HADDAD PLUMBING AND HEATING, INC.,

Plaintiff-Appellant,

vs.

NEWBURGH WINDUSTRIAL SUPPLY CO., INC. d/b/a NEWBURGH WINDUSTRIAL COMPANY,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO: A-0000125-23

APPEAL SOUGHT FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION,ESSEX COUNTY
DOCKET NO: ESX-L-3755-21

SAT BELOW:
HON. CYNTHIA D. SANTOMAURO, J.S.C.

DATE OF AMENDED SUBMISSION TO COURT: DECEMBER 22, 2023

BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT HADDAD PLUMBING AND HEATING, INC.'S APPEAL

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TABLE OF ORDERS, JUDGMENTS & RULINGS BEING APPEALED

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Pa1	September 11, 2023 Order granting Defendant's motion for summary judgment on Counts I, II, III, IV, V and VI of Plaintiff's Complaint.

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1T	Transcript of Motion for Summary Judgment Hearing, June 5, 2023, filed with the September 14, 2023 Notice of Appeal

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PRELIMINARY STATEMENT

Plaintiff/Appellant Haddad Plumbing and Heating, Inc. ("Plaintiff" or "Haddad") and Defendant/Respondent Newburgh Windustrial Supply Co., Inc. d/b/a Newburgh Windustrial Company ("Defendant") entered into a fixed price contract related to the sale of pipe. Plaintiff's lawsuit arose from Defendant's breach of that contract, i.e., Defendant refused to sell for the agreed upon price after fulfilling prior orders at the contract price. Plaintiff now appeals the lower court's order: (1) granting Defendant's Motion for Summary Judgment and dismissing the entirety of Plaintiff's Complaint based on a credibility determination on Plaintiff's proof of damages; and (2) denying Plaintiff's Cross-Motion for Partial Summary Judgment as to liability only with respect to Count I of Plaintiff's Complaint (breach of contract).

Defendant filed a Motion for Summary Judgment arguing that Plaintiff had failed to produce evidence of damages arising from the breach of contract. In opposition, Plaintiff produced documents and deposition testimony that support its claims and, more particularly, the over $600,000.00 in damages caused by Defendant's breach of contract. Further, Plaintiff produced a Certification from its president on the exact issues that Defendant chose not to ask about at depositions. All of this evidence gave rise to issues of fact that the lower court ignored when granting Defendant's Motion for Summary Judgment.

Even more importantly, in determining that Plaintiff had not failed to prove damages, the lower court made impermissible credibility determinations with respect to the witness testimony submitted by Plaintiff. For these reasons, this Court should reverse the lower court's order and allow this case to proceed to trial.

Finally, the lower court's denial Plaintiff's Cross-Motion for Summary Judgment as to Count I of Plaintiff's Complaint – relating to liability on breach of contract – should be reversed. There are no disputes of material fact on this issue, and Defendant is liable for breaching the fixed price agreement entered into between the parties.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1,2]

A. Terms of the Contracts and Defendants' Breach

On or about September 3, 2020, Defendant provided a one-year price quote to Plaintiff for various plumbing and HVAC supplies on a per pound basis. Pa222; Pa15. This price quote became binding when it was executed by Plaintiff. Pa222; Pa15. This formed the first contract ("First Contract") entered into between the parties. Id. The First Contract contained various terms that were not common for Defendant, including a 95% purchase requirement for the one-year period and requiring releases to be made in 20,000 pound minimums. Pa223; Pa15. There are instances where Defendant would allow customers to purchase less than the minimum weight requirement stated in a contract. Pa223; Pa429. The parties also entered into a second contract ("Second Contract") on September 11, 2020 for purchase of a different type of pipe. Pa224; Pa235. Plaintiff understood that the Second Contract would operate with the same terms as the First Contract. Pa225; Pa390.

Plaintiff placed five orders of product from Defendant throughout September 2020 through November 2020. Pa224; Pa46. At least four of these

[1] Plaintiff has combined the statement of facts and procedural history into one section in this brief. This has been done for convenience for the Court as the procedural history is uncomplicated and is intertwined with the Statement of Facts

[2] 1T refers to the June 5, 2023 transcript of the hearing of the parties' Motions for Summary Judgment.

orders were made in connection with the two contracts, with only one of the orders being for a quantity over 20,000 pounds. Pa224; Pa15; Pa235; Pa46. Directly following the initial order, Defendant's president internally complained that it did not meet the minimum purchase requirement, but still ultimately approved the five orders. Pa224; Pa435. A representative of Defendant has admitted that it "obviously" did not adhere to the strict requirements of the contract terms. Pa225; Pa427.

The First Contract contains payment terms of "net 60 or 2 percent 30 days." Pa225; Pa15. Plaintiff did not receive invoices for the five orders until December 4, 2020 and remitted final payment within sixty days, on January 21, 2021. Pa225; Pa310-311. Yet, even though Defendant had been paid in full, it refused to honor the agreements with Plaintiff in April 2021. Pa225; Pa284. Defendant's then-president, Dean Lucas, has admitted that he was "uncomfortable" that Plaintiff did not place any orders between January 2021 and April 2021 and "didn't want to work with [Plaintiff] anymore." Pa225-226; Pa286. Mr. Lucas also conceded that Defendant "probably" would have fulfilled Plaintiff's orders if it had been buying on a regular basis and that the decision to terminate the First Contract was due to Plaintiff's failure to order a "large" amount of product. Pa226; Pa287.

Mr. Lucas conceded that from 2020 through 2021, the costs of

construction materials generally increased. Pa226; Pa437. At the time it terminated the agreements, Defendant had already purchased the amount of pipe needed fulfill the quote. Pa226; Pa430. Multiple representatives of Defendant testified that they would not agree to structure an agreement in the way that Plaintiff's agreement was structured, and that Defendant does not typically agree to deals that required it to purchase product in advance without upfront payment. Pa228; Pa414; Pa450. Mr. Lucas admitted that the pipe Defendant purchased for Plaintiff would have sold in April 2021 for a price higher than quoted to Plaintiff in September 2020. Pa229; Pa254. As further evidence of Defendant's bad faith, Mr. Lucas confirmed in an internal email that Defendant terminated the agreements due to an increase in pipe prices. Pa226; Pa442.

B. Plaintiff's Complaint and Damages

Following Defendant's termination of the agreements, Plaintiff filed a complaint against Defendant on May 10, 2021, alleging causes of action for Breach of Contract (First Count), Breach of Implied Contract (Second Count), Breach of Implied Covenant of Good Faith and Fair Dealing (Third Count), Promissory Estoppel (Fourth Count), Legal Fraud (Fifth Count), and Equitable Fraud (Sixth Count). Pa19-22.

If Defendant had honored its commitments, Plaintiff would have ordered $390,005.85 worth of pipe through Plaintiff. Pa16; Pa235. Instead, due to

Defendant's breach of the agreements, Plaintiff was forced to seek product from another vendor, North Shore Plumbing Supply, Inc. Pa232. North Shore provided Plaintiff with two separate agreements each matching the type of pipe that would have been ordered from Defendant. Pa69; Pa15; Pa235. Plaintiff is obligated to purchase the same amount of pipe it would have purchased from Defendant from North Shore. Pa120.

In order to release product from the applicable agreements from North Shore, Plaintiff would call North Shore and request certain material to be released. Pa154; Pa177. The only checks provided by Plaintiffs from North Shore are related to the same pipe identified in Defendant's quote and quantity. Pa232. Plaintiff's damages are $621,011.16. Pa227-28.

C. Motions for Summary Judgment

Defendant filed a renewed Motion for Summary Judgment on March 2, 2023. Pa3. The substantive argument in the Motion for Summary Judgment is that Plaintiff failed to produce documentation to tie the replacement pipe from North Shore to the specific type or quantity of pipe it agreed to order from Defendant. Pa3-214. Plaintiff opposed the Motion for Summary Judgment on March 21, 2023, and filed a Cross-Motion for Partial Summary Judgment, arguing that issues of fact related to damages precluded summary judgment, and that there was no issue of fact with respect to Plaintiff's liability for breach of

contract. Pa214-455. Reply papers were filed by the Defendant on December March 27, 2023. Pa456-502.

The Lower Court conducted oral argument on the Motions for Summary Judgment on June 5, 2023. 1T:1-1. During the oral argument, Plaintiff set forth the various disputed material facts with respect to damages that precluded summary judgment in favor of Defendant. In particular, Plaintiff's counsel raised the various checks to North Shore, replacement quotes, and deposition testimony that gave rise to issues of fact. 1T16:2-15. Plaintiff's counsel highlighted a certification from Plaintiff's principal providing the exact damages calculation and stating that the various checks to North Shore represented purchases of the same type of pipe that Plaintiff was obligated to buy from Defendant. 1T16:2-15, 1T23:17-24. Further, counsel highlighted the testimony from Plaintiff's representatives confirming that it entered into a binding agreement with North Shore to buy the same amount of pipe that they were obligated to buy from Defendant, irrespective of whether those purchases have already been made. 1T17:12-17, 1T19:12-18, 1T20:12-20, 1T21:12-18.

Plaintiff highlighted that Defendant was attacking the weight and credibility of Plaintiff's damages, and that Defendant asked the Court to act as a factfinder and to make credibility determinations, which was not appropriate for summary judgment. 1T17:23-18:2, 1T21:20-22:4, 1T42:3-12. The Lower

Court also expressed confusion about the various North Shore checks and how they correlated to the contract amounts with Defendant, which Plaintiff further emphasized evidenced a dispute of fact. 1T24:1-19. The Lower Court also acknowledged the existence of various issues of fact, such as whether or not Plaintiff and North Shore entered into a contract, and whether or not Plaintiff purchased the pipe from North Shore in accordance with the terms of that contract. 1T25:23-26:7, 1T37:1-10, 1T40:4-8, 1T45:17-18, 1T46:14-17.

Significantly, the Lower Court acknowledged that Plaintiff's evidence of damages gave rise to various issues of fact. For example, the Court found that Plaintiff's chart reflecting a comparison of pipe prices as part of the damages calculation and whether the North Shore quotes were binding created questions of fact. 1T50:14-51:16, 1T52:11-22. Yet, even with all these disputes of fact as to damages, the Lower Court ultimately found in favor of Defendant by finding that the checks did not prove exactly what was purchased from North Shore. 1T58:20-59:11.

Further, the Lower Court denied Plaintiff's Cross-Motion for Summary Judgment without any reasoning. 1T59:14-22. Accordingly, the Lower Court entered an Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Cross-Motion for Summary Judgment. Pa1-2.

STANDARD OF REVIEW

At primary issue during this appeal is an Order dismissing Plaintiff's Complaint on summary judgment. Appellate review of a Motion for Summary Judgment is *de novo*. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491, 867 A.2d 1159 (2005). New Jersey Court Rule 4:46-2(c) states, in pertinent part, that a motion for summary judgment should be granted when:

> [T]he 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 judgment or order as a matter of law.

See Brill v. Guardian Life Ins. Co., 142 N.J. 520, 528-29 (1995).

Summary judgment is designed to protect parties against the expense of protracted litigation where a trial would serve no useful purpose. Kopp Inc. v. United Technologies, Inc., 223 N.J. Super. 548, 555 (App. Div. 1988). Summary judgment should only be granted when a search of the documents submitted clearly shows there is no "genuine issue of material fact requiring disposition at trial." Judson v. Peoples Bank & Trust of Westfield, 17 N.J. 67, 74 (1954). The standard in New Jersey is substantively controlled by the summary judgment standard proffered by the New Jersey Supreme Court in Brill v. Guardian Life Insr. Co. Of America, 142 N.J. 520, (1995) pursuant to R. 4:46-2. Under this standard, once the movant demonstrates there is no genuine

issue of material fact, the burden then shifts to the non-movant to "establish the existence of a genuine issue of material fact." Heljon Management Corp. v. DiLeo, 55 N.J. Super. 306, 313 (App. Div. 1959). Failure to discharge this duty entitles the movant to summary judgment. Id. Mere conclusory denials are insufficient to defeat a plaintiff's motion for summary judgment, unless the denials are supported by factual statements and evidence. Pipe & Foundry Co. v. American Arbitration, 67 N.J. Super. 384 (App. Div. 1961).

"[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Brill, 142 N.J. at 540. The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 536; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether a genuine issue of fact exists, it is well settled that although "allegations of the pleadings standing alone may raise an issue of fact, if other papers show that there is no material issue," then summary judgment should be granted. Campbell v. New Jersey Auto Ins., 270 N.J. Super. 379, 384 (App. Div. 1994).

In sum, "[i]f the opposing party in a summary judgment motion offers only facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy, or merely suspicious, he will not be heard to complain

if the court grants summary judgment. Brill, 142 N.J. at 529 (internal citations and quotations omitted). "New Jersey does not follow the scintilla of evidence rule." Golddome Realty Credit Corp. v. Hardwick, 236 N.J. Super. 118, 124 (Ch. Div. 1989) (internal citations and quotations omitted). Thus, even "if there exists a single, unavoidable resolution of the alleged disputed fact, that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of R. 4:46-2." Brill, 142 N.J. at 540 (internal citations and quotations omitted). "[P]rotection is to be afforded against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Id., at 542.

LEGAL ARGUMENT

I. THE LOWER COURT MADE IMPERMISSIBLE CREDIBILITY DETERMINATIONS TO REACH THE CONCLUSION THAT THERE WAS NO ISSUE OF FACT WITH RESPECT TO PLAINTIFF'S DAMAGES (1T50:14-51:16; 1T52:11-22; 1T57:16-59:11; Pa72-83; Pa227; Pa232; Pa391; Pa398; Pa503).

The Lower Court erred when it found that there was no evidence of the damages that Plaintiff sustained. 1T59:1-4. In doing so, the Lower Court impermissibly acted as a factfinder and rejected the various evidence produced by Plaintiff that gave rise to issues of fact.

For example, Plaintiff provided documentary evidence supporting its damages; two binding quotes from North Shore and thirteen (13) checks issued to North Shore representing the purchase of replacement goods that Plaintiff has been forced to buy as a result of Defendant's breach of the binding contracts by and between the parties. Pa72-83. In addition, deposition testimony elicited by Plaintiff's representatives created issues of fact. For example, testimony indicated that in order to release product from the applicable quotes from North Shore, Plaintiff would call North Shore and request certain material to be released. Pa227; Pa391; Pa398. Representatives of Plaintiff testified and certified that Plaintiff is obligated to purchase the same amount of pipe it would have purchased from Defendant from North Shore. Pa227; Pa398. All of this evidence creates issues of fact that warranted a denial of summary judgment.

Pipe & Foundry Co. v. American Arbitration, 67 N.J. Super. 384 (App. Div. 1961).

Notably, the Lower Court acknowledged the various issues of fact created by Plaintiff's damages evidence. 1T50:14-51:16, 52:11-22. Yet, even with all of these issues of fact, the Lower Court concluded that there was no evidence to support what Plaintiff's checks to North Shore actually purchased, and for that reason it granted Defendant's Motion for Summary Judgment. 1T58:7-9. Critically, with this finding, the Lower Court ultimately rejected the clear certification provided by Plaintiff's President, who stated that: "Plaintiff ordered the same types of pipe from North Shore at higher pricing than Defendant." Pa232.

"Where issues of credibility are presented, summary judgment is generally inappropriate." Singer v. Beach Trading Co., 379 N.J. Super. 63, 73 (App. Div. 2005). Issues of credibility must be left to the factfinder. Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App.Div.2007). "In the context of a summary judgment motion, the judge does not weigh the evidence, or resolve credibility disputes. These functions are uniquely and exclusively performed by a jury." Id. Here, the Lower Court made an impermissible credibility determination at the summary judgment stage, by rejecting the certification of Plaintiff's President that specifically addressed the type of pipe ordered from

North Shore. See Conrad, 394 N.J. Super. at 13 (reversing dismissal and finding that the motion judge gave less weight to testimony that favored the plaintiff's case); Will v. Caruso Thompson LLP, 2013 WL 6508480 (N.J. App. Div. Dec. 13, 2013) (finding that summary judgment was inappropriately granted to defendants as to the CEPA claim because it assessed that the defendants' denials were more credible than the plaintiff's allegations). Pa503. Reversal is warranted for this reason.

II. THE LOWER COURT ERRED WHEN IT DISMISSED PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT (1T59:14-22; Pa15; Pa30; Pa46-50; Pa223; Pa224; Pa225; Pa226; Pa263; Pa284; Pa285; Pa286; Pa287; Pa310-311; Pa430; Pa432; Pa442; Pa435; Pa437).

The lower court ruled in error that Plaintiff's Cross-Motion for Summary Judgment should be denied, and it did not provide any reasoning for this ruling. 1T59:14-22. There is no dispute of material fact that Defendant is liable for breaching the agreements with Plaintiff, which is Count One of Plaintiff's Complaint.

To prevail on a claim of breach of contract,

> "[o]ur law imposes on a plaintiff the burden to prove four elements: first, that "the parties entered into a contract containing certain terms"; second, that "plaintiffs did what the contract required them to do"; third, that "defendants did not do what the contract required them to do," defined as a "breach of the contract"; and fourth, that "defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs."

Goldfarb v. Solimine, 245 N.J. 326, 338 (2021), citing Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016). Decisional law mandates that "[a] contract is an agreement resulting in obligation enforceable at law." Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 24 (1958). "[T]he basic features of a contract" are "offer, acceptance, consideration, and performance by both parties." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 439 (2013). "A contract

arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992), quoting Caldwell, 26 N.J. at 24-25.

A. There Was a Binding Contract between Plaintiff and Defendant (Pa30)

First, there is no dispute that Plaintiff and Defendant had binding contracts with one another. That is obvious through the discovery elicited and the mere fact that Defendant has filed a Counterclaim premised on Breach of Contract. Pa30. Accordingly, Plaintiff satisfied the first element of its breach of contract claim.

B. Plaintiff's Performance Under the First Contract (Pa15; Pa46-50; Pa223; Pa224; Pa225; Pa263; Pa284; Pa285; Pa310-311; Pa442; Pa435; Pa437)

Next, there can be no reasonable dispute that Plaintiff did not perform under the subject contract. Defendant has alleged that Plaintiff did not perform under the First Contract since Plaintiff did not: (1) comply with the required payment terms and (2) did not comply with the First Contract's threshold release requirements. Neither of these arguments are meritorious.

(i) Plaintiff Abided by Defendant's Payment Terms (Pa46; Pa224; Pa225; Pa263; Pa284; Pa285; Pa310-311; Pa442)

Defendant has produced no evidence to dispute that Plaintiff never received any invoices until December 4, 2020, such that the argument that Plaintiff failed to comply with payment terms lacks any support. Pa225; Pa310-311. All of the evidence shows that Plaintiff complied with the payment terms under the agreements. In particular, Defendant possesses no tracking information to confirm that the invoices were actually received by Plaintiff prior to December 4, 2020. Pa225; Pa263. Further, Defendant has no proof that Plaintiff actually received the invoices through the U.S. mail. Pa225; Pa285. Eventually, after receiving a request by Plaintiff, Defendant sent all invoices to Plaintiff via email on December 4, 2020. Pa225; Pa263. Thereafter, Plaintiff remitted final payment to Defendant on January 21, 2021, which was within sixty (60) days of December 4, 2020. Pa225; Pa285; Pa442. As it stands, Defendant has been paid in full for what was owed from Plaintiff. Pa225; Pa284.

(ii) Defendant Waived the Requirement of 20,000 Pound Releases (Pa 15; Pa223; Pa46-50; Pa224; Pa435; Pa437)

The undisputed facts show that Defendant waived the First Contract's requirements of 20,000 pound releases pursuant to applicable provisions of the Uniform Commercial Code ("UCC"), as adopted in New Jersey. Article 2 of the UCC, titled "Sales," applies to transactions in goods. N.J.S.A. 12A:2-102. The term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale

other than the money in which the price is to be paid, investment securities (Division 8) and things in action." N.J.S.A. 12A:2-105(1). A "course of performance" is a sequence of conduct between parties to a contract that exists if both: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection. N.J.S.A. 12A:1-303(a)(1)-(2). "[C]ourse of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance." N.J.S.A. 12A:1-303.

There can be no dispute that the First Contract falls within the definition of a sale of goods within the meaning of the UCC. Further, there can be no dispute that the First Contract calls for repeated transactions of performance, since Plaintiff was required to order ninety-five percent of the product contemplated by the First Contract within one (1) year. Pa223; Pa15. Therefore, the only issue for consideration is whether Defendant accepted Plaintiff's performance. The undisputed evidence shows that it did.

In particular, Plaintiff procured five (5) orders of product with Defendant that were shipped on the following dates, according to Defendant's records: September 21, 2020 (Invoice No.: 190111); September 28, 2020 (Invoice No.:

190363); October 5, 2020 (Invoice No.: 190671); October 20, 2020 (Invoice No.: 191266) and November 4, 2020 (Invoice No.: 191821). Pa46-50. On September 25, 2020, Dean Lucas, President of Defendant, complained internally of Plaintiff's failure to order a minimum of 20,000 pounds. Pa224; Pa435. Thereafter, Defendant shipped to Plaintiff four (4) additional orders of product since the date of Dean Lucas' internal email. Pa224; Pa46. Of those four (4) additional orders, only one (1) order was for a quantity of over 20,000 pounds, which order was placed on October 19, 2020 and shipped on October 20, 2020. Pa224; Pa46; Pa437. Brian Hagen, who brokered the relationship between Plaintiff and Defendant, testified that he had to "fight with ownership" to release orders under 20,000 pounds for Haddad. Pa224; Pa425-426. To that end, Dean Lucas approved every sub-20,000 pound order for Haddad, based off of Mr. Hagen's "begging." Pa224; Pa426.

Here, the parties' course of performance obviously amended the terms of the First Contract, as the undisputed evidence shows that Defendant committed a knowing waiver of the 20,000 pound requirement. Accordingly, Plaintiff performed under the contract.

C. Defendant's Failure to Perform Under the First Contract (Pa225; Pa226; Pa286; Pa287; Pa430; Pa432; Pa442)

The undisputed facts show that Defendants breached the agreements with Plaintiff, after Plaintiff timely paid and after Defendant waived the order

requirements through course of performance. In or around April 2021, Defendant refused to honor the agreements with Plaintiff, citing to Plaintiff's failure to place orders of 20,000 pounds and Plaintiff's failure to remit payment on time. Pa225; Pa432. However, Dean Lucas testified that he was "uncomfortable" that Plaintiff did not place any orders between January 2021 and April 2021. Pa225; Pa286. Dean Lucas testified that after not hearing from Plaintiff for three months, he didn't "want to work with [Plaintiff] anymore." Pa226; Pa286. Further, Dean Lucas testified that had Plaintiff been buying from Defendant on a regular basis, Defendant "probably" would have fulfilled Plaintiff's orders. Pa226; Pa287. During his deposition, Dean Lucas admitted that part of Defendant's decision to terminate the contract with Plaintiff was due to the fact that Plaintiff had not ordered a "large" amount of product from Defendant; despite the fact that Plaintiff had up to one (1) year to purchase Defendant's product. Pa226; Pa287.

Of course, the proverbial smoking gun sinking Defendant in this matter is an internal email from Dean Lucas confirming that Defendant terminated the agreements due to an increase in price of pipe. Pa226; Pa442. But since Defendant had already purchased all of the pipe required to be sold to Plaintiff under the First Contract (Pa226; Pa430), it is clear that Defendant intended to sell the pipe earmarked for Plaintiff at a higher price, since construction prices

began to significantly increase from 2020 to 2021. Accordingly, Defendant breached the First Contract.

For the reasons asserted herein, Plaintiff can, and has, established that Defendant breached the terms of the First Contract, such that the Lower Court erred in denying partial Summary Judgment in favor of Plaintiff on the issue of contract liability.

CONCLUSION

For all of the reasons set forth herein, Plaintiff requests:

(1) The Lower Court's Order on Defendant's Motion for Summary Judgment be Reversed and Plaintiff's Complaint be Reinstated;

(2) The Lower Court's Order on Plaintiff's Cross-Motion for Summary Judgment be Reversed such that Plaintiff is awarded Summary Judgment as to the First Count of the Complaint on the issue of liability; and

(3) Such other and further relief as this Court deems just, equitable, and proper.

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Dated: December 22, 2023

HADDAD PLUMBING AND HEATING, INC., **Plaintiff/Appellant** **v.** **NEWBURGH WINDUSTRIAL SUPPLY CO., INC. d/b/a NEWBURGH WINDUSTRIAL COMPANY,** **Defendant/Respondent**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **APPELLATE DIVISION** **DOCKET NO: A-000125-23** **On Appeal From:** **Superior Court of New Jersey** **Essex County: Law Division** **DOCKET NO: ESX-L-3755-21** **CIVIL ACTION** **Sat Below: Cynthia D. Santomauro, J.S.C.**

RESPONDENT'S BRIEF AND APPENDIX (VOL. I, Da1 – Da61) OF DEFENDANT/RESPONDENT NEWBURGH WINDUSTRIAL SUPPLY CO., INC.

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PRELIMINARY STATEMENT

The issue on this appeal is single, narrowed and focused. Occam's Razor cuts sharply here, as it is axiomatic and a fundamental principle of black-letter law that in order for an action for breach of contract and various related claims to be viable, evidence must be presented at the summary judgment stage after discovery has been completed that permits the trier of fact to determine the existence of damages and the method and means to determine their amount to a reasonable certainty. In this case, Plaintiff/Appellant Haddad Plumbing And Heating, Inc. ("Haddad") received crystal clear Court ordered instructions and multiple opportunities over an extended period of time to present sufficient evidence that Haddad had incurred damages as an integral component of its *prima facie* case. The complete and total failure to provide such proofs of damages resulted in Haddad's Complaint being dismissed on summary judgment.

This case involves a one-year fixed price contract between Haddad and Defendant/Respondent Newburgh Windustrial Supply Co., Inc. ("Newburgh"). The contract required Newburgh to provide very specific types, gauges and quantities of Schedule 40 steel pipe at specified and predetermined prices. When Newburgh canceled the contract as a result of various performance issues, Haddad promptly filed a lawsuit. The gravamen of Haddad's allegations was

that it had been compelled "to order replacement materials from other vendors at significantly higher costs in order to meet project deadlines." If this were true, Haddad's measure of damages should have involved the simple calculation of what it cost to obtain the replacement goods matching the items previously ordered within the same one-year time period from another party. But Haddad never provided any cognizable connection between its paltry provision of supporting documents and its outlandish and entirely unsupported claims of damages.

The entire corpus of the so-called "evidence" that Haddad produced was limited to the provision of thirteen (13) checks, all without any indication of what it was that Haddad was purchasing, and two (2) unsigned handwritten quotes. The Law Division accorded Haddad every conceivable opportunity to satisfy its burden of proof on the damages issue. First, in the context of a discovery motion, the Court issued an Order giving Haddad specific instructions, which ultimately yielded no further substance. Secondly, upon the filing of Newburgh's first summary judgment motion, the Court, although expressly unimpressed with Haddad's evidentiary showing at that time, denied Newburgh's first summary judgment motion without prejudice, pending the conclusion of depositions.

The subsequent depositions of Haddad's representatives not only added

nothing "new" to Haddad's insufficient evidentiary showing, but they also elicited the following devastating admissions in Newburgh's favor: (1) Shallan Haddad, Haddad's President, blithely admitted that Haddad's employees, as a matter of routine business practice, threw into the trash all of the packing slips that accompanied deliveries! Thus, Haddad had, either through reckless neglect or by intentional design, knowingly engaged in self-sabotaging acts of evidential spoliation, which are tantamount to litigation suicide in any breach of contract case; (2) Shallan Haddad, when asked during his rancorous deposition testimony to provide relevant proofs of Haddad's damages, responded not with substance, but with a disturbingly venomous harangue of profanity and personal insults that must be read to be believed. Consequently, the crucible of the discovery process exposed the inner depravity of the same principal who would have this Court hold that his mere spoken word, without the barest shred of documentary corroboration can, through some mysterious occult alchemy, magically transform a case without any cognizable proof of damages into one where Shallan Haddad can, *ex cathedra,* move his lips and compel Newburgh to sign a blank check with the arbitrary numbers that he has dictated, per a plenary Court Order.

Further evidence of the baselessness of Haddad's alleged damages emerged at the summary judgment motion hearing. The issue arose as to whether

Haddad had subpoenaed the third party alleged to have provided the "replacement" Schedule 40 pipe. The answer was "no." Strike three. The Law Division thus reached the only decision that it could upon this record and summary judgment was duly entered on all counts of Haddad's Complaint.

STATEMENT OF FACTS

In or about August of 2020, Newburgh and Haddad began negotiating an agreement for Haddad to purchase from Newburgh various sizes of Standard Black Beveled pipe, from 1 inch through 8 inches in diameter, which is identified in the industry as Schedule 40. (Pa6) The order at issue included different diameters and quantities of Schedule 40 pipe. (Pa6) The negotiations further contemplated that Newburgh would obtain in advance, pay for, and store all of the Schedule 40 pipe, all of which was earmarked for Haddad's purchase within a specifically identified one-year period. (Pa6) Prior to memorializing a written contract, Haddad's General Counsel and CFO, Joann Haddad, also signed a Credit Application on or about September 1, 2020, which explicitly bound Haddad to accept Newburgh's Terms and Conditions of Sale. (Pa39)

The parties thereafter formalized a one-year fixed price Contract dated September 3, 2020 ("the Subject Contract"). (Pa15 – Pa16) The Subject Contract provided Haddad with one-year, fixed pricing on specific types, gauges and quantities of Schedule 40 steel piping. Per the "Description" section of the

Subject Contract, the parties agreed to the following explicit terms governing the release and purchase requirements of the Schedule 40 pipe: (1) Haddad was required to order supplies in a minimum of 20,000-pound quantities per order; (2) Haddad was required to pay Newburgh upon delivery of the supplies; and (3) Haddad was required to purchase 95% of all individual quantities of the supplies within one year from September 3, 2020. (Pa5 –Pa6) The total value of all material included in the Subject Contract that Haddad agreed to purchase was $364,294.75. (Pa16)

The Subject Contract described the exact quantity limits (measured in terms of linear feet), diameter, price, payment and delivery requirements that had to be honored during the one-year term. The detailed and precise Schedule 40 pipe specifications were as follows:

1. 10,000 linear feet of ½ inch Schedule 40 pipe;
2. 15,000 linear feet of ¾ inch Schedule 40 pipe;
3. 25,000 linear feet of 1 inch Schedule 40 pipe;
4. 20,000 linear feet of 1 ¼ inch Schedule 40 pipe;
5. 20,000 linear feet of 1 ½ inch Schedule 40 pipe;
6. 10,000 linear feet of 2 inch Schedule 40 pipe;
7. 1,000 linear feet of 2 ½ inch Schedule 40 pipe;
8. 10,000 linear feet 3 inch Schedule 40 pipe;
9. 10,000 linear feet 4 inch Schedule 40 pipe;
10. 7,000 linear feet of 6 inch Schedule 40 pipe; and
11. 4,000 linear feet of 8 inch Schedule 40 pipe

(Pa15) During the first three (3) months of the Subject Contract, Haddad failed to comply with the explicit quantity requirements and payment terms. First, from

September 2020 to November 2020, Haddad placed five (5) orders with Newburgh, four (4) of which were well below the 20,000 pound per order minimum requirements of the Subject Contract: 9/21/2020 for 2,069.43 pounds; 9/28/2020 for 9,036.60 pounds; 10/5/2020 for 13,226.052 pounds; and 11/4/2020 for 12,837.825 pounds. (Pa46 – Pa48, Pa50) Newburgh fulfilled these noncompliant orders as a favor and courtesy to Haddad, which had indicated that these orders were on an "emergency" basis only. Secondly, from September 2020 through April 2021, Haddad had ordered only approximately 7% of the required minimum quantities of 95%. Haddad failed to make timely payments for these orders, despite receiving three (3) forms of notice. Consequentially, when Haddad attempted to place yet another noncompliant order in April 2021, Newburgh duly terminated the Subject Contract.

After Newburgh terminated the Subject Contract in April of 2021, Haddad filed the underlying Complaint on or about May 10, 2021. (Pa17) Newburgh then filed an Answer and Counterclaim on or about June 21, 2021. (Pa24)

After discovery commenced and following Haddad's initial responses to Newburgh's First Set of Interrogatories and First Set of Document Demands, Newburgh notified Haddad of extensive deficiencies and demanded more specific answers. See (Pa51 – Pa54) Thereafter, Newburgh filed a Motion to Dismiss. On May 2, 2022, the Court ordered Haddad to produce various items

of discovery. (Pa64) Specifically, in pertinent part, Haddad was ordered to either produce all documentation regarding its alleged purchases of replacement materials from F.W. Webb, North Shore Plumbing Supply Co. Inc. ("North Shore"), and any and all vendors from April 2021 to September 2021, or, alternatively, to produce a written Certification confirming all such documentation is contained within Haddad's discovery responses Bate Stamped P0078-88. (Pa64 – Pa65)

In response to the Court's May 2, 2022 Order, Haddad produced vague answers to certain limited interrogatories, a completely unsubstantiated Statement of Damages in the amount of $581,916.40, (Pa66), approximately two hundred (200) pages of unrelated emails exchanged between Haddad's and Newburgh's representatives, and a Certification confirming Haddad's assertion that all documentation regarding Haddad's alleged purchase of replacement materials were contained within the documents Bate Stamped P0078-88. (Pa67) As to these documents, Haddad's discovery responses Bate Stamped P0078-79 contain two (2) unsigned quotes from North Shore dated May 13, 2022. (Pa69-Pa70) In pertinent part, P0078 relates to Schedule 10 pipe, which bore no relationship to the Subject Contract. Compare (Pa69) with (Pa15 –Pa16) Additionally, P0080 - P0087 include eight (8) checks Haddad allegedly issued to North Shore. (Pa71 – Pa78) No additional explanatory and corroborative

proofs such as emails, letters, or other correspondence, or any account statements, packing slips, receipts, or other documentation were ever produced that would clarify the issue of what specific pipe, if any, was allegedly purchased with these North Shore checks.

On or about November 29, 2022, on the eve of the depositions of Joann Haddad and Shallan Haddad, Haddad's President, Haddad produced five (5) additional pages of discovery, Bate Stamped P0278-282. (Pa79 – Pa83). This consisted of five (5) additional checks that Haddad allegedly sent to North Shore. Once again, the North Shore checks were devoid of any supporting documentation or information relating to the specific items/materials that were allegedly purchased. There are no invoices, packing slips, or any other documentation as to what was actually purchased with any of these checks.

The Deposition of Shallan Haddad. The deposition of Shallan Haddad, held on November 30, 2023, was equally barren of any proofs to either confirm or corroborate the purchase of any identifiable "replacement material." Shallan Haddad is Haddad's President and "hundred percent" owner. See (4T6:21-22) During his deposition, Shallan Haddad was asked various questions relating to his ability to either recall or to confirm what specific types of Schedule 40 pipe were allegedly purchased from North Shore with any of these thirteen (13) checks. When asked how Haddad could support a contractual damages claim

when the documentation provided does not specify what was purchased, Shallan Haddad continuously and generally referenced the documents Bate Stamped P0078-87. The following colloquy is representative of this fact:

> Q: Well is there a document from North Shore saying – a packing slip or an invoice or spreadsheet or something to justify the checks?
>
> A: I don't remember.
>
> Q: Mr. Haddad, you've written several hundred thousand dollars' worth of checks through Haddad which you've represented in this case, and your wife has represented in this case, are to cover the goods you couldn't purchase from Newburgh, correct?
>
> A: Okay.
>
> Q: Okay. So how does the litigation resolve that question if we have no documentation?
>
> A. I believe we gave you all the documentation.
>
> Q: I will represent to you we have never seen a single purchase order, spreadsheet, packing slip or anything along those lines from North Shore.
>
> A: What do you have?
>
> Q: Nothing. We have checks . . . [and] a quote.

(4T48:17- 4T49:13, -19) Shallan Haddad was consistently non-responsive when asked questions seeking to determine how to confirm that the checks Haddad issued to North Shore were attributable to the acquisition of "replacement material." Indeed, when questioned regarding the steps Haddad employees had

undertaken to locate documentation that would confirm what Haddad received in exchange for the North Shore checks, Shallan Haddad vaguely responded, "I only did what I was told to do." (4T61:3-4) Further, when Shallan Haddad was asked "[h]as anyone else, to your knowledge, been asked to look for documentation to support these checks?" he responded "No." (4T64:18-21)

Shallan Haddad provided no information at his deposition as to what it was that the North Shore checks purchased. Without this critical information, it could not be determined whether the North Shore payments were truly made for "replacement material," which is the core and essential assertion underlying Haddad's claimed entitlement to damages. For instance, in an attempt to determine what, if any, documentation exists to support the receipt and acknowledgement of the deliveries of "replacement material," the following colloquy occurred:

> Q: There's no paperwork. You're telling me that we're just supposed to accept you at face value. You said, send me 500 units of this. There's no paperwork exchanged, and you send them a check. So there's no way for anyone in the accounts receivable department of North Shore to say, oh, this $50,000 check corresponds to these goods sold, correct? Is that what you're telling me? That there is no paper trail to support any of these checks?
>
> A: When the material gets delivered, there's a packing slip.
>
> Q: Where is the packing slips?
>
> A: **The guys throw it out after material is received**.

(4T62:23 – 4T63:12) (emphasis supplied) Furthermore, the following exchange highlights Haddad's inability to corroborate and to prove what, if any, "replacement materials" were allegedly purchased:

> Q: We don't know what was – for each of these checks, as we sit here today –
>
> A. Yeah.
>
> Q: -- can you tell me what that $50,000 check covered?
>
> A: Off the top of my head, no.
>
> Q: And not just off the top of your head. Is there any way for us to determine what that $50,000 check paid for?
>
> A: I am not sure.

(4T88:19 – 4T89:3) Shallan Haddad further testified that he was unaware of any tracking mechanism for Haddad to determine what specific materials were being purchased at any given time:

> Q: So if we don't have a document telling us what your maximum quantity is and how much you've already ordered, how does anyone know whether or not you're going over the amount that the contract provides – allowed you to buy?
>
> A: I don't have that answer for you.

(4T76:13-18) Later in the deposition, Shallan Haddad testified that he utilizes the "honor system" in relation to Haddad's ability to track how much of your

maximum quantity was used. (4T115:8)

The Deposition of Joann Haddad. The deposition Joann Haddad, Haddad's General Counsel and CFO, also took place on November 30, 2022. During her deposition, Joann Haddad reported that Haddad had been working with North Shore for "several years." (3T37:12-13) Based upon prior experience, Joann Haddad testified that North Shore's business practices included the provision of "a statement of the account or something at the end of the month." (3T107:19-24) When presented with follow-up questions relating to the existence and location of such documentation, Joanne Haddad responded, "I am sure it does somewhere. I'd have to see if I can obtain it. I don't know." (3T115:17-18) Moments later, however, the following exchange ensued:

> Q: So you sent several hundred thousand dollars to North Shore. And as you sit here today, with all the certifications that have been filed and whatnot in this case, you have no idea what was purchased with these checks.
>
> A: No. It was pipe. I know it was pipe. **I don't know specifically which – which pipe, if it was Schedule 40 or Schedule 10, but it was pipe.**
>
> Q. Okay. Again, that's an interesting concept. But, again, do you have anything from North Shore, for example, saying that we provided only Schedule 40 pipe totaling $400,000.00 and here is a packing slip or a spreadsheet or anything to support what these checks were for.
>
> A: No. From North Shore, no I don't have that.

(3T116:6-24) (emphasis supplied) Remarkably, Joann Haddad appears to have been oblivious of the fact that if Haddad's payment to North Shore was for Schedule 10 pipe, it would be factually impossible for this same payment to be for "replacement material" within the purview of the Subject Contract.

Furthermore, "It was pipe" was Joann Haddad's stock answer to a myriad of questions relating to whether or not Haddad could establish the specific type of Schedule 40 pipe that was purchased with any of the North Shore checks. This tired, non-responsive litany of evasion and deflection from Joann Haddad includes the following testimony: (3T71:23-34) ("It's my understanding it was pipe."); (3T74:4-9, -14) ("It was pipe. . . . [It] was all pipe."); (3T106:11-12) ("As far as I know, it would have been the pipe . . . ."); (3T111:14) ("It was for pipe."); (3T117:8-9) ("It would have been pipe."); (3T123:25) ("It was for the pipe."); (3T125:18-19) ("I said pipe, and then you did not like my answer.") For example, the following exchange was typical of Joanne Haddad's maddeningly circular method of answering direct questions, with its strangely fallacious underlying assumption that the applicable definition of "pipe," in all of its vast manufactured diversity, is an all-encompassing universal construct that somehow cannot be differentiated in any way, shape or form from the unique and particularized "pipe" that the Subject Contract encompassed for the purpose of calculating Haddad's alleged damages:

> Q: And so what I'm asking you is how are we going to figure out, for page one of P-9, what goods were sent by North Shore to Haddad to cover check number 2043?
>
> A: I don't – it would have been the – it would have been pipe. That's all I – that's all I know at this point.

(3T106:19 – 3T107:2) (emphasis supplied) Tellingly, when Joann Haddad was asked, "[j]ust so we are clear, there is no documentation to indicate what was purchased with any of these checks"? (3T123:5-7), she made the following fatal admission: "Correct, counsel." (3T123:8)

Joann Haddad testified that she had previously searched through Haddad's extant records looking for responsive documents to support the alleged and direct contractual link with North Shore, but she was ultimately unable to uncover anything further than two (2) unsigned invoices and thirteen (13) unsupported checks. See (3T31:2-23); (3T107:9-13); (3T109:2-15); 3T114:9-20); (3T116:15- 3T117:2); (3T118-1-4); (3T135:16-23). Both Joann Haddad and Shallan Haddad testified that there is no further documentation in support of their damages other than what was produced and identified as P0078-88 and P0278-282. See (3T31:2-23); (3T107:9-13); (3T109:2-15); (3T114:9-14); (3T116:15-117:1); (3T118-1-4); (3T123:5-25); (3T135:20-23); (4T48:18-4T49:19); (4T62:23 – 4T63:12); (4T64:18-21); (4T76:13-18); and (4T88:19 – 4T89:3)

Shallan Haddad's Gross Deposition Misconduct. For anyone who has had the misfortune of reading (or even worse, either conducting or being present during) the deposition of Haddad's President, Shallan Haddad, Mr. Haddad's deposition was conspicuously and notoriously marked by the following: (1) Shallan Haddad's devastating admissions (throwing critical proofs in the garbage in the ordinary course of business); and (2) what can only be described as his prolonged and demented meltdown when asked the most basic questions pertaining to the virtually non-existent proofs "supporting" Haddad's case. Haddad's counsel on appeal, whistling in the proverbial graveyard, and hoping to avert the Court's eyes from the frothing and malevolent "elephant in the living room" who is their client's principal, predictably made no mention in Haddad's appeal brief of the train-wreck debacle of Shallan Haddad's pathetically self-destructive deposition testimony/*enfant terrible* performance that has all been duly transcribed. This calculated de-emphasis is perhaps understandable out of sheer embarrassment alone, even if it is ultimately unavailing as a litigation strategy for a party on appeal holding a losing hand and hoping for a miracle of undeserved deliverance.

No such *Deus Ex Machina* can rescue Haddad's faltering and flamed out case, nor should it. Failing to provide any real supporting evidence either at his deposition or in written discovery, Shallan Haddad exhibited what could fairly

be characterized as tiresomely protracted and wickedly juvenile, bullying tantrum. The record speaks for itself in all of its shameful ugliness. Shallan Haddad employed a crude and unhinged fury of expletives during his deposition that highlight his true colors and the way that Haddad, his namesake company, conducts its business. Nevertheless, despite the pertinacity of Shallan Haddad's evasions and his inappropriate *ad hominem* attacks, Newburgh's counsel persisted in asking Shallon Haddad the questions that he had to answer in order to sustain Haddad's case.

In sum and substance, Shallan Haddad's depraved deposition "testimony" unleashed a prodigious effluent of verbal swill that truly captured in the amber of printed recordation the heart, soul and spirit of Haddad's President, his dysfunctional business organization (which apparently retains no pertinent business records as part of its alleged "honor system"), his utter contempt for any type of legal process, the way he treats people, and the negative consequences that directly arise from such an impotently pathetic and bully-boy approach to both life and to the legal process. In its grim and disgusting tally, Shallan Haddad used the following "dirty words" with promiscuous frequency at his deposition, which he made many transparent efforts to sabotage: "fucking" (16 references), (4T73:19), (4T74:4), (4T98:5); (4T98:9), (4T98:13), (4T99:3) (twice), (4T99:4), (4T99:12), (4T99:13), (4T99:14, 4T99:17), (4T99:18),

(4T100:13), (4T101:16), (4T103:9); "mother fucker" (4 references), (4T100:1), (4T100:16-17), (4T101:24), (4T103:4); "scumbag" (1 reference), (4T98:6); "asshole" (1 reference), (4T99:4); "bullshit" (2 references), (4T85:5), (4T100:14); "dick head" (3 references) (4T98:18), (4T99:13), (4T101:24), 4T101:2-3); "goddamn" (2 references) (4T72:20), (4T82:9); "jerk off," (5 references) (4T98:13). (4T98:15), (4T98:23), (4T99:5), 4T102:2-3); "retarded", (1 reference) (4T103:9); "stupid" (3 references), (4T72:1), 4T81:15, 4T101:16); and "piss me off" (2 references) (4T98:3), (4T103:14-15) As set forth above, Shallan Haddad obscenely exposed his hideous persona *in fragrante delicto* during the grotesque spectacle and self-destructive travesty of his deposition. In so doing, Shallan Haddad has already told his false and twisted "story." This same narrative, which simultaneously embodies Haddad's "theory of the case," and the Hellishly dismal soul darkness that it reveals, frankly speaks volumes about who Shallan Haddad is, what his guiding core values are, and how Haddad conducts its business with this deeply disturbed man "running the show" with a dictatorial iron fist that tolerates no reasonable inquiry, and the inevitable social and transactional chaos and unaccountability that results from this.

The Law Division Ordered Haddad to conduct specific searches, obtain all available evidence, and certify to its finalization. The depositions of both Shallan Haddad and Joann Haddad clearly and explicitly establish that what the

Court Ordered was never done in good faith, as the most basic Court Ordered discovery was not even searched for, much less produced. Haddad only deigned to provide ineffectual noncompliance (to the unlikely extent that any pertinent records may have ever existed), with the inevitable and inexorable consequence of a summary judgment dismissal.

STATEMENT OF PROCEDURAL HISTORY

On or about May 10, 2021, Haddad filed a Six Count Complaint alleging Breach of contract (First Count), Breach of Implied Contract (Second Count), Breach of Covenant of Good Faith and Fair Dealing (Third Count), Promissory Estoppel (Fourth Count), Legal Fraud (Fifth Count) and Equitable Fraud (Sixth Count). [1] (Pa17 – Pa23) On or about June 21, 2021, Newburgh filed its Answer, along with a Counterclaim alleging causes of action for Breach of Contract (Count One), Breach of Covenant of Good Faith and Fair Dealing (Count Two), and Legal Fraud (Count Three). (Pa24 – Pa36)

After discovery ensued, and after objecting to Haddad's deficient

[1] The stenographic transcripts are cited by Volume number, with the June 5, 2023 Summary Judgment Motion Transcript being 1T, the October 7, 2022 Summary Judgment Motion Transcript being 2T, the November 30, 2022 Deposition of Joanne Haddad being 3T, the November 30, 2022 deposition of Shallan Haddad being 4T.

discovery responses, Newburgh filed a Motion to Dismiss on February 2, 2022. The crux of Newburgh's Motion to Dismiss focused upon Haddad's failure to produce any documentation to support its demand for compensatory, indirect, consequential, and special damages. Per its own pleadings, Haddad's entire basis for its alleged damages claim, as set forth in Paragraph 20 of Haddad's Complaint, is that "[d]ue to Defendant's refusal to honor the terms of its Agreement, Plaintiff has been forced to order materials from vendors in order to meet deadlines for certain projects, resulting in Plaintiff spending sums over and above what it would have spent with the Defendant." (Pa19). Thus, in its motion papers, Newburgh demanded production of all "purchase orders, invoices, receipts, account balance statements, packing slips, proof of payments, checks, emails, etc." related to Haddad's alleged purchase of replacement materials from any vendor from April 2021 to September of 2021. (Pa60) Moreover, Newburgh requested relevant correspondence and communications with other vendors to support Haddad's allegation that replacement materials were actually ordered and paid for, as well as the identity of customers in order to verify Haddad's theory that it was attempting to "meet deadlines for certain projects." (Pa19)

On or about April 20, 2022, oral argument was conducted on Newburgh's discovery motion before The Honorable Stephen L. Petrillo, J.S.C. This resulted in a May 2, 2022 Order incorporating all of Judge Petrillo's findings regarding

the discovery Haddad was compelled to produce. (Pa64 – Poa65) Specifically, Haddad was ordered to produce the following: (a) a written Certification confirming that all documentation in support of Haddad's purchase of replacement material from any vendor from April 2021 to September 2021 had already been produced; (b) a substantive Answer to Interrogatory #30 of Newburgh's First Set of Interrogatories, which demanded information on any projects and/or contracts Haddad anticipated to complete with the materials stemming from the Subject Contract; (c) a Statement of Damages; (d) a written Certification explicitly detailing all of Haddad's efforts and due diligence searches to verify that all relevant internal and external communications between Haddad, Newburgh, and any and all vendors that Haddad alleges it was forced to order replacement materials from have been produced; and (e) the identity of the individuals responsible for receiving and processing Haddad's correspondence between September 2020 and September 3, 2021. (Pa64 – Pa65)

On or about June 6, 2022, Haddad produced the following documentation in response to the May 2, 2022 Order: a Statement of Damages alleging $581,916.40 in total damages, (Pa66) ; correspondence amending its discovery responses, which comprised approximately two hundred (200) pages of general email exchanges between Haddad's and Newburgh's representatives that did not address the issues at hand; and a Certification of Joann Haddad, Haddad's CFO

and General Counsel, swearing under the threat of sanction that all documentation in support of Haddad's purchase of replacement material is contained within the eleven (11) pages of documents Bates Stamped P0078-88. (Pa67)

The Statement of Damages that Haddad ultimately provided was unsupported by any of the discovery that Haddad produced. The two hundred (200) pages of email exchanges were a classic "document dump," as they provided no relevant insights relating to the issue of damages. Finally, the Certification of Joann Haddad states that all documentation in Plaintiff's possession relating to the alleged purchase of replacement supplies from any vendor from April 2021 (when Newburgh terminated the Subject Contract) to September 2021 (the end date per the terms of the Subject Contract) were previously produced as bates stamp documents P0078-88. (Pa67) These eleven (11) pages of documents include two (2) unsigned, handwritten quotes from North Shore and eight (8) checks addressed to North Shore without any documentation to demonstrate exactly what it was that these checks purchased. (Pa71 – Pa78) Notwithstanding its prior representations of finality, Haddad later amended its discovery responses with five (5) additional checks addressed to North Shore, again with no explanation or proof of what specific materials were purchased. (Pa79 – Pa83)

First Summary Judgment Motion Hearing, October 7, 2022. At the time of the return date of the first motion for summary judgment, Haddad had produced two unsigned quotes and nine random checks from North Shore. Counsel for Newburgh argued that given the miniscule corpus of relevant "evidence" that had been provided, summary judgment should be granted because there was no discernible nexus between the proffered North Shore checks and what is was that Haddad had obtained for this money. To wit, Haddad had provided "no purchase orders, no invoices, no packing slips, no delivery acknowledgments, nothing" as to what had allegedly been purchased. (2T5:23-25) In response to these arguments, the Law Division acknowledged that "the evidence at this time is not strong. . . [I]f I were the trier of fact, if this were a bench trial and this was all that was submitted, it would be insufficient, most likely, at this point." (2T14:10-14)

The Law Division reasoned that since this case was then "in the beginning of discovery" and that "there very well could be a subpoena to North Shore," (2T14:15-16, -18), a denial of the summary judgment motion, without prejudice, would be most appropriate at this relatively early juncture. In so doing, however, the Law Division acknowledged that "I don't feel the damages documentation that has been submitted is strong." (2T15:17-18)

Second Summary Judgment Motion Hearing, June 5, 2023. Newburgh

renewed its summary judgment motion on March 3, 2023. Haddad then filed a cross-motion for partial summary judgment on March 21, 2023. A summary judgment motion hearing took place in the Law Division before the Honorable Cynthia D. Santomauro, J.S.C., on June 5, 2023.

At the summary judgment hearing, the Court inquired of Haddad's counsel "Did anyone send a subpoena to North Shore for their records?" (1T15:2-3) Haddad's counsel replied, "No, Your Honor." (1T15-9) This glaringly inexplicable omission puzzled the Court, which inquired "why North Shore was not subpoenaed to either produce documents, to testify as to the relationship and what was purchased and what wasn't purchased on these alleged contracts?" (1T25:20-23)

The Law Division, in its summary judgment decision, addressing the issue of the sufficiency of the evidence in support of Haddad's alleged damages, stated that it had been "hopeful, very hopeful that the deposition transcripts would flesh out the . . . issues." (1T53:12-14) But notwithstanding the specific requirements of the Subject Contract, when Newburgh's counsel at the depositions inquired "what type of pipe" was ordered, Haddad's witnesses put no flesh on the bare bones of their allegations, as they consistently and repeatedly "just said `it was for pipe." (1T54:22-24) Accordingly, the Court determined that "we don't know whether it's for Schedule 40 pipe, schedule 10

pipe; we . . . just don't know. We don't know the quantities. We don't know anything." (1T54:24 – 1T55:1-2)

The Law Division further opined that "there's all kinds of pipe in this world. There's not just schedule 10, there's schedule 40, there's PVC pipe, there's other . . . pipe. So we don't know. And . . . we will never know, because discovery is over. . . . We don't know that these checks were for anything in . . . this alleged contract." (1T55:13-19) The Law Division stated that "it was very, very odd, to say the least, that they said that they paid hundreds of thousands of dollars to North Shore. There's no bills of lading. There's no orders. There's no emails. There's no text messages. Nothing . . . . There's testimony that . . . we made a phone call." (1T56:9-14)

The Law Division emphasized that

> there's zero. There's nothing. We have checks, and nothing more. There is nothing whatsoever to connect these checks to . . . this alleged quote or these contracts. They could be for any other thing in the whole world. . . . [T]hey didn't say it was for Schedule 40 piping. They . . say its for pipe. It's for pipe. Repeatedly, for pipe. Not even going further than that.

(1T57:7-15) Clarifying its reasoning and analysis further, the Law Division held and concluded that

> I have to rule that there is no material issue of fact with regard to damages. There are many issues of fact with regard to breaches of contract . . . but with regard to damages, we have a bunch of checks that bear no relation to anything whatsoever. None. I scoured, scoured the deposition transcripts, line by line, to find something

> that would create an issue of fact . . . to what these checks were for. . . .
>
> . . .
>
> The fact is that, they have not one shred, not one shred, of documentation showing what these checks are for. Not one. Not one. If I had one email, one packing slip, . . . someone who was on the ship . . . who drove the truck or . . . took the supplies in . .. got a delivery . . . and it was Schedule 40 piping and I got it. . . . We have nothing.

(1T57:16-25; 2T587-14)

As to the testimony of Haddad's principals, Shallan Haddad and Joann Haddad, the Law Division observed that their testimony was "I really don't know what it was for," (1T58:16), with the exception of Joann Haddad's predictably rote statement that "it was for piping." (1T57:18-19) This was not enough, as

> there has to be evidence of damages, . . .not a complete proof, but some evidence. And instead, we have checks with absolutely nothing more. There's no choice . . . but to rule that there is . . . no evidence of what the damages are that they actually in fact sustained. . . And all I needed was some proof of what they purchased, but there was no such evidence. So for that reason, I have no choice but to dismiss the complaint because there is no evidence, no evidence, sufficient to move forward on this.

(1T58:22- 2T59:10)

The Law Division further granted Haddad's cross-motion for summary

judgment.[2] The Court issued its summary judgment dismissal Order on or about September 11, 2023. (Pa1) On or about September 14, 2023, Haddad filed a timely notice of appeal. (Da1)

STANDARDS OF REVIEW

Summary Judgment. It is well settled that summary judgment should only be granted where "there are no genuine issues as to any material fact challenged and the moving party is entitled to judgment as a matter of law." Kopp, Inc. v. United Technologies, Inc., 223 N.J. Super. 548, 554-55 (App. Div. 1988) The trial court must not decide issues of fact. It must only decide whether there are such issues. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all the legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Beatty v. Farmer, 366 N.J. Super. 69, 78-79 (App. Div. 2004). When the evidence "is so one-sided that one party must prevail as a matter of law, a trial court should not

[2] For purposes of clarity and streamlining this appeal, Newburgh elected not to file a cross-appeal of the Law Division's dismissal of its counterclaims against Haddad.

hesitate to grant summary judgment." Brill , 142 N.J. at 540 Credibility questions are not properly resolved on a motion for summary judgment. Tannenbaum & Milask, Inc. v. Mazzola, 309 N.J. Super. 88, 93 (App. Div. 1998)

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3rd. Cir. 1986) The role of the reviewing Court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986) When deciding a motion for summary judgment, courts evaluate whether "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, 142 N.J. at 540 Such a determination requires "a searching review" of the record, id. at 541, and further requires that all "legitimate inferences" deriving from the evidence in the record be made in the non-moving party's favor. Id.

Summary Judgment Where Record Evidence of Damages Is Insufficient. In any legal action in New Jersey seeking damages as a remedy, these same damages must be established with "reasonable certainty." Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 51-52 (2004) The requirement of

"reasonable certainty" applies regardless of whether the underlying claim arises in contract or tort. See Hirsch v. General Motors Corp, 266 N.J. Super. 222, 242 (Law Div. 1993) ("Under the traditional damages standard, . . . plaintiffs must prove the amount of damages with reasonable certainty.") (citing WILLAM PROSSER, HANDBOOK OF THE LAW OF TORTS, §7 (4th ed. 1971)); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS, §14-8, at 599-600 (West 3d. ed. 1987) ("It has been said that damages must be certain, both in their nature and in respect to the causes from which they proceed. It seems to be generally recognized that absolute certainty is not required; 'reasonable certainty' will suffice.")

Plaintiffs have the further burden to establish the "fact" of damages. Tessmar v. Grosner, 23 N.J. 193, 203 (1957) As the New Jersey Supreme Court explained in Caldwell v. Haynes, 136 N.J. 422, 426 (1994), "plaintiffs have the burden to prove damages," id. at 426, and the "law abhors damages based upon mere speculation." Id. at 442 Per Caldwell, plaintiff has the responsibility to " provide . . . some evidentiary and logical basis for calculating or, at least, rationally estimating a compensatory award." Id. at 436 (quoting Huddell v. Levin, 537 F.2d 726, 743 (3d Cir. 1976))

The Law Division should enter summary judgment when the record is lacking evidence of damages to a reasonable certainty. See Thiedemann v.

Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005) ("[T]he plaintiff must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation, although it need not be demonstrated in all of its particularity to avoid summary judgment."); Rocci v. Macdonald-Cartier, 323 N.J. Super. 18, 22 (App. Div. 1999) ("[I]t is the lack of any proof of any damages that causes us to affirm summary judgment for defendants."), aff'd sub nom., 165 N.J. 149 (2000); Jet Leasing Support Servs. United States v. Curcio Mirzaian Sirot, 2022 N.J. Super. Unpub. LEXIS 719, at *7 (N.J. Super Ct. App. Div. May 2, 2022) ("Plaintiffs have no proof of damages under any view of the evidence. . . . All this leads to a single conclusion: plaintiffs' claims are without basis in law and were properly dismissed.") (Da43); Exclusive Detailing v. Prestige Auto Group, 2021 N.J. Super. Unpub. LEXIS 3135, at *14 (N.J. Super. Ct. App. Div. December 21, 2021) ("Even if plaintiff could prove that there was a contract from 2011 to 2016, plaintiff could not prove a breach of contract without proof of damages that were related to the breach.") (Da39); Ten W. Apparel v. Mueser Rutledge Consulting Eng'rs, 2020 N.J. Super. Unpub. LEXIS 418, at *17 (N.J. Super. Ct. App. Div. February 28, 2020) ("Ten West's proofs do not demonstrate what, exactly, MRCE and Entact were responsible for. Not only did Ten west fail to provide a reasonable estimate of damages, but it did not prove that MRCE and

Entact's negligence caused actual damages.") (Da58); Emerald Bay Developers, LLC v. Lenyk Auto, Inc., 2018 N.J. Unpub. LEXIS 2125, at *15 (N.J. Super. Ct. App. Div. September 25, 2018) ("Damages must be proven with reasonable certain proof, which was lacking here.") (Da33); LoPrete v. Mohegan Sun, Inc., 2006 N.J. Super. Unpub. LEXIS 927, at *8 (N.J. Super. Ct. App. Div. April 27, 2006) (Summary judgment affirmed where "the record before the motion judge presented no proof of damages") (Da50)

LEGAL ARGUMENT

I. THE ORDER OF THE LAW DIVISION GRANTING NEWBURGH SUMMARY JUDGMENT RESULTING FROM HADDAD'S FAILURE TO SATISFY ITS BURDEN TO PROVIDE SUFFICIENT EVIDENCE OF DAMAGES SHOULD BE AFFIRMED.

The decisive crux of the present controversy involves whether the "fact" of damages has been sufficiently established on a notably sparse appellate record. In this context, the requisite "competent evidence" of damages requires proofs of the existence of actual, tangible, and quantifiable damages in order for Haddad to avoid summary judgment. Specifically, Haddad's proofs must be able to support the premise that the checks allegedly issued to North Shore were for the specific Schedule 40 pipe that was explicitly identified in the Subject Contract.

In this case, however, Haddad ultimately failed to provide even a scintilla of evidence that it purchased even one (1) foot of the specific

Schedule 40 pipe that was contemplated in the Subject Contract following its termination in April 2021. New Jersey law is crystal clear that in order to survive a motion for summary judgment after discovery has been completed, evidence of damages must not be "speculative" and must be determined with "reasonable certainty." See, e.g., Caldwell v. Haynes, 136 N.J. at 426; Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. at 248; Hirsch v. General Motors Corp, 266 N.J. Super. 222, 242 Otherwise, as here, any such claims should be dismissed on summary judgment.

Haddad's entire case consists of the following: two (2) unsigned, handwritten quotes from North Shore; and thirteen (13) checks allegedly issued to North Shore to purchase the specific types and quantities of Schedule 40 pipe as set forth in the Subject Contract. Moreover, extensive deposition testimony has provided no further evidence or information to support the fact and even the possible existence of any damages.

Haddad's facially inadequate "documentary evidence" is legally insufficient to prove (a) that the specific materials were actually purchased from North Shore; (b) the precise quantity of materials that were allegedly purchased; or (c) whether the specific materials were ever actually received from North Shore in relation to the two (2) unsigned, handwritten quotes and thirteen (13) checks. Tellingly, and fatally for Haddad, the record on appeal

is completely devoid of any competent and supporting documentary evidence (no signed purchase orders, no signed invoices, no receipts, no account balance statements, no proof of payments, no packing/delivery slips, no type of inventory of the specific types and amount of material allegedly received from North Shore, or any form of acknowledgement) that would allow a rational factfinder to award Haddad any damages. Indeed, Haddad's appeal brief makes no attempt to tie together the underlying checks with the specific type and/or quantity of pipe, other than the circular, conclusory and utterly unsubstantiated statements set forth in Shallan Haddad's March 21, 2203 Certification, (Pa231 –Pa234), discussed *infra*, at 39-43

In addition, deposition testimony elicited from Joann Haddad and Shallan Haddad was contradictory to Joann Haddad's prior filed Certification, submitted per Court Order, wherein Joanne Haddad stated under oath that all documents had been provided and specific and exhaustive searches had already been conducted. (Pa67 – Pa68) For example, when Shallan Haddad was questioned as to whether or not North Shore ever issued to Haddad a "purchase order, an invoice, a spreadsheet or any documentation to support or memorialize" what materials North Shore delivered to Haddad, Shallan Haddad testified that he "would have to go back and check. . . . If I checked I wouldn't say I have to go back and check." (4T63:23, 4T63:25 –

4T64-1) On the contrary, Shallan Haddad further admitted that no one had "been asked to look for documentation to support the checks" made payable to North Shore. (4T64:18-21)

Joann Haddad, Haddad's General Counsel, who had previously signed a Certification which was compelled by a Court Order, (Pa67 – Pa68), testified with a disturbing sangfroid recklessness, and on numerous occasions in direct contradiction to her own sworn Certification. Joanne Haddad admitted, *inter alia*, the following:

- Joanne Haddad did not check all of Haddad's employees' email inboxes and/or outboxes for any correspondence or emails from North Shore. Indeed, when asked whether she had "made any attempt to search for documents . . . that we exchanged with North Shore . . . other than the checks" Joann Haddad responded "I don't think so." (3T52:18-24);
- Joann Haddad never authorized Haddad's IT vendor to conduct a search of the company's email server for the term, "North Shore" (3T55:1-4); and
- Joann Haddad explicitly stated that the email of Shallan Haddad, Haddad's President and alleged point-person with North Shore representatives, was never checked for communications from North Shore. See (3T53:14-22).

When Joann Haddad was directly confronted with these strikingly deficient document production efforts, she testified smugly and acidly that, "[t]hen you should have filed a motion for that, Counsel. I don't know what to tell you, if you want that specific word searched." (3T55:2-4) But this critical information that could theoretically have supported Haddad's case most emphatically was not an arbitrary and informal request and off-the-cuff inquiry from counsel at her deposition. Rather, Newburgh's counsel's inquiries mirrored and echoed the plain language of a Superior Court Judge's explicit Order; Newburgh's counsel's pointed and relevant inquiries were not the product of a mere whim and whimsy, but Joann Haddad's sarcasm and lame and telling attempt at deflection served to demonstrate either (1) her dishonesty (lying under oath), (2) her stunningly superficial understanding of what Haddad's discovery responsibilities were, and even what her signed Certification meant (despite affixing her signature as a corporate officer of Haddad), or (3) all of these things. Whatever caused Joann Haddad's serial failures here, her reckless disregard and purblind inattention to the legal consequences of signing a Court Ordered discovery compliance Certification as a corporate representative of Haddad, while simultaneously proclaiming under oath at a deposition virtual ignorance of what Haddad had been ordered to produce in discovery, further and fatally

undermines Haddad's appeal.

In light of the above, any purported reliance upon Joann Haddad's testimony in support of the alleged relationship between Haddad and North Shore is without foundation of fact. First and foremost, Joann Haddad admittedly never had any discussions with North Shore, (3T62:13-14), and Joann Haddad was "not involved" in seeking material from North Shore. (3T95:1-4). Further, when discussing the subject of the two (2) unsigned, handwritten quotes from North Shore, Joann Haddad had no personal knowledge whatsoever regarding the specific materials that were identified in those documents. Instead, Joann Haddad testified that it was her "understanding" that the checks that were issued were for "pipe," (3T71:13-14), while simultaneously admitting that she does not "deal with the material for each job," (3T72:1-2), and her familiar trope that "[i]t's my understanding, and maybe I'm wrong, it was all pipe." (3T74:13-14) (emphasis supplied)

In addition, any question posed to Joann Haddad relating to the relationship between North Shore and Haddad was almost inevitably followed by a response along the lines of, "you need to ask my husband." The following colloquy is representative of this phenomenon which, among other statements, rendered Joann Haddad's deposition testimony worthless

to prove the existence of damages, which was and is Haddad's burden:

> Q: And you're telling me that these handwritten that have no terms and conditions attached to them and are unsigned by Haddad obligated Haddad to purchase all materials on this list?
>
> A: Yes.
>
> Q: When? At any time for the next 50 years?
>
> A: No, it's not going to be 50 years, obviously.
>
> Q: There's no term. So you're telling me that … North Shore obligated itself to sell you those good at those prices for the next 50 years.
>
> A: I am not saying for the next 50 years. You said the next 50 years, okay? So then **you would have to ask my husband**, that because. . . I didn't negotiate any terms with North Shore. My husband is the one that dealt with them. My husband is the one that gets the pricing and does all that. I did not negotiate any terms with them.

(3T35:21-36:16) (emphasis supplied) Joann Haddad provided that same response to over a dozen questions relating to the relationship with North Shore. (3T41:2-12) ("my husband made the purchase with North Shore"); (3T60:22-23) ("I did not request the quote from North Shore. My husband requested it"); (3T62:13-18) (We ended up going with North Shore for whatever reason my husband ended up going with them. I don't know."); (3T70:1-14) ("I wouldn't have any information on that. That would probably be my husband. He would know what projects that materials were for. I don't

get involved in that."); (3T71:20-72:3) (regarding the materials sent to Haddad from North Shore, "That would be something my husband has to answer."); (3T76:10-23) (regarding projects and deadlines that replacement materials allegedly had to be obtained, "that's something you would have to ask my husband. . . . I am not sure. You would have to ask my husband"); (3T96:17-18) ("I have no idea. You would have to ask my husband. I don't know."), (3T97:10-11) (as to contacted personnel at North Shore, "You probably have to ask my husband who he deals with at North Shore. I don't know."), (3T103:13-18) (on the issue of why Haddad produced no identifying documents as to what was purchased and when from North Shore, "**I do not have anything in writing, correct**. But my husband, when he deals with them . . . 99 percent of it is verbal with our vendors. So you would have to ask him if there were any specific discussions."); 3T126:19-20 (as to what check(s) to North Shore paid for ""it probably would have come from my husband") (3T127:8-18) ("I didn't receive anything. What it would have been is that my husband would have told me we ordered a certain amount of pipe and to pay the bill. . . . **I don't have a specific invoice from North Shore or any type of, like, spreadsheet, or anything like that**.") As set forth above, and marked by her habitual efforts to "pass the buck" to her husband, Shallan Haddad, it is clear that Joann Haddad, despite her status as

Haddad's designated corporate representative at her deposition, had no independent knowledge of any of the alleged transactions that Haddad had with North Shore.

Both Joann Haddad and Shallan Haddad were presented with the thirteen (13) checks that were allegedly submitted to North Shore and questioned as to what specific material was purchased. Joann Haddad's deposition provided no information at all as to the specific materials that were allegedly purchased.

> Q: And so what I'm asking you is how are we going to figure out, for page one of P-9, what goods were sent by North Shore to Haddad to cover check number 2043?
>
> A: I don't – it would have been the – **it would have been pipe. That's all I – that's all I know at this point**.

(3T106:19 – 3T107:2) (emphasis supplied) Joann Haddad's relentless mantra that "pipe" was purchased from North Shore provides no pertinent information as to the specifics of the exact type and quantity and gauge of "pipe" that was allegedly purchased. This amorphous reference to "pipe" remained Joann's one-trick-pony testimony throughout the entirety of her deposition. See (3T71:20-25); (3T74:4-22); (3T105:23 – 3T107:2); (3T111:11); (3T116:11-14); (3T117:9); (3T123:25; 3T125:18) Generalized references to "pipe" were so pervasive and reflexive that they became Joanne

Haddad's non-probative verbal tic and crutch.

It is further noteworthy that Haddad's counsel on appeal, with precious little to work with, channels and is in lockstep solidarity with Joann Haddad on this issue of generalized references to mythically uniform and identifiable "pipe." Haddad's counsel, in the introductory paragraph of Haddad's appeal brief, expediently eschews any references to any specific contractually covered order for specific types, gauges and quantities of Schedule 40 pipe, and dutifully parrots Joann Haddad in the opening paragraph of Haddad's appeal brief, positing that the Subject Contract merely "related to the sale of pipe." (Pb1) Thin and counterfeit gruel indeed, if one seeks to prove actual damages.

Shallan Haddad's deposition also provided no information at all as to the specific material that was allegedly purchased from North Shore, and no information whatsoever that the materials that were allegedly received from North Shore were in fact the same exact type of material that was contemplated in the Subject Contract. The following colloquy is instructive of this:

> Q: We don't know what was – for each of these checks, as we sit here today –
>
> A. Yeah.
>
> Q: -- can you tell me what that $50,000 check covered?
>
> A: Off the top of my head, no.

> Q: And not just off the top of your head. Is there any way for us to determine what that $50,000 check paid for?
>
> A: I am not sure.

(4T88:19-25, 89:1-3) Shallan Haddad further testified that there is no way to know what specific material each North Shore check purchased:

> Q: So if we don't have a document telling us what your maximum quantity is and how much you've already ordered, how does anyone know whether or not you're going over the amount that the contract provides – allowed you to buy?
>
> A: I don't have that answer for you.

(4T76:13-18).

Haddad, by its own admission, has no way of confirming that materials were actually delivered. Shallan Haddad testified that, upon delivery, there is a packing slip that confirms the quantity and materials received. However, according to Mr. Haddad, Haddad's employees "throw it out" after the material is received. (4T62:23-63:12) In addition, Shallan Haddad testified that there is no way of tracking the quantity of materials that were purchased from North Shore. When asked how Haddad keeps track of how much of the maximum quantity is used up, Shallan Haddad stated, "[h]onor system. I don't know." (4T115:6-8)

In the end, neither Joann Haddad nor Shallan Haddad were able to

provide any evidence at all to connect the underlying checks to specific types of material that Haddad allegedly purchased from North Shore. Accordingly, not only was Haddad's documentary "evidence" completely silent in relation to the exact type, quantity and price of material that was allegedly purchased from North Shore, but the depositions of Haddad's representatives were equally unenlightening as to Haddad's burden of sufficiently proving its alleged six-figure damages. But these same depositions, however, were highly informative and speak volumes regarding the corporate culture and pertinaciously slipshod practices that perversely nurture a broken business system that was averse to proper recordkeeping and discovery compliance, all of which the legal process requires for any proper and meritorious legal actions to be filed. Through the words and testimony of Haddad's two corporate mouthpieces, it was Haddad's broken "system" and toxic culture that was ultimately incapable of complying with the most basic demands of the discovery process. This same rage and fear fueled tunnel vision blindly lead to the wasteful filing of an utterly non-meritorious and drawn-out legal action fueled by arrogance, chutzpah and blind fury, and a disreputable and misbegotten effort to use and abuse the legal process as a blunt instrument of submission to Haddad's arbitrary and capricious demands. Accordingly, the Order of the Law Division granting Newburgh summary judgment should

be affirmed.

II. SHALLAN HADDAD'S BARE-BONES CERTIFICATION DOES NOT CREATE A "CREDIBILITY" ISSUE THAT PRECLUDES A GRANT OF SUMMARY JUDGMENT.

When reading Haddad's appeal brief, one gets the distinct impression that Shallan Haddad's principal evidentiary contribution to Haddad's lost cause was his Certification, (Pa231 – Pa234), which merely identified, confirmed the existence of, and touted the purported relevance of Haddad's threadbare discovery production. See (Pb1 – Pb2, Pb13) This same Certification somehow reached a remarkably precise to-the-penny so-called damages calculation without a corresponding shred of corroborative evidence. (Pa233 – Pa234)

Counsel for Haddad makes the following "whopper" of a false and misleading statement in Haddad's appeal brief; *i.e.*, that Haddad "produced a Certification from its president on the exact issues that Defendant chose not to ask about at depositions." (Pb1) Just what additional questions that Newburgh's counsel should have asked of the evasive and cantankerous Mr. Haddad are not clear, as counsel for Newburgh merely sought to determine what evidence of damages Haddad could possibly produce. But Haddad's evidentiary cupboard was barren. It is frankly ridiculous to assume that Newburgh had its in power the ability to compel Haddad to conceal relevant evidence of its non-existent damages!

What Haddad appears to base this argument upon is that Shallan Haddad testified that "I would call North Shore and release material as I need it." (4T47:19-20); (Pb12) This tells us nothing of substance or proof of damages for allegedly procured replacement goods. Haddad's drawn-out non-effort to provide evidence of the purchase of replacement materials turned out to be the decisive evidentiary "Holy Grail" quest in this case, wherein Haddad, in its obstinacy, made no serious attempt, even in the compelling face of a Court Order, to either find or obtain sufficient support (likely as a result of its non-existence) for its sought-after remedies. Haddad's comically weak argument boils down to its current claim that, in addition to Haddad's *de minimis* document production, Shallan Haddad made some phone calls to North Shore. (Pb12) But when were these calls made? To whom were the calls made? And what, specifically, was "released" at Shallan Haddad's direction, and at what time? We never learn this. Not the slightest scrap of evidence was ever provided. Shallan Haddad's totally and completely unsupported "word" does not have the force of law.

Counsel for Haddad directs the Court's attention to a deposition page, albeit without direct quotations (for reasons that will soon be clear), in Haddad's appeal brief, see (Pb12), wherein Shallan Haddad stated the following regarding the release of covered materials from North Shore: "I am telling you for the last

time, and I will never answer this question again. Even if you call Jesus Christ, I'm not going to fucking answer it. I pick up the phone, I release the order." (4T74:2-6) Again, to say the least, this bully-boy testimony adds nothing to Haddad's fatally weak case; indeed, it only subtracts from its zero baseline. To state the obvious, it creates no material issue of fact.

Seeking to desperately frame the matter as a "contested credibility issue" on an established issue of fact, counsel for Haddad argues that "the Lower Court ultimately rejected the clear certification provided by Plaintiff's President, who stated that Plaintiff ordered the same types of pipe from North Shore at higher pricing than Defendant." (Pb13) (citing Pa232) But Shallan Haddad could not back up that empty statement with any evidence at all, despite countless opportunities to do so. Shallan Haddad's utterly baseless certification was nothing but "lay net opinion." 5 Dwight Assocs. v. Township of Fairfield, 2012 Tax Unpub. LEXIS 36, at *35 (N.J. Tax Ct. October 26, 2012) Shallan Haddad's much-touted certification was comprised of nothing more than "bare conclusions, unsupported by factual evidence . . . ." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) In the end, the Law Division had all of the evidence before it that Haddad could provide. This same evidence was justly found wanting as a matter of law and, *a fortiori*, left the Law Division with no viable alternative than to grant Newburgh's motion for summary judgment, and dismiss this case

in its entirety.

In this case, there existed a perverse and distorted nexus between (1) Shallan Haddad's magical thinking on the issue of the alleged phantasmagorical amount of Haddad's contrived damages claim; see (Pa227 – Pa228), (2) the twisted funhouse mirror reflection of Shallan Haddad's irate and fanciful sense of faux victimization, as darkly reflected in the stark contrast between Haddad's extreme claims of loss and its non-existent evidence of any damages at all; (3) Haddad's subsequent poor judgment and misbegotten decision to file legal action against Newburgh; and (4) after losing in the Law Division, Haddad's mulish persistence in a strategy of extreme litigiousness through the pertinacious filing of this frivolous appeal.

III. HADDAD'S CROSS-MOTION FOR SUMMARY JUDGMENT WAS CORRECTLY DENIED WITH PREJUDICE.

As set forth at length above, Haddad's meager proofs directly led to the Law Division's summary judgment Order. In light of this, it requires a colossal and fanatical leap of faith, and much imaginary thinking, coupled with staggering *chutzpah*, to argue that Haddad's cross-motion for summary judgment somehow should have been granted. This notably frivolous argument and point heading should be rejected out of hand for the same legal and factual reasons that summary judgment was entered against Haddad in the first instance.

CONCLUSION

Haddad's sloppy business practices, repeated failures through either neglect or design to produce any direct evidence of damages at all, much less to a reasonable certainty, inexorably lead to the dismissal on summary judgment of its non-meritorious claims against Newburgh. There is no genuine issue to be left to the trier of fact, as no reasonable person can look at Haddad's threadbare proofs and determine that Haddad has presented any evidence of the "fact" of damages with the fifteen (15) pages of unsupported documentation: the two (2) invoices are unsigned; there are no receipts or any other documentation to prove that the thirteen (13) checks were for purchases of the relevant and very specific material contemplated in the Subject Contract; there is no acknowledgement of delivery or receipt of the alleged replacement materials; and there is no communication between Haddad and these vendors negotiating price terms, delivery status, and release of the material.

As such, and on the complete factual and documentary record on this appeal, the following facts remain undisputed:

- Haddad cannot prove what specific materials were allegedly purchased from North Shore;
- Haddad cannot prove what quantity of materials were purchased from North Shore;

- Haddad cannot prove what specific material was purchased in relation to each individual check made out to North Shore; and
- Haddad cannot prove that they ever actually received the specific materials from North Shore.

The deposition of Shallan Haddad, and his sordid treatment of the legal process, captured and encapsulated the utter contempt that Haddad has for the adversarial legal process and its search for truth and for its civilized rules for resolving disputes. The fish rots from the head down. Shallan Haddad's vicious statements on the record were instructive of the dysfunctional way that Haddad runs its and business and conducts its affairs, both internally and with third parties. Cf. In re Vincenti, 152 N.J. 253, 276 (1998) ("The feral character of his groundless personal attacks . . . evidence only his rancorous disposition and his utter contempt for the basic sensitivities of other people."); Corporate Realty Servs., LLC v. Croghan, 2018 N.J. Super. Unpub. LEXIS 1623, at *13-14 (N.J. Super. Ct. App. Div. July 10, 2018) (A litigant and contentious deponent who hurls *ad hominem* insults and "who obstructs full discovery corrupts one of the fundamental precepts of our trial practice – the assumption by the litigants and the court that all parties have made full disclosure of all relevant evidence in compliance with the discovery rules.") (Da26)

"According to an old legal adage, with many variations, `if the law is

against you, pound the facts; if the facts are against you, pound the law; if they are both against you, pound the table.'" City of New York v. Smart Apts. LLC, 39 Misc. 3d 221, 227 (Sup. Ct., New York Cty. 2013) Having produced no cognizable proofs as part of a lengthy and patient discovery process, Shallan Haddad, when called upon to testify, "pounded the table" repeatedly, engaged in intimidation tactics, discarded all efforts at decorum and contemptuously spit in the eye of the legal process. Shallan Haddad did not come to his deposition with supportive facts, but with the proverbial extension of his middle finger at our system of laws and anyone else who will not obediently submit to his own unstable will and dictates; but now, and with extravagant moxie, this same corporate principal and party in interest risibly demands an additional bite of the apple for his company in this litigation. It is frankly difficult to imagine any party that is less deserving of this than Haddad, which has already squandered multiple opportunities to actually support its forlorn and utterly non-meritorious case.

In this case and appeal, Haddad has been given a plethora of opportunities to avoid its ultimate fate of a summary judgment dismissal. It is respectfully submitted that it is entitled to no more. Accordingly, Newburgh respectfully requests that this Court affirm the decision and Order of the Law Division granting Newburgh summary judgment as against all of Haddad's claims on the

ground of the insufficient proofs that have been provided to establish damages with any reasonable certainty.

Respectfully submitted,

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DATED: 2/21/2024