STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: MARCH 15, 2012)

DAYAMI CHANG	:	
	:	
V.	:	**C.A. No. PC-2008-0405**
	:	
BENEFIT HOLDING CO, LLC	:	

DECISION

MCGUIRL, J. This matter comes before this Court for decision following a non-jury trial. Plaintiff Dayami Chang ("Plaintiff") alleges that Defendant Benefit Holding Co., L.L.C. ("Defendant") failed to disclose material deficient conditions of a condominium at 188 Benefit Street, Providence, Rhode Island, prior to entering a Purchase & Sales Agreement ("the Agreement") with Plaintiff for the sale of that unit. Plaintiff alleges such actions violated the Rhode Island Real Estate Sales Disclosure Act ("REDA" or "the Act"), G.L. 1956 § 5-20.8-1 et. seq. (2009), as well as the terms of the Agreement. Plaintiff contends that the Defendant is liable to her for breach of contract, fraudulent misrepresentation, and negligent misrepresentation and seeks damages, including but not limited to the $32,750 security deposit she previously paid to Defendant. Jurisdiction is pursuant to Rule 52(a) of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Defendant is a limited liability company in East Greenwich, Rhode Island, involved in the development and sale of real estate. During the fall of 2007, Plaintiff expressed an interest in purchasing Defendant's condominium located at 188 Benefit

Street, Providence, Rhode Island ("Unit Six"). Plaintiff had substantial experience in the real estate industry, selling mortgages for Wells Fargo, Countrywide, West Bay, and Carteret between 2003 and 2007. Pl's Dep. 8:14–9:3. In addition, Plaintiff had some familiarity with home renovation, as she had supervised the renovation of the premises located at 20 Woodlawn Terrace, Providence, Rhode Island. Pl's Dep. 41:5–43:14.

Prior to making an offer on the property, Plaintiff personally viewed Unit Six in the company of her realtor, Harry Smith. At the time of this viewing, the condominium was unfurnished. Pl.'s Dep., 19:7–19:9, 23:16–24:14. On October 25, 2007, Plaintiff submitted an offer to purchase Unit Six. As negotiations continued, Defendant presented Plaintiff with a "Written Disclosure," describing all of the deficiencies in the property of which Defendant was aware as required by REDA. Sec. 5-20.8-2 ("[T]he seller of the real estate shall deliver a written disclosure to the buyer . . . .").

After consultation with Smith, Plaintiff entered into a Purchase and Sale Agreement with Defendant on October 30, 2007, whereby Defendant and Plaintiff agreed to enter into a contract for the sale of the condominium. See generally Condominium Resale Purchase and Sales Agreement between Chang and Benefit ("Agreement"). The Agreement set the purchase price of the unit at $655,000 and called for Plaintiff to tender a deposit in the amount of $32,750 to Defendant. Agreement at 1. Plaintiff made the deposit at the time of the Agreement. The Agreement provided that upon the default of one party, the non-breaching party had the right to retain or recover the deposits in addition to damages or specific performance.[1]

[1] The Default provision of the Agreement provides in full:

> "Upon default by the Buyer, the Seller shall have the right to retain the Deposits, such right to be without prejudice to the

Section twenty-four of the Agreement established the parameters for inspection of the premises. It provided that "Buyer [Plaintiff] may, at the Buyer's expense, choose to have any or all of the following inspections conducted as part of this Sales Agreement." Agreement at 7. Plaintiff elected to have Unit Six inspected for pest infestation, hazardous substances, radon gas, physical and mechanical deficiencies, lead contamination, and roofing issues. Agreement at 7. Regarding the discovery of a "substantial/materially deficient condition" by an inspector, the Agreement further provided:

> "If any inspection by a recognized and reputable inspector or inspection company, performed within the Inspection Period, discloses any existing, substantial/materially deficient condition* which has not been disclosed to the Buyer prior to the execution of the Agreement, the Buyer, upon providing the inspection report verifying said existing, substantial/materially deficient condition*(s) to Seller within seven (7) days after Buyer has obtained a copy of said report . . . , may:
>
> > (a) Allow the Seller the opportunity to cure such deficient condition*(s) by providing a written list of those items Buyer requests Seller to correct, whereupon Seller shall be given seven (7) days after receipt of the report and request to notify, per Section 18, Buyer in writing if Seller agrees, at Seller's own expense, to correct the deficient condition*(s). Buyer and Seller should mutually agree prior to any work being performed what each other's obligations will be subsequent to such performance.

> right of the Seller to require specific performance and payment of other damages, or to pursue any remedy, legal or equitable, which shall accrue by reason of such default. If the Seller shall default in the performance of this Agreement, all Deposits shall be promptly returned to Buyer, and Buyer may pursue any and all remedies available to it at law or equity, including but not limited to specific performance." Agreement at 8.

> (b) If Seller does not so agree or perform, and the Buyer has not waived this contingency in writing, this Agreement shall be null and void and Deposits made hereunder shall be refunded, or;
>
> (c) Terminate this Agreement by notifying the Seller in writing within seven (7) days of receipt of the inspection report whereupon this Agreement shall be null and void and Deposits made hereunder shall be refunded." Agreement at 7.

On October 31, 2007, Len Rucker of Home and Hearth Inspections, L.L.C., inspected Unit Six at the behest of Plaintiff. See generally Home & Hearth Inspections, L.L.C., Building Inspection Report: 188 Benefit Street, Oct. 31, 2007 ("2007 Pl.'s Building Inspector's Report"). Rucker is a licensed home inspector under Massachusetts law. In his report, Rucker used an issue scale to categorize the significance of problems he identified in Unit Six. This scale featured the following levels of conditions in descending order of seriousness: "Major Concern," "Safety Issue," "Repair," "Improve," and "Monitor." 2007 Pl.'s Building Inspector's Report at 3. Plaintiff's building inspector did not categorize any issue in Unit Six as a "Major Concern." His findings are discussed in substantial detail further below. See infra at 11–19.

In addition to Rucker's inspection, Plaintiff arranged for various contractors to look at the property. These contractors proposed various repairs to Unit Six and provided Plaintiff with estimates of the costs of the repairs. From the report of her building inspector and the estimates of her contractors, Plaintiff concluded that there were defects in Unit Six. In a letter dated November 9, 2007, Plaintiff expressed concern to Defendant about purported issues with Unit Six's roof/chimney, interior, heating, ventilation and air conditioning system ("HVAC"), plumbing, electrical system, and appliances/shower doors. Pl.'s Letter to Seller, November 9, 2007 ("November 9 Letter").

On November 16, 2007, Plaintiff learned that Defendant had repaired the defects in the property denoted in Plaintiff's building inspector's report without discussing the repairs with Plaintiff. That same day, Plaintiff submitted a counteroffer, offering to purchase the property for the lower sum of $600,000 and upon the Defendant's satisfaction of certain conditions. Pl.'s Letter to Gary Marinosci, November 16, 2007. Plaintiff did not submit any report verifying a defect in the property with her counteroffer. Defendant rejected this counteroffer and insisted that Plaintiff go forward with the closing. Plaintiff requested that Defendant return her deposit, but Defendant refused and ultimately sold Unit Six to another purchaser on April 7, 2008, for $635,000. Plaintiff filed the instant action to recover her deposit.

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "[t]he trial justice sits as a trier of fact as well as of law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "Consequently, [the trial justice] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. The factual determinations and credibility assessments of a trial justice traditionally are accorded a great deal of respect because it is "the judicial officer who actually observe[s] the human drama that is part and parcel of every trial and who has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a

reading of a cold record." In re Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006). Our Supreme Court has recognized that a trial justice's analysis of the evidence and findings in the bench trial context need "not be exhaustive, [and] if the decision reasonably indicates that [she] exercised [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." Notarantonio v. Notarantonio, 941 A.2d 138, 144–45 (R.I. 2008) (brackets in original) (quoting McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005)). "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) (internal citation omitted)).

III

Analysis

Plaintiff alleges that Defendant breached its contract and must return her deposit pursuant to REDA or Section twenty-four of the Agreement. To prevail on either theory, Plaintiff must show that Defendant failed to disclose—and Plaintiff was unaware of—materially deficient conditions in Unit Six prior to Plaintiff's entering the Agreement. As a threshold matter, therefore, this Court must determine whether the defects in Unit Six constituted "materially deficient conditions." If no such conditions were present, then Plaintiff's claim must fail. After review of the evidence submitted by both parties, this Court concludes that no "substantial/materially deficient conditions" existed at Unit Six and therefore finds Plaintiff in default of her obligations under the Agreement.

A

Identifying a "Materially Deficient Condition" under REDA and the Agreement

Whether a particular condition on a property is "materially deficient" within the meaning of REDA or the Agreement is a question of fact. See Am. Capital Corp. v. Blixseth, 575 F. Supp. 2d 379, 384 (D. R.I. 2008). ("[W]hether any particular condition is a materially deficient condition, or even a deficient condition, is a question that must be evaluated by a factfinder."); see also Christiania Gen. Ins. Corp. of N.Y. v. Great Am. Ins. Co., 979 F.2d 268, 278 (2d Cir. 1992) (noting in the context of a lawsuit over failure to disclose information relevant to an insurance contract that "[m]ateriality is ordinarily a question of fact"). In terms of determining the "materiality" of an allegedly deficient condition, however, the Act and the Agreement provide minimal guidance.

REDA grants buyers significant rights regarding the discovery of materially deficient conditions in the property post-agreement. If prior to closing, but after execution of an agreement to transfer real estate, "the buyer discovers that a *materially deficient condition* exists which has not been disclosed to the buyer," then buyer may choose to:

> "(1) Terminate the agreement to transfer in which case the buyer shall receive all deposits paid by the buyer to the seller or his or her agent pursuant to the agreement; or
>
> (2) Allow the seller the opportunity to cure such deficient condition, in which case the buyer must provide the seller with a report of inspection performed by a recognized and reputable inspector or inspection company, within seven (7) calendar days after the buyer has obtained a copy of the inspection report, and the seller shall be given seven (7) calendar days after receipt of the report to notify the buyer, in writing, that the seller agrees, at the seller's own expense, to correct the defective condition. If the seller does not so agree, the buyer may terminate the agreement to transfer and

> the buyer shall receive all deposits paid by the buyer to the seller or his or her agent pursuant to the agreement." Sec. 5-20.8-4(b)(1)-(2) (emphasis added).

REDA defines "deficient conditions" as "any land restrictions, defect, malfunction, breakage, or unsound condition existing on, in, across or under the real estate of which the seller has knowledge." Sec. 5-20.8-1. This broad definition of "deficient condition," however, does not provide when such deficient conditions are "material."

The Agreement grants Plaintiff rights substantially similar to those REDA provides to buyers who discover a materially deficient condition that has not been disclosed prior to the execution of the sales contract.[2] The Agreement also presents a more focused definition of "deficient conditions." Under the Agreement,

> "'Deficient Condition' is defined as a structural, mechanical or other condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property, or that, if not repaired, removed or replaced would significantly shorten or have a significant adverse effect on the expected normal life of the Property. Deficient condition does not include structural, mechanical or other conditions the nature and extent of which Buyer had actual knowledge or written notice before signing this Agreement."

Like REDA, however, the Agreement does not state when a "deficient condition" becomes "material" and triggers the buyer's right to terminate the contract or allow the seller the opportunity to cure defects.

Although Rhode Island decisional law is also silent as to a standard for judging "materiality" of defective conditions, other sources provide some guidance. As a general proposition, an item is "material" when it is "[o]f such a nature that knowledge of the

[2] Section twenty-four of the Agreement provides that the Buyer may allow the Seller the opportunity to cure such deficient conditions or terminate the agreement and receive a refund of his or her deposit. Agreement at 7.

item would affect a person's decision-making." Black's Law Dictionary 1066 (9th ed. 2009); see, e.g., United States v. Swanquist, 161 F.3d 1064, 1075 n.3 (7th Cir. 1999) ("'Materiality' is defined as 'ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" (brackets in original) (quoting United States v. Wells, 519 U.S. 482, 489 (1997))); Zimmerman v. Kent, 575 N.E.2d 70, 74 (1991) ("'[M]ateriality' . . . has been defined as whether 'a reasonable man would attach importance [to the fact not disclosed] in determining his choice of action in the transaction in question.'" (brackets in original) (quoting Rogen v. Ilikon Corp., 361 F.2d 260, 266 (1st Cir. 1966))).

In the context of misrepresentation actions filed by buyers of real estate against sellers relating to defects discovered after purchase, other jurisdictions have made the "materiality" evaluation with reference to "value." These courts consider whether a defect that seller allegedly failed to disclose is such as to significantly affect the value or desirability of the property. See, e.g., Reed v. King, 193 Cal. Rptr. 130, 132 (Cal. Ct. App. 1983); Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1986). In making this determination, the court may "rely upon the opinion of experts in the field and also upon its knowledge and experience shared in common with people in general." Reed, 193 Cal. Rptr. at 134 n.8. This Court considers such an analytical framework instructive to resolving the question before it.

The "doctrine of caveat emptor . . . has long dominated real estate transactions in Rhode Island . . . ." Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 956 (R.I. 1994). The duty that sellers owe to buyers of real estate "is established primarily through contracts between the parties who theoretically reach an arms-length agreement on a sale

price that reflects the true value of" the property. Id. at 955 (citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312 (3d. Cir. 1985)). Prospective buyers have "the option to inspect the property and inquire into possible defects prior to purchase." Id. Under "an affirmative duty to inspect the land and make reasonable inquiry," a buyer therefore can "negotiate a selling price that reflects the land's actual, economic value." Id. at 956.

B

Factual Findings Relating to the Conditions in Unit Six

The inquiry as to the presence of a materially deficient condition is factual in nature, requiring the court to determine if a purported defect is sufficient to affect the value or desirability of the property. Blixseth, 575 F. Supp. 2d at 384. Plaintiff exercised her option to view Unit Six in an unfurnished condition in the presence of her realtor prior to entering the Agreement with Defendant.[3] See Fischer v. Heymann, 943 N.E.2d 896, 902 (Ind. Ct. App. 2011) (holding that "[i]t was the [buyers'] responsibility to clarify with the [building] inspector the extent of" problems with the property prior to "basing their decision to terminate the agreement on his findings"). In her letter to Defendant, dated November 9, Plaintiff expressed concern about Unit Six's state of repair. Specifically, she mentioned the condition of Unit Six's roof/chimney, interior, HVAC unit, plumbing, electrical system, and appliances/shower doors. November 9 Letter. Defendant took steps in an attempt to alleviate Plaintiff's concerns with Unit Six and

[3] Moreover, Plaintiff, by her own admission, was familiar with real estate transactions and home renovation. She sold mortgages for a number of major firms and brokers. Pl.'s Dep. 8:14–9:3. In addition, Plaintiff supervised a major renovation of a property in Providence, Rhode Island. Pl.'s Dep. 41:3–43:14.

move the deal forward (albeit without consulting Plaintiff in conformance with the Agreement).

After careful review of the Plaintiff's building inspector's report, the estimates of Plaintiff's contractors, and other exhibits submitted by the parties, this Court concludes that the conditions within Unit Six were not materially deficient within the meaning of REDA or the Agreement. The Court shall now address each area of concern raised in Plaintiff's November 9 letter. [4]

1

Roof/Chimney

Plaintiff cites defects in Unit Six's roof and chimney as partly justifying her request that Defendant return her deposit. Pl.'s Dep. 35:1–37:11. If Unit Six's roof was in severe disrepair, such a condition would certainly have an adverse impact on the value or desirability of the property. The weight of the evidence, however, does not allow for such a conclusion in regard to either the roof or the chimney. Plaintiff's building inspector observed in his report that only "[m]inor repairs to the roofing are needed" and that the flashing around the chimney "should be monitored" for possible future leakage. 2007 Pl.'s Building Inspector's Report at 6. He characterized such problems as within the "repair" and "monitor" levels on the report's issue scale. 2007 Pl.'s Building Inspector's Report at 6–7. Moreover, Plaintiff's roofing contractor observed in his

[4] Plaintiff might have also argued that Defendant's repair of the items she listed in her November 9 letter without consulting her violated the Agreement. However, because this Court concludes that no "substantial/materially deficient conditions" existed in Unit Six, Plaintiff's rights under REDA and Section twenty-four of the Agreement were never triggered and no breach occurred.

proposal that the "[g]eneral condition of the roof is good." Weisman Roofing Inspection & Estimate at 1.

Regarding the chimneys, Plaintiff's building inspector recommended that the masonry chimney needed re-pointing and placed the chimneys in the "repair" category on the issue scale. 2007 Pl.'s Building Inspector's Report at 7. Plaintiff's contractor proposed more serious measures, stating that the "rear chimney needs to be taken a part [sic] and reflashed at base to roof detail." Weisman Roofing at 2. The contractor estimated that it would cost $5600 to fully repair the roof and chimney. Weisman Roofing at 2.

Having considered Plaintiff's building inspector's report and Plaintiff's contractor's estimate, this Court finds that the problems with the roof and chimney would not significantly reduce the value or desirability of the property. Blixseth, 575 F. Supp. 2d at 384; Reed, 193 Cal. Rptr. at 134 n.8. Therefore, neither Unit Six's roof, nor its chimney constituted materially deficient conditions within the meaning of REDA or the Agreement.

2

Interior (Water Staining)

Plaintiff alleges problems existed in Unit Six's interior, placing particular emphasis on the presence of "[w]ater staining . . . in several areas of the ceilings; along the wall of the master bedroom and . . . in the area containing the air handler." Pl.'s Post Trial Mem. at 1. Water staining is physical evidence of a leak(s) in the condominium and could hamper the habitability of the unit if severe. Again, however, the evidence does not permit the conclusion that this staining was a material defect in the property.

Plaintiff's building inspector noted that "a moisture meter did not detect moisture in these stained areas" and placed the staining in the "Monitor" level on the issue scale. 2007 Pl.'s Building Inspector's Report at 18. The inspector also noted some "[m]inor cracks" in the wall ceiling finishes, "[t]ypical drywall flaws," and "[e]vidence of patching . . . in some ceilings." 2007 Pl.'s Building Inspector's Report at 18. These issues were categorized on the "Monitor" level of the issue scale as well. Plaintiff's contractor, DiSalvo Construction, proposed opening up the wall in the second floor bedroom to repair the damage at a cost of $600. DiSalvo Construction Proposal at 1.

Shortly after being notified of the staining, Defendant found and repaired the leak, which was located "in the pitch pocket around the gas line penetration in the roof." E-mail of Gary Marinosci to Geraldine Schiffman, November 15, 2007; Dep. of Salvatore Marinosci 31:12–31:19, 38:1–38:23. A subsequent inspection of Unit Six by Plaintiff's building inspector in 2008 is devoid of any mention of water staining. Home & Hearth Inspections, LLC, Building Inspection Report: 188 Benefit Street, Apr. 1, 2008 at 4 ("2008 Pl.'s Building Inspector's Report"). From this subsequent inspection report, one may infer that Defendant's plugging of the leak resolved the water staining issue. 2008 Pl.'s Building Inspector's Report at 4. This inference is strengthened by the fact that the 2008 inspection occurred at a time when recent weather conditions had been "relatively rainy." 2008 Pl.'s Building Inspector's Report at 2. The ease with which Defendant resolved the leak and water staining issue suggests that the problem was not that serious initially.

After review of Plaintiff's building inspector's findings and Plaintiff's contractor's estimate, this Court does not find that the water staining in Unit Six was of

such a character to significantly reduce the value or desirability of the property and therefore concludes that it is not a materially deficient condition under REDA or the Agreement. Blixseth, 575 F. Supp. 2d at 384; see Reed, 193 Cal. Rptr. at 134 n.8 (stating that, in determining materiality, a court may "rely upon the opinion of experts in the field and also upon its knowledge and experience shared in common with people in general").[5]

3

Heating, Ventilation, and Air Conditioning System (HVAC)

Plaintiff argues that Unit Six's roof HVAC system did not function effectively and needed to be replaced. Had the HVAC failed to operate, the value and desirability of the property would have depreciated and the HVAC would constitute a "materially deficient condition." Plaintiff's building inspector's report indicated that "[h]eat

[5] Plaintiff cites a number of cases in her post-trial memorandum from other jurisdictions holding that water leakage issues have a materially adverse affect on the value and desirability of a piece of property. This Court, however, considers these cases distinguishable from Plaintiff's own. The four cases that Plaintiff cites involved extensive water penetration and/or widespread damage. See, e.g., Barnhouse v. City of Pinole, 183 Cal. Rptr. 881, 884–885, 892 (Cal. Ct. App. 1982) (involving undisclosed seeps, slides, and springs causing substantial damage to homes and backyards throughout a residential subdivision); Johnson, 480 So. 2d at 626–27 (reviewing case of numerous undisclosed leaks resulting from an inherently defective roof that would have to be replaced at a cost of $15,000); Wasson v. Schubert, 964 S.W.2d 520, 523–26 (Mo. Ct. App. 1998) (involving property featuring multiple undisclosed leaks and attempted repairs that would have, if disclosed, reduced the market value of the home by $10,000); Wash. Courte Condo. Ass'n-Four v. Wash.-Golf Corp., 643 N.E.2d 199, 216–218 (Ill. App. Ct. 1994) (featuring undisclosed widespread water infiltration problems in multiple condominium buildings). Plaintiff's case is of an entirely different stripe. The water staining damage to Unit Six appears relatively minor, as Plaintiff's contractor estimated repairs would cost only $600. DiSalvo Proposal at 1. Moreover, Defendant discovered and repaired the leak with relative ease, suggesting that the problem was minor. E-mail of Gary Marinosci to Geraldine Schiffman; see Fischer, 943 N.E.2d at 901 (holding that three inoperative electrical outlets "which could be and in fact [were] easily repaired" would not have a significant adverse effect on a $315,000 condo's value and so did not constitute a "major defect" under the purchase and sales agreement). Therefore, Plaintiff's analogy between the conditions in Unit Six and the properties in Wasson, Johnson, Barnhouse, and Washington Courte is misplaced.

distribution within the home is adequate" and "[t]he heating system shows no visible evidence of major defects." 2007 Pl.'s Building Inspector's Report at 12. The temperature differential between the system's "return temp" and "supply temp" was fifteen degrees, a figure the building inspector characterized as "normal." 2007 Pl.'s Building Inspector's Report at 14. The inspector recommended monitoring the HVAC unit "as it is approaching its life expectancy" and suggested "[b]alancing of the ductwork . . . to improve the distribution of heat supply." 2007 Pl.'s Building Inspector's Report at 12. He did not consider any HVAC problems a "Major Concern," but instead characterized them as "Repair," "Improve," or "Monitor" on the issue scale.

Plaintiff's contractor, Air Tech Heating & A.C., had a different view. According to Air Tech, the system had "extremely poor air flow measured with the balometer." Air Tech Heating & A.C. Inspection & Estimate at 1. Air Tech also stated that the "roof HVAC unit [was] 20 years old and in disrepair." Air Tech Inspection at 1. Air Tech proposed immediate removal and replacement of the HVAC system at a cost of $10,500. Air Tech Inspection at 1–2. Correcting the air flow issues reported by Air Tech would have also required further work from DiSalvo Construction, at a cost of $2800. DiSalvo Proposal at 1.

Upon consideration of the views of Plaintiff's building inspector and Plaintiff's contractors, this Court finds the inspector's observations regarding the condition of the HVAC more credible and concludes that the system was in sufficient working order to not seriously damage the value or desirability of Unit Six. Blixseth, 575 F. Supp. 2d at 384; see Reed, 193 Cal. Rptr. at 134 n.8 (noting that the court may refer to expert opinion or rely on its own knowledge and experience when making a materiality determination);

see generally Parella, 899 A.2d at 1239 (stating that trial justice assesses credibility in non-jury trials). Therefore, the issues with the HVAC did not amount to a materially deficient condition within the meaning of REDA or the Agreement.

4

Plumbing

In her November 9 letter to Defendant, Plaintiff listed "plumbing issues" among her concerns with Unit Six. Plaintiff's building inspector, however, noted that "[t]he plumbing system is in generally good condition" and that some "of the plumbing fixtures within the home have been upgraded." 2007 Pl.'s Building Inspector's Report at 16. The only issues the building inspector encountered were in regards to a "sump pump" that "could not be tested" and an inability to inspect the whirlpool tub because the access panel appeared to be missing and "the tub drain would not close." 2007 Pl.'s Building Inspector's Report at 16. On the issue scale, the inspector labeled the plumbing issues as something to "Repair" or "Monitor." Plaintiff's contractor, DiSalvo Construction, estimated that constructing an access panel for the whirlpool would cost $800. DiSalvo Proposal at 1.

Upon receipt of Plaintiff's building inspector's report, Defendant stated in an e-mail that what the inspector believed was a "sump pump" was actually a sewer injection pump for a separate unit in the condominium building and thus beyond the scope of the inspection. E-mail of Gary Marinosci to Geraldine Schiffman. Defendant also noted that the inspector simply failed to locate the access panel, which was on "the tile on the side of the whirlpool." E-mail of Gary Marinosci to Geraldine Schiffman.

Having considered Plaintiff's building inspector's report, Plaintiff's contractor's estimate, and Defendant's explanation as to the sump pump and whirlpool tub access panel, this Court finds that any purported issues with Unit Six's plumbing were minor. See Fischer, 943 N.E.2d at 901. They would not significantly reduce the property's value or desirability and therefore do not constitute a materially deficient condition. Blixseth, 575 F. Supp. 2d at 384; see Reed, 193 Cal. Rptr. at 134 n.8.

5

Electrical

Plaintiff alleges that defects in Unit Six's electrical system also partially justified her request for return of her deposit. Plaintiff's building inspector reported that "[o]versized breakers within the main distribution panel should be examined" and recommended that "[c]ircuits within the main distribution panel that are doubled up . . . should be separated." 2007 Pl.'s Building Inspector's Report at 10. The inspector also recommended that abandoned distribution wiring should be replaced or terminated and found that two outlets and several light switches in Unit Six were inoperative. 2007 Pl.'s Building Inspector's Report at 10. He characterized the problems with the main panel as a "Repair, Safety Issue" on the issue scale and placed all other conditions in the "Repair" category. 2007 Pl.'s Building Inspector's Report at 10. Plaintiff's contractor, Young Electrical Services, estimated that it would cost $430 to correct these issues. Young Electrical Services Estimate at 1.

In response to Plaintiff's building inspector's report, Defendant explained that the panel that the inspector reviewed "was incorrectly designated as [the] main distribution panel by the inspector" and "is actually the House Panel for common areas" and therefore

outside the scope of the inspection. E-mail of Gary Marinosci to Geraldine Schiffman. As such, the items marked as a "Repair, Safety Issue" in the inspector's report were not an Unit Six issue.

After review of Plaintiff's building inspector's findings, Plaintiff's contractor's estimate, and Defendant's explanation regarding the main distribution panel, this Court does not believe that the electrical issues in Unit Six would significantly detract from the condo's value or desirability. See Fischer, 943 N.E.2d at 901 (finding that three inoperative electrical outlets would not cause a substantial negative effect on a condo's value and therefore were not a "major defect" under the sales contract). It therefore finds that the electrical system does not constitute a materially deficient condition within the meaning of REDA or the Agreement. Blixseth, 575 F. Supp. 2d at 384; see Reed, 193 Cal. Rptr. at 134 n.8.

6

Appliances/Shower Doors

Finally, Plaintiff listed inoperative appliances and missing shower doors in the master and guest bathrooms in her November 9 letter to Defendant. November 9 Letter. After examining Unit Six, Plaintiff's building inspector actually observed that "[m]ost appliances that were tested responded satisfactorily. The appliances that have been installed in the kitchen are good quality." 2007 Pl.'s Building Inspector's Report at 25. The inspector did report, however, that the waste disposer and the burners on the gas range were inoperative and classified them as "Repair" on the issue scale. 2007 Pl.'s Building Inspector's Report at 25. According to Defendant, the waste disposer was not

wired at the time of the inspection, but had since been and was now functional. E-mail of Gary Marinosci to Geraldine Schiffman.

Plaintiff's November 9 letter also indicated that shower doors were missing in the master and guest bathrooms. Plaintiff's contractor, Rhode Island Glass Company, estimated that shower doors for both bathrooms collectively would cost between $3529.50 to $7079.20. Rhode Island Glass Co. Estimate at 1. Once aware of the missing shower doors, Defendant explained that a door had already been ordered for the master bathroom and offered to grant Plaintiff a credit for the door in the guest bathroom. E-mail of Geraldine Schiffman to Harry Smith, November 15, 2007.

Having considered Plaintiff's building inspector's findings, Plaintiff's contractor's estimate, and Defendant's explanation as to the shower doors and the waste disposer's lack of functionality, this Court finds that the problems with the appliances and shower doors in Unit Six do not approach a materially deficient condition. See Fischer, 943 N.E.2d at 901 (determining that three non-functioning electrical outlets were easily repairable and were not a "major defect" under purchase and sales agreement); see also Blixseth, 575 F. Supp. 2d at 384 (holding that the materiality of a deficient condition is a question for the factfinder).

C

Legal Consequences of Factual Findings

Because the Plaintiff did not prove that a materially deficient condition existed, Plaintiff's failure to tender the balance of the purchase price of Unit Six at the date of the closing constituted a breach of her duties under the Agreement. The Agreement states

that "[u]pon default by the Buyer, the Seller shall have the right to retain the Deposits . . . ." Thus, Defendant is entitled to keep Plaintiff's deposit.

In addition, the Agreement provides that in the event of Plaintiff's default, "Seller shall have the right . . . to require specific performance and payment of other damages, or to pursue any remedy, legal or equitable, which shall accrue by reason of such default." Defendant made a number of repairs to Unit Six in response to Plaintiff's November 9 Letter. Defendant repaired and re-pointed the masonry chimney and corrected the flashing issues denoted in Plaintiff's building inspector's report. E-mail of Gary Marinosci to Geraldine Schiffman.[6] Defendant also fixed the leak in the roof and arranged for a cleaning of the HVAC. Dep. of Salvatore Marinosci 13:6–15:2, 31:12–31:19, 38:24–41:4. Finally, Defendant hired a licensed plumber to adjust the tub drain, arranged for a licensed electrician to address the common area electrical panel, ordered and installed a new igniter for the gas range, and wired the waste disposer. E-mail of Gary Marinosci to Geraldine Schiffman. Collectively, repairs cost Defendant approximately $1900. These repairs corrected minor defects in Unit Six and likely improved the overall value of the property. Cf. Rhodes v. Tomlin, 102 So. 2d 904, 908 (Ala. 1958). The repairs thus worked to Defendant's benefit. As such, damages are not appropriate. Notably, however, Defendant has not requested any damages.

[6] A review of Unit Six by Plaintiff's building inspector in 2008 did not find problems with the masonry chimney. 2008 Pl.'s Building Inspector's Report at 3.

IV

Conclusion

After consideration and review of the evidence before it and the applicable law, the Court finds for the Defendant Benefit Holding Co., L.L.C. and holds that Defendant is entitled to retain the deposit. Counsel shall submit an appropriate order consistent with this Decision.