SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER: A-000514-23T4

WATERFRONT CORPORATE CENTER III JV LLC,	:	CIVIL ACTION
Plaintiff-Respondent,	:	ON APPEAL FROM ORDER OF LAW DIVISION GRANTING
- against -	:	SUMMARY JUDGMENT AND DENYING
GFG HOBOKEN LLC, MARC RAMUNDO and CHARLES CASTELLI,	:	MOTION FOR RECONSIDERATION/ TO VACATE
Defendants/Third-Party Plaintiffs-Appellants,	:	SAT BELOW:
- against -	:	HON. SUSANNE LAVELLE, J.S.C.
DREAMFOOD USA LLC,	:	
Third Party Defendant/Fourth Party Plaintiff-Respondent,	:	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY LAW DIVISION DOCKET NO. HUD-L-987-22
- against -	:	
GEORGIOS DROSOS and GGLM LLC,	:	
Fourth Party Defendants-Respondents.	:	

APPELLANTS' BRIEF IN SUPPORT OF APPELLANTS' NOTICE OF APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

INDEX TO APPENDIX

SEPARATE STATEMENT OF ALL ITEMS/EXHIBITS SUBMITTED IN SUPPORT OF PLAINTIFF-RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Defendants-Appellants bring this appeal after having both their prior counsel and the trial court hamstring them from pursuing their claims and defenses. This matter centers on Defendants-Appellants executing a guaranty regarding a commercial lease in Hoboken.

First, Defendants-Appellants' prior counsel failed to oppose the landlord's (Plaintiff-Respondent) motion for partial summary judgment—resulting in Defendants-Appellants being liable for the tenant's (co-defendant GFG Hoboken) owed rent and related costs.

Second, when Defendants-Appellants hired new counsel and sought to undo the harm that their prior counsel caused, the trial court closed the door on Defendants-Appellants at every turn—denying them any such relief.

When Defendants-Appellants, equipped with new counsel, sought to vacate the judgment (which was a result of their prior counsel failing to oppose the motion for partial summary judgment), the Court denied the relief. When Defendants-Appellants sought to file an amended answer, conforming their

pleading to the theory of the case and the proof at hand, the Court denied the relief. When Defendants-Appellants moved to disqualify their prior counsel from representing the Fourth Party Defendants Georgios Drosos and GGLM LLC—based on a clear, concurrent conflict of interest—the Court denied the relief.

But, when Plaintiff-Respondent sought partial summary judgment, final judgment, and to amend that judgment, despite the fact that Plaintiff-Respondent did not establish its *prima facie* case that there was consideration for the guaranty agreement with Defendants-Appellants, the Court granted Plaintiff-Respondent relief at every turn.

The result was a judgment in Plaintiff-Respondent's favor and against Defendants-Appellants for $325,416.77. The trial court, without a motion for such relief before it, prescribed that—with that judgment in view—Defendants-Appellants pursue a claim for indemnification against Fourth Party Defendant Drosos and a malpractice claim against Defendants-Appellants' prior counsel. Defendants-Appellants made no request for such relief; they merely sought to undo the harm of their prior counsel and proceed with the matter.

This appeal follows.

APPELLANTS' PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Pleadings Filed in This Action

Plaintiff-Respondent commenced this action by filing a Complaint on March 23, 2022. DA 1. The Complaint asserted claims for breach of contract (as to the lease and, separately, as to the guaranty) and unjust enrichment. DA 1.

Defendants-Appellants filed their Answer, Crossclaim, and Third Party Complaint on June 2, 2022. DA 11. The crossclaims by Defendants-Appellants against GFG Hoboken LLC consist of breach of contract, bad faith, promissory estoppel, and indemnification/contribution. DA 11. Additionally, the Third Party Complaint asserted that Third Party Defendant Dreamfood USA LLC interfered with the contract by shutting down GFG Hoboken LLC, thereby causing the Plaintiff-Respondent to commence the first-party action against Defendants-Appellants. DA 11.

[1] Defendants-Appellants combine the R. 2:6-2(a)(5) statement of facts and R. 2:6-2(a)(4) procedural history as there are a significant number of trial court motion decisions and facts surrounding the filing, briefing, and deciding of those motions which make a combined chronological statement of the facts and procedural history of this matter clearer than separating them into two sections.

Third Party Defendant Dreamfood USA LLC filed its Answer to Third Party Complaint, Affirmative Defenses, and Fourth Party Complaint on August 16, 2022. DA 25. Therein, Dreamfood USA LLC asserted a claim for indemnification/contribution due to breach of duty of loyalty and breach of duty of care in its Fourth Party Complaint against Georgios Drosos and GGLM LLC. DA 25.

Fourth Party Defendants Georgios Drosos and GGLM LLC filed their Amended Answer, Separate Defenses, and Counterclaim in response to the Fourth Party Complaint on August 26, 2022. DA 40.

Pleadings Filed in Relevant Bergen County Law Division Action

In a Bergen County Law Division action, Fourth Party Defendants filed a Complaint against Third Party Defendant Dreamfood USA LLC, among other defendants, and asserted claims for appointment of a receiver for Third Party Defendant Dreamfood USA LLC, misappropriation, conversion, and conspiracy, dated February 22, 2022. DA 49.

On August 4, 2022, Third Party Defendant Dreamfood USA LLC filed its Amended Answer, Separate Defenses, and Counterclaim. DA 80.

The substance of those counterclaims centered on Fourth Party Defendant Drosos effectively becoming the "dictator" of Dreamfood until his resignation in 2021, using "his position as Manager to use Dreamfood for his own personal benefit . . . at the expense and to the extreme detriment of Dreamfood." (DA 80 ¶¶ 6-7). According to the Amended Answer, Drosos "caused Dreamfood to employ his family and other persons with whom he had close relationships to perform no-show or nearly-no-show jobs . . . paying them a healthy sum . . . effectively [using] Dreamfood in a conspiracy to defraud the federal government." (DA 80 ¶ 8).

Then, Drosos "absconded with substantial monies from Dreamfood." (DA 80 ¶ 9). Additionally, "Drosos never disclosed to Dreamfood that Counterclaim Defendants had received several hundred thousand dollars on behalf of Dreamfood from a landlord for the rights to a certain lease Dreamfood held," and rather "than remit this money to Counterclaimants, Counterclaim defendants instead kept it for themselves and/or invested it in entities in which they – but not Dreamfood – had an interest." (DA 80 ¶ 20). When Drosos resigned as Dreamfood's "dictator," in July 2021, "he

admitted he had committed various of the above misdeeds." (DA 80 ¶ 21).

On August 25, 2022, Fourth Party Defendants Georgios Drosos and GGLM LLC filed an Answer to Counterclaim in response to Dreamfood USA LLC's Amended Answer. DA 108.

Plaintiff-Respondent's Motion for Partial Summary Judgment

On September 16, 2022, Plaintiff-Respondent moved for partial summary judgment against Defendants-Appellants and made the motion returnable on October 21, 2022. DA 125.

On October 20, 2022, Defendants-Appellants' then-counsel, Jeffrey A. Bronster, Esq., requested an adjournment of the motion for partial summary judgment as "[m]ore time [was] needed to properly respond to the motion, and the parties are also attempting to resolve the matter prior to the new return date[.]" DA 1983.

However, Jeffrey A. Bronster, Esq., while representing Defendants-Appellants and the Fourth Party Defendants, did not file any response to the Plaintiff-Respondent's motion for partial summary judgment without advising Defendants-Appellants of the

same and despite assuring them in writing that opposition would be filed.

On November 18, 2022, the Court granted Plaintiff-Respondent's motion for partial summary judgment against the Defendants-Appellants in its decision on the motion and a letter of opinion accompanying that decision. DA 289. The Court correctly noted that the motion was unopposed.

Plaintiff-Respondent's Motion for Final Judgment and Defendants-Appellants' Cross-Motion to Vacate the Judgment

On March 24, 2023, Plaintiff-Respondent moved for final judgment against Defendants-Appellants and GFG Hoboken LLC. DA 278.

On April 17, 2023, after learning for the first time that partial summary judgment was entered against them unopposed and without the benefit of any discovery being conducted by prior counsel, Defendants-Appellants retained new counsel and cross-moved to vacate the judgment as to personal liability of Defendants-Appellants and to reopen discovery and eventually move to consolidate the Bergen County action since those claims and others were still pending and discovery still ongoing. DA 509.

On May 8, 2023, Plaintiff-Respondent opposed the Defendants-Appellants' cross-motion and submitted a reply brief in further support of its motion for final judgment against Defendants-Appellants and GFG Hoboken LLC. DA 674.

On May 31, 2023, the Court issued its decision granting Plaintiff-Respondent's motion. DA 700. Also on May 31, 2023, the Court issued a separate decision denying Defendants-Appellants' cross-motion. DA 688.

Third-Party Defendant's Motion for Partial Summary Judgment

On April 13, 2023, Third-Party Defendant moved for partial summary judgment dismissing the Third Party Complaint that the Defendants-Appellants filed against it. DA 739.

On May 2, 2023, Defendants-Appellants filed their opposition to Third-Party Defendant's motion. DA 883. On May 8, 2023, Third-Party Defendant filed its reply.

On May 31, 2023, the Court granted Third-Party Defendant's motion and dismissed the Third Party Complaint. DA 1029.

Defendants-Appellants' Motion to Disqualify Jeffrey A. Bronster, Esq. and to Strike Correspondence

On April 24, 2023, Defendants-Appellants moved to disqualify their former counsel, Jeffrey A. Bronster, Eesq., as counsel for Fourth-Party Defendants Georgios Drosos and GGLM LLC in this action and to strike a letter from the record that Mr. Bronster had filed. DA 1049. That day, Mr. Bronster filed opposition to the motion on behalf of Fourth-Party Defendants Georgios Drosos and GGLM LLC.

On May 4, 2023, Plaintiff-Respondent filed its opposition to the motion. On May 8, 2023, Defendants-Appellants filed their reply.

On May 31, 2023, the Court issued its decision denying the motion. DA 1045.

Defendants-Appellants' Motion for Leave to File Amended Answer

On May 12, 2023, Defendants-Appellants filed a motion for leave to file an amended Answer in this action. DA 1049.

On June 1, 2023, Fourth-Party Defendants Georgios Drosos and GGLM LLC filed their opposition to the motion. On June 5, 2023, Defendants-Appellants filed their reply.

On June 9, 2023, the Court issued its decision denying Defendants-Appellants' motion. DA 1166.

Defendants-Appellants' Motion for Reconsideration/to Vacate

On June 20, 2023, Defendants-Appellants filed a motion for reconsideration/to vacate. DA 1164. On June 21, 2023, Fourth-Party Defendants Georgios Drosos and GGLM LLC filed their opposition to the motion. On June 29, 2023, Third Party Defendant filed its opposition to the motion. Also on June 29, 2023, Plaintiff-Respondent filed its opposition to the motion. On July 3, 2023, Defendants-Appellants filed their reply.

On July 21, 2023, all counsel appeared for oral argument of the motion on the record. On August 29, 2023, the Court denied Defendants-Appellants' motion for reconsideration/to vacate. DA 1526.

Plaintiff-Respondent's Motion to Amend the Judgment and Defendants-Appellants' Cross-Motion to Amend the Judgment

On June 20, 2023, Plaintiff-Respondent filed a motion to amend the judgment. DA 1552. On June 29, 2023, Defendants-Appellants filed a cross-motion to amend the judgment. DA 1588. On June 30,

2023, Plaintiff-Respondent filed its opposition to Defendants-Appellants' cross-motion.

On August 29, 2023, the Court issued its decision on Plaintiff-Respondent's granting motion to amend the judgment. DA 1917. Also on August 29, 2023, the Court issued its decision denying Defendants-Appellants' cross-motion to amend the judgment. DA 1903. On September 6, 2023, Plaintiff-Respondent filed a five-day notice and proposed order. DA 1936. On September 14, 2023, the Court issued its amended judgment. DA 1980.

Defendants-Appellants' Change Counsel and Pursue Relief

On May 24, 2022, Georgios Drosos and Defendants-Appellants entered into an indemnification agreement. DA 1990. At that time, Jeffrey A. Bronster, Esq. represented Georgios Drosos and Defendants-Appellants.

After Drosos and Defendants-Appellants entered into the indemnification agreement, on September 16, 2022, Plaintiff-Respondent moved for partial summary judgment against Defendants-Appellants and made the motion returnable on October 21, 2022. DA 138.

On October 20, 2022, Defendants-Appellants' then-counsel, Jeffrey A. Bronster, Esq., requested an adjournment of the motion for partial summary judgment as "[m]ore time [was] needed to properly respond to the motion, and the parties are also attempting to resolve the matter prior to the new return date[.]" DA 1983.

However, Jeffrey A. Bronster, Esq., while representing Defendants-Appellants and the Fourth Party Defendants, did not file any opposition to the Plaintiff-Respondent's motion for partial summary judgment without advising Defendants-Appellants of the same and despite assuring them in writing that opposition would be filed.

On March 14, 2023, current counsel superseded Bronster as counsel for Defendants-Appellants after respectively executing the substitution of attorney on February 11, 2023 and February 28, 2023. DA 1987.

Current counsel began a flurry of motion practice designed to reverse the damaging work that Bronster had performed while representing Defendants-Appellants.

The most urgent priority was to address the partial summary judgment that Bronster permitted to be entered against Defendants-Appellants on November 18, 2022 without opposition and all without advising Defendants-Appellants of the same and despite assuring them in writing that opposition would be filed. DA 289.

By the time that current counsel began representing Defendants-Appellants, however, Plaintiff-Respondent had already filed its motion for final judgment against Defendants-Appellants (on March 24, 2023). Defendants-Appellants then cross-moved to vacate the judgment and reopen discovery (on April 17, 2023). DA 505.

Then, on April 13, 2023, Third Party Defendant Dreamfood USA LLC filed its motion for partial summary judgment dismissing the Third Party Complaint against it, which Defendants-Appellants opposed on May 2, 2023. DA 883.

On April 24, 2023, Defendants-Appellants moved to disqualify Bronster based on conflict of interest, which Bronster—still representing the Fourth Party Defendants—immediately opposed that day. DA 1039.

On May 12, 2023, Defendants-Appellants moved for leave to file an amended Answer so as to conform the pleading, which Bronster had prepared, to current counsel's theory of the case and the evidence reviewed. DA 1049.

The trial court issued decisions on May 31, 2023 (1) denying Defendants-Appellants' motion to disqualify Bronster; (2) denying Defendants-Appellants' cross-motion to vacate the November 18, 2022 order for partial summary judgment in Plaintiff-Respondent's favor; (3) granting Plaintiff-Respondent's motion for final judgment against Defendants-Appellants; and (4) granting Third Party Defendant Dreamfood's motion for partial summary judgment, dismissing it from the action. DA 1045.

Then, on June 9, 2023, the Court denied Defendants-Appellants' motion for leave to file an amended pleading. DA 1161.

As a result, Defendants-Appellants were not permitted to disqualify Bronster—despite his conflict of interest, to vacate the judgment that Bronster permitted to be entered against Defendants-Appellants without any opposition filed or any discovery conducted, to proceed with their claims against Third Party Defendant

Dreamfood which owned 85% of the Tenant's business and who was not a party to the original Lease and Guaranty, or to proceed with filing an amended pleading. Each of these alone significantly undercut Defendants-Appellants' ability to defend themselves in this action, and current counsel was not able to proceed with any theory of the case other than Bronster's—who had a clear, demonstrable conflict of interest representing Defendants-Appellants and Fourth Party Defendants Drosos and GGLM LLC.

Defendants-Appellants—hamstrung by first, their counsel, and second, the trial court ruling—then filed a motion for reconsideration/to vacate with respect to the Court's decisions from November 18, 2022, May 31, 2023, and June 9, 2023. DA 1164. Defendants-Appellants filed their motion for reconsideration/to vacate on June 20, 2023. DA 1164.

That day, June 20, 2023, Plaintiff-Respondent also filed a motion to amend the final judgment against Defendants-Appellants and GFG Hoboken LLC to include additional attorneys' fees that Plaintiff-Respondent incurred. DA 1552. Defendants-Appellants cross-moved to amend the judgment's amount downward and clarify

that Defendants-Appellants had a right of contribution against co-defendant GFG Hoboken LLC. DA 1588.

On August 29, 2023, the Court issued a decision denying Defendants-Appellants' motion for reconsideration/to vacate in its entirety, denying Defendants-Appellants' cross-motion to amend the judgment, and granted Plaintiff-Respondent's order amending the judgment to include an additional $63,309 in attorneys' fees for a total judgment of $325,416.77. DA 1917.

LEGAL ARGUMENT

Standard of Review

An appellate court reviews a grant of summary judgment *de novo*, "applying the same standard as the trial court." L.A. v. New Jersey Div. of Youth and Family Services, 217 N.J. 311, 323 (2014). Summary judgment is warranted where "there is no genuine issue as to any material fact challenged and . . . the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). An issue of material fact arises where "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve

the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

R. 4:49-2 provides for a motion to alter or amend a judgment or final order and states: "Except as otherwise provided by R. 1:13-1 (clerical errors), a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any."

Reconsideration is to be utilized in cases "in which either 1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." Medina v. Pitta, 442 N.J.Super. 1, 18 (App. Div. 2015) (quoting D'Atria v. D'Atria, 242 N.J.Super. 392, 401 (Ch. Div. 1990)). The motion for reconsideration "provides the court, and

not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina, 442 N.J.Super. at 18.

R. 4:50-1 provides that a "court may relieve a party . . . from a final judgment or order" based on "(a) mistake, inadvertence, surprise, or excusable neglect" or "(f) any other reason justifying relief from the operation of the judgment or order."

R. 4:50-1 "is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." See Baumann v. Marinaro, 95 N.J. 380, 392 (1984).

"The four identified categories in subsection (a), when read together, as they must be, reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." DEG, LLC v. Township of Fairfield, 198 N.J. 242, 262 (2009).

"[C]arelessness may be excusable when attributable to honest mistake, accident, or any cause not incompatible with proper diligence . . . ." In re T, 95 N.J. Super. 228, 235 (App. Div. 1967).

"A court should view the opening of default judgments . . . with great liberality, and should tolerate every reasonable ground for indulgence . . . to the end that a just result is reached." Mancini v. EDS on Behalf of New Jersey Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993) (quoting Marder v. Realty Constr. Co., 84 N.J.Super. 313, 319 (App. Div. 1964), aff'd, 43 N.J. 508 (1964)). "[A]bsent an abuse of discretion," an appellate court will leave the decision on such a motion "to the sound discretion of the trial court . . . ." Mancini, 132 N.J. at 334. "All doubts, however, should be resolved in favor of the parties seeking relief." Id. (citing Arrow Mfg. Co. v. Levinson, 231 N.J.Super. 527, 534 (App. Div. 1989)).

POINT I: THE TRIAL COURT ERRED BY *SUA SPONTE* EFFECTIVELY DISPOSING OF THIS MATTER (DA 1526)

The rules "must be 'construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'" Klier v. Sordoni Skanska Const. Co., 337 N.J.Super. 76, 83 (App. Div. 2001) (quoting R. 1:1-2). "The cornerstone of our judicial system is that justice is the polestar and the procedures utilized by the courts must 'be moulded and applied with that in mind.'" Klier, 337 N.J.Super. at 83

(quoting N.J. Highway Authority v. Renner, 18 N.J. 485, 495 (1955)).

The judicial system's "goal is not, and should not be, swift disposition of cases at the expense of fairness and justice." Klier, 337 N.J.Super. at 83. Instead, the goal "is the fair resolution of controversies and disputes." Id. Additionally, [e]agerness to move cases must defer to our paramount duty to administer justice in the individual case." Id. (citing Audubon Volunteer Fire Co. No. 1 v. Church Const. Co., 206 N.J.Super. 405, 405 (App. Div. 1986)). In other words, "[s]hortcuts should not be utilized at the expense of justice." Klier, 337 N.J.Super. at 83.

Central to the trial court's August 29, 2023 decision was that Defendants-Appellants may have a malpractice claim to pursue against Bronster but that there was no excusable neglect to justify vacating the final judgment that Plaintiff-Respondent obtained against Defendants-Appellants—due to Bronster's failure to oppose Plaintiff-Respondent's motion for partial summary judgment.

Defendants-Appellants did not seek that relief. Defendants-Appellants sought to vacate the judgment because they wished to defend the claims that Plaintiff-Respondent brought against them at

a time when discovery was not complete and other viable and indispensable claims and parties to the actions were still pending requiring a possible consolidation of the actions and a global resolution of all claims. The trial court effectively shielded Bronster by accepting the absurd claim that not opposing a motion for partial summary judgment—effectively consenting to a judgment without conducting or exchanging any discovery—can have a strategic value in this litigation.

It did not and cannot have any such strategic value.

Then, the trial court went one step further and prescribed relief for which Defendants-Appellants did not ask: the trial court made a finding that if Defendants-Appellants pursue an indemnification claim against Fourth Party Defendant Drosos, such a claim will not be barred by the entire controversy doctrine and that such a claim was then ripe for litigation since Defendants-Appellants had a judgment against them.

Based on Bronster's blunder, Defendants-Appellants have had a judgment entered against them—and without even having a chance to fight and flesh out through ongoing discovery their meritorious defenses and pending claims. Once Defendants-Appellants hired

current counsel, current counsel went to work on trying to open the door for Defendants-Appellants to defend themselves against the claims, and the trial court slammed the door shut on Defendants-Appellants at every turn—with every motion decision.

POINT II: THE TRIAL COURT ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION TO VACATE (DA 1526)

At the heart of this appeal is Defendants-Appellants' motion to vacate the November 18, 2022 judgment which their prior counsel essentially consented to without his clients' approval or knowledge, and after specifically advising them in writing that opposition to the motion would in fact be filed.

The trial court not only took Bronster at his word that failing to oppose Plaintiff-Respondent's motion for partial summary judgment was, somehow, part of a strategy; the trial court even went a step further and framed Bronster's actions as not neglecting the case, neither excusably nor inexcusably, because Defendants-Appellants "had no defense to the motion"—a curious choice given Defendants-Appellants' extensive efforts to reopen discovery and make the Court aware of their numerous defenses, including, inter alia, that the guaranty lacked consideration and the landlord failed

to mitigate its damages by rejecting a valid prospective tenant that was ready, willing, and able to take over the Lease and come current on the arrears at the time the Landlord's notice of default was served.

The trial court, in its August 29, 2023 decision on Defendants-Appellants' motion for reconsideration/to vacate, excused Bronster's neglect that caused the judgment to be entered against Defendants-Appellants—framing that neglect as a "strategic" decision. Yet, despite that excuse, the trial court chose to interpret Defendants-Appellants' motion as being limited to the virtually-never-invoked R. 4:50-1(f) ("any other reason justifying relief") and then promptly denying Defendants-Appellants' motion.

The trial court wrote: "the Court need not render a decision on whether the decision not to oppose the motion for summary judgment was a strategic decision, whether Defendant's [sic] Ramundo and Castelli concurred with this strategy, whether said decision constitutes legal malpractice, or a breach of ethical standards." DA 1526. The trial court's role "on a motion to reconsider is not to cure the alleged deficiencies of prior counsel but rather to determine if the prior decision is based on plainly incorrect reasoning or if the

court failed to consider evidence or if there is good reason to reconsider new information." DA 1526.

The trial court reviewed *in camera* emails between Bronster and the Defendants-Appellants and concluded that those "emails might form the basis for a separate claim by Ramundo and Castelli against Drosos, or by Ramundo and Castelli against Bronster, but are not sufficient to justify vacating the judgment that was entered against them as Guarantors and in favor of Waterfront or to reconsider Judge Allende's decision."

Defendants-Appellants demonstrated that Bronster neglected to oppose the motion for partial summary judgment, and as the record before the Court shows, there are meritorious defenses that Defendants-Appellants have asserted and seek to establish—namely that the guaranty was conditional, lacked consideration, and relates to a transaction mired in fraud, misdealing, and interference such that its enforcement against Defendants-Appellants is highly suspect. In addition, Bronster failed to conduct any discovery whatsoever at the time he consented to Summary Judgment against the Defendants-Appellants, when he and his other client Drosos with conflicting interests to those of the Defendants-Appellants, were

well aware that the Plaintiff-Respondent failed to mitigate damages when another Tenant that was ready, willing and able to take over the lease and commercial space and come current on all arrears which claim, if pursued, documented and investigated through discovery, would have eliminated altogether or significantly reduced the damages and unopposed Judgment obtained in this case. The Plaintiff-Respondent rejected the ready, willing and very able qualified Tenant and hence failed to mitigate its damages to the damage and detriment of the Defendants-Appellants.

To wit, because a guaranty is a contract by which the guarantor is responsible for the debt or default of another person, "[s]uch a contract is upon a contingency, and, not being commercial paper, nor under seal, does not import a consideration." Wallace, Muller & Co. v. Leber, 65 N.J.L. 195, 199 (E&A 1900). Such consideration "must be asserted and proved." Id.

Here, Defendants-Appellants were precluded from defending themselves and presenting their theory of the case, to wit, there was no consideration for the guaranty. Defendants-Appellants had no connection at all to the tenant, GFG Hoboken, received absolutely no benefit at all from the business, had no membership interest in

the LLC, were never enriched by GFG's business, never received a salary, and were never provided a Form K-1 or W-2. Since there was no consideration at all for entering into this Guaranty Agreement, the Guaranty agreement is not enforceable, an argument that was already made and decided by other Appellate Courts. See Yellow Book, Inc. v. Tocci, 2014 Mass. App. Div 20.

Moreover, a clear reading of the language of the four corners of the guaranty itself shows it does not contain the necessary words for "valuable consideration and for one dollar being received" and hence doesn't provide sufficient notice of what the consideration is.

In addition, as Defendants-Appellants detailed before the trial court, the dates of the guaranty and the lease are not clear and raise a question of whether there is consideration for the guaranty—which should have barred Plaintiff-Respondent from establishing its *prima facie* case when it moved for partial summary judgment. There is ample case law that the trial court overlooked or misapprehended when granting that motion, each of which Defendants-Appellants raised in their motion for reconsideration/to vacate. See Kesselman v. Cohen, 5 N.J.Misc. 31 (1926); Faust v. Rodelheim, 77 N.J.L. 740,

743 (E&A 1909); Kosson v. Harris, 108 N.J.L. 162 (E&A 1931); Schaus v. Henry, 89 N.J.L. 607 (E&A 1916).

POINT III: THE TRIAL COURT ERRED IN ENTERING FINAL JUDGMENT IN FAVOR OF PLAINTIFF-RESPONDENT AGAINST DEFENDANTS-APPELLANTS (DA 289, DA 1046, DA 1526, 1917)

With Bronster at the helm, Defendants-Appellants saw themselves receive partial summary judgment against them in terms of liability without any opposition being filed and without consenting to or having any knowledge of the same. Then, Plaintiff-Respondent filed its motion for final judgment and laid out its claimed damages. Soon thereafter, current counsel filed the motion to vacate the underlying partial summary judgment.

Nonetheless, despite current counsel making the circumstances clear and wishing to have a chance to present Defendants-Appellants' theory of the case—and seeking a chance to amend their pleading to reflect that theory of the case—when reviewing Plaintiff-Respondent's motion for final judgment, the trial court accepted Bronster's self-serving assertion that the motion for partial summary judgment was not opposed as a strategic decision and found that thus the only prejudice inured to the Plaintiff-Respondent for having

experienced delay and expense to collect the owed rent even though discovery was still ongoing to flesh out the other claims in the Hudson County action, as well as, the Bergen County action.

This is an error. If the trial court had properly considered Defendants-Appellants' motion to vacate the November 18, 2022 judgment—and permitted Defendants-Appellants an opportunity to defend themselves in this action—that would have necessitated denying Plaintiff-Respondent's motion for final judgment as liability would not have been established (or in this case, consented to by Bronster).

POINT IV: THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF THIRD-PARTY DEFENDANT, DISMISSING IT FROM THIS ACTION (DA 1029)

Defendants-Appellants filed the Third-Party Complaint against Third Party Defendant Dreamfood and asserted a claim sounding in tortious interference. The central question was whether there was malice in Dreamfood's actions related to the lease and first-party co-defendant GFG Hoboken LLC's default, and the Defendants-Appellants submitted a certification by Ramundo and pointed the Court to a Bergen County Law Division matter which has a number

of allegations pertaining to the intentionality underlying Dreamfood's actions. At the time of the Landlord's Notice of Default and rent arrears, it is important to note that Dreamfood had acquired an 85% interest in the business after Drosos sold a controlling stake of the company to it without any of the Parties, *to wit*, the Plaintiff-Respondent, Drosos, or Dreamfood ever providing any written or oral notice to the Defendants-Appellants of the company's sale to Dreamfood and presenting the Defendants-Appellants with an Addendum to the Lease and Guaranty Agreement, which parenthetically Defendants-Appellants would never have signed since it drastically increased the liability of the Guaranty and was never a meeting of the minds at the time the original Guaranty was signed.

That Bergen County Law Division case also has a long history, and it has been sent to arbitration with its current status unknown. Instead of reviewing that Bergen County Law Division matter in detail, the Court only took notice that the Complaint's allegations commencing that action were neither certified nor verified and thus may not be relied upon.

A claim for tortious interference with contract requires four elements: (1) the existence of the contract (or the prospective economic relationship); (2) interference which was intentional and with malice; (3) the loss of the contract or prospective gain as a result of the interference; and (4) damages." Velop, Inc. v. Kaplan, 301 N.J.Super. 32, 49 (App. Div. 1997). Malice "is defined to mean that the harm was inflicted intentionally and without justification or excuse." Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 751 (1989). The Appellate Division has held that "[i]mplicit in the Supreme Court's definition of malice is acceptance of the principle that the requisite intent may be either a specific intent to interfere with the contract or the taking of improper action with knowledge that interference will probably result." Velop, Inc., 301 N.J.Super. at 49.

The trial court only considered the Complaint in the Bergen County Law Division matter despite the fact that, at the time the trial court issued the decision on the Defendants-Appellants' motion for reconsideration, the litigation was ongoing and there had been an amended answer and counterclaim that Third Party Defendant Dreamfood filed asserting counterclaims of breach of fiduciary

duty/duty of loyalty, breach of duty of care, breach of covenant of good faith and fair dealing, conversion, and fraud against Fourth Party Defendants Drosos and GGLM.

The substance of those counterclaims centered on Drosos effectively becoming the "dictator" of Dreamfood until his resignation in 2021, using "his position as Manager to use Dreamfood for his own personal benefit . . . at the expense and to the extreme detriment of Dreamfood." (DA 80 ¶¶ 6-7). According to the Amended Answer, Drosos "caused Dreamfood to employ his family and other persons with whom he had close relationships to perform no-show or nearly-no-show jobs . . . paying them a healthy sum . . . effectively [using] Dreamfood in a conspiracy to defraud the federal government." (DA 80 ¶ 8). Then, Drosos "absconded with substantial monies from Dreamfood." (DA 80 ¶ 9).

Additionally, "Drosos never disclosed to Dreamfood that Counterclaim Defendants had received several hundred thousand dollars on behalf of Dreamfood from a landlord for the rights to a certain lease Dreamfood held," and rather "than remit this money to Counterclaimants, Counterclaim defendants instead kept it for themselves and/or invested it in entities in which they—but not

Dreamfood—had an interest." (DA 80 ¶ 20). When Drosos resigned as Dreamfood's "dictator," in July 2021, "he admitted he had committed various of the above misdeeds." (DA 80 ¶ 21).

If the trial court took judicial notice of the pleadings, as it should have, the trial court would have seen that the tortious interference claim sat amidst a number of allegations of wrongdoing lodged between Dreamfood and Drosos. The extent to which those allegations pertain to this dispute should not have been so easily dismissed: the existence of GFG Hoboken, that Dreamfood subsequently acquired 85% of GFG Hoboken after the Lease and Guaranty were initially signed without the Defendants'-Appellants' knowledge or consent to the Guaranty obligation continuing to the benefit of another Company and Individuals who were not known to Defendants-Appellants, and the operation of the commercial business at the leased premises, are wrapped up in the actions that Dreamfood and Drosos took—which indicate that there was substantial wrongdoing in the months leading up to GFG Hoboken's default.

Yet, at a time when current counsel was on the campaign to give Defendants-Appellants an opportunity to defend themselves in this

action and to right the ship, the trial court instead decided to dismiss Dreamfood from this action altogether rather than permit Defendants-Appellants to proceed with their theory of the case to discovery.

POINT V: THE TRIAL COURT ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION TO DISQUALIFY JEFFREY A. BRONSTER, ESQ. AS COUNSEL FOR FOURTH-PARTY DEFENDANTS (DA 1046)

The trial court denied the motion to disqualify as moot given the trial court's other rulings on May 31, 2023 (Plaintiff-Respondent's motion for final judgment, Third Party Defendant Dreamfood's motion for partial summary judgment, and Defendants-Appellants' motion for reconsideration/to vacate).

The trial court held that if Defendants-Appellants were permitted to file a supplemental pleading and bring an indemnification claim against Fourth Party Defendant Drosos, then "Bronster must be disqualified, as his continued representation of Drosos will be in direct conflict to his previous clients."

However, the trial court also did not permit Defendants-Appellants to file such supplemental pleading despite the fact that Bronster, their prior counsel, did not take any discovery and

essentially consented to a partial summary judgment on liability on behalf of Defendants-Appellants.

As an aside, the component of Defendants-Appellants' motion to strike the letter from the docket that Bronster filed was rendered moot when the trial court struck the letter from the docket.

Nonetheless, a motion to disqualify calls for the trial court "to balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." RPC 1.9(a).

Courts must consider that "a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement." City of Atlantic City v. Trupos, 201 N.J. 447, 462 (2010) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). The "initial burden of production—that the lawyer(s) for whom disqualification is sought formerly represented their present adverse party and that the present litigation is materially adverse to the former client—must be borne by the party seeking disqualification." Trupos, 201 N.J. at 462.

If that burden is met, "the burden shifts to the attorney(s) sought to be disqualified to demonstrate that the matter or matters in which he or they represented the former client are not the same or substantially related to the controversy in which the disqualification motion is brought." Id. at 462-63. Ultimately, it is the moving party's "burden of proving that disqualification is justified." Id. at 463 (quoting N.J. Div. of Youth & Family Servs. v. V.J., 386 N.J.Super. 71, 75 (Ch. Div. 2004)).

The determination "of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." Trupos, 201 N.J. at 463.

RPC 1.9(a) provides: "A lawyer who has represented a client in a matter shall not thereafter represent another client in the same . . . matter in which that client's interests are materially adverse to the interests of the former client . . . ."

RPC 1.7 addresses concurrent conflicts of interests and provides:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation.... When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
>
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (3) the representation is not prohibited by law; and
>
> (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

As this appeal brief makes clear, this matter should be remanded with the judgments vacated against Defendants-Appellants, discovery reopened, and Bronster disqualified. His representing the Fourth Party Defendants after having represented Defendants-Appellants ensures this.

POINT VI: THE TRIAL COURT ERRED IN DENYING DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER (DA 1161)

As the trial court noted, Bronster knew Fourth Party Defendant Georgios Drosos agreed to indemnify Defendants-Appellants, but Bronster declined to include a crossclaim in the Defendants-Appellants' Answer for indemnification as against Drosos—an extraordinary oversight, blunder, or intentional act that certainly cannot be chalked up to a strategic move, as he claimed failing to oppose a partial summary judgment motion on liability was.

When current counsel substituted in for the Defendants-Appellants, current counsel sought to move to amend their June 2022 Answer to reflect a crossclaim against GFG Hoboken as well as claims against Drosos and GGLM Hoboken LLC.

The trial court did not permit Defendants-Appellants' new counsel this opportunity.

Instead, the trial court explained that despite the fact that there was a final judgment entered against the Defendants-Appellants, and the Defendants-Appellants' Third-Party Complaint against Dreamfood had been dismissed (disposing of the original Complaint and the Third-Party Complaint), if the Defendants-Appellants wished

to file a separate action based on indemnification against Drosos, the trial court "finds that they will not be barred by the entire controversy doctrine"—a finding on an issue not before the trial court and essentially prescribing how the Defendants-Appellants should proceed with their claims and defenses with respect to the subject controversy in this matter.

In other words, the trial court went out of its way to reason that equity dictated this result as Bronster could have filed a crossclaim for indemnification by Defendants-Appellants against Drosos—but he did not do so.

Additionally, in an extraordinary aside, the trial court also went out of its way to note, while irrelevant, that one of the Defendants-Appellants is a sitting Superior Court judge, "an experienced and knowledgeable attorney" and "cannot now be heard to complain that certain sections are unenforceable due to a conflict with Mr. Bronster . . . ."

[Remainder of page intentionally blank]

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that the Court grant their appeal and reverse and remand the matter to the trial court.

Respectfully Submitted,

/s/ Scott Piekarsky, Esq.

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MEMBER OF NEW JERSEY & NEW YORK BAR

April 15, 2024

Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

Re: Waterfront Corporate Center III JV LLC
vs. GFG Hoboken LLC, et al.
Docket No. A-514-23T4

On the appeal of Charles Castelli and Marc Ramundo
from Orders of the Hudson County Law Division,
Hon. Susanne Lavelle, Docket No. HUD-L-987-22

LETTER-BRIEF OF RESPONDENT GEORGIOS DROSOS, FOURTH-PARTY DEFENDANT IN THE COURT BELOW, PURSUANT TO R. 2:6-2(b)

TABLE OF CONTENTS

Page

TO THE HONORABLE JUDGES OF THE APPELLATE DIVISION:

PRELIMINARY STATEMENT

Fourth-party defendant Georgios Drosos was a peripheral figure, at best, in the court below. No claims were ever asserted against him by these appellants, nor did Drosos ever assert any claims against them. Drosos takes no position on this appeal as to the various Orders of summary judgment issued by the Court below; legally they are a matter of indifference to him. Drosos is a Respondent on this appeal only on two issues raised by Appellants in their brief:

(1) Appellants had moved in the court below to amend their Answer so as to *add* a crossclaim against Drosos. That motion was denied, and while this appeal has been pending the appellants have in fact filed a separate lawsuit pursuing all their claims against Drosos;

(2) Appellants also moved in the court below to disqualify Jeffrey A. Bronster, Esq. As Drosos's attorney on the crossclaim, should the court allow them to file it. The issue was moot because of the denial of the amendment itself. However, the court below did state that Bronster would necessarily have been disqualified had the amendment been permitted, and Drosos has not filed a cross-appeal contesting that part of the Court's decision.

PROCEDURAL HISTORY AND STATEMENT OF FACTS [1]

Waterfront, a commercial landlord, sued GFG Hoboken ("GFG") for breaching a commercial lease, and sued Charles Castelli and Marc Ramundo ("the Guarantors") based on a personal guaranty each had signed to induce Waterfront to enter into that lease. (Complaint, Da-14). GFG Hoboken failed to answer, and Waterfront entered default against it (Da-181). The Guarantors' Answer included a Third-Party Complaint against Dreamfood USA, the current owner of GFG, for indemnification, alleging that it had caused GFG to default on the lease. (Da-24). Dreamfood responded with a Fourth-Party Complaint against Drosos for indemnification. (Da-38).

The court below granted summary judgment to Waterfront on its affirmative claims on the personal guaranty (Da-693), and granted summary judgment in favor of Dreamfood dismissing the Guarantors' Third-Party Complaint. (Da-1029). The latter decision rendered Dreamfood's Fourth-Party Complaint against Drosos moot.

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[1] Drosos is combining the Procedural History and Statement of Facts to avoid repetition. As to him, the only relevant facts are the procedural ones.

At the same time that summary judgment motions were pending, the Guarantors filed a motion to amend their Answer to add a crossclaim against Drosos. They also moved to disqualify Bronster from representing Drosos on that claim. Bronster had been the original attorney for the Guarantors, having been appointed to that position by Drosos under an Indemnification Agreement. (Da-1066). The Guarantors had repudiated that agreement by refusing to settle the case on terms approved by Drosos, and replaced Bronster with new counsel. Bronster remained in the case as Drosos's attorney on the defense of the Dreamfood Fourth-Party Complaint.

The court below denied the Guarantors' motion to file a crossclaim against Drosos in the action, primarily on the basis that the action had been ended by the granting of summary judgment to the landlord and to Dreamfood, rendering the motion moot. (Da-1161). The Court did note in its decision that had the claim against Drosos been permitted, Bronster would have to be disqualified as his counsel. Drosos has never contested this. Aside from any other considerations, Bronster would have been a necessary trial witness on any claim by the Guarantors for indemnification from Drosos, which would have necessarily have implicated the issue of the Guarantors' breach of the Indemnification Agreement and how that breach occurred.

During the pendency of this appeal, and before the filing of their brief, the Guarantors filed an action in the Hudson County Law Division, under the caption, *Castelli v. Drosos,* Docket No. HUD-L-4340-23, asserting against Drosos the very claims that they had asked to assert in this case.

LEGAL ARGUMENT

POINT I

THE GUARANTORS' APPEAL AS TO THE FILING OF A CROSSCLAIM HAS BEEN RENDERED ENTIRELY MOOT BY THEIR RECENT LAWSUIT AGAINST DROSOS

By the time this appeal is decided, it is likely that the Guarantors' pending lawsuit against Drosos will already have been going on for a year or more. What sense, then, does it make for them to pursue this part of their appeal? Even if they are successful, all they could obtain was an Order allowing them to file a claim that they had already long since filed.

The Guarantors are asking the Court to rule on a purely academic question: should the trial court have allowed them to file a claim against Drosos in the Waterfront litigation. The answer to that question will have no practical significance at this point. Ruling against the Guarantors will not stop them from pursuing their new lawsuit against Drosos, and ruling in their favor will not expand their right to do so.

POINT II

THE ISSUE OF BRONSTER'S DISQUALIFICATION IS ALSO MOOT, AND IN ANY EVENT WAS DECIDED IN FAVOR OF THE GUARANTORS IN THE COURT BELOW

The Guarantors, in addition to moving to be allowed to add a claim against Drosos to the Waterfront litigation, also moved to disqualify Bronster from representing Drosos on that claim. The basis of the motion was that Bronster had previously represented Castelli and Ramundo, and

therefore could not then represent Drosos against them on the proposed claim. The trial court agreed, and Drosos has not filed any cross-appeal of that ruling. It is unclear why the Guarantors are even raising the issue on this appeal, having already prevailed.

Even putting the motion by the Guarantors aside, it is self-evident that Bronster could not represent Drosos on the claim, nor did he or Drosos ever expect otherwise. Bronster was, and is, an essential witness in any lawsuit between the Guarantors and Drosos over indemnification. Drosos's defense to any claim for indemnification - - a defense that the court below recognized and made reference to - - will undoubtedly center on the fact that Drosos entered into the agreement gratuitously, that as consideration for his agreement to indemnify the Guarantors had given him authority to settle the case, and that the Guarantors then breached the agreement by refusing to accept a negotiated settlement.

Based on Judge Lavelle's Order, and even independently of it, Bronster has already acknowledged that he will not be representing Drosos in any action filed against him by the Guarantors, nor in any action against the Guarantors filed by Drosos, and the issue is moot.

CONCLUSION

The Guarantors made an ill-advised decision to breach the Indemnity Agreement, and are now living with the consequences in the form of a money judgment. Trying to force someone else to pay the price for their own poor judgment, they are now suing both Drosos and Bronster. Drosos asks for no relief from this Court; he will fight the claims when and if he is ever served in the new

lawsuit, and he will be fighting in through other counsel, not through Bronster. On this appeal, the Guarantors have simply failed to raise any issues as to Drosos that merit the Court's consideration, and Drosos asks that the Court dispose of the appeal accordingly.

Respectfully submitted,

/s/ Jeffrey A. Bronster

JEFFREY A. BRONSTER

Superior Court of New Jersey

Appellate Division

Docket No. A-000514-23T4

WATERFRONT CORPORATE CENTER III JV LLC, *Plaintiff-Respondent,* vs. GFG HOBOKEN LLC, MARC RAMUNDO and CHARLES CASTELLI, *Defendants/Third-Party Plaintiffs-Appellants,* *(For Continuation of Caption See Next Page)*	:	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-987-22 Sat Below: HON. SUSANNE LAVELLE, J.S.C.

BRIEF AND APPENDIX FOR THIRD-PARTY DEFENDANT/FOURTH-PARTY PLAINTIFF-RESPONDENT DREAMFOOD USA LLC

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and DREAMFOOD USA LLC, *Third-Party Defendant/Fourth-Party Plaintiff-Respondent,* vs. GEORGIOS DROSOS and GGLM LLC, *Fourth Party Defendants-Respondents.*	:

TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

This case arises out of a commercial lease (the "Lease") between landlord Plaintiff Waterfront Corporate Center III JV LLC (the "Landlord") and Defendant GFG Hoboken LLC ("GFG Hoboken"), whereby GFG Hoboken leased premises to operate a bakery and restaurant specializing in Greek Foods (the "GFG Hoboken Store") until GFG Hoboken defaulted on the Lease by failing to pay rent. Defendants/Third-Party Plaintiffs Marc Ramundo and Charles Castelli (the "Guarantors") signed a lease guaranty (the "Lease Guaranty"), whereby they guaranteed GFG Hoboken's performance of the Lease. The Guarantors were sued because they failed to cure GFG Hoboken's failure to pay rent; in turn, the Guarantors filed a Third-Party Complaint against Dreamfood USA LLC ("Dreamfood"), which owns 85% of GFG Hoboken and operated the GFG Hoboken Store, alleging GFG Hoboken tortiously interfered with the Lease Guaranty by shutting down the GFG Hoboken Store.

The Trial Court correctly granted Dreamfood's Motion for Summary Judgment to dismiss the Guarantors' Third-Party Complaint because there was and is absolutely no evidence to demonstrate that Dreamfood shut down the GFG Hoboken Store out of malice and, therefore, a claim for tortious interference with the Lease Guaranty is utterly impossible to sustain. Indeed, evidence presented to the trial court indisputably demonstrated that the GFG

Hoboken Store was failing financially, losing hundreds of thousands of dollars a year, and had to be shut down accordingly.

The Appellants' arguments that pleadings from a different case should have kept the trial judge from granting Summary Judgment are completely unavailing, both because the lawsuit cannot be deemed competent evidence and also because, even if the allegations were accepted as true by the court for purposes of the Summary Judgment Motion, the allegations in the Complaint have essentially nothing to do with facts in this case, and could not overcome the evidence demonstrating the clear fact that the GFG Hoboken Store was closed due to financial problems and not because of anyone's malice.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Dreamfood has and does operate restaurant/bakeries called GFG, which stands for Greek From Greece, and which specialize in Greek food and baked products. (Da 746). Dreamfood is an owner of 85% of GFG Hoboken. (Da 863).

GFG Hoboken entered into a lease with the Landlord to rent commercial space in Hoboken for the GFG Hoboken Store on May 28, 2016. (Da 746-747). On March 14, 2016, the Guarantors executed the Lease Guaranty, pursuant to which each of the Guarantors unconditionally guaranteed the full performance

[1] The factual background and procedural history of this matter are intertwined and thus presented together.

and observance of all terms, covenants and conditions of the Lease between the Landlord and GFG Hoboken. (Da 839-Da 844).

After making a modest profit of $67,249 in 2018, GFG Hoboken lost $61,071 in 2019. (Da 869-871). In 2020, and not surprisingly in light of the COVID epidemic, the GFG Hoboken Store started hemorrhaging money – it lost $392,283 and saw a decrease in revenue of some forty percent (40%). (Da747 ¶ 9 and Da 873-878). Things only got worse in 2021, as GFG Hoboken lost $497,850 (Da747 ¶ 10 and Da 881). As consequence of these losses, GFG Hoboken was unable to pay its bills, including rent for the GFG Hoboken Store, and was forced to shut down. (Da747 ¶ 11).

On March 23, 2022, the Landlord commenced this action by filing a Complaint against GFG Hoboken and the Guarantors due to GFG Hoboken's failure to pay rent, and the Guarantors' failure to abide by the terms of the Lease Guaranty by not covering the missed rent. (Da 709-716) On June 2, 2022, the Guarantors filed an Answer, Crossclaim and Third-Party Complaint against Dreamfood. (Da 718-727.) The Third-Party Complaint alleged that "Dreamfood interfered with the contract by shutting down GFG Hoboken, causing it to default on the payment of rent," and that "Dreamfood's interference with the contract was intentional and with malice . . .." (Id.). On June 14, 2022, partial

judgment by default for liability only was entered by the Court against GFG Hoboken. (Da729).

On July 7, 2022, Dreamfood filed a Motion to Dismiss the Third-Party Complaint for failure to state a claim upon which relief could be granted pursuant to R. 4:6-2(e), arguing that its decision to shut down the GFG Hoboken Store could not satisfy the elements of tortious interference under any circumstances. (Da 707). The court denied Dreamfood's Motion Dismiss, holding that, "at this stage of the proceedings, where Plaintiffs are entitled to a liberal interpretation of the complaint and all inferences that can reasonably be drawn . . . [t]he complaint against Dreamfood suggests a cause of action because if Dreamfood was motivated by malice when shutting down GFG, as is alleged here, a cognizable claim for tortious interference has been made." (Da 741.)

On November 18, 2022, the Court entered an Order granting partial summary judgment in favor of Landlord and against the Guarantors as to liability only. (Da 743-744.) The Guarantors never answered written discovery propounded by Dreamfood and Guarantors never conducted any Discovery of their own. (Da 707 ¶ 6.) On February 11, 2023, former counsel for the Guarantors signed a Substitution of Attorney. (TPDa1). New counsel for the Guarantors executed the Substitution of Attorney thirteen (13) days later on

February 24, 2024. (Id.) The Guarantors did not file the Substitution of Attorney until March 13, 2023. Discovery ended on March 29, 2023. (TPDa5).

On May 31, 2023, the trial court granted Dreamfood's Motion for Summary Judgment and accordingly dismissed the Guarantors' Third-Party Complaint. (Da 1310-1318). As further discussed infra, in granting Dreamfood's Motion for Summary Judgment, the trial court noted that counsel for the Guarantors conceded that the Guarantors had no evidence to support the allegation that there was an improper motive to shutting down the GFG Hoboken Store. (Da 1316). On August 29, 2023, the trial judge denied the Guarantors Motion for Reconsideration of her grant of Summary Judgment in favor of Dreamfood. (Da 1526-1550).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED DREAMFOOD'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE GUARANTORS FAILED TO SUBMIT ANY EVIDENCE TO SUPPORT THEIR CLAIM OF TORTIOUS INTERFERENCE WITH A CONTRACT IN ORDER TO DEFEAT THE MOTION FOR SUMMARY JUDGMENT

The Guarantors alleged in the Third-Party Complaint against Dreamfood that: the GFG Hoboken lease and the Lease Guaranty "formed a single contract"; that Dreamfood, which controlled GFG Hoboken, "interfered with the contract by shutting down GFG Hoboken,"; when Dreamfood shut down GFG Hoboken, it "was operating at a break even level or at a profit"; and (iv) Dreamfood closed

GFG Hoboken "with malice, and with both the knowledge and intent that the landlord would seek payment of any amounts due from the Guarantors." (Da 726). The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice—that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages." DiMaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001). Crucially, "liability rests upon whether the interfering act is intentional and improper." Nostrame v. Santiago, 213 N.J. 109, 121-122 (2013).

In Nostrame, the New Jersey Supreme Court set forth examples of the types of interfering conduct that could be deemed "improper" and thereby potentially satisfy the tortious interference standard:

> Our Appellate Division, for example, has recognized that deceit and misrepresentation can constitute wrongful means. See Shebar v. Sanyo Bus. Sys. Corp., 218 N.J. Super. 111, 118, (App. Div. 1987) (holding that using deceit to prevent employee from accepting alternate employment while planning to terminate him would be actionable), aff'd, 111 N.J. 276 (1988). Similarly, our courts have concluded that "violence, fraud, intimidation, misrepresentation, criminal or civil threats, and/or violations of the law" are among the kinds of conduct that would be considered to be "wrongful means." E Z Sockets, Inc. v. Brighton–Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 559, (Ch. Div.1996), aff'd, 307 N.J. Super. 438, (App. Div. 1997). On the other hand, lesser sorts of behavior have been found to fall short of constituting wrongful means in the ordinary business context. See Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 205–06, (App. Div.) (holding that 'vigorous' solicitation of competitor company's customers was not wrongful), certif. denied, 141 N.J. 99, (1995); C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J.

Super. 168, 174, (Law Div. 1989) (holding that "sneaky" or "underhanded" acts are not "wrongful means").

Nostrame v. Santiago, 213 N.J. at 124.

In their Third-Party Complaint, the Guarantors allege that the improper interfering act was Dreamfood shutting down the GFG Hoboken store, even though the store was allegedly "breaking even or making a profit," with the alleged knowledge (and alleged wrongful intent) that this would cause a default on a Lease and exposure to the Guarantors on that Lease.

As an initial matter, Dreamfood asserts that shutting down a store or closing business operations cannot fathomably be deemed "improper." Yet, the Guarantors presented no evidence in opposition to Summary Judgment to show that that Dreamfood was motivated by malice when shutting down the GFG Hoboken Store. As the Dreamfood's tax returns and its manager's Certification make clear, GFG Hoboken lost massive amounts of money in 2020 and 2021, contrary to the Third-Party Complaint's assertion that "GFG Hoboken was operating either at a break-even level or at a profit despite the pandemic." The absences of evidence of malice and the clear evidence demonstrating losses makes clear that any rational business would shut down a failing store, and this eviscerates the Guarantors' claim of tortious interference with contract.

In opposition to Dreamfood's Motion for Summary Judgment, the Guarantors relied entirely on the Certification of one of the Guarantors, Mark

Ramundo, which simply provides no competent evidence regarding the issue of the GFG Hoboken Store closure. (the "Ramundo Certification")(Da 887-982). The Ramundo Certification relies on a lawsuit filed by a Dreamfood shareholder and former manager George Drosos (Da 899-926) against Dreamfood (the "Drosos Litigation") and cites allegations in that litigation that Dreamfood's failure to pay leases exposed Drosos to personal liability and Dreamfood allegations that Drosos mismanaged Dreamfood when he served as manager. (Da 889-890 ¶ 10 and Da 890-892 ¶ 14.) Ramundo further mischaracterizes the pleadings in the Drosos Litigation to state that "Drosos alleged Dreamfood's sabotage was the sole reason for GFF's Hoboken's closing," (Da 890 ¶11), although the pleadings in the Drosos Litigation make no such assertion.

Simply, even if the court were to accept the allegations in the pleadings of the Drosos Litigation as true, they would not create a genuine material issue of issue of fact that should have prevented the court from granting Summary Judgment to Dreamfood. The Drosos Litigation pleadings did not specifically relate to the GFG Hoboken Store or the circumstances surrounding its closure, and they certainly do not allege anything remotely close to malicious closing of the GFG Hoboken Store[2].

[2] The Drosos Litigation was dismissed in December 2023 after an Appellate Division decision reversing a trial court decision that failed to dismiss the matter in favor of arbitration. (TPDa 3-4)

Moreover, an opponent to a Motion for Summary Judgment cannot simply rely on allegations in a pleading to defeat the motion, especially hearsay allegations in an unverified pleading that were filed in a different case. "[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Such evidence, however, must be more than "speculation" or "fanciful arguments," Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), certif. granted, 183 N.J. 592 (2005); an "abstract doubt" about a material fact, Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009); or inadmissible hearsay, Robbins v. City of Jersey City, 23 N.J. 229, 240 (1957). Real evidence must be presented to defeat summary judgment, not "fanciful, frivolous, gauzy or merely suspicious" assertions. Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75, (1954). Summary Judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

The Guarantors conducted zero discovery[3] and therefore had no deposition transcripts, interrogatory answers or any other evidence to cite to in order to buttress their allegations, not to mention overcome the evidence presented by Dreamfood that showed the GFG Hoboken Store was closed due to losing vast sums of monies. Defendants argument that the court should have taken judicial notice of the pleadings in the Drosos Litigation (Db8) is absurd. The rules regarding judicial notice are designed solely to provide a speedy and efficient means of proving matters which are not in genuine dispute." RWB Newton Assocs. v. Gunn, 224 N.J. Super. 704, 711 (App. Div. 1988). Accepting contested allegations from an unverified Complaint in another case to prove malicious intent is not something for which judicial notice can be used.

Additionally, the statements in the Ramundo Certification mined from Drosos Litigation constitute inadmissible hearsay. To this end, it is beyond contestation that the bits and pieces of allegations the Ramundo Certification has cherry-picked, and mischaracterized, from the Drosos Litigation are hearsay,

[3] The Guarantors conducted no discovery, for which they want to blame their former counsel, although the Substitution of Attorney document was fully executed a month before Discovery ended. In any event, Defendants have other recourse against their former counsel for failing to conduct Discovery.

as (i) they are out-of-court statements, and (ii) the Ramundo Certification has "offered" them "to prove the truth of the matter asserted in the statement[s]." N.J.R.E. 801(c). As such, they are "not admissible" unless they qualify for admission under one or more so-called "hearsay exceptions." N.J.R.E. 802; see N.J.R.E. 803, 804. However, *nothing* in the Ramundo Certification offers so qualifies.

First, to aver that "Dreamfood deliberately shut down GFG stores … to force Drosos out of the Company," that "Dreamfood stopped paying the landlords at GFG locations [to expose] Drosos to personal liability," that "Dreamfood's sabotage was the sole reason for GFG Hobken's closing" and that, in reality, Dreamfood and GFG Hoboken were actually doing so well they were "expanding business" (as opposed to financially failing), the Ramundo Certification cites to various allegations made in the Complaint filed by *George Drosos*, a non-party to the controversy between the Guarantors and Dreamfood. (Da 889-890 ¶ 10, 11.). Loaded statements lifted from a non-party's pleading in an unrelated matter do not qualify for any recognized hearsay exception. See N.J.R.E. 803, 804.

Even more importantly, not only did the Ramundo Certification improperly cited to George Drosos' statements, it mischaracterized them. *No*

pleadings in the Drosos Litigation made *any* assertion that "Drosos alleged Dreamfood's sabotage was the sole reason for GFG's Hoboken's closing."

The Ramundo Certification also cites to portions from Dreamfood's Amended Answer and Counterclaim to the Drosos Litigation to apparently contend that Dreamfood, via Drosos, somehow engaged in wrongful conduct that tortiously interfered with the Guarantors' guarantees. First, even if the Dreamfood allegations can be deemed "admissions" (which the Guarantors did not argue in their brief) they still are inadmissible in any court, as New Jersey's appellate courts have long and routinely held, while "a pleading may, as a general matter, be viewed as an admission [pursuant to N.J.R.E. 803(b)(3)], our pleading practices, which permit the assertion of alternative claims, render problematic the use of a particular statement in a [pleading] – particularly one that is equivocal or that consists of a mixture of both facts and legal conclusions." Higgins v. Thurber, 413 N.J.Super. 1, 24, n. 22 (App. Div. 2010)(citing Shankman v. State, 184 N.J. 187, 205-206 (2005), Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972) (holding that, "to be binding, judicial admissions must be unequivocal"), Van Sickell v. Margolis, 109 N.J.Super 14, 18 (App. Div. 1969)(holding that "a pleader's conclusions of law are not admissions of facts") aff'd 55 N.J. 355 (1970)). Here, the Guarantors have attempted to twist and weaponize words in Dreamfood's Answer and

Counterclaim that are *nothing but* "equivocal" claims (e.g., Dreamfood's failure is due to "Drosos' mismanagement, *and/or* other wrongful acts *and/or* omissions while he was the manager of Dreamfood," (Da. 890-892-93 ¶¶ 14, 15))) are "mixture[s] of both facts and legal conclusions." The trial court was right to disregard these impermissible "statements" in the Ramundo Certification. Moreover, even were the Ramundo Certification's cherry-picked and misinterpreted statements from pleadings in the Drosos Litigation somehow admissible, they still do nothing to bolster the Guarantors case or salvage their tortious interference claim: In that these pleadings allege Drosos engaged in mismanagement, they do nothing to demonstrate that Dreamfood acted with malice when it shut down the GFG Hoboken store.

There was no genuine issue of material fact presented by the Guarantors' submission in opposition to Dreamfood's Motion for Summary, and there can be no genuine issue of material fact that could somehow convert the decision to shut down the GFG Hoboken store into a malicious act that warrants submitting the claim of tortious interference with the Lease Guaranty to a jury.

CONCLUSION

Since the Guarantors failed to present any competent evidence to defend their claim of tortious interference in opposition to Dreamfood's Summary Judgment Motion, the trial court's decision granting Summary Judgment to Dreamfood and dismissing the Guarantors' Third-Party Complaint should be upheld.

Dated: May 10, 2024

Respectfully submitted,

William C. Matsikoudis
Matsikoudis & Fanciullo, LLC

WATERFRONT CORPORATE CENTER III JV LLC, Plaintiff-Respondent, - against - GFG HOBOKEN LLC, MARC RAMUNDO and CHARLES CASTELLI, Defendants/Third-Party Plaintiffs-Appellants, - against - DREAMFOOD USA LLC, Third Party Defendant/Fourth Party Plaintiff-Respondent, - against – GEORGIOS DROSOS and GGLM, LLC, Fourth Party Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000514-23T4 CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO.: HUD-L-987-22 Sat Below: Hon. Susan Lavelle, J.S.C.

PLAINTIFF-RESPONDENT WATERFRONT CORPORATE CENTER III JV LLC'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

This case involves Defendants-Appellants' attempt to avoid their obligations as personal guarantors of a defaulted commercial lease agreement even though they knowingly and voluntarily signed a guaranty.

Appellants, Marc Ramundo (who is an active judge of the New Jersey Superior Court) and Charles Castelli (together, "Guarantors" or "Appellants"), are the personal guarantors of a lease agreement between Plaintiff-Respondent, Waterfront Corporate Center III JV LLC ("Landlord" or "Respondent") and Defendant, GFG Hoboken LLC ("Tenant"). Guarantors appeal from the Amended Final Judgment in favor of Respondent, entered by the Honorable Susanne Lavelle, J.S.C., on September 14, 2023 ("Amended Final Judgment"). Although Appellants' noticed an appeal of the Amended Final Judgment, their doing so was, at best, a thinly-veiled way of getting around the "clear abuse of discretion" standard associated with appealing a denied motion for reconsideration—which, as revealed by a deeper reading of their brief, is what they are really appealing.

The Amended Final Judgment simply determined the precise amount due and owing Landlord under the lease. Guarantors are not challenging the amount due. Instead, they are trying for a third time to reverse the trial court's November 18, 2022, order granting Landlord's unopposed motion for partial

summary judgment, in which the Honorable Veronica Allende, J.S.C., determined that Guarantors are liable to Landlord for the rents due under the lease ("Liability Judgment"). But Guarantors did not appeal the Liability Judgment.

It was only in connection with Landlord's March 2023 motion for Final Judgment on the amount due that Guarantors filed a cross-motion to vacate the Liability Judgment under Rule 4:42-2(b) and 4:50-1 (they were far beyond the 20-day time frame for a Rule 4:49-2 motion), which Judge Lavelle denied on May 31, 2023, thoroughly analyzing and disposing of each of the substantive issues Guarantors raised. But again, Guarantors did not appeal the denial of their cross-motion to vacate.

Even though Guarantors had already lost their cross-motion to vacate the Liability Judgment, they then tried a second bite at the apple and moved for reconsideration of the Liability Judgment under Rule 4:49-2 (captioning it as a motion for reconsideration of the motion to vacate). Judge Lavelle also denied this motion, explaining that Guarantors' arguments were essentially the exact same arguments they had already submitted in their denied cross-motion to vacate. The Judge was correct in doing so since reconsideration motions require something more than just a repeat of the same exact arguments; they require a showing of something the Court overlooked in the original motion such that the

Court's conclusion was "palpably incorrect," and a "clear abuse of discretion." Simultaneously with the denial of Guarantors' motion to reconsider, the Court granted Landlord's motion to amend the Final Judgment to include additional attorneys' fees.

As stated above, Guarantors now appeal the Amended Final Judgment; but on appeal, they only advance arguments concerning their already-improper, second-bite-at-the-apple, motion for reconsideration of the Liability Judgment. And, as will be discussed in this brief, those arguments are precisely the same arguments that could not meet the high standards of a motion to vacate a judgment under Rule 4:50-1, which requires a showing of excusable neglect and a meritorious defense, nor the even higher standards of a Rule 4:49-2 motion for reconsideration.

For all the reasons set forth in this brief, Judge Lavelle correctly denied Guarantors' motion for reconsideration and correctly entered the Amended Final Judgment. This Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The material facts are simple and not in dispute: Landlord, Waterfront Corporate Center III JV LLC, and Tenant, GFG Hoboken LLC, entered into a commercial Agreement of Lease dated March 28, 2016 ("Lease"). (Da1598).[2] Under the Lease, Tenant was required, among other things, to pay Landlord rent. (Da1602-3). On March 14, 2016, in connection with the Lease, Guarantors executed a certain Lease Guaranty ("Lease Guaranty"), which unconditionally guaranteed to Landlord the full and punctual performance of Tenant's obligations under the Lease. (Da1683). Beginning January 2022 and continuing thereafter, Tenant defaulted on its obligations under the Lease by failing to make rent payments. (Da14-23).

As a result of the payment default, Landlord filed a Complaint on March 23, 2022, seeking a money judgment against 1) the Tenant for failure to pay rent and 2) the Guarantors, Marc Ramundo and Charles Castelli, for their defaults and breaches of the Lease Guaranty in failing to pay the rent after Tenant's

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1 Landlord combines the Rule 2:6-2(a)(5) statement of facts and Rule 2:6-2(a)(4) procedural history as the two are inextricably intertwined in this case.

2 Pursuant to Rule 2:6-8, "Da" refers to Appellants-Defendants' Appendix.

failure to do so. (Id.). Guarantors filed their Answer, Cross-claim, and Third Party Complaint against Dreamfood USA LLC on June 2, 2022. (Da24).[3]

A. Guarantors' liability to Landlord was adjudicated in November 2022 and never appealed.

On September 16, 2022, Landlord moved for partial summary judgment against Guarantors to establish their liability under the Lease Guaranty. (Da138-288). On October 20, 2022, Guarantors requested an adjournment of the motion for partial summary judgment, (Da1983), however, ultimately Guarantors did not oppose Landlord's motion. (Da289-296).

Therefore, on November 18, 2022, Judge Allende granted Landlord's motion for partial summary judgment against Guarantors, accompanying the order with a letter opinion ("Liability Judgment"). (Da289-296). In the letter opinion, the trial court analyzed the Lease Guaranty, holding that the "terms of the Guaranty are clear as to [Guarantors'] liability to any debt [Tenant] owes to [Landlord] arising from breach of the leasing agreement." (Da295). In the Order granting partial summary judgment, the trial court directed Landlord to submit an application for final judgment on the amount due. (Da290). Guarantors never appealed the Liability Judgment.

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[3] There were a number of other pleadings filed concerning the Third and Fourth-Party Plaintiffs and Defendants, most of which are not relevant to the relief obtained by Landlord against Guarantors, and are therefore, not discussed in this brief.

B. Guarantors' cross-motion to vacate the Liability Judgment was thoroughly analyzed, denied, and never appealed.

On March 24, 2023, pursuant to the Court's directive in the Liability Judgment, Landlord moved for final judgment on the amount due against Guarantors and Tenant. (Da297-504). In response, on April 17, 2023, Guarantors cross-moved to vacate the Liability Judgment. (Da505-673). In their cross-motion—which, although captioned as a "cross-motion to vacate," was largely predicated on Rule 4:42-2(b) concerning motions for reconsideration of an interlocutory order—Guarantors argued the following:

1) they believed their former counsel, Jeffrey Bronster, Esq., was going to oppose Landlord's motion for partial summary judgment on liability, but that he failed to do so;

2) the ownership structure of GFG Hoboken LLC (the Tenant) changed, which constituted a material modification of the Guarantors' obligations under the Lease Guaranty, and thereby relinquished them of their obligations under the Lease Guaranty;

3) they believed their signing of the Lease Guaranty was a mere "formality," and that, by signing the Lease Guaranty, they were doing a favor for the real guarantor, Fourth-Party Defendant Georgios Drosos ("Drosos"), who had signed an indemnification agreement ("Indemnification Agreement"),

pursuant to which Drosos agreed to fund an escrow account with $200,000 to cover any Lease defaults; and

4) Guarantors did not receive any consideration for signing the Lease Guaranty because they had no ownership interest in the Tenant, GFG Hoboken LLC, and therefore, the Lease Guaranty was unenforceable as against them for lack of consideration.

(Da511-532).

On May 8, 2023, Landlord opposed Guarantors' cross-motion and addressed each of these four arguments. (Da674-687). On May 31, 2023, Judge Lavelle issued a decision granting Landlord's motion for final judgment and a separate decision denying Guarantors' cross-motion. (Da688-699). In the denial of the cross-motion, the trial court analyzed Guarantors' motion under both Rule 4:42-2(b) and Rule 4:50-1, and concluded that Guarantors failed to establish any basis for vacating or reconsidering the Liability Judgment. (Da688-692).

Judge Lavelle explained that although the motion for partial summary judgment was unopposed, "Judge Allende issued a thorough written opinion, in which the Court reviewed and analyzed the lease and Guaranty in accordance with applicable contract law, and held, that '[t]he terms of the Guaranty are clear

as to [Guarantors'] liability to any debt [Tenant] owes Landlord arising from breach of the [Lease].'" (Da690).

Moreover, in its May 31 denial of the cross-motion to vacate, the trial court addressed each of Guarantors' four arguments (outlined above) as follows:

First, after considering Guarantors' arguments concerning their beliefs that their former counsel would file opposition to Landlord's motion and that they were only signing the Lease Guaranty as a favor to Drosos, the trial court noted that after an *in camera* review of the email communications between Guarantors and Drosos and between Guarantors and their former counsel, those emails "might form the basis for a separate claim" by them against those individuals, "but they are not sufficient to justify vacating the judgment that was entered against them as Guarantors and in favor of Landlord," (Da691), since those allegations did not change any of the material findings of fact from Judge Allende's decision.

Next, the Court considered and rejected Guarantors' argument that the Lease Guaranty lacked consideration. In rejecting that argument, the Court explained that Guarantors "failed to provide any legal support for the proposition that monetary consideration must be part of a valid and enforceable Guaranty and that the consideration in this matter – inducement for the Landlord to enter a lease with the Tenant – is not sufficient consideration. Rather, the

Guaranty stated the consideration: it requested the Landlord to enter the lease; thus the making of the lease was the consideration for the Guaranty." (Da691). The trial court noted that in any event, after a review of the emails, there was an indication that Guarantors' signing of the Lease Guaranty was in fact part of a larger business transaction. (Id. at fn. 1).

Finally, the trial court was not swayed by Guarantors' "unsupported allegation" that the change in Tenant's ownership structure materially impacted Guarantors' obligations and risks. In fact, the trial court explained that when it pressed Guarantors to provide the specifics of how they were impacted, Guarantors could not do so. (Da691).

Accordingly, after rejecting each of Guarantors' arguments, the trial court denied Guarantors' cross-motion to vacate the Liability Judgment and entered Final Judgment on the amount due to Landlord from Guarantors for a total judgment of $262,107.77. (Da693-694).

C. The reconsideration motion was really just a rinse and repeat of the already-rejected arguments from the cross-motion to vacate the Liability Judgment.

On June 20, 2023, Guarantors moved for reconsideration of the cross-motion to vacate the Liability Judgment and the other orders that followed. (Da1164). Landlord opposed the motion. (Da1529). On August 29, 2023, Judge Lavelle denied Guarantors' motion for reconsideration of the cross-

motion to vacate the Liability Judgment, issuing a well-reasoned, 22-page written decision. (Da1526-1551).

When distilled to its essentials, Guarantors' motion for reconsideration advanced the exact same arguments the trial court had already rejected in denying the cross-motion to vacate. Denying the motion, the trial court explained, "Guarantors have now argued two times regarding the merits of denying the summary judgment motion (by virtue of the first motion to vacate and second, by virtue of the present motion to vacate and/or reconsider the present judgment and motion to vacate)." (Da1531). The trial court then opined, "What has not changed are the undisputed facts upon which Judge Allende relied in granting the partial summary judgment on liability: the Guarantors, knowingly and voluntarily signed an unconditional guaranty as inducement for the Landlord to enter a lease with the Tenant; the Tenant defaulted on the terms of the lease; the Landlord sought to enforce the guaranty that the Guarantors knowingly signed." (Id.).

Notwithstanding the attempt to rehash stale and already-rejected arguments, the trial court again addressed Guarantors' argument that their former counsel's failure to oppose Landlord's motion for partial summary judgment was allegedly due to what amounted to "'ineffective assistance of counsel,'" and explained that that argument does not demonstrate how Judge

Allende's decision to grant partial summary judgment on liability was "palpably incorrect or irrational . . . or that she failed to consider, or appreciate the significance of probative, competent evidence." (Da1530-31). Indeed, notwithstanding the lack of opposition to the motion for partial summary judgment, Judge Allende issued a thorough and well-reasoned letter opinion in connection with the entry of the Liability Judgment. (Da289-296).

In any event, the trial court concluded after a review of the record and email correspondence, that Guarantors' former counsel, Mr. Bronster, "knowingly and strategically decided not to file opposition to the motion for summary judgment having determined that Guarantors did not have a defense to same." (Da1531).

The trial again addressed Guarantors' argument that the Lease Guaranty was unenforceable for lack of consideration, which included a new theory the Lease Guaranty lacked consideration because it was signed before the Lease Agreement. (Da1535). Rejecting this argument, the trial court concluded that "the Guaranty was signed two weeks prior to the lease. Although not *simultaneous*, the court has found no decisional law that requires simultaneous signing of a guaranty and lease. Since the guaranty was executed two weeks before the lease, *not after*, the court concluded that the consideration for the

guaranty – *as stated in the guaranty itself* – was the inducement to have the Landlord enter the lease, albeit two weeks later." (Id.) (emphasis supplied).

D. None of Guarantors' appellate arguments actually challenge the motion to amend final judgment from which they appeal.

On June 20, 2023, the same day that Guarantors filed their motion for reconsideration, Landlord filed a motion to amend the judgment to include additional attorneys' fees necessitated by Guarantors' belated motion practice. (Da1552-1587). On June 29, 2023, Guarantors filed a cross-motion to amend the judgment. (Da1588-1902).

On August 29, 2023, after another lengthy and thorough decision, the trial court granted Landlord's motion to amend the Final Judgment and simultaneously denied Guarantors' cross-motion. (Da1903-1935). On September 14, 2023, the Court entered the Amended Final Judgment in favor of Landlord and against Guarantors in the amount of $325,416.77, together with post-judgment interest. (Da1980-1982).

On October 5, 2023, Guarantors filed their notice of appeal of the Amended Final Judgment, which was revised on October 19, 2023. (Da1). Upon a review of Appellants' brief, however, none of the arguments therein actually challenge the Amended Final Judgment in which the trial court simply determined the amount due plus additional attorneys' fees. (Da1980-1982). Instead, each of the arguments pertain to the trial court's August 29, 2023, denial

of the motion for reconsideration of the cross-motion to vacate the Liability Judgment. Guarantors' appellate arguments, which are almost entirely retreads of their previous arguments, are summarized as follows:

In Points I, II and III, Guarantors argue that the trial court erred by suggesting in its denial of the motion for reconsideration that although Guarantors might have a claim against Mr. Bronster for not opposing Landlord's motion for partial summary judgment on liability, such an argument did not amount to any excusable neglect that would otherwise justify vacating the underlying Liability Judgment. (Db20).[4]

In Point II, Guarantors again argue that the Lease Guaranty lacked consideration since it was not signed at the same time as the Lease and Guarantors received no benefit from it since they had no ownership interest in the Tenant, GFG Hoboken, LLC. (Db25-26). And in their latest attempt at a "Hail Mary", Guarantors allude to a prospective tenant who was ready, willing and able to take over the Lease from GFG Hoboken LLC. (Db25). They cite to nothing in the record for a reason: because there is nothing in the record about this. This argument has no basis whatsoever, is improperly raised, and should be simply ignored.

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[4] Pursuant to Rule 2:6-8, "Db ____" refers to Appellants-Defendants' Appellate Brief.

The remaining points have nothing to do with Landlord. Point IV relates to Guarantors' claims against the Third-Party Defendant, Dreamfood, and therefore, Landlord need not address that point. Point V relates to Guarantors' motion to disqualify Mr. Bronster as counsel to the Fourth-Party Defendants based on alleged conflict, and therefore, Landlord does not need to address that point. Point VI relates to Guarantors' motion for leave to file an amended answer to include a cross-claim against Drosos related to the Indemnification Agreement, and therefore, Landlord need not address that point except to highlight that the existence of the Indemnification Agreement in and of itself serves as an admission that Guarantors are bound by the Lease Guaranty, since they executed the Indemnification Agreement so that after any payment to Landlord under the Lease Guaranty, they would then, presumably, seek indemnification from Drosos.

Although Judge Lavelle thoroughly considered the arguments in Points I-III, twice, and disposed of them, (Da688-692 and Da1526-1551), Landlord will address them again below.

STANDARD OF REVIEW

None of Appellants' arguments on appeal actually pertain to the Amended Final Judgment of the amount due. Instead, distilling Appellants' convoluted brief to its essentials, this is an appeal of the trial court's denial of Appellants' Rule 4:49-

2 motion for reconsideration of Appellants' Rule 4:50-1 cross-motion to vacate the Liability Decision. In essence, and as explained by Judge Lavelle in her well-reasoned opinion denying reconsideration, (Da1526-1551), Guarantors' motion to reconsider was just a rehash of their cross-motion to vacate; and this appeal—which advances the same arguments as the cross-motion to vacate and the motion to reconsider—represents Appellants' improper third bite at the apple. The already-high standard of appellate review of a motion to reconsider should be viewed through this lens.

The appellate standard of review of an order denying reconsideration is whether there was a "clear abuse of discretion" by the trial court. Dennehy v. East Windsor Regional Board of Education, 469 N.J. Super. 357, 363 (App. Div. 2021), aff'd 252 N.J. 201 (2022). "'Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court.'" Id. at 362 (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)). "Reconsideration 'is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion.'" Id. at 363 (quoting Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010)). Instead, reconsideration:

> should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based

> upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.
>
> Id. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

"Thus, [the Appellate Division] will not disturb a trial judge's denial of a motion for reconsideration absent '**a clear abuse of discretion**.'" Id. (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. at 382) (emphasis added).

Lastly, as Judge Lavelle aptly highlighted, "[a]n important consideration in determining whether to grant a motion for reconsideration is whether the motion is based on unraised facts known to the movant prior to entry of the Order as to which reconsideration is sought." (Da1530) (citing Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188-190 (App. Div. 2006)). "A reconsideration motion is not an opportunity to supplement the record with material that could have been submitted on the original motion." (Id.) (citing Cummings v. Bahr, 295 N.J. Super. 374, 384-85 (App. Div. 1996)).

LEGAL ARGUMENT

On appeal, Guarantors advance the exact same legal arguments that they already tried twice with the trial court. They have never offered any new or different facts or evidence to even suggest that any of the underlying decisions stemming all the way back to the November 2022 Liability Judgment were "based upon a palpably

incorrect or irrational basis," nor have they shown that "it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Dennehy, 469 N.J. Super. at 363.

Judge Lavelle, reviewing the same arguments that Guarantors had already advanced in their rejected cross-motion to vacate, and addressing the above standard, resoundingly held, "[w]hat has not changed are the undisputed facts upon which Judge Allende relied in granting the partial summary judgment on liability: the Guarantors, knowingly and voluntarily signed an unconditional guaranty as inducement for the Landlord to enter a lease with the Tenant; the Tenant defaulted on the terms of the lease; the Landlord sought to enforce the guaranty that the Guarantors knowingly signed." (Da1531).

Guarantors have not met the high standard for reconsideration by simply rehashing their same, stale, arguments. Just like Judge Lavelle opined, the material facts concerning Guarantors' liability to Landlord have not changed at all. (Id.). Accordingly, their appeal should be rejected on that ground alone. Nevertheless, although it is already addressed at numerous points in the record, Landlord will briefly address the substance of Guarantors' appellate brief Points I-III.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING GUARANTORS' ARGUMENT THAT ITS FORMER COUNSEL'S DECISION NOT TO OPPOSE THE PARTIAL SUMMARY JUDGMENT PRECLUDED THEM FROM HAVING THEIR "DAY IN COURT"

In the trial court's decision denying the motion for reconsideration of the cross-motion to vacate the Liability Judgment, the trial court began with the reconsideration standard pursuant to Rule 4:49-2, which is set forth in the Standard of Review section above, and then set out the Rule for motions to vacate a judgment, which is Rule 4:50-1. (Da1530). Under Rule 4:50-1, there are several grounds for vacating a judgment, however, Guarantors have focused exclusively on "excusable neglect." Rule 4:50-1(a); (Db20). Excusable neglect has been defined as excusable carelessness "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini v. EDS, 132 N.J. 330, 335 (1993). In addition, a party moving to vacate a judgment must be able to present a meritorious defense. U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 469 (2012).

Guarantors argue "excusable neglect" by attempting to shift the blame for their own signing of a Lease Guaranty onto the apparent failure of their former counsel to oppose the motion for partial summary judgment. (Db19). But that argument, in and of itself, is not a basis to reconsider to the cross-motion to vacate where the record reflects that Guarantors entered into a written Indemnification

Agreement with Drosos, whereby they authorized Drosos to select Guarantors' attorneys and control the lawsuit on Guarantors' behalf in exchange for Drosos' agreement to indemnify them with respect to any judgment or settlement in this matter. (Da1990).

Moreover, the trial court concluded after a review of the record and email correspondence, that their former counsel, Mr. Bronster, "knowingly and strategically decided not to file opposition to the motion for summary judgment having determined that Guarantors did not have a defense to same." (Da1531). In other words, the decision not to oppose the motion was not careless or an "honest mistake." Mancini v. EDS, 132 N.J. at 335. Indeed, the record reflects that it was not a mistake at all.

Any suggestion by the trial court that Guarantors might have a claim against Mr. Bronster is irrelevant to the relationship between Landlord and Guarantors. As explained by Judge Lavelle when she denied the cross-motion to vacate, such claims "are not sufficient to justify vacating the judgment that was entered against them as Guarantors and in favor of Landlord." (Da691).

Judge Lavelle reviewed Judge Allende's decision on the Liability Judgment, wherein Judge Allende analyzed the Lease and Lease Guaranty and "issued a thorough written opinion, in which the Court reviewed and analyzed the lease and Guaranty in accordance with applicable contract law, and held,

that "[t]he terms of the Guaranty are clear as to [Guarantors'] liability to any debt [Tenant] owes Landlord arising from breach of the [Lease].'" (Da690). Those are the only material facts that matter. And based on those, the trial court properly rejected Guarantors' argument that the Liability Judgment should be vacated due to Mr. Bronster's decision not to oppose the motion; and certainly, the trial court's decision does not amount to a "clear abuse of discretion." Dennehy, 469 N.J. Super. at 363.

POINT II

GUARANTORS HAVE NOT ESTABLISHED ANY MERITORIOUS DEFENSES TO THE LIABILITY JUDGMENT

Even if Guarantors had opposed the motion for partial summary judgment, all of their suggested defenses are without merit. Therefore, again, the trial court did not abuse its discretion in denying the motion for reconsideration where Guarantors have not met their obligation of presenting a meritorious defense. Rule 4:50-1(a); U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. at 469. The following is a brief analysis of Guarantors' purported defenses raised in the their appellate brief and why they each fail.

A. The Lease Guaranty is Enforceable and Sufficient Consideration Was Given.

In Point II of their appellate brief, Guarantors again argue that the Lease Guaranty is unenforceable due to a lack of consideration because Guarantors have

no connection to the Tenant, GFG Hoboken LLC, and therefore, received nothing in exchange for the Guaranty. (Db22-25). First, Judge Lavelle correctly concluded that this argument is directly contradictory to the plain language of the Lease Guaranty that Guarantors knowingly and voluntarily signed. (Da691). On the very first page, the Lease Guaranty provides, "WHEREAS, the Landlord has required as a condition to entering into the lease that the Guarantor guaranty the Lease in the manner hereinafter set forth." (Da1683). After reviewing this provision, Judge Lavelle concluded, "thus the making of the lease was the consideration for the Guaranty." (Da691). The Judge also noted that Guarantors "failed to provide any legal support for the proposition that monetary consideration must be part of a valid and enforceable Guaranty and that the consideration in this matter – inducement for the Landlord to enter a lease with the Tenant – is not sufficient consideration." (Id.). They again fail to do so on appeal.

The law supports Judge Lavelle's rejection of Guarantors' argument since the making of a lease has long been considered adequate consideration for another's execution of a guaranty of the lease. See, e.g., Kesselman v. Cohen, 5 N.J. Misc. 31, 32 (1926) ("[T]he court was justified in finding that the making of the lease was sufficient consideration for the 'guaranty.'"). Indeed, "[w]hatever consideration a promisor assents to as the price of his promise is legally sufficient consideration." Coast Nat'l Bank v. Bloom, 113 N.J.L. 597, 602 (E. & A. 1934). "[E]ither a slight

benefit to the promisor or a trifling inconvenience to the promisee suffices." Ross v. Realty Abstract Co., 50 N.J. Super. 147, 153 (App. Div. 1958). Here, as expressly set forth on the face of the Lease Guaranty, Guarantors executed the Guaranty to induce Landlord to enter into the Lease with Tenant. (Da1683). In other words, the Lease Guaranty's consideration was, among other things, Landlord's making of the Lease, which it otherwise would not have been willing to do. Guarantors have not pointed to any authority (1) that would require Landlord to investigate why Guarantors wanted Landlord to make the Lease or what their relationship was to Tenant, or (2) that says that Guarantors' subjective thoughts and intent are legally relevant, as no such authority exists and that is not the law. Sufficient consideration for the Lease Guaranty is recited on the face of the document, and accordingly, Guarantors' argument fails and the trial correctly rejected this argument twice. (Da688-692 and Da1526-1551).

Moreover, consideration need not pass directly between parties who enter into a guaranty because "any consideration moving from the original obligor[ ] to the guarantor * * * is sufficient" consideration for the guaranty. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 401 (Ch. Div. 1993). The Indemnification Agreement provides that the Lease Guaranty was executed as part of a "business transaction" between Guarantors and Drosos, (Da1980), which suggests that, in addition to the consideration plainly stated on the Lease Guaranty's face, Guarantors may have

received further consideration from Drosos, which is contrary to their position that they received nothing in exchange for executing the Lease Guaranty. This is supported by the trial court's observation, upon its *in camera* review of the email communications between Guarantors and Mr. Bronster, that Guarantors' signing of the Lease Guaranty appeared to have been part of a larger business transaction. (Da691 at fn. 4).

B. Guarantors' signing of the Lease Guaranty before the Lease was executed does not change its enforceability.

Guarantors' latest attempt to manufacture a meritorious defense should be also disregarded. As another method of suggesting the Lease Guaranty lacked consideration, in their Appellate Brief, Guarantors again raise the argument that the subject Lease Guaranty appears to be dated March 14, 2016, while the subject Lease appears to be dated March 28, 2016, two weeks later. See (Db26); then compare (Da1687, which is the execution page of the Lease Guaranty) with (Da1598, which is the first page of the Lease). There are several obvious holes in Guarantors' theory.

First, as an initial matter, this argument was advanced for the first time as part of the motion for reconsideration even though Guarantors have obviously had the Lease Guaranty for years. And, as Judge Lavelle correctly noted, "[a] reconsideration motion is not an opportunity to supplement the record with material that could have been submitted on the original motion." (Da1530 (citing Cummings v. Bahr, 295 N.J. Super. at 384-85)).

In any event, the law does not support their argument. Though it is true that "'[a] mere promise to pay an antecedent debt of another is not generally regarded as consideration for a guaranty," Great Falls Bank v. Pardo, 263 N.J. Super. at 401 (emphasis added)), here, the Lease Guaranty clearly provides that Landlord was not willing to enter into the Lease with Tenant unless and until the Guaranty was executed by Guarantors, and the execution of the Guaranty before the Lease is consistent with this representation, (Da1683), which is the opposite of an antecedent debt. Accordingly, Judge Lavelle's conclusion that "Guarantors have failed to demonstrate a palpably incorrect or irrational basis for Judge Allende's decision, or that she failed to consider or appreciate the significance of probative, competent evidence" should not be disturbed. (Da1530-1531).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the trial court's denial of Guarantors' motion for reconsideration and its granting of Landlord's motion for an Amended Final Judgment and dismiss the appeal.

Dated: May 13, 2024

Respectfully submitted,

/s/ Clement J. Farley

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WATERFRONT CORPORATE CENTER III JV, LLC, Plaintiff- Respondent, vs. GFG HOBOKEN LLC, MARC RAMUNDO and CHARLES CASTELLI, Defendants/Third-Party Plaintiffs-Appellants, vs. DREAMFOOD USA LLC, Third-Party Defendant/ Fourth Party Plaintiff-Respondent, vs. GEORGIOS DROSOS and GGLM LLC, Fourth Party Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000514-23T4 CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO.: HUD-L-987-22 SAT BELOW: HON. SUSANNE LAVELLE, J.S.C.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

On the Brief:

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Dated: June 10, 2024

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Treatises

INDEX TO SUPPLEMENTAL APPENDIX

PRELIMINARY STATEMENT

Through no fault of their own, a judgment as to liability on a personal guaranty was entered against the Appellants during the infancy of the litigation (the "Liability Judgment") when their counsel,[1] who failed to conduct any discovery on their behalf, unilaterally and inexplicably decided not to oppose Plaintiff's partial summary judgment motion, notwithstanding that Appellants had defenses to the claim, directed the attorney to file opposition and the attorney represented he would file opposition.

The blatant disregard for the Appellants' rights set in motion a landslide of catastrophe for the Appellants as every subsequent effort by their substitute counsel to undue this injustice and extricate them from their attorney's neglect was thwarted by the trial court, ultimately resulting in a $325,000 judgment (the "Judgment"). Shortly after independently learning of the Liability Judgment's entry, Appellants filed a motion to vacate it and re-open discovery, which was erroneously denied by the trial court notwithstanding Appellants' presentation of circumstances warranting relief and multiple meritorious defenses. The trial court manifestly abused its discretion in failing to resolve its doubts in favor of Appellants to the end of securing a just result, thus burdening Appellants with

[1] Appellants' counsel at the time the Liability Judgment was entered was Jeffrey Bronster, Esq. ("Bronster").

the "sins or faults of [their] errant attorney." From there, Appellants had no meaningful ability to defend against the entry of the Judgment because their attorney failed to conduct any discovery with regard to Appellants' mitigation defenses. Those same failures resulted in Appellants inability to fight off dismissal of their third-party complaint and the denial of a subsequent motion to vacate the Liability Judgment and the Judgment.

Despite presentation of circumstances warranting relief from the judgments and meritorious defenses to the underlying claim, the trial court denied any relief to the Appellants who rightfully believed their interests were being represented by their counsel. That turned out not to be the case and the trial court's abuse of its discretion in denying relief has left Appellants to answer for the shortcomings of their attorney - and resulted in anything the just result on the merits that Appellants were entitled to.

SUMMARY OF PERTINENT FACTS

While the Appellants' initial brief details the procedural and factual background of the underlying litigation, the following is a timeline of the salient events necessary for the proper disposition of this appeal:

- March 23, 2022 - Plaintiff's Complaint was filed [Da14];
- June 2, 2022 - Appellants' filed an Answer, Counterclaim and Third-Party Complaint [Da24];

- September 16, 2022 - Plaintiff filed a motion for partial summary judgment, as to liability only, against the Appellants [Da138];
- October 20, 2022 - Bronster adjourns the summary judgment "because: More time is needed to properly respond to the motion" [Da1983];
- November 18, 2022 - The Liability Judgment was entered with no opposition having been filed on Appellants' behalf [Da289];
- January 18, 2023 - Appellants independently learn of the Liability Judgment [Da525, Da543];
- March 14, 2023 – Appellants' substitute counsel files a Substitution of Attorney with the trial court [Da1987];
- March 29, 2023 - Discovery ends;
- April 17, 2023 – Appellants cross-move to vacate the Liability Judgment and Re-Open Discovery [Da505] in response to Plaintiff's motion for final judgment [Da297];
- May 31, 2023 – Appellants' Cross-Motion to Vacate the Liability Judgment is denied [Da688] and the Judgment is entered [Da693];
- June 20, 2023 – Appellants file Motion for Reconsideration and/or to Vacate, among other things, the Liability Judgment and the Judgment [Da1164];

- August 29, 2023 – The trial court denies the Appellants' June 20, 2023 motion [Da1526].

ARGUMENT

I. The Trial Court Erred In Refusing to Vacate the Liability Judgment

The trial court abused its discretion in denying Appellants relief from the Liability Judgment. The trial court's failure to determine that the Liability Judgment's entry was the result of excusable neglect under Rule 4:50-1(a) or circumstances requiring relief under Rule 4:50-1(f), where it was entered on account of the failure of Appellants' attorney to file opposition to a summary judgment motion, was an abuse of discretion. The trial court then compounded its error when it improperly required Appellants to "prove" their meritorious defenses rather than, as required under applicable jurisprudence, simply present their defenses.

Relief from a judgment is governed by New Jersey Court Rule 4:50-1, which provides a mechanism for direct attack on a judgment or order entered by a court of this State. Security Beneficial Life v. TFS Insurance, 279 N.J. Super. 419 (App. Div.), certif. den. 141 N.J. 95 (1995). In the instance of a judgment that is entered by default, such as the Liability Judgment, our courts have made clear that a motion to vacate the same is "viewed with great liberality and every reasonable ground for indulgence is tolerated to that end that a just result is

reached." Marder v. Realty Construction Co., 84 N.J. Super. 313, 319 (App. Div.) aff'd 43 N.J. 501 (1964).

Although the decision is generally left in the sound discretion of the trial court, the court must recognize that "all doubts . . . should be resolved in favor of the party seeking relief." Mancini v. EDF on Behalf of New Jersey Auto. Full Ins. Underwriting Ass., 132 N.J. 330, 334 (1993). That is so because of the importance the courts attach to securing a decision on the merits. Davis v. DND/Fidoreo, Inc., 317 N.J. Super. 92, 100-101 (App. Div. 1998).

Under Rule 4:50-1(a), a judgment will be vacated if the same was the result of excusable neglect. R. 4:50-1(a). In this context, "'excusable neglect' has been defined as that neglect which might have been the act of a reasonably prudent person under the same circumstances." Tradesman National Bank and Trust Co. v. Cummings, 38 N.J. Super. 1, 4 (App. Div. 1955). As subsequently explained by this Court in In re Tee, 95 N.J. Super. 228 (App. Div. 1964):

> … carelessness may be excusable when attributed to honest mistakes, accidents, or any cause not incompatible with proper diligence, but in such case the moving party is required to show a meritorious defense. Id. at 235; Bauman v. Marinaro, 95 N.J. 380 (1984).

Alternatively, relief was available under subsection (f), which provides "any other reason justifying relief from the operation of the judgment or order." As explained by the New Jersey Supreme Court in Court Invest. Co. v. Perillo, 48 N.J. 334 (1966):

> No categorization can be made of the situations which warrant redress under subsection (f)… [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice. Perillo, supra, 48 N.J. at 341.

The purpose of this rule is to afford relief when enforcement of a judgment or order would be unjust, oppressive, or inequitable. C.R. v. J.G., 306 N.J. Super. 214, 241 (Ch. Div. 1997). "Because R. 4:50-1(f) deals with exceptional circumstances, each case must be resolved on its own particular facts; no categorization can be made of the situations which would warrant redress under the rule, and strict bounds should never confine its scope." Id. Indeed, as recognized by the Comment to R. 4:50-1, it is clear that the right to relief under this subsection "depends on the totality of the circumstances ***and that the correctness or error of the original judgment is ordinarily an irrelevant consideration***." Pressler & Verniero, Current N.J. Court Rules, Cmt. to R. 4:50-1 (GANN) (emphasis added).

This Court has repeatedly found excusable neglect arising from parties' reasonable reliance on their attorneys. See, e.g., Goldhaber v. Kohlenberg, 395 N.J. Super. 380, 391-92 (App. Div. 2007) (finding excusable neglect where defendant "consulted with a California attorney who advised him that New Jersey did not have jurisdiction over him, and that, as a consequence, he need take no steps to defend himself."); Regional Const. Corp. v. Ray, 364 N.J. Super.

534, 541 (App. Div. 2003) (finding excusable neglect based on defendant's mistaken assumption that an attorney, who was representing it in other actions involving the same parties, would respond to a newly filed complaint); Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190 (App. Div. 1985); Parker v. Marcus, 281 N.J. Super. 589 (App. Div. 1995).

While in some instances an attorney's lack of diligence may not warrant relief from a judgment, the "sins or faults of an errant attorney should not be visited upon his client absent demonstrable prejudice to the other party." Jansson, supra, 198 N.J. Super. at 194 (reinstating complaint that was dismissed where attorney failed to respond to discovery and misrepresented the status of the case to the client); see also, Parker, supra, 281 N.J. Super. at 591-95 (vacating a dismissal where an attorney failed to appear at an arbitration hearing and to inform the client about the dismissal).

Below, after citing certain legal principles applicable to Rule 4:50-1 motions, the trial court stated that Appellants failed to set forth any law in support of relief thereunder and thus concluded Appellants did not establish grounds for relief under Rule 4:50-1. Da690. However, the notice of motion specifically indicated Appellants were moving for relief under R. 4:50-1 as did the supporting motion papers. Da1164. The accompanying Certification of Marc Ramundo detailed the unjust circumstances leading to the Liability Judgment's

entry, namely, Bronster's failure to file opposition, despite representations that he would do so. Da511-520.

The facts and circumstances presented were sufficient for the trial court to evaluate the request for relief under Rule 4:50-1, even if a specific basis was not enumerated in the motion. Indeed, the Comment to R. 4:50-1 provides guidance to the court in exercising discretion in such circumstance, stating:

> While it is useful, it is absolutely not imperative to the application to state the particular subsection pursuant to which relief from the judgment is sought. In many situations, exact categorization is very difficult, and in the main, should be avoided except where the category is obvious or where exact choice is necessary to decision. Pressler & Verniero, supra, Cmt. to R. 4:50-1.

Here, the trial court abused its discretion by failing to evaluate thoroughly whether relief was warranted under Rule 4:50-1 and, in particular, whether the circumstances warranted relief under Rule 4:50-1(a) or (f) simply because the specific provision was not identified in Appellants' motion. The trial court essentially ignored this request.

By failing to do so, the trial court also failed to consider the equities relating to the circumstances that led to entry of the Liability Judgment. In Jansson, supra, this Court identified four "important" factors in deciding whether relief is appropriate: "(1) the extent of the delay in making the application; (2) the underlying reason or cause; (3) the fault or blamelessness of

the litigant; and (4) the prejudice that would accrue to the other party." Parker, supra, 281 N.J. Super. at 593, citing, Jansson, supra, 198 N.J. Super at 195.

The record below amply demonstrated that each factor favored relief. First, Appellants moved for relief promptly after independently learning of the Liability Judgment in January 2023. When Bronster failed to take any action to vacate the Liability Judgment, they retained new counsel who sought such relief while the action was still pending - less than 5 months after entry of the Liability Judgment and less than 3 months after learning of its entry.

As to factors (2) and (3), as explained in the initial brief and as was clear from Appellant's Certification below, Bronster's failure to oppose the motion was the cause of the entry of the Liability Judgment and such failure was through no fault of the Appellants. In fact, the Appellants directed Bronster to oppose the motion. Da525, Da531, Da546. Bronster represented he was going to do so, both to the Appellants and the trial court when he sought to adjourn the motion "… because: More time is needed to properly respond to the motion." Da1983. There is also no dispute that Bronster made the unilateral decision not to file opposition without consulting his clients, one of whom was a practicing attorney. Bronster then submitted a response to the Appellants' motion to vacate, which mostly undermined his former clients' interests, but did acknowledge that

he, and he alone, decided not to file opposition. Da678.[2] Bronster's failure to oppose the motion doomed the Appellants from the outset of this case.

Finally, the Liability Judgment was entered while the case was in its infancy, where no discovery had been conducted and no opposition to its motion was filed. Further, Appellants sought relief from the Liability Judgment not too long after it was entered and before a monetary judgment was entered. Thus, there was no "demonstrable" prejudice to the Plaintiff by relieving Appellants of the unopposed Liability Judgment and requiring Plaintiff to litigate its claim.

Instructive to this appeal is this Court's decision in Parker, supra. There, relief was granted three years after the plaintiff independently determined that his lawsuit had been dismissed on account of his attorney's failure to attend an arbitration hearing. This Court stated:

> Applying the Jansson factors here, we are convinced that plaintiff is entitled to relief. He made every effort to keep in contact with his attorney during the pendency of his case, and was assured that the matter had not been scheduled for trial because of a calendar backlog. When, in May 1994, plaintiff determined that the matter had been dismissed in December 1991, he fired his then attorney, obtained his

[2] Bronster's response also illuminates the conflict of interest he had in his representation of the Appellants. RPC 1.7. Bronster was retained by fourth-party defendant, Drosos, who had convinced the Appellants to execute the subject guaranties for an entity in which they had no interest or involvement. Drosos and Appellants were parties to a certain Indemnification Agreement. Da1990. When the interests and strategy of Appellants and Drosos diverged when it came time to oppose the partial summary judgment motion, Bronster took a position that he believed best suited Drosos, without consulting Appellants, and decided not to oppose the relief sought against Appellants. Da680.

> file and immediately retained his present counsel. The motion for relief was made in the beginning of July 1994. Thus, plaintiff's dilemma was not occasioned by his own dereliction or ambivalence concerning whether or not to proceed with the suit. ***The dismissal and its devastating effect on plaintiff rests squarely on the shoulders of his prior attorney, whose dereliction is unquestioned***. Parker, supra, 281 N.J. Super. at 594-95 (emphasis added).

Like the plaintiff in Parker, the "devastating effect on [Appellants] rests squarely on the shoulders of [their] prior attorney, whose dereliction is unquestioned."

While relief from the Liabiilty Judgment required a showing of a meritorious defense, the trial court further abused its discretion when it required the Appellants to "establish," rather than simply present, their meritorious defenses.[3] Applicable case law makes clear that a party seeking relief from a judgment under R. 4:50-1 need not establish a likelihood of prevailing on the merits of its defense, but it is sufficient to articulate reasons "that, if proven, would constitute a valid defense." LVNV Funding, LLC v. Maialetti, 2022 N.J. Super. Unpub. LEXIS 1047, *12-13 (App. Div., June 13, 2022) (Da1993); Carrano v. Dibizheva, 2011 N.J. Super. Unpub. LEXIS 929, *21 (App. Div., April 14, 2011) (Da1998). Indeed, as this Court previously determined in LVNV

[3] In reciting the standards for relief under R. 4:50-1, the trial court correctly noted that the Appellants were simply required to "present a meritorious defense…, which is to be viewed with great liberality," yet ignored that standard and denied relief when it found Appellants had not "established a meritorious defense." Da690.

Funding, supra, in vacating a default judgment, "Defendant was not required to prove his defense on the motion to vacate the default, and it was sufficient that he articulated reasons that, if proven, would constitute a valid defenses." LVNV Funding, supra, at *12-13.

Below, the record was clear that Bronster served no discovery with regard to the Appellants' defenses. Da691. Nevertheless, as the record below established and as set forth in the Appellants' initial brief, the Appellants articulated reasons supporting several defenses to the subject guaranty. Those defenses included lack of consideration[4], that the subject lease was executed and presented weeks after the Appellants signed the guaranty, and that the ownership of the tenant was significantly changed such as to unduly increase the Appellants' exposure to liability, all of which could have voided the guaranty. However, as of the time of the filing of the partial summary judgment motion, a mere 3 months after the Appellants filed an answer, no discovery had been served by Bronster. Thus, when Appellants had counsel seek relief, they had no discovery relating to their defenses, yet they **presented** defenses which, if proven after an actual opportunity to conduct discovery, could have avoided liability.

[4] See Yellow Book Inc. v. Tocci, 2014 Mass. App. Div. 20 (App. Div. 2014).

Overwhelming evidence of excusable neglect and circumstances justifying relief from the Liability Judgment, as well as the presentation of meritorious defenses, required the trial court to grant relief under Rule 4:50-1.

II. Subsequent Efforts to Relieve Appellants of Their Attorney's Dereliction Were Improperly Rejected by the Trial Court

As detailed in the Appellants' initial brief, subsequent efforts were made to extricate Appellants from Bronster's dereliction and limit the damage he caused. This included a motion to amend the Answer [Da1049], opposing dismissal of Appellant's third-party complaint [Da883-975] and a motion to vacate the Liability Judgment and the Judgment [Da1164]. In each instance, the trial court denied Appellants a meaningful opportunity to defend themselves.

After the initial motion to vacate was denied and Appellants unable to conduct discovery, Appellants were saddled with an adjudication that they were liable for the debt to Plaintiff. It was made clear to the trial court that Bronster had failed to conduct any discovery on Appellants' behalf. Not only did this include the defenses to liability, but it included defenses to the quantum of damages and in support of the Appellants' third-party claims, both of which could have reduced Appellants' liability (which they dispute) to the Plaintiff.

Appellants laid out their mitigation defense in their submissions to the trial court; but having been deprived of the opportunity to conduct discovery with regard thereto on account of Bronster's actions, coupled with the trial

court's earlier refusal to re-open discovery, Appellants were left with no meaningful ability to avoid the Judgment. Likewise, when the third-party defendant moved for summary judgment to dismiss the third-party complaint, the trial court granted that motion since Appellants could not provide the requisite facts in support of that claim.

As for the subsequent motion to vacate the Liability Judgment and the Judgment, the trial court again failed to appreciate the circumstances surrounding the entry of the Liability Judgment and then repeated its errors from its prior denial of Appellants' request for relief under Rule 4:50-1. Furthermore, in justifying its second denial, the trial court committed error by resolving doubts against Appellants with respect to the excusable neglect attributable to Bronster by inexplicably concluding Bronster "knowingly and strategically decided not to file opposition to the summary judgment motion having determined that [Appellants] did not have a defense." Da1531. The trial court then erroneously considered the correctness of the Liability Judgment. Da1531-32. Thus, at a time, when the trial court had an opportunity to rectify its improper denial of justice to the Appellants, it only compounded its error.

The applicable case law requires all doubts to have been resolved in favor of Appellants, who dispute that there was any strategic value - to their benefit at least - in not opposing the summary judgment motion and, in fact, directed

Bronster to file opposition, which he represented he would. Bronster's self-serving, post-facto contention that it was a strategic decision made without consulting his clients should not have served to deprive Appellants of a defense and relief from the judgments. The caselaw also dictates that the correctness of the judgment from which relief is being sought is an irrelevant consideration, yet the trial court erroneously pointed to the facts recited in support of the Liability Judgment as a basis to deny relief, even noting the facts were "undisputed." However, it was the "undisputed" nature of those facts that Appellants were seeking relief from on account of Bronster's negligence.

The trial court should have taken steps to ensure Appellants had an opportunity to defend themselves and it erroneously failed in its charge to secure a just determination at every step.

CONCLUSION

Accordingly, Appellants respectfully submit the trial court's orders be reversed and the matter be remanded to the trial court.

Respectfully Submitted,
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By: Alexander G. Benisatto
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Dated: June 10, 2024