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**Superior Court of New Jersey**  
**Appellate Division**

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Docket No. A-000893-23T2

In the Matter of the Estate of : CIVIL ACTION  
MARTHA C. CLARK, Deceased. :  
: ON APPEAL FROM THE  
: FINAL ORDER OF THE  
: SUPERIOR COURT  
: OF NEW JERSEY,  
: CHANCERY DIVISION,  
: PROBATE PART,  
: MONMOUTH COUNTY  
:  
: DOCKET NO. MON-P-274-23  
:  
: Sat Below:  
:  
: HON. DAVID F. BAUMAN, P.J.S.C.

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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT**  
**SCOTT M. CLARK**

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Date Submitted: May 6, 2024

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**PRELIMINARY STATEMENT**

Defendant Scott Clark (“Scott”) appeals the Trial Court’s October 13, 2023 Order granting Plaintiff’s Order to Show Cause and allowing the sale of real property located at 25 Citation Drive, Freehold, New Jersey (“Subject Property”) to proceed and the Trial Court’s October 13, 2023 Order denying defendant/appellant’s motion for permission to file counterclaims in response to Plaintiff’s Verified Complaint. The Trial Court’s decision should be overturned because: (1) the Trial Court improperly granted the application for Order to Show Cause allowing the sale of the Subject Property to proceed when there were numerous issues and disputes of fact presented to the Trial Court relating to the sale and marketing of the Subject Property in contravention of a Consent Judgment, including whether such sale and marketing were conducted in good faith, requiring the matter to proceed by way of a plenary action; (2) the Trial Court failed to consider and enforce the April 13, 2022 Consent Order relating to the sale of the Subject Property; (3) the Trial Court erred in failing to allow defendant/appellant to assert counterclaims in response to the Order to Show Cause and Verified Complaint where the issues raised in the counterclaims were directly related to the issue of whether the requested sale of the Subject Property was valid and conducted in good faith; and (4) the Trial Court lacked jurisdiction to hear the dispute raised in the Order to Show Cause because the Subject Property was not a probate asset and enforcement of a Consent Judgment is

considered a breach of contract action, not a probate matter. Should the Trial Court's Orders stand, Defendant Scott Clark would be deprived of a fair, equitable and just adjudication of the merits of his counterclaims in this matter and deprived of, not only his rights as property owner of the Subject Property but, his rights under the agreed upon Consent Judgment of April 13, 2022.

### **PROCEDURAL HISTORY**

This matter involves the sale of real property located at 25 Citation Drive, Freehold, New Jersey ("Subject Property") which was owned since 2005 by five (5) siblings – Scott M. Clark ("Scott"), Mark P. Clark ("Mark"), Colleen Ercole ("Colleen"), Patrice Stenftennagel ("Patrice") and Brian Clark ("Brian")<sup>1</sup> - which ownership was subject to the reservation of life estates retained by their parents, William D. Clark and Martha Clark. (Da383). The life estates retained by William and Martha Clark were extinguished upon their deaths and the title to the property was vested in the names of Scott, Mark, Colleen, Patrice and Brian<sup>2</sup> as tenants in common. (Da383).

Following the passing of their mother, Martha Clark (who was predeceased by her husband), the five siblings were involved in contentious litigation relating to the probate of her estate. (Da383). On April 13, 2022, the five siblings entered into

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<sup>1</sup> After the filing of this appeal, Brian Clark has tragically passed away.

<sup>2</sup> Note, first names are used herein for ease of reference and to avoid confusion. No disrespect is intended.

a Consent Judgment relating to the administration of the estate. (Da395). The Consent Judgment also contained the parties' agreement as to the sale of the Subject Property, which was not part of the Estate. (Da395). The Consent Judgment stated that the five siblings were to "execute a listing agreement for sale of the property...with a licensed real estate agency" and "[i]f the parties cannot agree upon a Realtor within that time, the Realtor shall be selected by the court." (Da401). The Order further stated that "**[a]ll decisions related to the marketing and sale of the property, including but not limited to, raising or lowering the list price, performing maintenance or repairs, accepting proposed Contracts, retaining an attorney to handle the real estate transaction, responding to requests for home inspection repairs and credits, and all other decisions of any nature whatsoever, must be unanimous...**" (Da401).

Unfortunately, the five siblings could not agree on the selection of a real estate professional to market and sell the Subject Property. (Da383). Thus, motion practice ensued for a realtor to be selected by the Court pursuant to the Consent Judgment, and on January 12, 2023, the Court appointed James Paone, Esquire of Davison, Eastman and Paone to sell the Subject Property. (Da33). To that end, the Court granted Mr. Paone authority to appoint a realtor to market and sell the Subject Property. (Da33). The Order further stated that "all of the parties are to cooperate in

the sale of the property” and “the parties may communicate any questions/concerns about the sale to [Mr. Paone].” (Da33).

On January 18, 2023, Mr. Paone advised the five siblings and certain counsel that he had “selected and appointed Alan Hack of NJ Realty Pros as the realtor to sell” the Subject Property. (Da34). The letter stated that “Mr. Hack will prepare a listing agreement consistent with the terms of the Consent Judgment.” (Da34).

Thereafter, a dispute arose regarding the manner in which Mr. Hack and Mr. Paone were proceeding with the marketing and sale of the Subject Property, including allegations of disagreement over the list price, the sale price, claims that the property was listed with no notice to the co-owners and/or their counsel, refusal by Mr. Hack to properly show the property to certain prospective buyers and/or realtors, and agreeing to sell the property well below market value, to name but a few. (Da15, Da383).

On July 28, 2023, after months of Mr. Paone being unresponsive, Mr. Paone filed a Verified Complaint and Order to Show Cause. (Da15). On August 4, 2023, the Court ordered that the interested parties show cause before the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County Surrogate on September 15, 2023 at 9:00 a.m. (Da378). The Court further ordered that “[a]ny party in interest who wished to be heard with respect to any of the relief requested

in the verified complaint...shall file...a written answer, an answering affidavit...or other response...to the relief requested in the verified complaint.” (Da380).

On September 13, 2023 an Answer to the Verified Complaint and Counterclaim was filed on Scott’s behalf seeking rescission of the Sales Contract, enforcement of the Consent Judgment, and asserting claims for breach of contract. (Da462). Scott also filed opposition to the Order to Show Cause. (Da383). In addition, on September 18, 2023, Scott filed a motion seeking permission to file counterclaims. (Da481). On October 13, 2023, following oral argument of counsel, the Honorable David F. Bauman, J.S.C. (1T)<sup>3</sup> denied Scott’s motion to file counterclaims and granted Mr. Paone authority to sell the Subject Property to Salome Monteiro (“Monteiro”) for five hundred thousand (\$500,000) dollars, a value which the co-owners did not unanimously consent to. (Da1, Da4). Scott timely filed a Notice of Appeal on November 27, 2023. (Da5).

Defendant Scott is appealing Judge Bauman’s denial of his motion to file counterclaims as well as the Order granting Mr. Paone authority to sell the Subject Property to Monteiro for \$500,000 for the following reasons: (1) the probate court erred in granting the Order to Show Cause allowing the sale of the Subject Property to proceed because numerous issues and disputes of fact existed as to whether the sale and marketing of the property was conducted in good faith precluding the matter

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<sup>3</sup> 1T refers to the Transcript of Motion Proceedings, dated October 13, 2023.

from being disposed of summarily; (2) the probate court erred in not considering and/or enforcing the April 13, 2022 Consent Order which the co-owners had agreed to and which was binding; (3) the probate court erred in denying Scott leave to assert counterclaims in response to the Order to Show Cause and Verified Complaint as there were genuine disputes of material fact presented to the Court by the parties which were directly related to whether the sale of the Subject Property to Monteiro for \$500,000 was valid and conducted in good faith; and (4) the probate court lacked jurisdiction to hear the dispute raised in the Order to Show Cause because the Subject Property was not a probate asset and the sale of the property was subject to certain requirements under the Consent Judgment of April 13, 2022 which were not complied with and enforcement of same constitutes a breach of contract. (Da5).

### **STATEMENT OF FACTS**

This matter involves the attempted forced sale of the Subject Property in violation of the Consent Judgment of April 13, 2022 entered into between the five sibling co-owners of the Subject Property. (Da1, Da395). Following the passing of their mother, who had the final life estate, the five sibling co-owners were involved in highly contentious probate litigation relating to the probate of her estate. (Da384). During the course of the probate matter, the five siblings entered into a Consent Judgment, dated April 13, 2022. (Da395). The Consent Judgment was signed and agreed to by all parties (and counsel) and was countersigned by the Honorable

Joseph P. Quinn, P.J.Ch. (Da395). The Consent Judgment addressed the various probate assets of Martha Clark's Estate, and also contained numerous provisions and specific thresholds related to the sale of the Subject Property. (Da395). The Subject Property was not a probate asset because Martha Clark and her husband had transferred title of the property to the five adult children prior to their deaths but retained a life estate that extinguished upon their deaths. (Da384).

The Consent Judgment contained the following provisions relating to the sale of the Subject Property:

17. **Within 10 days from the date of this Consent Judgment, all co-owners shall execute a listing agreement for the sale of the property located at 25 Citation Drive, in Freehold, NJ with a licensed real estate agency...If the parties cannot agree upon a Realtor within that time, the Realtor shall be selected by the court. The initial list price shall be set by the Realtor, but shall not be less than \$537,900. The listing agreement shall require that the property be listed on Multiple Listing Service and shall permit the placement of a lockbox on the Property.**

18. All co-owners shall cooperate with the Realtor, and with each other, with respect to the marketing and sale of the Property.

19. **All decisions related to the marketing and sale of the property, including but not limited to, raising or lowering the list price, performing maintenance or repairs, accepting proposed Contracts, retaining an attorney to handle the real estate transaction, responding to requests for home inspection repairs and credits, and all other decisions of any nature whatsoever, must be unanimous,** except as provided in paragraph 20 below.

20. **All co-owners must accept and approve any Contract which contains a purchase price which is equal to or greater than 95% of the list price.** If any co-owner refuses to execute a Contract which contains a purchase price equal to or greater than 95% of the list price, any other co-owner may execute a Contract on his behalf. Co-owners fully agree this stipulation is to be kept *Confidential* amongst the co-owners themselves and not to be disclosed to any party, or listing agent, with potential interests in the real property. (Da395).

Unfortunately, the five sibling co-owners could not agree on a realtor. (Da383). Thus, motion practice ensued for the selection of a realtor pursuant to Paragraph 17 of the Consent Judgment. After extensive disagreement and motion practice relating to the selection of a realtor, the Court appointed James A. Paone, Esquire on January 12, 2023 to serve as the contact intermediary between the five sibling co-owners and granted Mr. Paone authority to appoint a realtor. (Da30). Of note, the January 12, 2023 Order dealt only with Paragraph 17 of the Consent Order and nothing else. (Da30). This is confirmed by the language of the January 12, 2023 Order which expressly states:

THIS MATTER **having been resolved by amicable settlement,** which settlement is **embodied in a Consent Judgment entered by the Court on April 13, 2022;** and

**Paragraph 17 of the Consent Judgment having provided that the co-owners of the real estate...shall execute a listing for the sale of that property and if those co-owners fail to agree on the identity of a realtor**



**for the marketing and sale of the Property, a realtor shall be selected by the court;** and

**The co-owners having failed to agree on the selection of a real estate professional for the marketing and sale of the Property;** and

...

The Court having held a case management conference on the record on October 13, 2022;

...it is on this 12 day of Jan, 2023 hereby ORDERED as follows.

...

1. **The Court appoints James Paone, Esq. of Davison, Eastman and Paone, Freehold, NJ to sell the property at 25 Citation Drive Freehold.**
2. **This person shall have the authority to appoint a realtor to sell the property.**
3. **All of the parties are to cooperate with the sale of the property.**
4. **The parties may communicate any questions/concerns about the sale to the Attorney...(Da30).**

This Order did not supersede, alter, amend or in any way vacate any provisions of the Consent Order relating to the sale of the Subject Property. (Da30, Da395). Thus, paragraphs 18, 19, 20 and 21 which relate to the sale of the Subject Property are still binding on all parties to the Consent Judgment, including the requirement for unanimous consent on all major decisions relating to the Subject Property. (Da395). One of the major decisions being the sales price for the Subject Property. (Da383).

On January 18, 2023, Mr. Paone informed the five sibling co-owners that he had retained Alan Hack as the realtor in charge of selling the Subject Property. (Da34). During the sales and minuscule marketing of the home, Scott made numerous complaints in writing through counsel about the process, all in accordance with the Consent Judgment and the January 12, 2023 Order. (Da179, Da348, Da350, Da356, Da363, Da413, Da416). Those concerns included, but were not limited to, the fact that the assigned realtor was denying access to certain prospective buyers and/or other realtors to the property, the fact that the assigned realtor was looking to achieve a quick sale of the property even if that meant selling the property substantially below market value, the fact that the property was listed with no notice to the owners and/or their counsel, the fact that Mr. Hack changed the access code to the Lock Box so that certain realtors could not gain entry, the fact that Mr. Hack was unresponsive and ignored realtors and prospective buyers, and the fact that Mr. Paone never obtained unanimous consent prior to accepting the \$500,000 offer from Monteiro despite communications from counsel and other co-owners. (Da179, Da348, Da350, Da356, Da363, Da413, Da416).

Unable to get an agreement on the sale price for the property to Monteiro, among other issues, Mr. Paone sought permission, through an Order to Show Cause and Verified Complaint to sell the Subject Property at a remarkable and unsupported price of \$500,000, which was on average \$118,000 lower than what comparable

houses were selling for **in the exact same neighborhood** where the Subject Property was located. (Da15).

On September 14, 2023, Scott opposed the Order to Show Cause and filed an Answer to the Verified Complaint, with counterclaims, along with a motion seeking permission to file counterclaims. (Da383, Da462). After a full briefing and oral argument, on October 13, 2023, the Court granted the Order compelling the sale of the property to Monteiro for \$500,000 and denied Scott permission to file counterclaims. (Da1, Da4, 1T). In reaching its decision, the Court erroneously concluded that the January 12, 2023 Order was the only Order in effect with respect to the sale of the property. (1T12:19-1T13:5). Specifically, the Court stated:

THE COURT: Okay. What is your position on this?

MR. MILUN: **Well, Judge, the January 12<sup>th</sup> order is not the only order that is in play here. The April consent order –**

THE COURT: **As far as I am concerned, it is.**

MR. MILUN: **Well, Judge, the January 12<sup>th</sup> order was put in place specifically to deal with what was, essentially, paragraph 17 of the April order, which was you guys need to agree on a real estate agent to sell the property.**

**They couldn't do it. So an application was made to the court to appoint one...**(1T12:19-1T13:5)

As the facts establish, the January 12, 2023 Order was not the only order in effect as it only addressed paragraph 17 of the April 13, 2022 settlement Consent

Judgment entered into between the co-owners of the Subject Property. (Da395). The factual record also established that the \$500,000 offer was not unanimously agreed to by the parties which would preclude the sale from proceeding under the express terms of the Consent Judgment. (Da179, Da348, Da350, Da356, Da363, Da413, Da416). Accordingly, the Court should not have compelled the sale of the Subject Property. (Da1).

The Court erred in hearing and deciding this matter through an Order to Show Cause application because there were genuine disputes of fact relating to the sale of the property to Monteiro which could not be properly decided by way of a summary action. (1T). The genuine disputes required the Court to convert the matter to a plenary action with the opportunity for assertion of counterclaims and for discovery. (Da383).

Review of the oral argument record demonstrates that the Court failed to consider and/or overlooked the numerous disputed facts relating to the sale of this property and the applicability of the threshold provisions of the Consent Judgment. (1T). Scott submitted a Certification in opposition to the Order to Show Cause which set forth numerous issues of fact, objections and lack of consent relating to the marketing and sale of the Subject Property. (Da383). Scott certified to the following:

40. After being appointed by the Court, plaintiff retained Alan Hack as the realtor in charge of selling the Subject Property.

41. It is unclear what connection, if any, there is between plaintiff and Alan Hack, but I believe that Hack is an in-law or otherwise related to plaintiff.

42. The list price of the Subject Property was \$537,900, which was unfortunately, the minimum list price per the Consent Judgment.

43. The list price proposed did not reflect the appropriate market value for the property, which was significantly higher.

44. In fact, we had all discussed listing the property for a price between \$560,000-570,000, yet this discussion was ignored by plaintiff.

45. During this process, there were four proposed brokers suggested to the group of five owners, each of which have not only agreed to a lower commission rate than the 5% commission to be paid to Hack, but also suggested list prices significantly higher than the list price from plaintiff and Hack...

46. As support for the higher list price, I obtained a Comparative Market Analysis for the Subject Property, which showed a market value for the property at \$564,000.

...

48. Plaintiff was informed of both the requested list price and the Comparative Market Analysis, but still maintained the listing of the property at \$537,900 and refused a 10-day reset period to adjust the market price accordingly.

49. After the property was listed, with no notice to the owners and/or their counsel, there were several suspicious and curious activities by the realtor, Hack.

50. I was informed on numerous occasions that Hack refused to show the property to certain prospective buyers and/or realtors.

51. I was also informed that Hack had changed the access code on the Lock Box at the Subject Property so that certain realtors could not gain entry. Indeed, one realtor had an interested buyer and was coming up from Washington, D.C., only to be denied entry.

52. Further, I was told that there was an interested buyer from California and/or Colorado who was willing to pay upwards of \$538,000-plus for the property but was strangely denied access to the property by Hack...

53. After stonewalling several other realtors and potential purchasers, plaintiff agreed to accept (unauthorized) \$500,000 sale price for the Subject Property.

54. Plaintiff never obtained unanimous consent **prior to** accepting the \$500,000 offer.

55. Plaintiff informed the five siblings of his acceptance of the \$500,000 offer, despite the fact that he did not have unanimous consent, as required by the Consent Judgment, and the fact that at least one other sibling had asked plaintiff to seek a higher price for the Subject Property.

...

64. I was informed that there were numerous other realtors and prospective buyers interested in the Subject Property, but none were given access by Hack or plaintiff – the entire sales process was apparently being stonewalled in order to effectuate and finalize the all-cash, lowball offer by the Monteiros.

65. ...since accepting the offer, there have been several homes in the exact same subdivision...that have sold at prices significantly higher than the one accepted by plaintiff...

...

68. The average sale price of the homes noted above was \$618,000!

69. It is unclear why plaintiff is insisting on a sale of this property to Monteiro at a value that is \$118,000 less than the average sales of the properties in the same neighborhood and is more than \$60,000 less than the Comparative Market Analysis, dated May 8, 2023, that had been provided to all parties in this action, including plaintiff. (Da383).

The factual record also reveals that Scott offered to purchase the house from his siblings for the listing price amount of \$539,000 without the need for realtor commission (this was above the \$500,000 offer presented by Monteiro). (Da551). A factual dispute also exists as to whether the co-owners were required to accept and approve Scott's offer as it was equal to or greater than 95% of the list price pursuant to paragraph 20 of the Consent Judgment lending further support to the fact that this matter should not have been disposed of by way of a summary action and/or Order to Show Cause. (Da395). However, that offer was denied for the mere reason that there was animosity between the parties. (Da383). This genuine issue of material fact was presented to the Court during oral argument:

MR. MILUN: **My client through his counsel Jim Nardelli sent an e-mail and said, look, we can't agree on a realtor. I will buy the house from you for the 538. You guys will get distributed your 107,000. I'll do it without a commission.** It will be – 538 is the number. I'll purchase your house. You guys will get your 107,000 rough split, whatever your interests are per the consent order –

THE COURT: **Why doesn't he do that?**

MR. MILUN: **Because none of them agreed.** They all said absolutely not.

THE COURT: Okay.

MR. MILUN: And they wouldn't even negotiate. (1T18:8-21).

The fact that there were genuine disputes relating to the sale of the Subject Property to Monteiro for \$500,000 was even acknowledged within Mr. Paone's Order to Show Cause application to the Court, where he acknowledged in Paragraph 24 that:

**Scott M. Clark, however, has repeatedly raised objections to the sale and made allegations that the Plaintiff is operating outside of the terms of the Consent Judgment dated April 13, 2022.** (Da19).

Thus, the Trial Court incorrectly concluded that the record failed to contain any evidence of the objections to the sale of the Subject Property to Monteiro. (1T). The factual record shows the contrary – there was sufficient evidence presented outlining the fact that there were genuine disputes of material fact which precluded the matter from being decided summarily without the benefit of further discovery relating to the disputes, including deposition testimony. (Da383). Indeed, at various times throughout the course of oral argument by the parties, the Court acknowledged the fact that there were disputes relating to this sale. Specifically, the Court stated:

**Mr. Paone's papers reference objections to the sale. You have highlighted a litany of complaints to include that Mr. Paone did not list this property for what you**



**contend is the fair market value of other properties similarly situated in that neighborhood.**

And I am asking you very specifically, did you – **did your client communicate that concern or issue in writing to Mr. Paone.**

**And the answer I think is no because there is nothing in this record that supports that.** (1T29:15-24)

This conclusion is plainly erroneous and contrary to the record before the Court at the time. (Da383). This is especially so in light of the fact that there were numerous submissions by the parties that contained factual evidence supporting the argument that there were factual disputes and objections relating to the sale of the Subject Property to Monteiro for \$500,000. (Da179, Da348, Da350, Da356, Da363, Da413, Da416). This included communications and certain objections from other sibling owners as well, including:

- March 8, 2023 correspondence from Patrice Stenftennagel requesting an increase of the asking price in order to get the best possible offer for the Subject Property. (Da432).
- April 4, 2023 correspondence from Colleen Ercole stating that she has “been out of the loop of any and all decisions made after April 13<sup>th</sup> 2022” and “[w]hen questioned of damage I was told the woman up the street took the installation and to back off.” (Da435). Colleen states that she did her best “to stay out of the DYSFUNCTION and CHAOS between siblings, but the dynamics between some siblings were so out of control, **we end up here with unknown persons selling our home...**” (Da435).
- July 4, 2023 correspondence from Mark Clark requesting that Mr. Paone call him “pertaining to why the gas at 25 Citation Dr.,” was “shut

off” and stating that “**[t]he owners of this house should be made aware of any issues pertaining to the integrity of the house moving forward.**” (Da437). Mark also states “I want answers and I want answers now” and “**please follow up with this person and get me the answers I’m seeking” including “the status on the respective buyer that I have not heard a peep of over the last six weeks.**” (Da437).

- April 3, 2023 correspondence from Brian Clark which states that he was “also led to believe that the house...was the sell as is” and “[a]s far as any smoke detectors or CO 2 detectors nothing was even mentioned until I read your last email.” (Da494).
- Certification of Mark Clark in response to the Order to Show Cause admitting that the property was not sold as envisioned by the Consent Judgment. (Da545).

Further, the factual record contained information relating to Scott’s complaint to the New Jersey Department of Banking and Insurance – Real Estate Commission regarding Mr. Hack and the objections and disputes relating to Mr. Hack’s questionable actions relating to the marketing and sale of the Subject Property. (Da363).

These genuine disputes of fact precluded the Trial Court from deciding this matter summarily without the opportunity for counterclaims and discovery. (Da1). The issues before the trial court were improperly presented by way of an Order to Show Cause for the sole purpose of circumventing the parties’ right to due process. (Da383). The sale of the Subject Property was not an emergent matter and there were obvious issues of material fact relating to the validity of the proposed sale in

contravention of the binding Consent Judgment precluding summary disposition. (Da179, Da348, Da350, Da356, Da363, Da413, Da416).

### **STANDARD OF REVIEW**

In this case, the Court's ruling was, in essence, a premature summary judgment ruling as the issues were improperly presented by way of an emergent application and the ordered sale of the Subject Property was in contravention of the April 13, 2022 Consent Judgment entered into between the sibling co-owners of the Subject Property relating to its sale. Thus, the Appellate Division's review in this case is de novo. In reviewing the grant or denial of summary judgment, the appellate court applies the same standard as the trial court with respect to the same motion record. See Rule 2:10-2; W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Wilson v. City of Jersey City, 209 N.J. 558, 564 (2012); Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). A party is entitled to summary judgment only if there is no genuine dispute as to any material fact. See Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995). On a motion for summary judgment, **the judge's function is not to weigh the evidence and determine the truth of the matter**, but to determine whether there is a genuine issue for trial. (*Emphasis added*). Brill, 142 N.J. at 540. Similarly, with respect to an Order to Show Cause, the judge's function is to hear the evidence as to those matters which may be genuinely in issue. Rule 4:67-5 permits

the Court to order the action to proceed as in a plenary action when there are genuine issues of material fact.

The determination of whether there is a genuine issue with respect to a material fact **requires the Court to consider whether the competent evidential material present, when viewed in the light most favorable to the non-moving party** in consideration of the applicable evidentiary standard, **is sufficient to permit a rational fact-finder to resolve the disputed issue in favor of the non-moving party**. (*Emphasis added*). *Id.* at 523. Summary judgment should be denied where the opposing party comes forward with evidence that creates a genuine issue as to any material fact. *Id.* at 529.

Questions of law dependent upon the operative facts of the case cannot be decided by summary judgment when those facts are in dispute. See Central Paper v. Inter. Records, 325 N.J. Super. 225, 232 (App. Div. 1999), cert. den., 163 N.J. 74 (2000). A trial court should never decide on its merits a dispute which a rational jury could go either way. See Rowe, 209 N.J. at 50; Gilhooley v. County of Union, 164 N.J. 533, 545-546 (2000); Strumph v. Schering Corp., 133 N.J. 33 (1993).

The appellate court is not bound by the trial court's application of the law to the facts. See Wilson, 209 N.J. at 564; State v. Hudson, 209 N.J. 513, 529 (2012); Gere v. Louis, 209 N.J. 486, 499 (2012); see also State v. Ugrovics, 410 N.J. Super. (App. Div. 2009), cert. den., 202 NJ. 346 (2010); Edwards v. McBreen, 369 N.J.

Super. 415, 421-422 (App. Div. 2004). Therefore, an appellate panel's review of a trial court's decision on a motion for summary judgment, or on an Order to Show Cause as is the case here, is *de novo*. See Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

## LEGAL ARGUMENT

### POINT I

**THE TRIAL COURT IMPROPERLY GRANTED THE ORDER TO SHOW CAUSE RELIEF BECAUSE THE FORCED SALE OF THE SUBJECT PROPERTY WAS CONTRARY TO THE APRIL 13, 2022 CONSENT JUDGMENT BETWEEN THE CO-OWNERS AS THERE WERE GENUINE ISSUES OF MATERIAL FACT ON WHETHER THERE WAS UNANIMOUS CONSENT TO SELL THE PROPERTY FOR A PRICE THAT WAS WELL BELOW MARKET VALUE. (Da1)**

This Court should reverse the trial court's grant of Mr. Paone's Order to Show Cause, which confirmed the sale of the Subject Property to Monteiro for \$500,000, because the parties presented sufficient factual evidence demonstrating the existence of genuine issues of fact relating to the validity of the marketing and sale of the Subject Property. The factual evidence, when viewed in the light most favorable to the non-moving party (Scott) demonstrates that genuine disputes of material fact exist regarding the manner in which Mr. Paone and realtor Alan Hack listed, marketed and sold the Subject Property. As such, the Court's October 13, 2023 Order entering judgment confirming the sale of the Subject Property to Monteiro for \$500,000 must be reversed, and the case remanded for further proceedings.

Further, the Court erroneously denied Scott's motion for leave to file counterclaims which directly relate to the disputes surrounding the sale of the Subject Property to Monteiro, as will be discussed more fully below. In his opposition to the Order to Show Cause, Scott presented sufficient and specific factual evidence demonstrating the objections and disputes surrounding the proposed sale of the Subject Property to Monteiro for \$500,000. This included evidence that the price was unauthorized by the siblings and in contravention of the Consent Order of April 13, 2022. Scott provided a Certification in support of his opposition which outlined the objections to the sale of the Subject Property to Monteiro and set forth reasons why summary disposition of the matter was improper. (Da383).

It is evident from the Court's Orders and conclusions during oral argument that it overlooked Scott's Certification and/or failed to consider it. Based on the factual record before the Court, the matter could not have and should not have been disposed of summarily. Instead, the matter should have proceeded by way of a plenary action under the Court Rules. Specifically, Rule 4:67-2(b) states:

... The notice of motion to proceed summarily shall be supported by affidavits made pursuant to R. 1:6-6 and, if addressed to the defendant, may be served with the summons and complaint; but it shall not be returnable until after the expiration of the time within which the defendant is required to answer the complaint. **If the court is satisfied that the matter may be completely disposed of on the record (which may be supplemented by**

interrogatories, depositions and demands for admissions) or on minimal testimony in open court, it shall, by order, fix a short date for the trial of the action, which shall proceed in accordance with R. 4:67-5, insofar as applicable.

Here, the parties should have been permitted to conduct discovery and/or present minimal testimony to resolve the disputed issues of fact relating to the proposed sale. Mr. Paone failed to provide the Court and defendants with an affidavit supporting his application for summary disposition under Rule 4:67-2(b) and Rule 1:6-6. Rule 1:6-6 expressly requires that if “a motion is based on facts not appearing of record...the court may hear it on affidavits made on personal knowledge.” Indeed, Rule 4:67-5 states:

**The court shall try the action on the return day**, or on such short day as it fixes. If no objection is made by any party...or the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. **If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue**, and render final judgment. At the hearing or on motion at any stage of the action, **the court for good cause shown may order the action to proceed as in a plenary action wherein a summons has been issued**, in which case the defendant, if not already having done so, shall file an answer to the complaint within 35 days after the date of the order or within such other time as the court therein directs. In contested actions briefs shall be submitted. (*Emphasis added*).

The Court did not “try the action” on the return date of the Order to Show Cause as required under the Court Rules. Instead, the Court relied on oral argument of counsel without consideration of any affidavits as to the factual disputes. The record was laden with issues of material facts and disputes requiring the Court to “hear the evidence as to those matters.” Good cause had been demonstrated requiring the matter to “proceed in a plenary action wherein a Summons has been issued.” The Court erred in not hearing the evidence and permitting Scott’s counterclaims.

Moreover, it should be noted that Rule 4:67-4 states that:

A plaintiff proceeding pursuant to R. 4:67-1(b) shall be deemed to have waived any right to trial by jury to which plaintiff would otherwise have been entitled whether or not the motion is granted. **A defendant entitled to trial by jury shall make demand therefore in accordance with R. 4:35...**the demand shall be served and filed not later than 3 days before the return date of the motion and may be appended to any paper served and filed by the defendant in response to the motion. **If the defendant has a right to and has demanded a trial by jury, the court, upon finding the existence of a genuine issue to a material fact, shall order the action to proceed as in a plenary action in accordance with R. 4:67-5.** (*Emphasis added*).

Comment 2 to Rule 4:67-5 expressly states that “**[a] defendant having the right to trial by jury can defeat the motion for summary proceeding by demanding a jury trial in accordance with the time provision of the rule.**” The Comment further states that “**[i]f so demanded, the court must deny the order to proceed summarily if it finds a genuine issue as to a material fact,** the standard



of the summary judgment rule, R. 4:46-2.” (*Emphasis added*). In response to the Verified Complaint, Scott demanded a trial in accordance with Rule 4:35 and Rule 4:67-5 and demonstrated the existence of a genuine issue of material fact requiring that the Court order the action to proceed as in a plenary action.

Plaintiff’s attempts to compel a sale of the Subject Property through an Order to Show Cause was plainly improper. An Order to Show Cause is an emergent application reserved for matters where the situation at hand could cause serious and irreparable harm to the moving party if the court does not act. See Crowe v. DeGioia, 90 N.J. 126 (1982). That was not the case here. In fact, the Order to Show Cause application was filed by Mr. Paone who is not an owner of the Subject Property. He was appointed by the Court to facilitate the sale. He was not permitted to sell the Subject Property in contravention of the rights of the actual owners of the property as well as the settlement Consent Judgment which was binding upon them.

Moreover, there are only certain actions that may be prosecuted as a summary action. Plaintiff’s action seeking to enforce the terms of the Consent Judgment/contract, is not one of them. According to Rule 4:67-1:

This rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner, other than actions for the recovery of penalties which shall be brought pursuant to R. 4:70; and (b) to all other actions in the Superior Court other than matrimonial actions and actions in which unliquidated monetary damages are sought, provided it appears to the court, on motion made pursuant to R. 1:6-3 and on notice to the

other parties to the action not in default, that it is likely that the matter may be completely disposed of in a summary manner.

Examples of the types of proceedings that may proceed in a summary manner by Rule or Statute, include:

- Actions to expunge a voluntary or involuntary civil commitment. N.J.S.A. 30:4-80.9.
- Actions by insured to compel UIM arbitration after settlement with a tortfeasor. See R. 4:67 et seq.; Rutgers Cas. Ins. Co. v. Vassas, 139 N.J. 163, 174 (1995).
- Actions to discharge a construction lien. N.J.S.A. 2A:44A-30.
- Proceedings to obtain money deposited pursuant to a lien on real estate. N.J.S.A. 2A:56-20.
- Appeals by police officers pursuant to N.J.S.A. 40A:14-150.
- Appeals by investigators in the county prosecutors' offices pursuant to N.J.S.A. 2A:157-10.7.
- Controversies between execution creditors as to application of money realized from the sale of the property of a judgment debtor under executions issued out of different courts. N.J.S.A. 2A:17-6.
- Actions for enforcement of written agreement for alternative resolution. N.J.S.A. 2A:23A-4.
- Actions to challenge an election. N.J.S.A. 19:28-1 et seq.
- Actions for cancellation or discharge of a mortgage lien. N.J.S.A. 46:10B-6.
- Actions to confirm, vacate or modify an outside arbitration award including a fee arbitration award entered pursuant to R. 1:20A et seq.

N.J.S.A. 2A:23A-26. It should be noted that if a suit was pending prior to the matter going to fee arbitration, a summary action should not be filed. Rather, default can be entered pursuant to R. 1:20A-3(e). See R. 1:20A-3(e).

- Actions for civil penalties for violations of the animal cruelty laws. N.J.S.A. 4:22-17.
- Actions to recover wages paid at less than the minimum wage. N.J.S.A. 34:11-56.40.
- Actions by crime victims to recover the proceeds of sale of criminal memorabilia. N.J.S.A. 52:4B-28.
- Actions for a determination of costs and expenses when the court vacates arbitration awards. N.J.S.A. 2A:23A-18.

Notably, actions to enforce a contract – such as the Consent Judgment or settlement agreement – is not listed among the matters that can proceed summarily, nor is a breach of contract action listed. Rather, a breach of contract action, such as this one, should proceed through the ordinary course of discovery. **Plenary hearings are required when there are “contested issues of material fact on the basis of conflicting affidavits.”** (*Emphasis added*). See Conforti v. Guliadis, 128 N.J. 318, 322-23 (1992). Such is the case here.

To the extent Mr. Paone argues that this action falls under the second category of permitted summary actions, which is an action that “appears to the court...that it is likely that the matter may be completely disposed of in a summary manner” Mr. Paone has not met his burden under Rule 4:67-1 which requires a motion on notice

to all parties seeking such relief. Instead, plaintiff filed a Verified Complaint and Order to Show Cause in an attempt to completely circumvent the litigation process and proceed directly to judgment – all without the benefit of any discovery. The Order to Show Cause process, particularly to resolve what is otherwise a standard contract dispute, is not a favored procedure by the New Jersey Courts.

Finally, to the extent Mr. Paone argues that this matter falls under Rule 4:83-1, such Rule does not apply to the issues at hand – i.e., enforcement and/or breach of Consent Judgment as such action does not fall under the purview of the jurisdiction of the Chancery Division, Probate Part, as will be discussed more fully in Point IV below.

Viewing all of the facts and evidential material, it is clear that this dispute should not have been decided by way of an emergent summary action; it should have proceeded in a plenary manner and Scott should have been permitted to assert his counterclaims and conduct discovery. For these reasons, the Court's October 13, 2023 Order entering final judgment by way of Order to Show Cause to sell the Subject Property to Monteiro should be reversed and this matter remanded for a plenary action with consideration of Scott's counterclaims and the opportunity for discovery.

## POINT II

**THE TRIAL COURT FAILED TO CONSIDER AND ENFORCE THE BINDING TERMS OF THE CONSENT JUDGMENT RELATING TO THE MARKETING AND SALE OF THE SUBJECT PROPERTY WHICH THE CO-OWNERS AGREED TO ON APRIL 13, 2022. (Da1, Da4)**

The five sibling co-owners entered into a settlement Consent Judgment on April 13, 2022. (Da395). The Consent Judgment addressed the various probate assets of Martha Clark's Estate, and also contained numerous provisions and specific thresholds related to the sale of the Subject Property. (Da395). This settlement Consent Judgment and all the terms set forth therein are enforceable unless otherwise vacated by the Court. Here, there was no order vacating the Consent Judgment, thus, it is enforceable and binding.

New Jersey Courts have long recognized that “settlement of litigation ranks high in our public policy.” See Nolan v. Lee Ho, 120 N.J. 465 (1990); Columbia Presbyterian Anesthesiology v. Brock, 379 N.J. Super. 11 (App. Div. 2005). “**An agreement to settle a lawsuit is a contract which, like all contracts may be freely entered into and which a court, absent a demonstration of ‘fraud or other compelling circumstances,’ should honor and enforce as it does other contracts.**” (*Emphasis added*). See Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.), cert. denied, 94 N.J. 600 (1983); Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974).

Here, the co-owners of the Subject Property have never claimed that the settlement reached by way of Consent Judgment on April 13, 2022 was unfair, unreasonable, or unenforceable. The Court, therefore, should have been guided by the long standing proposition that public policy strongly favors the settlement of litigation, and it should have enforced the terms of the Consent Judgment. Thus, the Consent Judgment in this case should have been viewed by the Court with a predisposition in favor of its validity and enforceability and should not have been ignored by the Court when deciding the issues presented by Mr. Paone through the Order to Show Cause proceeding.

A “consent judgment has been defined as an agreement of the parties under the sanction of the court as to what the decision shall be.” See Stonehurst at Freehold, Section One, Inc. v. Township Committee of Freehold, 139 N.J. Super. 311 (Law Div. 1976), citing Fidelity Union Trust Co. v. Union Cemetery Ass’n, 136 N.J. Eq. 15, 25-26 (Ch. 1963). “As such, a consent judgment may only be vacated in accordance with R. 4:50-1.” Id., citing Middlesex Concrete, etc. Corp. v. Cartaret, 35 N.J. Super. 226, 235 (App. Div. 1955). Rule 4:50-1 states:

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether

heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Here, there was never any motion to vacate the Consent Judgment nor were there any arguments advanced that any party should be relieved from the Consent Judgment for any reasons enumerated under Rule 4:50-1. Thus, the court should have enforced the terms thereof and not granted Mr. Paone's Order to Show cause to confirm the sale of the Subject Property without the unanimous consent of the five sibling co-owners as required under the terms of the Consent Judgment.

### **POINT III**

**THE TRIAL COURT ERRONEOUSLY DENIED SCOTT CLARK'S REQUEST FOR LEAVE TO FILE COUNTERCLAIMS IN RESPONSE TO MR. PAONE'S VERIFIED COMPLAINT BECAUSE THE ISSUES RAISED IN THE COUNTERCLAIMS DIRECTLY RELATE TO WHETHER THE SALE OF THE SUBJECT PROPERTY TO MONTEIRO WAS VALID AND CONDUCTED IN GOOD FAITH. (Da4)**

Rule 4:67-4 states that “[n]o counterclaim or cross-claim shall be asserted without leave of court.” It is well-settled that the entire controversy doctrine requires that the adjudication of a legal controversy should occur in one litigation, in only one court. See Levchuk v. Jovich, 372 N.J. Super. 149, 154 (Law Div. 2004). “Accordingly, all parties involved in the litigation should, at the very least, present

in that proceeding all of the claims and defenses that are related to the underlying controversy.” Id., citing Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989); Kopin v. Orange Prod., Inc., 297 N.J. Super. 353, 374 (App. Div. 1997). “The confluence of goals created by the concept includes encouraging comprehensive and conclusive determinations, avoidance of fragmentation, and the promotion of party fairness and judicial economy.” Levchuk, 372 N.J. Super. at 154, citing Bonaventure Intl., Inc. v. Spring Lake, 350 N.J. Super. 420, 440 (App. Div. 2002).

Rule 4:30A states that “[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine...” The intent of this rule is to “maintain the requirement that a party must join all relevant claims against an adversary in one action, when those claims are related to and part of the same underlying controversy.” Id. Rule 4:30A remains dependent upon the fundamental requirement of fairness. “Acting in congruence with the inherent requirement of fairness is the principle that **preclusion under the doctrine is a remedy of last resort.**” (*Emphasis added*). Levchuk, *supra*, 372 N.J. Super. at 155.

Here, Scott presented sufficient facts to demonstrate genuine disputes of material fact relating to the marketing and sale of the Subject Property by Mr. Hack and Mr. Paone. The claims raised in the counterclaims directly relate to the claims presented to the Court by Mr. Paone in his application for an Order to Show Cause



and Verified Complaint. The Court's denial of Scott's request to file counterclaims has resulted in a deprivation of his right to fairness and equity. The Court's denial has resulted in preclusion of his viable claims relating to the wrongful sale of his property to Monteiro and that such sale was contrary to the settlement Consent Judgment entered into by the property owners on April 13, 2022. For these reasons, as well as those set forth in detail on Point I above, the Court's Order denying Scott's motion for leave to file counterclaims should be reversed and the matter remanded for further proceedings.

#### **POINT IV**

**THE TRIAL COURT, PROBATE PART, DID NOT HAVE JURISDICTION TO HEAR THE CONTRACT DISPUTE RAISED IN THE ORDER TO SHOW CAUSE AS THE SUBJECT PROPERTY WAS NOT A PROBATE ASSET AND THE ENFORCEMENT OF THE CONSENT JUDGMENT IS A BREACH OF CONTRACT ACTION, NOT A PROBATE ONE. (Da487, 1T22)**

Neither the Surrogate, nor the Chancery Division, Probate Part, has jurisdiction to hear this contractual dispute. New Jersey's probate law recognizes the general authority of the Chancery Division, Probate Part, over "all controversies respecting wills, trusts and estates, and full authority over the accounts of fiduciaries, and also authority over all other matters and things as are submitted to its determination under [Title 3B]." See Garruto v. Cannici, 397 N. J. Super. 231, 241 (App. Div. 2007); see also N.J.S.A. 3B:2-2; N.J.S.A. 3B:2-3 (jurisdiction of Superior Court over surrogate's proceedings). The Chancery Division, Probate Part

specifically designates the manner in which challenges to a will shall be instituted. See N.J.S.A. 3B:2-4 (directing commencement by order to show cause). Under Rule 4:83, the Court has jurisdiction to, among other things, “settle questions that concern or touch on a decedent’s estate.” See In re Estate of Stockdale, 196 N.J. 275, 301 (2008). The issues before the Court on Mr. Paone’s Order to Show Cause, do not touch upon or concern the Estate of Martha Clark nor any property within the Martha Clark Estate nor do the issues concern any challenges to Martha Clark’s will. Rather, the Order to Show cause proceeding dealt exclusively with Mr. Paone’s attempt to circumvent the provisions of a Consent Judgment that, as admitted by Mr. Paone himself, deals with property that was not a part of Martha Clark’s Estate.

Indeed, paragraph 1 of the Verified Complaint notes that “On November 5, 2005, William D. Clark and Martha Clark transferred title to their real property and premises located at 25 Citation Drive, Freehold, New Jersey to their five children.” (Da15). This transfer of property occurred long before the deaths of William and Martha Clark and long before any Estate was created or probated. Following the passing of Martha Clark, litigation ensued related to the probate of her Estate, and eventually the parties entered into a Consent Judgment resolving all remaining issues. In that Consent Judgment, the parties also agreed to include and resolve issues unrelated to the Estate, including the disposition of the Subject Property that was not a part of the Martha Clark Estate in the first place. This separate issue, albeit

included in the Consent Order, does not change the overall jurisdiction of the Probate Part. Rather, as with any other Consent Judgment that settles a pending dispute, it is essentially a contract that is governed by general principles of contract law. See Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.) cert. denied, 94 N.J. 600 (1983). By filing the Order to Show Cause, Mr. Paone sought to enforce the settlement contract between the parties, but in order to do so, the action should not have been filed in the Probate Court. Further, while the Probate Court may assert ancillary jurisdiction over property within the State, the property must still be possessed by the decedent at the time of death, a condition that is not present here. See In re Estate of Byung-Tae Oh, 445 N.J. Super. 402, 406 (App. Div. 2016).

Finally, while Mr. Paone may argue that this matter should be treated as one for partition under N.J.S.A. 2A:56-2, this argument is also without merit. There is no issue here about the ownership interests in the property or how the property should be partitioned. Rather, the only issues here relate to determining the appropriate sale price and whether the proposed sale to Monteiro was in line with fair market value; especially given the actions of Mr. Paone and Mr. Hack during the sales process as outlined in detail in Point I above. This type of determination is not subject to summary proceedings and discovery is absolutely necessary to determine the validity of the price; especially given the difference between the sales price (improperly) accepted by Mr. Paone without the consent of the five sibling co-

owners, as compared to the Comparative Market Analysis and comparable sales all within the same relevant time period. Accordingly, this Court should reverse the Court's October 13, 2023 Orders confirming the sale of the Subject Property and denying Scott's motion for leave to file counterclaims as the matter should not have proceeded summarily nor should it have proceeded in the Chancery Division, Probate Part.

### **CONCLUSION**

Scott has presented sufficient evidence demonstrating the existence of genuine issues of material fact precluding the Trial Court from deciding this matter summarily as there were Certifications and various documents submitted to the Court that demonstrated that the co-owners did not unanimously consent to the sale of the Subject Property to Monteiro for \$500,000, there were issues of fact relating to whether Mr. Paone and/or Mr. Hack denied access to the Subject Property to certain prospective buyers and/or realtors. There were also sufficient facts presented relating to the enforceability of the April 13, 2022 Consent Judgment and whether the sale to Monteiro for \$500,000 violated the terms of that Consent Judgment. These facts support Scott's claims that the sale of the Subject Property was not valid and/or was not conducted in good faith. Thus, the Trial Court erred in deciding this matter summarily and denying Scott's motion for leave to file counterclaims. Scott,

therefore, respectfully requests that the Trial Court's decision be reversed and that this matter be remanded for further proceedings on the merits.

Dated: May 6, 2024

**THE MILUN LAW FIRM, LLC**  
*Attorneys for Defendant-appellant,  
Scott Clark*

By: *s/Susan Ferreira*  
Susan Ferreira

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**IN THE MATTER**  
**OF THE ESTATE,**  
**OF MARTHA C. CLARK**  
Deceased.

: SUPERIOR COURT OF NEW JERSEY  
: APPELLATE DIVISION  
: DOCKET NO. A-000893-23  
:  
: ON APPEAL FROM  
: SUPERIOR COURT OF NEW JERSEY  
: CHANCERY DIVISION, PROBATE PART  
: MONMOUTH COUNTY  
:  
: DOCKET NUMBER P-274-23  
:  
: SAT BELOW  
: HONORABLE DAVID F. BAUMAN, P.J.CH.

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**PLAINTIFF-RESPONDENT'S BRIEF**  
**ON BEHALF JAMES A. PAONE, II, ESQUIRE**

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The Plaintiff-Respondent will rely on and refer to the Judgments, Orders & Rulings attached to Defendant-Appellant’s brief.

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The Plaintiff-Respondent will rely on and refer to the Appendices attached to Defendant-Appellant's brief.

**PRELIMINARY STATEMENT**

Defendant-Appellant Scott M. Clark appeals from two Orders of the Honorable David F. Bauman, P.J.Ch. dated October 13, 2023 that granted judgment confirming the sale of the real property and premises located at 25 Citation Drive, Freehold, New Jersey 07728 and that denied Defendant-Appellant's Motion Seeking Permission to file Counterclaims against Plaintiff-Respondent, James A. Paone, II, Esquire. Plaintiff-Respondent respectfully requests that both of the Trial Court's Orders be affirmed.

## PROCEDURAL HISTORY

On November 5, 2005, William D. Clark and Martha Clark transferred title to their real property and premises located at 25 Citation Drive, Freehold, New Jersey (hereinafter referred to as the “Property”) to their five children, Scott M. Clark, Mark P. Clark, Colleen Ercole, Patrice Stenftennael, and Brian Clark (hereinafter referred to as the “Owners”), subject to the reservation of life estates. (Da25). Following the passing of William D. Clark and Martha Clark, litigation ensued with regard to the Estate of Martha Clark, and on April 13, 2022, the Honorable Joseph P. Quinn, P.J.Ch. and the Owners executed a Consent Judgment that resolved the estate matter and for the Property to be sold. (Da395). When the Owners could not agree to list the Property for sale, the Owners engaged in further litigation and, on January 12, 2023, the Honorable Joseph P. Quinn, P.J.Ch. executed an Order that appointed the Plaintiff-Respondent to sell the Property. (Da30). The Order did not provide Plaintiff-Respondent with any access to funds to pay any of the expenses of the Property. (Da30).

The Order dated January 12, 2023 did not require the Plaintiff-Respondent to obtain unanimous consent from the Owners, but it directed the Owners to cooperate in the sale of the Property. (Da33). On January 18, 2023, Plaintiff-Respondent notified the Owners that he had chosen Alan Hack of NJ Realty Pros to list the Property for sale and requested that they allow him access to the Property so that he could

recommend a listing price. (Da35). On January 27, 2023, Plaintiff-Respondent signed a listing agreement with NJ Realty Pros to sell the Property for an initial price of \$537,900.00 and a total realtors' commission of five (5.0%) percent. (Da37).

The Property was shown 15 times to prospective purchasers between January 26, 2023 and February 26, 2023. (Da43). The Plaintiff-Respondent did not receive any offers until March 7, 2023, when the Plaintiff-Respondent received a cash offer from Ms. Salome Monteiro to purchase the Property for Four Hundred Eighty Thousand (\$480,000.00) Dollars. (Da50). The Plaintiff-Respondent did not accept Ms. Montiero's initial offer, and on March 11, 2023, the Plaintiff-Respondent received an offer from Kenya and Zoran Penca to purchase the Property for Five Hundred Fifteen Thousand (\$515,000.00) Dollars, but that was subject to a mortgage contingency. (Da66). Although the Plaintiff-Respondent initially accepted the offer from Mr. and Mrs. Penca, they withdrew the offer on March 14, 2023. (Da80). On or about March 15, 2023, Ms. Monteiro (hereinafter referred to as the "Buyer") increased her cash offer to purchase the Property for Five Hundred Thousand (\$500,000.00) Dollars. (Da82). Plaintiff-Respondent accepted Ms. Montiero's offer and the attorney-review period was completed on April 14, 2023. (Da115).

Ms. Montiero performed inspections at the Property and forwarded Plaintiff-Respondent a letter on May 1, 2023 that itemized her list of concerns. (Da121). Pursuant to the terms of the Contract, Plaintiff-Respondent's realtor obtained estimates

for contractors to install the proper Smoke and Carbon Monoxide detectors at the property and to convert the Property back to a garage and to have his bill paid from the sale proceeds. (Da118). The Buyer conducted an inspection of the property and requested repairs, or a credit in lieu of repairs, for the deficiencies listed in the inspection report. (Da121). Despite the Buyer's requests, she agreed to accept the Property in "As Is" condition, subject to the agreement to convert the Property back to a garage and the Seller obtaining the proper Smoke and Carbon Monoxide certifications from the Township of Freehold prior to closing. (Da186).

On May 4, 2023, James M. Nardelli, Esquire notified the Plaintiff-Respondent that he was no longer representing Defendant-Appellant with regard to any issues involving the sale of 25 Citation Drive. (Da170). On May 11, 2023, the Plaintiff-Respondent's attorney notified the Owners that the Buyer made inspection requests and forwarded copies of the reports to the Owners. (Da172). On May 11, 2023, Michael T. Warshaw, Esquire notified the Plaintiff-Respondent that he was not representing Defendant-Appellant or Colleen Ercole with regard to any issues involving the sale of 25 Citation Drive. (Da175). On May 12, 2023, Defendant-Appellant sent three emails to the other Owners and attorneys and ordered them to cease and desist and referenced "Litigation pending regarding 25 citation malfeasance identified (sic)." (Da179-181).

On May 23, 2023, the Plaintiff-Respondent's counsel sent the Owners correspondence via email and provided them with copies of the Buyer's title commitment for the Property. (Da186). The May 23, 2023 letter from Plaintiff-Respondent's counsel notified the Owners that he or she would be required to sign closing documents, including but not limited to a deed of conveyance, in order for the Plaintiff-Respondent to convey clear title to the Property to the Buyer. (Da187). Since some of the owners failed to confirm that they would execute the necessary documents to convey title to the Buyer, the Plaintiff-Respondent filed a Verified Complaint and Order to Show Cause that sought to obtain a judgment approving the sale of the Property to Salome Monteiro for the sale price of Five Hundred Thousand (\$500,000.00) Dollars and authorizing him to sign any necessary closing documents on behalf of any Owner that would be necessary to convey clear and marketable title to the Property to the Buyer. (Da15). On August 29, 2023, Respondent Mark P. Clark filed an Answer to the Complaint. (Da523). On September 13, 2023, Defendant-Appellant filed an Answer to the Plaintiff-Respondent's Verified Complaint. (Da462). On September 13, 2023, Defendant-Appellant filed a Notice of Motion Seeking Permission to File a Counterclaim (Da481).

Oral argument was conducted in person on October 13, 2013, at which time the Honorable David F. Bauman, P.J.Ch. entered a judgment confirming the private sale of lands (Da1) and an order that denied the Defendant-Appellant's Notice of Motion

Seeking Permission to File a Counterclaim. (Da4). Thereafter, Defendant-Appellant filed this appeal.

### **COUNTER STATEMENT OF FACTS**

Plaintiff-Respondent James A. Paone, II, Esquire was appointed for the sole purpose of selling the real property and premises located at 25 Citation Drive, Freehold, New Jersey, 07728 pursuant to an Order of the Honorable Joseph P. Quinn, P.J.Ch. dated January 13, 2023. (Da30). The Order did not require Mr. Paone to obtain unanimous consent of all co-owners and did not require Mr. Paone to sell the property for a specific price. (Da31). The Order required all co-owners to cooperate with Mr. Paone's efforts to sell the property. (Da33). The Order, however, did not authorize Mr. Paone to sign closing documents on behalf of any co-owners that refused to cooperate with him or that refused to sign the necessary closing documents to convey clear title to the buyer of the property. (Da33).

On January 27, 2023, Plaintiff-Respondent signed a listing agreement with NJ Realty Pros to sell the Property for an initial price of \$537,900.00 and a total realtors' commission of five (5.0%) percent. (Da37). The Property was shown 15 times to prospective purchasers between January 26, 2023 and February 26, 2023. (Da43). The Plaintiff-Respondent did not receive any offers until March 7, 2023, when the Plaintiff-Respondent received a cash offer from Ms. Salome Monteiro to purchase the Property for Four Hundred Eighty Thousand (\$480,000.00) Dollars. (Da50). The Plaintiff-

Respondent did not accept Ms. Montiero's initial offer, and on March 11, 2023, the Plaintiff-Respondent received an offer from Kenya and Zoran Penca to purchase the Property for Five Hundred Fifteen Thousand (\$515,000.00) Dollars, but offer that was subject to a mortgage contingency. (Da66). Although the Plaintiff-Respondent initially accepted the offer from Mr. and Mrs. Penca, Mr. and Mrs. Penca withdrew the offer on March 14, 2023. (Da80). On or about March 15, 2023, Ms. Monteiro (hereinafter referred to as the "Buyer") increased her cash offer to purchase the Property for Five Hundred Thousand (\$500,000.00) Dollars. (Da82). Plaintiff-Respondent accepted Ms. Montiero's offer and the attorney-review period was completed on April 14, 2023. (Da115). When some of the owners failed to confirm that they would execute the necessary documents to convey title to the Buyer, the Plaintiff-Respondent filed a Verified Complaint and Order to Show Cause that sought to obtain a judgment approving the sale of the Property to Salome Monteiro for the sale price of Five Hundred Thousand (\$500,000.00) Dollars and authorizing him to sign any necessary closing documents on behalf of any Owner that would be necessary to convey clear and marketable title to the Property to the Buyer. (Da15).

Oral argument was conducted in person on October 13, 2013, at which time the Honorable David F. Bauman, P.J.Ch. entered a judgment confirming the private sale of lands (Da1) and an order that denied the Defendant-Appellant's Notice of Motion Seeking Permission to File a Counterclaim. (Da4).



### **STANDARD OF REVIEW**

The present matter involves issues of law and the Appellate Division must review the matter de novo. N.J. Realty Concepts, LLC v. Mavroudis, 435 N.J. Super. 118, 123 (App. Div. 2014). “A trial court’s interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019), quoting Manalapan Realty, L.P. v. Tp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

## LEGAL ARGUMENT

### I. THE TRIAL COURT CORRECTLY GRANTED THE RELIEF SOUGHT BY THE PLAINTIFF-RESPONDENT.

The Trial Court properly decided the underlying case in summary manner. Defendant-Appellant incorrectly argues that the Trial Court considered a summary judgment motion, and not a summary hearing that was conducted pursuant to R. 4:67-5. “The Superior Court, in any proceeding by or against fiduciaries or other persons, may proceed in a summary manner.” N.J.S.A. 3B:2-4. New Jersey Court Rules 4:67-5 and 4:83-1 promote dismissal of claims in a summary manner when the “affidavits show palpably that there is no genuine issue as to any material fact,” in which case “the court may try the action on the pleadings and affidavits, and render final judgment thereon.” “If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment.” New Jersey Court Rule 4:67-5. “Rule 4:67–1 is designed ‘to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving the defendant an opportunity to be heard at the time plaintiff makes his application on the question of whether or not summary disposition is appropriate’.” Grabowski v. Twp. of Montclair, 221 N.J. 536, 549 (2015). “In such summary actions, ‘findings of fact must be made, and a party is not entitled to favorable inferences such as are afforded to the Defendant on a summary judgment motion for purposes of

defeating the motion'." Ibid. (citing O'Connell v. New Jersey Mfrs. Ins. Co., 306 N.J. Super. 166, 172 (App. Div.1997), appeal dismissed, 157 N.J. 537 (1998). General and vague allegations made by a party that are not substantiated by competent evidentiary support do not require submission of the matter to a trier of fact.

Plaintiff-Respondent was appointed by the Honorable Joseph P. Quinn, P.J.Ch. for the sole purpose of selling the Property and he negotiated a contract for sale pursuant to the authority granted to him by the terms of the Order dated January 13, 2023. When the Owners of the property failed to cooperate with the Plaintiff-Respondent and he could not sign the necessary closing documents to convey clear title to the Property to the Buyer, he filed a Verified Complaint and to Order Show Cause to enable him to sell the property and fulfil his duties. Plaintiff-Respondent respectfully submits that Defendant-Appellant's Answer and opposition failed to raise any genuine issues of material fact that required the Trial Court to conduct a plenary hearing before rendering a judgment in his favor.

The present matter involves an Order dated January 13, 2023 that directed an independent individual to sell real estate. The prior Trial Judge entered the Order dated January 13, 2023 and considered it to be an order for partition of the property pursuant to N.J.S.A. 2A:56-2. (Da573, 12:4-22). "The superior court may, in an action for the partition of real estate, direct the sale thereof if it appears that a partition thereof cannot be made without great prejudice to the owners, or persons interested therein." Ibid.

The court must administer relief in a partition action in accordance with “notions of general justice and equity between the parties.” Newman v. Chase, 70 N.J. 254, 263 (1976). “When a sale of real estate is ordered by the superior court in any action, wherein the order or judgment under which such sale is ordered, is founded upon a cause of action of an equitable nature, except mortgage foreclosure sales, the officer or person authorized or directed to make the sale may, in his discretion, make the same at public or private sale and on such terms as he may deem to be most advantageous to the parties concerned therein.” N.J.S.A. 2A:61-3. “A private sale shall not be valid until it is confirmed by the court upon a report of the terms thereof by the officer or person making the sale.” Ibid. The Trial Court had authority to order the sale of lands and properly granted the relief sought by the Plaintiff-Appellant.

Defendant-Appellant failed to provide the Court with anything but vague allegations during the hearing October 13, 2023 in opposition to the Order to Show Cause. Defendant-Appellant failed to provide certifications from any witnesses, but he made unsupported allegations that he was “informed” by unnamed individuals that the listing realtor allegedly refused to show the property to unnamed “prospective buyers and/or realtors”, that unnamed interested realtors and buyers from Washington, D.C., California and/or Colorado were allegedly denied access to the property, and that the Plaintiff-Respondent was guilty of “stonewalling several other realtors and potential purchasers.” (Da390-391). Defendant-Appellant did not submit any

certification from the unnamed individuals that purportedly provided this information to him, and the Trial Court properly disregarded all of Defendant-Appellant's contentions as impermissible hearsay. After considering the Defendant's position and his counsel's arguments at the hearing on October 13, 2023, the Trial Court concluded could be resolved summarily. The decision should be affirmed because the Defendant-Appellant failed to provide evidence to support his position and relied on general allegations and hearsay.

**II. THE TRIAL COURT PROPERLY CONSIDERED THE PROVISIONS OF THE APRIL 23, 2022 ORDER.**

Defendant-Appellant incorrectly contends that the Trial Court disregarded the terms of the Owner's Consent Order dated April 23, 2022. During oral argument on October 13, 2023, the Trial Court specifically addressed the terms of the Consent Order dated April 23, 2023 and considered Defendant-Appellant's. The Trial Court correctly determined that "the Clark siblings couldn't agree" and the decisions regarding the sale of the property "were to be left to Mr. Paone's best judgment." Tr. 32:1-21. The January 13, 2023 Order was entered to allow for the Property to be sold and inherently did not require Mr. Paone to obtain unanimous consent from the Owners to sell the Property. It is respectfully requested the Appellate Division consider this argument to be of no moment.

**III. THE TRIAL COURT PROPERLY DENIED DEFENDANT-APPELLANT'S MOTION TO ASSERT A COUNTERCLAIM AGAINST MR. PAONE.**

The motion judge correctly denied the motion because of the absence of any fiduciary duty relationship between Mr. Paone and any of the owners of the Property. Defendant-Appellant's counterclaim was based on an allegation that Plaintiff-Respondent breached a fiduciary duty to the owners of the Property. Defendant-Appellant's motion was opposed by the Plaintiff-Respondent, who argued that he was not a "fiduciary." "The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." F.G. v. MacDonnell, 150 N.J. 550, 563 (1997). "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. Id. at 563. "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Id. at 564. Plaintiff-Respondent was appointed by the Trial Court for the sole purpose of selling the Property and the Trial Judge specifically found that there was no basis to impose a fiduciary duty between him and any of the Owners. Tr. 34:6-17. Therefore, the Appellate Division should affirm the Trial Court's determination that Plaintiff-Respondent did not have a fiduciary obligation and to deny the Defendant-Appellant's motion for leave to file a counterclaim.




**IV. THE TRIAL COURT HAD JURISDICTION TO ORDER THE SALE OF THE SUBJECT PROPERTY.**

The Defendant-Appellant waived issue of jurisdiction when the Owners voluntarily consented to the jurisdiction of the Monmouth County Probate Court to address the sale of the Property. When a party generally appears at hearings and fully participates in hearings on their merits, the Appellate Division may properly find that the party waived its right to object to the Court's jurisdiction, especially in cases when the party voluntarily submitted itself to the jurisdiction of the Court. Hill v. Warner, Berman & Spitz, P.A., 197 NJ. Super. 152, 167 (App. Div. 152). Prior to the entry of the January 13, 2023 order that appointed Plaintiff-Respondent to sell the Property, the Defendant-Appellant never objected to the jurisdiction of the Probate Court. The Defendant-Appellant filed motions to amend the Consent Order dated April 22, 2023 and participated in all of the prior hearings that were conducted by the Probate Court with regard to the sale of the Property. (Da559, Da562, Da564). When the Court appointed the Plaintiff-Respondent as the individual to sell the Property on January 13, 2023, Defendant-Appellant failed to object to the Court's jurisdiction, failed to file a motion for reconsideration, and failed to file an interlocutory appeal based on lack of jurisdiction. Tr. 33:4-18. The Trial Court's determination that it had jurisdiction to order the sale of the Property should be affirmed.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the relief sought in the Plaintiff-Respondent's Verified Complaint was properly granted, and an affirmance is well-merited by the circumstances of the matter under consideration herein.

Respectfully submitted,  
Davison Eastman Muñoz Paone, P.A.

By:     
\_\_\_\_\_  
Christopher D. Olszak, Esquire

Dated: June 5, 2024



In the Matter of the Estate of  
MARTHA C. CLARK, Deceased,

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-000893-23T2

CIVIL ACTION

ON APPEAL FROM THE FINAL  
ORDER OF THE SUPERIOR COURT  
OF NEW JERSEY, CHANCERY  
DIVISION, PROBATE PART:  
MONMOUTH COUNTY  
DOCKET NO.: MON-P-274-23

Sat Below: Hon. David F. Bauman,  
P.J.S.C.

Submitted: July 15, 2024

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**REPLY BRIEF OF DEFENDANT-APPELLANT,  
SCOTT M. CLARK**

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**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Defendant-Appellant, Scott M. Clark (“Scott”), incorporates by reference the Statement of Facts and Procedural History contained in his initial brief in support of his appeal.

**LEGAL ARGUMENT**

**POINT I**

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE FORCED SALE OF THE SUBJECT PROPERTY BECAUSE IT WAS CONTRARY TO THE APRIL 13, 2022 CONSENT JUDGMENT. (Da1)**

Plaintiff-Respondent argues that “Defendant-Appellant’s Answer and opposition failed to raise any issues of material fact that required the Trial Court to conduct a plenary hearing before rendering a judgment in his favor.” (Pb10). Scott respectfully disagrees. Contrary to plaintiff’s arguments, the factual record in this case, when viewed in the light most favorable to Scott (the non-moving party below) demonstrates that genuine disputes of material fact exist regarding the circumstances relating to the manner in which Mr. Paone and realtor Alan Hack listed, marketed and sold the Subject Property. As outlined in more detail in Scott’s initial brief and herein, the disputed factual evidence includes, but is not limited to the following:

- During the course of the underlying Probate matter, the five siblings entered into a Consent Judgment, dated April 13, 2022. (Da395);
- The Consent Judgment was signed and agreed to by all parties (and counsel) and was countersigned by the Honorable Joseph P. Quinn, P.J.Ch. (Da395);

- The Consent Judgment addressed the various probate assets of Martha Clark’s Estate, and also contained numerous provisions and specific thresholds related to the sale of the Subject Property (Da395);
- The Consent Judgment expressly states that “All decisions related to the marketing and sale of the property, including but not limited to raising or lowering the list price...accepting proposed Contracts...and all other decisions of any nature whatsoever, must be unanimous.” (Da395);
- The Consent Judgment also expressly states that “All co-owners must accept and approve any contract which contains a purchase price which is equal to or greater than 95% of the list price.” (Da395).
- On January 12, 2023, the Court appointed James A. Paone, Esquire to serve as the contact intermediary between the five sibling co-owners and granted Mr. Paone authority to appoint a realtor. (Da30).
- The January 12, 2023 Order did not supersede, alter, amend or in any way vacate any provisions of the Consent Judgment Order relating to the sale of the Subject Property. (Da30, Da395);
- During the sales and minuscule marketing of the home, Scott made numerous complaints in writing through counsel about the process, all in accordance with the Consent Judgment and the January 12, 2023 Order. (Da179, Da348, Da350, Da356, Da363, Da413, Da416);
- The facts establish that the January 12, 2023 Order was not the only order in effect as it only addressed paragraph 17 of the April 13, 2022 settlement Consent Judgment entered into between the co-owners of the Subject Property. (Da395);

- The factual record also established that the \$500,000 offer was not unanimously agreed to by the parties which would preclude the sale from proceeding under the express terms of the Consent Judgment. (Da179, Da348, Da350, Da356, Da363, Da413, Da416);
- There were numerous submissions by the parties that contained factual evidence supporting the argument that there were factual disputes and objections relating to the sale of the Subject Property to Monteiro for \$500,000. (Da179, Da348, Da350, Da356, Da363, Da413, Da416);
- This included communications and certain objections from other sibling owners as well. (Da432, Da435, Da437, Da494, Da545);
- The factual record also contained information relating to Scott’s complaint to the New Jersey Department of Banking and Insurance – Real Estate Commission regarding Mr. Hack and the objections and disputes relating to Mr. Hack’s questionable actions relating to the marketing and sale of the Subject Property. (Da363).

These genuine disputes of fact precluded the Trial Court from deciding the matter summarily without the opportunity for counterclaims and discovery. See Conforti v. Guliadis, 128 N.J. 318, 322-23 (1992)(holding that plenary hearings are required when there are “contested issues of material fact on the basis of conflicting affidavits.”).

Here, viewing all of the facts and evidential material in the light most favorable to Scott as required under the Court Rules, it is clear that this matter should not have been decided summarily without consideration of Scott’s counterclaims and the opportunity for discovery.

**POINT II**

**THE TRIAL COURT FAILED TO CONSIDER AND ENFORCE THE BINDING TERMS OF THE CONSENT JUDGMENT WHICH THE CO-OWNERS AGREED TO ON APRIL 13, 2022. (Da1, Da4)**

Plaintiff argues that the Trial Court addressed the terms of the Consent Judgment because it “determined that ‘the Clark siblings couldn’t agree’ and the decisions regarding the sale of the property ‘were to be left to Mr. Paone’s best judgment.’” (Pb12). However, Plaintiff ignores the fact that the settlement Consent Judgment and all the terms set forth therein are enforceable unless otherwise vacated by the Court and there was no Order vacating the Consent Judgment, thus, it is enforceable and binding. Plaintiff also ignores the fact that the January 12, 2023 Order dealt only with Paragraph 17 of the Consent Judgment and nothing else. (Da30). This is confirmed by the language of the January 12, 2023 Order which expressly states:

THIS MATTER **having been resolved by amicable settlement**, which settlement is **embodied in a Consent Judgment entered by the Court on April 13, 2022**; and

**Paragraph 17 of the Consent Judgment having provided that the co-owners of the real estate...shall execute a listing for the sale of that property and if those co-owners fail to agree on the identity of a realtor for the marketing and sale of the Property, a realtor shall be selected by the court**; and

**The co-owners having failed to agree on the selection of a real estate professional for the marketing and sale of the Property;** and

...

The Court having held a case management conference on the record on October 13, 2022;

...it is on this 12 day of Jan, 2023 hereby ORDERED as follows.

...

1. **The Court appoints James Paone, Esq. of Davison, Eastman and Paone, Freehold, NJ to sell the property at 25 Citation Drive Freehold.**
2. **This person shall have the authority to appoint a realtor to sell the property.**
3. **All of the parties are to cooperate with the sale of the property.**
4. **The parties may communicate any questions/concerns about the sale to the Attorney...(Da30).**

This Order did not supersede, alter, amend or in any way vacate any provisions of the Consent Judgment relating to the sale of the Subject Property. Thus, paragraphs 18, 19, 20 and 21 which relate to the sale of the Subject Property are still binding on all parties to the Consent Judgment, including the requirement for unanimous consent on all major decisions relating to the Subject Property. (Da395). One of the major decisions being the sales price.

Since there was never any motion to vacate the Consent Judgment nor were there any arguments advanced that any party should be relieved from the Consent



Judgment for any reasons enumerated under Rule 4:50-1, the Trial Court should have enforced the terms thereof and should not have granted Mr. Paone's Order to Show Cause to confirm the sale of the Subject Property without the unanimous consent of the five sibling co-owners as required under the terms of the Consent Judgment.

**POINT III**

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING SCOTT'S REQUEST FOR LEAVE TO FILE COUNTERCLAIMS BECAUSE THE ISSUES RAISED IN THE COUNTERCLAIMS DIRECTLY RELATE TO WHETHER THE SALE OF THE SUBJECT PROPERTY TO MONTEIRO WAS VALID AND CONDUCTED IN GOOD FAITH. (Da4)**

Plaintiff argues that the "motion judge correctly denied the motion because of the absence of any fiduciary duty relationship between Mr. Paone and any of the owners of the Property." (Pb13). Scott respectfully disagrees. Contrary to plaintiff's argument, Scott's counterclaims do not relate solely to allegations of breach of fiduciary duty. Instead, Scott's counterclaims directly relate to disputes arising from the marketing and sale of the Subject Property by Mr. Hack and Mr. Paone. Specifically, the claims raised in the counterclaims directly relate to the claims presented to the Court by Mr. Paone in his application for an Order to Show Cause and Verified Complaint.

The Court's denial of Scott's request to file counterclaims has resulted in a deprivation of his right to fairness and equity. The Court's denial has resulted in preclusion of his viable claims relating to the wrongful sale of his property to

Monteiro and that such sale was contrary to the settlement Consent Judgment entered into by the property owners on April 13, 2022. For these reasons, as well as those set forth in detail in Scott's initial appellate brief, the Court's Order denying Scott's motion for leave to file counterclaims should be reversed and the matter remanded for further proceedings.

### **CONCLUSION**

Scott has presented sufficient evidence demonstrating the existence of genuine issues of material fact precluding the Trial Court from deciding this matter summarily as there were Certifications and various documents submitted to the Court that demonstrated that the co-owners did not unanimously consent to the sale of the Subject Property to Monteiro for \$500,000, there were issues of fact relating to whether Mr. Paone and/or Mr. Hack denied access to the Subject Property to certain prospective buyers and/or realtors. There were also sufficient facts presented relating to the enforceability of the April 13, 2022 Consent Judgment and whether the sale to Monteiro for \$500,000 violated the terms of that Consent Judgment. These facts support Scott's claims that the sale of the Subject Property was not valid and/or was not conducted in good faith. Thus, the Trial Court erred in deciding this matter summarily and denying Scott's motion for leave to file counterclaims. Scott, therefore, respectfully requests that the Trial Court's decision be reversed and that this matter be remanded for further proceedings on the merits.

Dated: July 15, 2024

**THE MILUN LAW FIRM, LLC**  
*Attorneys for Defendant-appellant,  
Scott Clark*

By: *s/Susan Ferreira*  
Susan Ferreira