Capra loan are each a transfer of a pledged asset that triggers reversion to the Consent Judgment. This analysis of the parties' bargain leads inexorably to the conclusion that Ms. Breen's motion to reopen is well founded.

For starters, the Settlement Agreement plainly is structured to afford Ms. Breen the right to recover by a publicly-filed Consent Judgment for $250,000 in punitive damages (less any payments made) based on the compromise of a claim for $300,000 in actual damages, plus $300,000 or $600,000 in double or treble damages, punitive damages, interest and attorneys' fees. At the same time, clearly focused on the risk of collecting such a sum, Section 1 of the

[7] Section 26 of the Settlement Agreement contains the integration clause. In relevant part, it provides:

> This Agreement contains the complete, final, and exclusive embodiment of the entire understanding between the parties . . . and [ ] the terms of the Agreement have been completely read are fully understood and agreed to voluntarily.

Settlement Agreement § 26.

Settlement Agreement, together with the attached Consent Order (referenced in Section 8), expressly provides the opportunity for the Greens to end the case by paying only $130,000 or even $120,000, and to keep the public record of the case forever cloaked under seal. As provided by Sections 5 and 9, the Greens' ability to take advantage of these far more favorable terms is expressly conditioned on their pledging certain assets as security and their making no transfer or attempt to transfer any of the pledged assets. According to Section 9, if the critical condition regarding the security fails, because any of the pledged assets are transferred, or even if just an attempt is made to transfer, the Settlement Agreement is clear and unambiguous: the parties revert to the deal embodied in the Consent Judgment and the Greens lose the opportunity to take advantage of the far less draconian terms set out in Section 1 and the Consent Order. Importantly, in regard to the "transfer or attempt to transfer" of assets pledged as security, Section 9 does not require proof of a breach. Settlement Agreement § 9.

As straightforwardly set out in Section 5, the most critical of the assets pledged as security is the Greens' expectation to be paid $100,000 by Angelo Capra[8] and the Liberty Lane Property mortgage that secured that loan: "[i]t is the intention of this Section 5 to insure that the Liberty Lane Property Mortgage . . . and any promise to pay money by Angelo Capra to the [Greens] shall serve as collateral for the [Greens'] obligations to [Ms. Breen] under this Agreement." Id. § 5. In recognition that the Greens did not then own the Liberty Lane Property itself, Section 5 is padded with other protections, including that, if the Liberty Lane Property

[8] The pledge of the Angelo Capra loan was of particular value to Ms. Breen because, as reflected in the Liberty Lane Property mortgage filed in the South Kingstown Land Records, the $100,000 had to be paid in full by May 10, 2019. Alone among the security pledged by the Greens, this asset created the realistic expectation that Ms. Breen would be paid a substantial part of the settlement fund within only five months of executing the Settlement Agreement. At the hearing, Ms. Breen's counsel pointed out that significant difficulties were expected with monetizing the other assets pledged as security – the Greens' marital home and certain stock certificates reflecting ownership in two companies traded over the counter. Only the Capra loan, secured by the Liberty Lane Property mortgage, created the expectation of swift payment.

were sold (for example by Angelo Capra to a third party), any proceeds received by the Greens must be paid to Ms. Breen, as well as that, if the Liberty Lane Property were conveyed to the Greens, they must pay any proceeds received by them as a result of owning the Property to Ms. Breen. However, none of these provisions undermines the clarity of the core Section 5 principle – the Liberty Lane Property mortgage and the Angelo Capra loan, which the Greens did own, are pledged assets that cannot be transferred.

That leaves only the question of whether Mr. Green's actions in discharging the Liberty Lane Property mortgage and forgiving the Angelo Capra loan constitute a "transfer or attempt to transfer," triggering the reversion of the Settlement Agreement from the Section 1 payment plan and the Consent Order, to the Consent Judgment.

The first issue is timing. This is not a hard question: the first sentence of the Settlement Agreement clearly states that it was "entered into on" December 6, 2018, before the transactions adversely affecting the Liberty Lane Property mortgage and the Angelo Capra loan were executed and recorded. Therefore, both transactions clearly occurred after the Greens had entered into the Settlement Agreement and are subject to its terms.

Second, the Court must determine whether either the discharge of the mortgage or the forgiveness of the loan, or both, amount to a "transfer" as the term is used in Section 9 of the Settlement Agreement. This also is not difficult.

As to the discharge, Rhode Island law establishes that a "mortgage (or mortgage deed) acts as security for [the] debt . . . in which 'a mortgagee not only obtains a lien upon the real estate by virtue of the grant of the mortgage deed but also obtains legal title to the property subject to defeasance upon payment of the debt.'" Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069, 1077-78 (R.I. 2013) ("Rhode Island is a title-theory state."). Thus, when a mortgage is

discharged, this legal title is restored to the mortgagor by operation of law. See Kirshenbaum v. Fid. Fed. Bank, F.S.B., 941 A.2d 213, 216 (R.I. 2008) (when "mortgage had been discharged, any encumbrances on their property had been removed"). As the applicable statute provides, a discharge operates to "defeat and release the mortgage and perpetually bar all actions to be brought thereon in any court." R.I. Gen. Laws § 34-26-2(a). And the term "transfer," defined in Merriam-Webster as the Greens suggest, means an action "to make over the possession or control of"; used as a noun, it means a "conveyance of right, title, or interest in real or personal property from one person to another."[9]

These analytical elements lead ineluctably to the conclusion that Mr. Greens'[10] discharge of the Liberty Lane Property mortgage is a "transfer" as the term is used in the Settlement Agreement. The action of Mr. Green in discharging the Capra loan was done (as he testified) so that Angelo Capra's title to the Liberty Lane Property could clear and allow it to be transferred, ultimately to the Greens. Such an action fits neatly into the definition of "transfer" in that it makes over control of real estate to the mortgagor and, in a title-theory state, it effectuates the conveyance of the legal title held by the mortgagee back to the mortgagor. Further, read holistically, salted with common sense, the Settlement Agreement clearly contemplates that a discharge of the Liberty Lane Property mortgage amounts to a transfer because it renders the

[9] See Transfer, Merriam-Webster, available at https://www merriam-webster.com/dictionary/transfer.

[10] A word on Mrs. Green's responsibility for Mr. Green's conduct: although much of the discussion surrounding the Liberty Lane Property mortgage discharge and the Capra loan forgiveness focuses on the conduct of Mr. Green, Mrs. Green stands with him with respect to the Settlement Agreement and – importantly – the Consent Judgment. For example, Section 1 of the Settlement Agreement provides that the Greens are "jointly and severally" responsible for paying Ms. Breen. Further, according to Section 9, if circumstances justify entering it, the "Consent Judgment shall provide for the entry of Judgment in favor of the Plaintiff [Ms. Breen] and against the Defendants [the Greens]." And Section 5, which underpins Ms. Breen's security, makes it a material breach if "the Defendants" fail to pay Ms. Breen any money received from the collateral. Nor has either of the Greens argued that Mr. and Mrs. Green should be considered differently as to Ms. Breen's motion to reopen. Accordingly, this report and recommendation treats each of them as responsible for the consequences of the "transfer" and of the admissions in Mr. Green's deposition in In re Grove.

mortgage unavailable as an asset securing Ms. Breen's right to be paid. See HSBC Realty Credit Corp. (USA) v. O'Neill, 745 F.3d 564, 574 (1st Cir. 2014) ("[A] dose of '[c]ommon sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.'").

The same common sense reading also disposes of the Angelo Capra loan. While the question whether the forgiving of a loan amounts to a "transfer" may pose an existential conundrum in the abstract, in context here, Ms. Breen bargained to have the Angelo Capra loan available to her as security. Mr. Green's forgiveness of the loan caused it to cease to exist and stripped her of that right. This too amounts to a "transfer [of an] asset[] which ha[s] been pledged as collateral," as the term is used in Section 9 of the Settlement Agreement.

Based on the foregoing, I find that the plain and ordinary meaning of the words used in the Settlement Agreement ends the inquiry. Mr. Green unambiguously transferred pledged assets when he signed and recorded the discharge of the Liberty Lane Property mortgage, as well as when he forgave the Angelo Capra loan. Under Section 9 of the Settlement Agreement, even one transfer of a pledged asset is enough to trigger reversion to the Consent Judgment. Based on this finding, I recommend that the Court order that the Consent Order be vacated and the Consent Judgment be removed from escrow and filed so that Ms. Breen may proceed to execute upon it.

B. Breach of Contract[11]

A material breach occurs when there is a breach of an essential term of the contract, which defeats the parties' objective in making the contract. Parking Co., L.P. v. R.I. Airport Corp., No. Civ.A. P.B.2004-4189, *4-5 (R.I. Super. Ct. Feb. 18, 2005). A party's material

[11] Strictly speaking, it is not necessary to continue the analysis in light of the plain meaning of the Settlement Agreement as discussed above. That is, my recommendations as set out in the Conclusion, *infra*, do not require a finding of material breach or fraud in the inducement. Rather, my proposed findings of breach and fraud in the inducement are presented in the alternative, to aid the Court, if it declines to adopt the plain meaning analysis.

breach of contract justifies the nonbreaching party's subsequent nonperformance of its contractual obligations. Women's Dev. Corp. v. City of Cent. Falls, 764 A.2d 151, 158 (R.I. 2001). On the other hand, if the evidence establishes that the breach of contract claim was a post-hoc rationalization to support a decision to terminate an agreement, it cannot amount to a material breach. Id. at 160. Generally, whether a party materially breached his or her contractual duties is a question of fact. Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010). However, if the issue of material breach "admits of only one reasonable answer, then the court should intervene and resolve the matter as a question of law." Id.

Applying the law of material breach to the facts presented in connection with this motion, I find that the Greens' financial machinations as described by Mr. Green in his In re Grove testimony unambiguously establish that they breached the following terms in the Settlement Agreement:

> In the event that the Liberty Lane Property shall be conveyed to the [Greens] under any circumstance, the [Greens] shall not encumber or borrow against said Liberty Lane Property without paying any proceeds from such encumbering or borrowing to [Ms. Breen] . . .
>
> [T]o the extent that such promise [to pay $100,000] and security [the Liberty Lane Property mortgage] by Angelo Capra to [the Greens] should in any way become monetized or liquidated, the proceeds of such monetization or liquidation shall be paid to [Ms. Breen] to reduce the obligation under this Agreement.

Settlement Agreement § 5. These terms unambiguously provide that any benefit received by the Greens as a result of their ownership of the Liberty Lane Property mortgage and the Angelo Capra loan must go directly to Ms. Breen. Because the Settlement Agreement expressly labeled a failure of these obligations as "a material breach of this Agreement," id., I further find that this is a circumstance that "admits of only one reasonable answer." Parker, 996 A.2d at 632. There

is no need for a factual examination of whether the breach is *de minimis*; rather, the court may intervene and resolve the matter as a question of law. Id.

So what is the breach? In his In re Grove deposition, Mr. Green admitted that he arranged for the Liberty Lane Property to be relieved of his mortgage so that it could be conveyed to him and his wife (and Edward Grove) encumbered by ongoing obligations owed to Angelo and Jane Capra, yet nothing was provided to Ms. Breen. He admitted that he caused the conversion of the Angelo Capra promise to pay $100,000 (or $150,000) and the Liberty Lane Property mortgage into controlling ownership of the Property, including its ability to generate "value" and "income." Green Depo. at 42, 48. He admitted that, based on this "value," he had been and was continuing to pay $400 per month to Jane Capra as a "gift" in connection with these conveyances. Id. Section 5 of the Settlement Agreement directly states that it is materially breached if the Greens receive value[12] from their ownership of the Liberty Lane Property mortgage or the Angelo Capra loan and do not deliver that value to Ms. Breen. Mr. Green plainly admitted that he and his wife did acquire value, yet they provided Ms. Breen with nothing. Neither the fact that the Greens structured these arrangements to avoid the receipt of cash nor the fact that untangling the Greens' stratagems make the Gordian knot seem like child's play justify allowing them to avoid the finding that this conduct is a material breach of the Settlement Agreement. See Kirshenbaum, 941 A.2d at 218 (argument that facts pertaining to mortgage and discharge "are 'ridiculously convoluted' is utterly devoid of merit; The very nature

[12] The Greens are not aided by the reference to "money" in the phrase, "[f]ailure of the [Greens] to pay any money received by them from the Liberty Lane Property or Angelo Capra," which the Settlement Agreement characterizes as the event constituting a "material breach." Settlement Agreement § 5 (emphasis added). The definition of "money" includes "[t]he assets, property, and resources owned by someone or something," and is not limited to cash. See Money, Lexico, available at https://www.lexico.com/en/definition/money. Thus, if they derived anything of value as a result of their ownership of the Liberty Lane Property mortgage or the Angelo Capra loan, it was a material breach if that value was not conveyed forthwith to Ms. Breen.

of our judicial system requires . . . judges [to] deal with extremely difficult and intricate factual questions.").

Based on the foregoing, I recommend that the Court find the Greens committed a material breach of Section 5 of the Settlement Agreement, voiding Ms. Breen's duty to perform her obligations in Section 1, which required her to accept only $130,000 (or $120,000) as full satisfaction of her claims. Accordingly, I recommend that the Court order that Ms. Breen may proceed with the alternative agreed-upon remedy – the Consent Judgment.

C. Fraud in Inducement[13]

I find by clear and convincing evidence that the Greens' conduct amounts to fraud that induced Ms. Breen to agree to the Section 1/Consent Order remedies because she believed herself to be secured by the Liberty Lane Mortgage and the Angelo Capra loan. Halpern v. Pick, 522 A.2d 197, 197 (R.I. 1987) (applying clear and convincing standard to claim of fraudulent inducement). Pursuant to Rhode Island law, if a contract is reached through fraud and trickery, the contract becomes voidable and the party who intentionally induced the duped party to rely on false representation may be sued for damages in an action for deceit or induced party may rescind the contract and recover what was paid. Zaino v. Zaino, 818 A.2d 630, 636-38 (R.I. 2003). To establish fraud, "the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon,' and that the plaintiff justifiably relied thereon to his or her damage." Women's Dev. Corp., 764 A.2d at 160 (quoting Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). The plaintiff must prove, among other facts, that at the time defendants entered into the agreements, they falsely represented their intent

[13] This section is contingent in the same way the material breach analysis is. See n.11 *supra*.

to perform. Parker, 996 A.2d at 634. Such fraud entitles the innocent party to recover the benefit she has lost. Dudzik v. Leesona Corp., 473 A.2d 762, 767 (R.I. 1984).

Application of these principles to the facts here (particularly Mr. Green's deposition testimony) clearly establishes that the discharge of the Liberty Lane Property mortgage and forgiveness of the Angelo Capra loan (which the Greens had set in motion well before December 6, 2018), at the same time that the Greens were pledging these assets to secure the less draconian remedy in Section 1, comprises intentional fraud which induced Ms. Breen to sign the Settlement Agreement believing that these assets existed and provided her with security. With this substantial fraud tainting the Section 1 remedies, the law provides Ms. Breen with the option to void that term, leaving her with the Consent Judgment as her remedy. See id. I recommend that the Court find the Greens committed fraud in inducing Ms. Breen to agree to Section 1's opportunity for the Greens to resolve the case by payment of $130,000 (or $120,000) over time. As a consequence, I recommend that the Court order that Section 1 is void, that the Consent Order referred to in Section 8 is vacated, and that Ms. Breen may now proceed based on the remedy that the Settlement Agreement provided in this circumstance – the Consent Judgment.

D. Unenforceable Penalty

The Court need not linger long on the Greens' argument that the Consent Judgment is a contractual penalty clause and is therefore unenforceable under Rhode Island law. The Greens are right that Rhode Island law distinguishes contractual penalties from liquidated damages and treats the former as unenforceable as a matter of public policy, Wai Feng Trading Co. Ltd. v. Quick Fitting, Inc., C.A. No. 13-033WES, 2018 WL 6605927, at *13 (D.R.I. Dec. 17, 2018), while the latter may operate as written, if the clause simply provides for a recovery of liquidated damages because the harm caused by the breach is difficult to estimate and the amount fixed is a

reasonable forecast of actual harm. See ADP Marshall, 710 F. Supp. 2d at 234-35. However, the Consent Judgement is neither a contractual penalty clause nor a liquidated damages clause. Rather, the Consent Judgment is the agreed-upon compromise of Ms. Breen's claims that would be deployed if the security supporting the approach in Section 1 failed because of a transfer or attempted transfer of any of the pledged assets. While its filing may be triggered by a breach or fraud voiding the Section 1 alternative, Section 9 expressly provides that the Consent Judgment may also become operative in the absence of a breach, such as in the circumstances presented here. Because the Consent Judgment is not a penalty to be imposed in the event of breach of the Settlement Agreement, the doctrine holding such penalties unenforceable is not applicable.

I do not recommend that the Court find the Consent Judgment is an unenforceable contractual penalty.

E. Accord and Satisfaction

An accord and satisfaction is "[a]n agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions." Kottis v. Cerilli, 612 A.2d 661, 664-65 (R.I. 1992). Essential to applicability of the doctrine is the parties' agreement that what is given is in full satisfaction of an obligation. Weaver v. Am. Power Conversion Corp., 863 A.2d 193, 197 (R.I. 2004). When that agreement is performed, the right of action arising from the obligation is extinguished. ADP Marshall, Inc. v. Brown Univ., 784 A.2d 309, 313 (R.I. 2001). For a negotiable instrument like the cashier's check tendered by the Greens, accord and satisfaction is governed by R.I. Gen. Laws § 6A-3-311, which provides that when a person "in good faith tender[s] an instrument to the claimant as full satisfaction of the claim," the claim is discharged if the "instrument or an accompanying written communication contained a conspicuous statement to the effect that the

instrument was tendered as full satisfaction of the claim." R.I. Gen. Laws § 6A-3-311(a-b). And before the doctrine of accord and satisfaction may operate as a defense, the party asserting the defense must show that an agreement exists and that the agreement was accepted in exchange for refusal to press a right of action. Kottis, 612 A.2d at 665.

In this case, the parties' Settlement Agreement provided for reversion to the Consent Judgment in the event of a transfer of a pledged asset, which occurred when Mr. Green discharged the Liberty Lane Property mortgage and forgave the Angelo Capra loan. Therefore, as the attorneys' communications make plain, by the time of the Greens' tender of the cashier's check for $117, 000, it was too late – the parties' agreement had moved past the point where $117,000 was an amount that Ms. Breen had committed to accept as payment in full. This was made clear to the Greens before they opted to send the check; that is, they were told that if they did send it, the check would be cashed as a credit reducing the $250,000 due and owing pursuant to the Consent Judgment. ECF No. 39-6 at 1, 3. Accordingly, the statutory element that the person against whom the claim is asserted must be acting "in good faith" in tendering a check as full satisfaction of the claim is missing. See R.I. Gen. Laws § 6A-3-311(a)(i). And more fundamentally, accord and satisfaction does not work unless it is pursuant to an agreement. Kottis, 612 A.2d at 664. Here, the agreement between these parties that the Greens could satisfy their obligations by giving $117,000 had been voided by the Greens' conduct. I do not recommend that the Court find accord and satisfaction.

IV. CONCLUSION

Based on the foregoing analysis, I recommend that Ms. Breen's motion (ECF No. 31) to reopen the case, vacate the Consent Order (ECF No. 29) and enter the Consent Judgment (ECF No. 31-2 at 43-44) be granted and that the Greens' motion (ECF No. 35) to enforce settlement

agreement be denied. I recommend further the Court direct that the Consent Judgment be removed from escrow by counsel for Ms. Breen, who shall file it, and that the Consent Judgment shall be entered, terminating the case by judgment in Ms. Breen's favor with credit for the $120,000 already paid. I further recommend that the Clerk shall be directed to unseal the case. Finally, in light of Ms. Breen's entitlement to recover her reasonable attorneys' fees and costs as the prevailing party in connection with the motion to reopen,[14] I direct that Ms. Breen file her application for attorneys' fees within ten days of the issuance of this report and recommendation; the Greens may file their opposition one week later.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
September 13, 2019

[14] The Settlement Agreement expressly provides for a reasonable fee award to Ms. Breen as the prevailing party on this motion. Settlement Agreement § 12. Alternatively, I recommend that the Court award her attorneys' fees in connection with this motion based on its inherent power to sanction a litigant who "has acted in bad faith" or "vexatiously, wantonly, or for oppressive reasons." Abdullah, 2015 WL 4603229, at *4 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991)). Such sanctions are appropriate in connection with enforcement of a settlement when the misconduct has imposed "any unjust hardship that a grant or denial of fee-shifting might impose." Id. I find that Mr. Green's conduct, as described *supra*, constitutes bad faith, that it compelled Ms. Breen to incur the expense of the motion to reopen and that this is sufficient to justify such an award.