SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MORRIS BELLIFEMINE, MD, PA, *Plaintiff-Appellant,* vs. MEADOWLANDS HOSPITAL MEDICAL CENTER, MHA, LLC F/D/B/A MEADOWLANDS HOSPITAL MEDICAL CENTER, LYNN MCVEY, TAMARA DUNAEV JOHN DOE, JANE ROE, ABC CORP, DEF LLC, being fictitious parties whose identities are currently unknown, both jointly and severally *Defendants,*	**DOCKET NO.: A-002670-22-T2** *CIVIL ACTION* *ON APPEAL FROM:* SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY DOCKET NO.: HUD L 004332-20 SAT BELOW: HON. ANTHONY V. D'ELIA, J.S.C. HON. JOSEPH A. TURULA, P.J.Cv

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STATEMENT OF PROCEDURAL HISTORY

On November 24, 2020, Dr Morris Bellifemine, PA (hereinafter "Dr. Bellifemine") filed a Complaint and Jury Demand seeking damages against defendants MHA, LLC F/D/S/A Meadowlands Medical Center Lynn McVey, Tamara Dunaev and fictitious entities designated as John Doe, Jane Roe, ABC Corp. (Volume 1 Pa 1-6). The Complaint and Jury Demand arose from Dr. Bellifemine's claim for unpaid services provided to Meadowlands Medical Center and included counts for breach of contract, unjust enrichment, breach of a covenant of good faith and fair dealing and conversion. (Volume 1, Pa. 1-6). Dr. Bellifemine filed a First Amended Complaint adding Hudson Regional Hospital as a defendant, a Second Amended Complaint removing Hudson Regional Hospital as a defendant and a Third Amended Complaint correcting the jury demand in the Complaint. (Volume 1, Pa. 12-17; Volume 1 1,Pa.19-25). Dr. Bellifemine filed a Stipulation of Dismissal without Prejudice as to defendant Hudson Regional Hospital. (Volume 1, Pa. 127).

On April 26, 2022, Defendants MHA, LLC., Tamara Dunaev and Lynn McVey filed answers to Dr. Bellifemine' Complaint and Jury Demand. (Volume I, Pa. 26-34). On July 3, 2022, defendants moved to quash a deposition subpoena on defendant's employee Diana Zhellandkovah. (Volume 1, Pa. 37-103; Volume 1, Pa 115-120). On July 3, 2022 Dr. Bellifemine moved to extend discovery, secure compliance with a deposition subpoena served on defendants' employee, compel the

deposition of defendant Tamara Dunaev and amend the complaint to reinstate the claim against defendant NJMHNC improperly pleaded as North Hudson Hospital. (Volume 1, Pa. 104-114). On July 28, 2022, defendants cross moved to bar evidence obtained subsequent to the discovery end date of May 26, 2022. (Volume 1, Pa. 115-133). On August 5, 2022, the Honorable Joseph A. Turula, PJ.Cv. denied Dr. Bellifemine's motion to extend discovery and amend the complaint and granted defendants' motion to bar introduction of evidence beyond the discovery end date. (Volume I, Pa. 133-134. On August 5, 2022, the Honorable Anthony Delia granted defendants motion to quash the deposition subpoena served On Diana Zhellandkovah. (Volume I, Pa. 135; IT1). [1]

On December 29, 2022 defendants filed a motion for summary judgment. Volume I Pa. 136 to Volume 3 Pa. 375; IT2). The Honorable Anthony D'Elia granted the motion on February 28, 2023. (Volume 4, Pa. 577),On March 29, 2023,Dr. Bellifemine filed a motion to reconsider the summary judgment granted to defendants. (Volume 4, Pa 578 to 650.

The Honorable Anthony D'Elia denied Dr. Bellifemine's motion to reconsider the summary judgment granted to defendants on April 14, 2023 (Volume IV Pa. 541;IT3). On May 28, 2023, Dr. Bellifemine filed a notice of appeal of the granting

Footnote 1. IT1 refers to the transcript of defendants motion to quash a subpoena heard on August 5, 2022; IT2 refers to the transcript of defendants motion for summary judgment heard on February 28, 2023. IT3 refers to the transcript of plaintiff's motion for summary judgment heard on April 14,2023.

of summary judgment to defendants, the denial of the motion for reconsideration, the and the interlocutory orders quashing the deposition subpoena on Diana Zhellandkovah and denying the motion to amend the complaint and extend discovery Volume IV Pa.642-646).

STATEMENT OF FACTS

Dr. Morris Bellifemine is a licensed physician who has been practicing pulmonary medicine, sleep medicine and internal medicine as a shareholder in a private practice known as Hudson Physician Associates for approximately thirty years (Volume 1, Pa 66-67; See Bellifemine Deposition hereinafter "Bellifemine Dep" attached as Exhibit E to the Certification of Benjamin Parisi, Esq. In Support of a Motion to quash a deposition of Diana served on Zhellandkovah, TR8-3 to 9-4; TR10-10 to 13). Dr. Bellifemine began working at nights in the Emergency Room at Meadowlands Hospital at the time he started his private practice. (Volume 1 Pa. 67; Bellifemine Dep. TR. 9-14 to 19). Dr. Bellifemine was on the staff at Meadowlands Hospital when Defendant MHA LLC purchased the hospital in 2011 and has remained on the staff until the present after MHA, LLC sold the hospital of to new ownership which changed the name of the facility to Hudson Regional Hospital. (Volume 1, Pa. 67; Bellifemine Dep. TR 10-1 to 5; Volume 3, Pa 393; See Certification of Dr. Morris Bellifemine in opposition to defendants motion for Summary Judgment, hereinafter "Bellifemine Certification 1."Paragraph 1). Prior to

MHA, LLC's ownership of Meadowlands, Dr. Bellifemine had the tile of Vice President and Secretary and practiced pulmonary care and critical care medicine. (Volume 1, Pa. 71; Bellifemine Dep.,TR 25-14 to 22)

Defendant MHA has followed a habit of breaching its contracts. When MHA purchased Meadowlands Hospital from Liberty Healthcare, it relied on loans from Liberty for 5 million dollars in loans on which MHA defaulted which resulted in a judgment against MHA for nearly 3 million dollars. (Volume III Pa. 416-432; See Article titled Meadowlands Hospitals Tangled Web of Questionable Billing Practices, Healthcare, August 11, 2016, page 7, paragraph 5, hereinafter "Health Care Article" Volume III Pa. 417; A copy of the article is attached to the Bardis Certification as Exhibit B). MHA had amassed $200,000 in fines by the State of New Jersey for late or missed financial filings and accumulated 4.5 million dollars in federal tax liens. Health Care article attached to the Bardis Certification as Exhibit B, page 1, paragraph 6 (Volume III Pa. 416-432).

In a 145 page opinion issued by Administrative Law Judge Stephen Davis on September 20, 2016, the court violated its labor contract with the Health Professional Union, AFT, AFL-CIO by threatening employees with the closure of Meadowlands Hospital's Rehabilitation Unit if its employees engaged in union activities, laying off employees without giving the Union the opportunity to bargain over the effects of the layoff, assigning the Service Unit to non union employees without giving the

Union the opportunity to bargain with MHA, LLC regarding MHA LLC's conduct, failing to provide the Union with a DNV inspection report, failing to continue the 12 hour shifts for the RN and Technical Contracts required by the labor agreement, failing to continue the terms and condition of the Union contract by refusing to apply the Union contract to Registered Nurse interns, failing to make financial contributions to the RN Service Contracts employee 401(K) plans, failing to permit Union representatives to meet with employees in the hospital's cafeteria, failing to provide the RN and Technical Service Contract Units with bumping and recall rights to laid off employees, failing to continue to apply the terms and conditions of the RN Technical and Service Units by refusing to apply the Service Contracts to Hospital Assistants and failing to apply the terms of the Union Contract to Nursing Assistant Interns. (Volume III Pa.571 -572; Opinion of Administrative Law Judge Davis, Page 138 Line 15 to Page 139, Line 20; Judge Davis' complete opinion is attached to the certification of Constantine Bardis as Exhibit C and part of the record below. Volume III Pa. 433-576).

Dr. Bellifemine entered into four written contracts with MHA LLC. (Volume I Pa. 150 to 183; the contracts between Dr. Bellifemine and MHA LLC are attached as Exhibit E to the certification of Benjamin Parisi in support of defendant's motion for summary judgement). A contract appointing Dr. Bellifemine as Co-Medical Director of Meadowlands Hospital dated December 16, 2010. (Volume I Pa.150-

159). The contract naming Dr. Bellifemine as Medical Director of the Meadowlands Sleep Center at a salary of $19,500.00 per year is dated June, 2011 and the only date on the contract is 12/12/12 after the signature of Lynn McVey the Acting President/CEO of MHA, LLC. (Volume I Pa. 160-164). A contract dated December 11, 2012 named Dr. Bellifemine President of Medical Staff/Co-Director of ICU. (Volume I Pa. 166-177). The contract naming Dr. Bellifemine President of the Medical Staff and Co-Director of ICU provided for a salary of $25,000.00 for services rendered as President of the Medical Staff and $33,600.00 for services rendered as Co-President of the ICU. (Volume I Pa. 176). Contract dated September 1, 2014 appointed Dr. Bellifemine Chief Medical Officer of Meadowlands Hospital Medical Center and provided for compensation of $75,000.00 per annum.(Vol. 1 Pa. 178-184).

Dr. Bellifemine's job as Co-Director of the ICU required him to be on call 24 hours per day, 7 days a week to admit patients who appeared at the Meadowlands Hospital Emergency Room to the Meadowlands Hospital. (Pa. 74;Bellifemine Dep., Tr 37-5 to 20).Dr. Bellifemine's duties as Director of the Sleep Center required him to interview patients prior to their sleep study, interpret the sleep studies after the sleep studies were completed, and make a recommendations for the patient's treatment. Volume 1Pa. 68; Bellifemine Dep. TR 16-5 to 20). Dr Bellifemine's duties as President of the Medical Staff required him to attend hospital meetings,

recruit physicians to work at the hospital, review complaints made by patients, interact with physicians on a daily basis, address complaints made by physicians about the hospital, and address complaints about physician performance brought to his attention by the nursing staff. (Volume I Pa. 77; Bellifemine Dep. TR 50-12 to 52-15).

Dr. Bellifemine was not paid all the money due to him under his contracts with MHA, LLC and on December of 2013 he complained to Lynn McVey, the Chief Executive Officer that he was not paid the full amounts due to him under his contracts with MHA, LLC and the payments were untimely. (Vol. 1 Pa.74; Bellifemine Dep. TR 39-11 to 40-1). The payments went from being "3 months behind, 4 months behind and then it went to years behind". (Vol 1 Pa. 74; Bellifemine Dep. TR 40-19). When Dr. Bellifemine received payments from MHA, LLC he received one monthly check for all his positions. (Vol. 1 Pa. 75; Bellifemine Dep. TR 40-9 to 13). Dr. Bellifemine was asked why he agreed to assume the position of Chief Medical Officer when he was not being paid fully for his services as Director of the Sleep Clinic and President of the Medical Staff, Dr. Bellifemine stated he considered Dr. Lipsky, one of the owners of the hospital to be a good friend and Dr. Lipsky and Tamara Dunaev the Executive Vice-President of MHA, LLC told him that he would be paid in full for his overdue salaries when the hospital was sold. (Vol. 1 Pa. 83; Bellifemine Dep. TR 71-20 to 24). In December of 2017, a

month prior to the transfer of Meadowlands Hospital by MHA, LLC to the current owner, Dr Bellifemine went to MHA's accounting employee, subsequently identified as Diana Zhellandkovah and asked her the amount he was owed by MHA for services performed in all his positions. (Pa.76; Bellifemine Dep. TR 48-7 to 49-12). After reviewing ledgers, Ms. Zhellandkovah advised Dr. Bellifemine in December of 2017 that he was owed $255,000.(Bellifemine Deposition attached to the Parisi Certification as Exhibit F, TR 49-7 to 13). Prior to December of 2017, Dr. Bellifemine would ask Ms. Zhellandkovah on a monthly basis from 2013 until December of 2017 about the amount he was owed by MHA and Ms. Zhellandkovah would always consult the ledger and advise Dr. Zhellandkovah of the amount MHA owed Dr. Bellifemine.(Volume I Pa. 76; Bellifemine Dep. TR 48-24 to 49-10).

On January 15, 2015, March 13, 2015, April 14, 2016 December of 2017, and February 22, 2019, Dr. Bellifemine asked Tamara Dunaev, the Vice President of MHA, LLC when he would be paid for the services Ms. Zhellandkovah told him he was owed by MHA LLC.(Volume III, Pa. 394-396; See Certification of Morris Bellifemine in opposition to defendants motion for summary judgment "hereinafter Bellifemine Certification," paragraphs 8-11). Each time Dr. Bellifemine asked Ms. Dunaev when he would get paid his overdue salary, Ms. Dunaev told him he would get paid when MHA, LLC. sold the hospital. (Volume III, Pa. 395; Meadowlands Hospital, paragraph 12). Dr. Bellifemine relied on Ms. Dunaev's statements to him

indicating he would be paid when MHA, LLC sold the hospital and would not have remained in his positions at Meadowlands Hospitals if he was not told he would get paid when the hospital was sold. (Volume 3, Pa. 395; See Bellifemine Certification, Paragraph 12).

The linkage between Dr. Bellifemine's reliance on defendants promise to pay him when the hospital was sold is established by his deposition testimony.

> Q. Did you ever have any Conversations with either Tamara or Richard Lipsky about any alleged amounts you were owed?
>
> A. Yes. We–again, it was during the Christmas party event, which was at the end of December 2017, and myself and another physician who was owed money, too, we approached Dr. Lipsky and said you know you're selling the hospital but we haven't gotten paid. And he said don't worry. The new owners have six years to pay us and we will pay you.(Volume 1, Pa. 85; See Bellifemine Dep., TR 83-11 to 25).

Dr. Bellifemine did not know the name of Ms. Zehllandkovah when he was deposed and defendants did not list her in answers to interrogatories as an individual having relevant knowledge of the facts of the case.(Volume I Pa. 76; Bellifemine Dep. 48-24 to 49-10; Volume I, Pa. 132; See MHA LLC's Answers to Interrogatories 2-3). Dr. Bellifemine's deposition notice on defendants returnable within the discovery period of May 26, 2023 required defendants to produce Lynn McVey, Tamara Dunaev and a designated representative with relevant knowledge of the litigation pursuant to R. 4:14-4. (Volume I, Pa. 121}. The deposition notice required defendant

to produce Dr. Bellifemine's file and correspondence, notes memorandum, email agreements invoices and documentation regarding the litigation. (Volume I, Pa. 119-122). Dr. Bellifemine was produced for his deposition on May 26,2022.(Volume I, Pa. 64-101) Defendant only produced Lynn McVey on May 26, 2023. (Volume II Pa. 289-352). Defendants produced no checks or 1099 forms to document any payments to Dr. Bellifemine. The sole documents produced by defendants were records which purportedly showed that Dr. Bellifemine's medical charts were submitted late. (Volume III, Pa. 184-288). As defense counsel indicated he would not produce Ms. Zhellandkovah for a deposition, a subpoena was served on Ms. Zhellandkovah and Dr. Bellifemine moved to extend discovery to compel compliance with the subpoena on Ms. Zhellandkovah and Ms. Dunaev. (Volume 1, Pa 104-114). Defense counsel produced Ms. Dunaev for a deposition on July 22, 2022. (Pa. 314-351).

Dr. Bellifemine's counsel served a courtesy copy of the motion papers on Judge D'Elia, the pretrial judge assigned to the case. (Volume I, Pa. 113-114). The motions were assigned to two judges, Honorable Anthony D'Elia, J.S.C. and Honorable Joseph Turula, Judge Turula denied Dr, Bellifemine's motion to extend discovery and compel Ms. Zhellandkovah because the motion was filed after the trial date and granted defendant's motion to bar discovery conducted after the trial date because the parties pursued the discovery without permission. (Volume I Pa.

133-134). Judge D'Elia granted defendant's motion to quash the subpoena on Ms. Zhellandkovah because he would not permit a deposition subpoena to be served beyond the discovery end date and all applications to extend discovery in Hudson County were required to be decided by the Presiding Judge of the Civil Part. (Volume I Pa. 134; IT1 3-25 to 5-5).

Dr. Bellifemine produced his tax returns for all the years he worked for MHA, LLC but his accountants did not make copies of any 1099 forms provided to the Internal Revenue Service. (Volume I Pa. 83-84; Bellifemine Dep. TR 75-25 to 80-21). Dr. Bellifemine produced all checks in the possession of his bank issued to him from Meadowlands Hospital Medical Center which included all checks issued in 2016 - 2017(Volume III Pa. 405-415; see Exhibit C attached to the certification of Constantine Bardis in opposition to defendant's motion for summary judgment). Dr. Bellifemine received a check of $10,000.00 dated September 8, 2016 a check of $10,000.00 dated August 23, 2016, a check for $10,000.00 dated April 4, 2016, a check for $10,000.00 dated December 7, 2016, a check for $10,576.04 dated September 25, 2017, a check for $10,576.04 dated September 1, 2017 for $10,576.04 a check for $10,576.04 dated August 2, 2017 a check of $961.64 dated August 19, 2017, a check for $951.54 dated June 1, 2017, a check for $961.54 dated May 22, 2017 and a check for $10,576.04 dated February 24, 2017(Volume III Pa. 405-415) The checks produced by Dr. Bellifemine for 2016 and 2017, the last two years

defendants operated Meadowlands Hospital establish payment to him by the defendants of $95,364.82. Defendants presented no proof of any payments to Dr. Bellifemine such as copies of the checks or the 1099 forms issued to Dr. Bellifemine.

Dr. Bellifemine filed his complaint on November 24, 2020. (Volume 1, Pa. 5). From November 24,2014 until December 31, 2017, the date defendants sold the hospital, Dr. Bellifemine's contracts provided for payment of $75,000.00 per year as Chief Medical Officer, payment of $58,600.00 for President of the Medical Staff and Co-director of the ICU, and payment of $19,500 as Director of the Sleep Clinic.(Volume 1, Pa. 182; Volume 1, Pa. 176; Volume 1, Pa. 165) Although Dr. Bellifemine was entitled to compensation of $153,00.00 per annum for services in his three positions , defendants only paid Dr. Bellifemine $95,364.82 of the $306,000 he was owed for 2016 and 2017. Dr. Bellifemine has provided unrebutted evidence that $210,635 of his $255,000 claim for damages accrued in 2016 and 2017 which is respectively within 4 and 3 years of the filing of his complaint.

Although defendants statute of limitations defense was asserted in defendants answer, defendants provided no documents which are part of the record below which supported the statute of limitations defense. (Volume 1, Pa 29; See Sixth Affirmative Defense of defendants answer; See Defendants Statement of Undisputed Material Facts, Volume 1, Pa. 138-142; Volume 1 and 2 Pa 143 to Pa. 369; See Certification

of Benjamin Paris1, Esq and exhibits) Defendants asserted that they had reached accord an satisfaction of Dr. Bellifemine's claim for unpaid compensation of $10,000.00. (Volume 1, Pa. 31; See Defendants Nineteenth Affirmative Defense; Volume 1, Pa. 149; See Defendants' Statement of Undisputed Material Facts, Paragraph 9). Defendants never produced a copy of the $10,000 check or any agreement with Dr. Bellifemine demonstrating an intent to settle his $255,000 claim for $10,000and Dr. Bellifemine denied receipt of the check and the existence of settlement agreement. (Volume 1, Pa.86; See Bellifemine Dep, TR86-14 to 88-14).

Despite Dr. Bellifemine's testimony that the $255,000 claim was based on the statement from MHA, LLC's accounting employee Diana Zhellandkovah advising him what he was owed in December of 2017, Defendant claimed without any supporting documentation in the record below that defendants were entitled to summary judgment because Dr. Bellifemine had no basis to calculate his damages.(Volume 1 and 2 Pa. 143 to 369). Defendants never advised Dr. Bellifemine during his employment that the reason he was not getting paid his full salaries that his patient charts were not completed on time. (Volume 1, Pa 81;Bellifemine Dep 67-1 to 12; Volume 3, Pa.394; Bellifemine Certification, Paragraph 5 was in opposition to Defendants Motion for Summary Judgment). Defendants asserted in their motion for summary judgment that the reason Dr. Bellifemine was not being paid his full salaries was that some of his charts were

late. (Volume II Pa. 141-142; Defendants Statement of Undisputed Material Facts, Paragraphs 5-8). Defendant MHA, LLC's Chief Executive Officer Lynn McVey testified that Meadowlands Hospital did not have a policy of withholding physician compensation because of the submission of late charts and she never told Dr. Bellifemine that the reason he was not getting paid his full salary because his charts were late. (Volume II Pa. 292; See Deposition of Lynn McVey, TR12-4 to 19). Tamara Dunaev, the Vice President of MHA, LLC who told Dr. Bellifemine that he would get made when Meadowlands Hospital was sold, admitted that she never told Dr. Bellifemine that the reason he was not getting paid his full salaries was his charts were late and was not aware that any MHA, LLC employee ever told Dr. Bellifemine that the reason he was not being paid his full salaries was because his charts were late. (Volume II Pa.328; Dunaev Dep attached to the Certification of Benjamin Parisi as Exhibit I, TR 34-11 to 23). Neither Ms. McVey nor Ms. Dunaev could identify a single instance in which the lateness of Dr. Bellifemine's charts caused an insurance payment to be delayed or denied. (Volume 2, Pa. 299; Mcv Deposition, TR 40-21 to 25; Volume 2 Pa. 331; Dunaev Deposition TR 47-12 to 22). DNV, the regulatory body with authority over Meadowlands Medical Center never issued a fine or penalty because Dr. Bellifemine's charts were late.(Volume 2, Pa. 299;McVey Deposition, TR 38-22 to 39-18).

The motion court determined that Ms. Zhellandkovah's statement to Dr. Bellifemine in December of 2017 that the hospital owed him $255,000.00 constituted a party statement admissible to establish the amount owed by defendants. (IT2 31-4 to 32-4). The motion court rejected defendants' argument that an alleged $10,000 payment to Dr. Bellifemine constituted an accord and satisfaction of the $255,000 claim because defendants had no release establishing an agreement to settle the claim for $10,000.00 (IT2 37-13 to 38-1). The motion court denied plaintiff's claim for summary judgment based on Dr. Bellifemine's late completion of patient medical records because the issue of whether the late submissions constituted a material breach of contract constituted a jury question. (TR2 38-2 to 15). The motion court held that if a jury accepted defendants' continued retention of Dr. Bellifemine's services and defendants' continuous promises to pay Dr. Bellifemine would give rise to claim of unjust enrichment and a breach of a covenant of good faith and fair dealing. (IT2 38-7 to 39-16).

The motion court granted defendants' motion for summary judgment because Dr. Bellifemine could not establish that the complaint seeking damages for $255,000 was filed within the six year statute of limitations for breach of contract set by N.J.S.A. 2A:14-6.(IT2 34-7 to 35-21;IT236-22; IT2 40-2 to 14). The motion court indicated that Dr. Bellifemine's certification filed in opposition to defendant's motion for summary judgment indicating that he relied on statements made by

Tamara Dunaev and Dr Richard Lipsky and Tamara Dunaev, two owners of the hospital that would have equitably estopped defendants from relying on a statute of limitations defense. (IT2 18-1 to 9). The motion court barred consideration of Dr. Bellifemine's certification because of the conclusion that it was barred by the sham affidavit doctrine since Dr. Bellifemine's answers to interrogatories and deposition testimony did not refer explicitly to his reliance on statements that he would be paid when the hospital was sold (IT2 12-8 to 13-13; IT2 16-6 to 19). Dr. Bellifemine moved for reconsideration of summary judgment based on the argument that Dr. Bellefemine's certification in opposition to summary judgment did not conflict with his deposition testimony and answers to interrogatories (Volume IV Pa.578-640). The motion court denied the motion for reconsideration (Volume IV Pa. 641;IT3).

ARGUMENT

I.THE COURT SHOULD REVERSE SUMMARY JUDGMENT ENTERED IN FAVOR OF DEFENDANTS BECAUSE DR. BELLIFEMINE PROVED THAT HIS COMPLAINT WAS TIMELY AND DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROOF ON THEIR STATUTE OF LIMITATIONS DEFENSE

(Volume I, Pa. 150-184; Vol III Pa. 405-15)

The motion court's conclusion that Dr. Bellifemine's complaint was untimely ignored the evidence presented regarding defendant's partial payments to

Dr. Bellifemine. The applicable statute of limitations on a breach of contract claim not subject to equitable tolling is six years. N.J.S.A. 2A:14-1; Metromedia Co. v. Mountain Associates 139 N.J. 62 (1995)(tenant who filed suit against landlord for breach of contract to reimburse the tenant for office cleaning services for a seven year and one month period is limited to a recovery of six years pursuant to N.J.S.A. 2A:14-1).

Dr. Bellifemine provided documentation that $210,000 of the $255,000 owed to him by the defendants accrued in 2016 and 2017 which is within the statute of limitations of N.J.S.A 2A:14-1 since Dr. Bellifemine's complaint was filed on November 14, 2020. Dr. Bellifemine's contracts with defendants entitled him to a salary of $25,000.00 for his services as President of the Medical Staff, $33,000.00 for his services as Co-Director of the ICU, $75,000 for his services as Chief Medical Officer and $19,500,00 for his services as Director of the Sleep Clinic. (Volume I Pa. 150-184). The total amount of Dr. Bellifemine's annual compensation pursuant to the contracts was $306,000. The cancelled checks for all compensation that Dr. Bellifemine received from defendants in 2016 and 2017 equaled $95,364.72. (Volume III Pa. 405-415).

Each time Dr. Bellifemine received a check from defendants, the check was for one sum and did state which pay period was covered by the check. The payment application rule provides that a creditor who is owed more than one debt by a debtor

may apply a payment to any debt the creditor chooses unless the creditor provides instructions indicating that it wishes the payment to apply to a specific account. Craft v. Stevenson Lumbar Yard, Inc., 179 N.J. 56, 72-76 (2004); General Elec. Co v. Fred Sulzer & Co., 86 N.J. Super. 520, 547-548 (App. Div. 1965). A creditor can utilize the payment application rule to apply a payment to the oldest debt. General Elec Co v. E. Fred Sulzer, supra 86 N.J. Super. at 548. The payment application rule entitles Dr. Bellifemine to apply defendants partial payments to him to any payment due during his employment with defendants including any debt which accrued prior to the filing of plaintiff's complaint in prior to November 20, 2014.

Unless a party seeks application of an equitable tolling of the statute of limitations, the statute of limitations is an affirmative defense on which a defendant bears the burden of proof. R.4:5-4; Citibank, N.A. v Estate of Simpson, 290 N.J. Super. 519, 523 (App. Div. 1996). In the case at hand, Dr. Bellifemine established that $210,000 of his $255,000 claim was made within the 6 year statute of limitations and the failure of defendants to designate any payments to a specific period entitled him to apply defendant's payment to defendants oldest debt. Dr. Bellifemine's proofs at a minimum required defendants to present evidence that the complaint was untimely because the claim for payment accrued prior to November 24, 2014. Defendants' failure to present any evidence on Dr. Bellifemine's contractual claims

accrued prior to November 24, 2014 required the denial of defendants' motion for summary judgment.

II. DEFENDANTS' PROMISES TO PAY DR. BELLIFEMINE UPON THE SALE OF THE HOSPITAL EQUITABLY ESTOPPS DEFENDANTS STATUTE OF LIMITATIONS DEFENSE AND DR. BELLIFEMINE' CERTIFICATION IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGEMENT MOTION WAS NOT A SHAM AFFIDAVIT
(Vol. I, Pa. 1-6, 85; Vol. III, Pa. 394-96, 405-415; Vol. IV, Pa. 576-577; TR-2, 12-8 to 13; 16-6 to 19; 83-11 to 25).

Dr. Bellifemine asserts his proofs that $210,000.00 of his $255,000.00 claim accrued in 2016 and 2017 and his justified reliance on the payment application rule defeat defendants statute of limitation claim without the application to equitable tolling of a statute of limitations. A party is entitled to present alternative theories to a court. Mt. Hope Inn v. Travelers Indem.Co., 157 N.J. Super. 431, 439-440 (App. Div. 1978). Dr. Bellifemine is thus arguing that the factual circumstances in this case would justify application of equitable estoppel to defendants' statute of limitation defense. Dr. Bellifemine also argues that his certification in opposition to defendants' summary judgment motion was not a sham affidavit.

The primary purpose of statute of limitations is to provide defendants a fair opportunity to defend and prevent the litigation of stale claims. Price v. New Jersey Manufacturing Co., 182 N.J. 519, 524 (2005); W.V Pangborne & Co. v. New Jersey Dept of Transp. 116 N.J. 543, 563 (2005). If a party seeking who seeks to invoke the

statute of limitations defense has notice of a claim and no significant prejudice results, the policy reasons for invoking the statute of limitations defense recedes. Id. A defendant who takes actions which lead plaintiff to believe that the filing of a complaint is not necessary is equitably estopped from asserting a statute of limitations defense. Price v. New Jersey Manufacturers Co., supra 182 N.J. at 544 (uninsured motorist carrier which requested insured's medical bills and reports, workers compensation lien information and scheduled a medical examination of its insured equitably estopped from asserting a statute of limitation defense based on its insured's attorney failure to render a formal request for arbitration within the six year limitation period}; W.V Pangborne & Co. vs. New Jersey Dept.of Transp., 116 N.J. at 558-562; (Department of Transportation's encouragement of contractor's participation in an administrative review process without advising contractor that statute of limitation defense would be invoked after participation in administrative review deemed invalid because it violated the governmental duty of compunction and integrity).

Dr. Bellifemine's bank records from 2016-2017 establish clearly that $210,000.00 of his $255,000.00 breach of contract claim has been filed within six years of the lawsuit. (Volume I, Pa. 1-6; Volume III, Pa. 405-415). Tamara Dunaev and Dr. Richard Lipsky repeated promises to pay Dr. Bellifemine the amounts he was owed on January 15, 2015, March 13, 2015, April 14, 2016, December 2, 2017

and February 22, 2019 are sufficient to justify an equitable estoppel claim as the conduct of the defendants is identical to the conduct of the defendants in Price v. New Jersey Manufacturers Co. 182 N.J. 519, 524 (2005) and W.V Pangborne & Co. vs. New Jersey Dept.of Transp., 116, N.J. 543,558-562 (1989) because the promises led Dr. Bellifemine to believe that a formal lawsuit was not necessary to receive payment of his full salaries. The motion court held that an explicit promise to get paid upon defendant's sale of the hospital was necessary to invoke equitable estoppel on defendants' statute of limitation defense. The motion court cited no authority for the proposition that defendant's statute of limitations defense required defendants to refer specifically to the sale of the hospital rather than a general promise to pay in order to invoke equitable estoppel.

The motion court refused to consider Dr. Bellifemine's certification asserting that he relied on promises to be paid after the sale of the hospital because of the conclusion that the certification was barred by the Sham Affidavit doctrine (Volume III, Pa. 394-396; TR-2 12-8 to 13; TR 2 16-6 to 19). The sham affidavit doctrine provides that a party cannot defeat summary judgment by presenting a certification which contains unexplained contradictions with the party's prior testimony. Shelcusky v. Garjulio, 172 N.J. 183 (2002)(plaintiff's certification in products liability action that he knew he was working with flammable materials not barred by deposition testimony stating he did not know what he was unloading

because (1) the deposition testimony and prior certification was not inconsistent with the applicable certification; and (2) plaintiff had a plausible explanation for any perceived inconsistency in his representations to the court.); Hinton v. Meyers, 416 N.J. Super. 141 (App. Div. 2010) (father's certification that when he heard a scream he knew it was his daughter's voice is a sham affidavit because the certification contradicted sworn deposition testimony in which the father stated he did not know who screamed); Kennelly-Murray v. McGill, 381 N.J. Super. 313 (App. Div. 2005)(plaintiff's statements in certification in verbal threshold case in which she certified she could not perform certain activities constituted a sham affidavit because the certification contained unexplained contradictions from plaintiff's deposition testimony).

In Shelcusky v. Garjulio, 172 N.J. 185 (2002) the court held that the sham affidavit doctrine should only be invoked to preclude consideration of an affidavit which the movant in a summary judgment asserts is contrary to prior deposition testimony in limited circumstances. The court stated:

> Accordingly, the sham affidavit doctrine calls for the trial court to perform an evaluative function that is consistent with our holding in Brill. When not applied mechanistically to reject any and all affidavits that contain a contradiction to earlier deposition testimony, the doctrine requires a court to evaluate whether a true issue of material fact remains in the case notwithstanding an affiant's earlier deposition testimony. The Appellate Division has applied the doctrine in the past, as do we for the first time here. See Shelcusky, supra, 343 N.J. Super. at 510, 778 A.2d 1176; Moisor v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195, 473 A.2d 86 (App. Div.1984). Critical to its appropriate use are its limitations. Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an

affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the *202 deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement. Shelcusky v. Garjulio, supra 172 N.J. at 201.

In the case at hand, the sham affidavit doctrine is clearly inapplicable because Dr. Bellifemine's certification "does not contradict patently and sharply the earlier deposition testimony" which is required by Shelcusky v. Garjulio to invoke the doctrine. Defense counsel never asked Dr. Bellifemine the reason why he did not file suit prior to November 24, 2020, the day plaintiff filed the within action. As plaintiff was never asked why he did not file suit prior to November 24, 2020, there is no deposition testimony which could possibly conflict with Dr. Bellifemine's certification in opposition to defendants' motion for summary judgment. The sham affidavit doctrine was raised by defendants in a reply brief. There thus existed no provision permitting plaintiff to submit written opposition to the argument prior to the return date of the motion. R. 1:6-3.

The motion court's conclusion that Dr. Bellifemine's certification contradicted his deposition testimony and discovery responses is incorrect because Dr. Bellifemine's deposition testimony and answers to interrogatories indicate clearly that he was relying on the proceeds from the sale of the hospital to get paid. Dr. Bellifemine's deposition testimony reads as follows:

Q. Did you ever have any conversations with either Tamara or Richard Lipsky about any alleged amounts you were owed?

A. Yes. We–again, it was during the Christmas party event, which was at the end of December 2017, and myself and another physician who was owed money, too, we approached Dr. Lipsky and said you know you're selling the hospital but we haven't gotten paid. And he said don't worry. The new owners have six years to pay us and we will pay you.(Volume 1, Pa. 85; See Bellifemine Dep., TR 83-11 to 25).

Dr. Bellifemine's answers to interrogatories also identify the sale of the hospital and defendants' non-payment of his salaries after the sale of the hospital as the impetus for the filing of the lawsuit. In answer to interrogatory #4 which asked about the steps Dr. Bellifemine took to obtain payment from the defendants, Dr. Bellifemine stated:

Defendants repeatedly promised to pay plaintiff and did not do so. They claimed that they had six years to pay him but have taken no action to do so *since the hospital was sold*. (*Italics added*) Volume 4 Pa. 576-577.

Dr. Bellifemine's discovery responses do not provide a basis for application of the sham affidavit doctrine. Instead, Dr. Bellifemine's prior discovery responses buttress his claim that he relied on defendants' promises to pay him after the hospital was sold. The motion court's decision to bar Dr. Bellifemine's reliance on defendants' promises to pay him after the sale of the hospital based on equitable estoppel should not have been excluded pursuant to the sham affidavit doctrine. The entry of summary judgment based on the sham affidavit doctrine should be reversed.

III. THE MOTION COURTS' DENIAL OF DR. BELLIFEMINE'S MOTION TO EXTEND DISCOVERY TO TAKE DIANE ZHELLANDKOVAH CONSTITUTED AN ABUSE OF DISCRETION
(TR1,3-25 to 5-5) (Volume 1 Pa. 119-22, 132, 134).

The orders denying plaintiff's motion to extend discovery and quashing the deposition subpoena on Diane Zhellandkovah were an abuse of discretion because the motion judges' failed to follow the required factors in deciding the motion.

R. 4:24-1(c) states:

> Extensions of Time. The parties may consent to extend the time for discovery for an additional 60 days. Such extension may be obtained by signed stipulation filed with the court or by application to the Civil Division Manager or team leader, by telephone or letter copied to all parties, representing that all parties have consented to the extension. A consensual extension of discovery must be sought prior to the expiration of the discovery period. Any telephone application for extension must therefore be confirmed in writing to all parties by the party seeking the extension. If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and made returnable prior to the conclusion of the applicable discovery period. The court may, for good cause shown, enter an order extending discovery for a stated period, and order shall also describe the discovery to be engaged in and such other terms and conditions as may be appropriate. Absent exceptional circumstances, no extension of the discovery period may be permitted after an arbitration or trial date is fixed.

If a motion for an extension of discovery is returnable prior to the expiration of the discovery period, the party seeking an extension must demonstrate good cause and not exceptional circumstances to justify the extension. Viti v. Brown, 359 N.J.

Super. 40, 45 (Law Div. 2003); Montiel v. Ingersol, 347 N.J. Super. 246, 248-249 (Law Div. 2001).

In Tucci v. Tropicana Casino, 364 N.J. Super. 48 (App. Div. 2003), plaintiff did not serve his engineering expert report within the time provided by court order because of the difficulty scheduling an inspection of defendant's elevator by plaintiff's engineering expert. The trial court indicated that the plaintiff's failure to provide a report justified the suppression of plaintiff's expert testimony and the consequent dismissal of plaintiff's cause of action. In reversing the trial court, the testimony and the consequent dismissal of plaintiff's cause of action, the Appellate Division stated:

> Surely, plaintiffs' attorney might well have sought a further extension of the expert-report deadline. On the other hand, he reasonably relied on the cooperation of his adversaries who made no objection to the expert's inspection of the elevator after the submission deadline. We point out, moreover, that the litigation process cannot effectively take place without some measure of cooperation among adversaries. Clearly the court ought not be unduly applied to for relief that the parties are able to arrange for themselves without prejudice to the justice system. Beyond that, the trial court's concern for the additional discovery by defendants that the expert report would require cannot justify the dismissal with prejudice. The May 14 case management order anticipated the necessity for that additional discovery. Hence, the late report simply delayed that supplementary discovery by thirty-nine days. If the thirty-nine-day delay resulted in an inability of the parties to complete the additional discovery in the more than two months remaining prior to the trial date, then the trial date could have been adjourned. It was still sufficiently far off that the court's own schedule could have made that accommodation. We point out that a major concern of the Best Practices rule was the establishment of credible trial dates by the avoidance of last-minute "eve of trial" adjournments by

> reason of incomplete discovery. See generally R. 4:36-3. It does not appear that the concern was substantially implicated here. Tucci v. Tropicana Casino, 364 N.J. Super. at 53-54.

In Leitner v. Toms River Regional Schools, 392 N.J. Super. 80 (App. Div. 2007), plaintiff student filed suit against the Toms River School District for failure to accommodate their disabled daughter pursuant to the requirements of the Law Against Discriminations and the Americans With Disability Act. Although plaintiff took no depositions and provided no expert reports, the trial court denied plaintiff's motion to extend discovery on the return date of the motion despite the fact that no arbitration or trial date had been set. The court termed plaintiff's counsel's discovery efforts "disheartening." 392 N.J. Super. at 88. The court expressed skepticism regarding plaintiff's need to obtain information from defendants to learn the identity of the individuals who would have to be deposed since plaintiff named the School Superintendent, the biology teacher and the cheerleading coach as individual defendants. 392 N.J. Super. at 93. The court noted that the factors to consider in whether an extension of discovery is justified in the absence of a fixed arbitration or trial date include (1) the movant's reason for the requested extension of discovery; (2) the movant's diligence in earlier pursuing discovery; (3) the type and nature of the case including any unique factual issues which may give rise to discovery problems; (4) any prejudice which would inure to the individual movant if an extension is denied; (5) whether granting the application would be consistent with

the goals and aims of "Best Practices"; (6) the age of the case and whether an arbitration date or trial date has been established; (7) the type and extent of discovery that remains to be completed; (8) any prejudice which may inure to the non-moving party if an extension is granted and; (9) what motions have been heard and decided by the court to date. 392 N.J. Super. at 87-88. Citing Ponden v. Ponden, 374 N.J. Super. 1 (App. Div. 2004), certif. denied 183 N.J. 212 (2005), a case in which the Appellate Division reversed the trial court's refusal to allow plaintiff leave to serve an expert report after the conclusion of discovery when no trial had been set, the court reversed the denial of the motion to extend the discovery period and the summary judgment order which resulted because plaintiff could not complete discovery. The court stated:

> "Best Practice" was adopted to establish uniformity in the trial courts throughout the State, to establish firm and meaningful trial dates, to restore the public's faith in expeditious and efficient litigation and to control dilatory litigation tactics by providing the trial courts with tools to manage litigation. It is important to note, therefore, that Best Practice was not adopted primarily as a means of reducing case backlog or increasing case clearance rates. While those goals are laudable, it is a misperception to think that Best Practices was principally adopted to give judges a seductive tool to be used chiefly to reduce backlog and increase clearance rates. A careful review of the Report, the case law, the Judge Pressler's comments, make clear that that is not the case. Best Practices, rather, is a vehicle that empowers individual trial judges to step in, where appropriate, and manage discovery in a case so that a realistic arbitration and trial date can be set. That is the reason R. 4:24-1(c) provides that not only may the court for "good cause shown" extend discovery, but if extended, it is to set the date by which the additional discovery is completed and is to describe the discovery to be engaged in and such other terms and conditions as may be appropriate.

> These provisions of R. 4:24-1(c), rather than restricting a trial judge's options to either deny an application to extend discovery or to extend same to a date certain, allow a trial judge to review each matter's unique factual situation, and in appropriate circumstances, enter a detailed case management order with appropriate terms and conditions so as to provide the individual litigants with a chance to have discovery completed and the matter heard on the merits. Leitner v. Toms River Regional Schools, 392 N.J. Super. at 91-92.

In Hollywood Café Diner Inc., 417 N.J. Super, 210, 220-221 (App. Div. 2022), the court held that a court should consider the effect of the Covid-19 health crisis on trial dates in ruling on motions to extend discovery.

In ruling on the defendant's motion to quash the deposition subpoena on Diane Zhellandkovah, the motion judge stated "I'm not going to force a deposition transcript of the witness" and stated that the procedure in Hudson County required all motions to extend discovery to be decided by the Presiding Judge of the Civil Part (TR1,3-25 to 5-5). The Presiding Judge of the Civil Division stated in the order denying an extension of discovery that plaintiff did not seek to extend discovery beyond the May 26, 2022 the discovery end date but rather went ahead and conducted discovery without seeking that permission. (Volume 1 Pa. 134). Although the parties took Tamara Dunaev's deposition on July 21, 2022, the Presiding Civil Judge ruled that use of the deposition was barred because it was taken without the court's permission. (Volume I Pa. 134).

The motion courts did not consider the reasons why the discovery was necessary. The reason why the discovery was necessary were defendants' failure

to comply with Dr. Bellifemine's notice of deposition requiring defendants to produce documents pertinent to the case including documentation regarding Dr. Bellifemine's damage claim (Volume I Pa. 119-122). The discovery was necessary because defendants did not list Diane Zhellandkovah as an individual having relevant knowledge of the facts of the case and failed to produce a witness having relevant knowledge of the amounts of defendants financial obligations to Dr. Bellifemine (Volume I Pa.132; see defendant's answer to interrogatory #2; Volume I, Pa. 121). Dr. Bellifemine complied with all the discovery requirements of defendants and appeared for his deposition on the discovery end date of May 26, 2022.

The sole reason discovery was not completed by the discovery end date was defendants refusal to provide responsive discovery to Dr. Bellifemine which was sought prior to the discovery end date. The sole discovery needed after May 26, 2022 was Ms. Zhellandkovah's deposition and the production of the ledgers utilized in responding to Dr. Bellifemine's requests on the amount owed to him by defendants. As a result of the Covid-19 pandemic, the case was not assigned a trial date at the time court decided the summary judgment motion on February 28, 2023. Defendants deficiencies in their discovery obligations requested prior to the discovery end date, the extremely limited nature of the discovery requested by Dr. Bellifemine and the court's inability to provide a trial date at the time the

discovery was sought constituted good cause to extend discovery. The motion courts rulings quashing a deposition subpoena, denying the motion to extend discovery and barring the use of discovery undertaken by the parties does not serve Best Practice's goal of providing litigants with credible trial dates. The motion courts' rulings on discovery in the within case constitute a toxic reward for gamesmanship. The interlocutory orders quashing Dr. Bellifemine's deposition subpoena and denying Dr. Bellifemine's motion to extend discovery and barring the use of Tamara Dunaev's deposition testimony should be reversed.

CONCLUSION

For the foregoing reasons the court should reverse the summary judgment order granted to defendants, reverse the denial of Dr. Bellifemine's motion for reconsideration, and reverse the denial of Dr. Bellifemine's motion to extend discovery to take the deposition of Diane Khallandkovah.

CONSTANTINE BARDIS, LLC

By:_____
CONSTANTINE BARDIS, ESQUIRE
Attorney for Plaintiff-Appellant
Dr. Morris Bellifemine, MD PA

MORRIS BELLIFEMINE, MD, PA, *Plaintiff,* v. MEADOWLANDS HOSPITAL MEDICAL CENTER, MHA, LLC F/D/B/A MEADOWLANDS HOSPITAL MEDICAL CENTER, LYNN MCVEY, TAMARA DUNAEV, JOHN DOE, JANE ROE, ABC CORP, DEF LLC, being fictitious parties whose identities are currently unknown, both jointly and severally *Defendants.*	**DOCKET NO.: A-002670-22-T2** *CIVIL ACTION* *ON APPEAL FROM:* SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY DOCKET NO.: HUD L 004332-20 SAT BELOW: HON. ANTHONY V. D'ELIA, J.S.C. HON. JOSEPH A. TURULA, P.J.Cv

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S APPEAL

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PROCEDURAL HISTORY

This action was first brought by Plaintiff on November 24, 2020, by his filing of a Complaint and Jury Demand, which included Hudson Regional Hospital (hereinafter "HRH") as a defendant. *See* Pa1-6. Before Defendants filed any responsive pleading, Plaintiff voluntarily removed HRH as a defendant in this lawsuit by filing a "Notice of Dismissal Without Prejudice as To Defendants Hudson Regional Hospital" on January 7, 2021. *See* Da1. On January 11, 2021, Plaintiff filed an amended complaint, captioned "Second Amended Complaint Removing Defendant Hudson Regional Hospital and Adding Back Meadowlands Hospital Medical Center", which was the subject of a motion to dismiss and resulted in the necessity of a third amended complaint. *See* Pa12-17.

Plaintiff's Third Amended Complaint was filed on April 6, 2021 and Defendants answered on April 16, 2021.[1] *See* Pa19-24, and 26-34. Since the outset of this lawsuit, Plaintiff has failed to provide any support for his allegations, which served as the source of numerous discovery-related motions, including motions to compel and dismiss due to Plaintiff's failure to provide

[1] In Plaintiff's Appellate Brief, Plaintiff incorrectly states that Defendants filed their answer on April 26, 2022. See Plaintiff's Brief and Table of Contents to Plaintiff's Appendix at page 001.

Defendants with proper discovery. On June 18, 2021, Defendants served Plaintiff with Defendants' First Set of Interrogatories and Defendants' First Notice to Produce Documents. *See* Da2-24. Also on June 18, 2021, Defendants wrote to Plaintiff notifying him that despite due demand for damages and documents relied on in the Third Amended Complaint, Plaintiff had not provided such information. *See* Pa41. On July 22, 2021, Defendants served Plaintiff with another correspondence that yet again identified Plaintiff's failure to provide discovery in response to the demand for damages and documents relied on in the Third Amended Complaint, which Plaintiff ignored. *See* Da25-26. Defendants timely responded to all of Plaintiff's written discovery on July 16, 2021, including providing Plaintiff with Defendant MHA, LLC's ("MHA) answers to interrogatories. *See* Da27-39.

On September 10, 2021, Plaintiff inexplicably filed a motion for summary judgment. At the time Plaintiff filed his motion, the time for Plaintiff to respond to Defendants' Interrogatories, Notice to Produce Documents, and Requests for Admission had all expired and no discovery had been provided to the Defendants. On September 14, 2021, Defendants served Plaintiff with a letter pursuant to *R.* 1:4-8, highlighting Plaintiff's breach of his discovery obligations and that Plaintiff's motion for summary judgment was premature at such an early stage of the litigation. *See* Da40-42. On September 20, 2021, well after

responses were due under the Court Rules and with the Summary Judgment motion pending, Plaintiff served Defendants with purported responses to interrogatories and document demands. Plaintiff's responses were wholly insufficient, and Plaintiff did not provide Defendant with responsive documents, including any documents that would support Plaintiff's claim for any amounts owed by Defendants. As a result, on September 28, 2021 Defendants cross-moved for a Protective Order and to Compel Discovery based on Plaintiff's deficient responses and failure to provide documents, namely those centering around how much Plaintiff was paid by Defendants and information supporting Plaintiff's claim of $255,000.00 in damages. Defendants' cross-motion went unopposed by Plaintiff.

On October 12, 2021, after hearing oral argument, the trial court entered an order denying Plaintiff's summary judgment motion and an order granting Defendants' cross-motion for a Protective Order and compelling discovery. *See* Pa146-148. Under the trial court's order, Plaintiff was required to provide "(1) complete and responsive answers to Defendants' First Notice to Produce Documents Nos. 3, 6, 9, 10, 11, 13, 16, 17, and 18; and (2) complete and responsive answers to Defendants' First Set of Interrogatories Nos. 11, 12, 14, 15, 19, 23, 24, and 25" by November 2, 2021. *Id.* The trial court's order dictated

that if Plaintiff failed to comply, Defendants could "move to have the Plaintiff's third amended complaint stricken and/or dismissed pursuant to *R.* 4:23-2". *Id.*

After receiving no communication or production from Plaintiff since the entering of the trial court's October 12, 2021 order, Defendants moved to enforce litigant's rights on November 17, 2021 (over two weeks after Plaintiff's discovery was due under the order). After utterly ignoring the motion, failing to file any opposition, and not contacting Defendants or the trial court at any point prior, at the eleventh hour on December 2, 2021 at approximately 4:45 p.m. Plaintiff attempted to "produce" certain documents required under the trial court's October 12, 2021 order and requested that Defendants withdraw the motion to enforce. Defendants responded by letter on December 3, 2021 highlighting that: (1) Plaintiff failed to oppose the motion; (2) Defendants were not notified of any intent by the Plaintiff to produce responsive documents; (3) Plaintiff did not contact Defendants in any way to request an adjournment to allow time for the documents to be provided and reviewed for completeness by Defendants' counsel; and (4) Plaintiff did not move before the trial court for relief. *See* Da43-44.

On December 13, 2021, the trial court dismissed Plaintiff's complaint with prejudice because of Plaintiff's failure to comply with the trial court's explicit order pursuant *R.* 1:10-3 and *R.* 4:23-2. *See* Pa46-47. On December 23, 2021,

Plaintiff moved for reconsideration, asserting that "discovery was fully complied with" and "fully responsive discovery was provided". *See* Pa54. Relying on this assertion, on March 18, 2022, the trial court granted Plaintiff's motion for reconsideration. In doing so, the court reasoned "that the dismissal of this matter with prejudice for a matter that essentially has not been considered on it's merits, might be considered extreme," and that the court was making this decision "in order to allow the parties a substantive resolution of this matter, as opposed to one that is based solely on procedural grounds." *See* Pa50-61. However, the trial court "admonish[ed] the parties to strictly adhere to the requirements that are set forth here" setting the Discovery End Date for May 26, 2022. *Id*.

After the case was reinstated, Plaintiff then once again sat on his hands regarding his discovery obligations until May 12, 2022, when he served Defendants with a Notice to Take Oral Deposition of MHA, LLC, Richard Lipsky, Lynn McVey, and Tamara Dunaev, set to occur on the discovery end date of May 26, 2022. Given that it would be impossible to complete all depositions on a single day, the parties agreed that Plaintiff's deposition and Lynn McVey's deposition would take place on the May 26, 2022 discovery end date. Defendants accommodated Plaintiff by making Tamara Dunaev and Richard Lipsky available after the discovery end date. Plaintiff eventually

deposed Ms. Dunaev on July 21, 2022, but elected not to pursue a deposition of Dr. Lipsky.

During Plaintiff's deposition, Plaintiff confirmed that he did not produce his W2's, 1099's, nor all checks he received from MHA (despite certifying he did in the prior motions to get this case reinstated), and also admitted that he has no documentation evidencing any support for his alleged amount owed of $255,000.00. *See* Pa63-100, at 38:18-39:19[2]; 44:7-13[3], 19:4-11[4], 76:3-20[5]; 80:8-

[2] "Q . . .Do you recall at the beginning of this contract not being paid what you felt you were entitled to under the agreement? A No. . . . I was paid properly, and then it just dwindled off. Q And when it dwindled off, was that six months, was that 18 months after you first signed this -- first signed this agreement? A I don't recall. Q Can you ballpark it? A Uh, I don't recall. . . . Q And you have no way of telling me or proving that you were either compensated X amount for your role as the ICU or X amount for your role as president of the medical staff? A No. It was all combined in one check."

[3] "Q So previously you had testified that you had provided checks from 2011 through the end of your time at MHA, but now that you've seen what I just showed you, would you agree that only from September of 2016 through the end of 2017 are checks that you provided? A Yeah, I assume so."

[4] "Q Do you have any way of ascertaining one way or the other if this contract you were paid in full versus any other contracts? A No, ... I don't know."

[5] "Q Would you receive one every year? A Yeah. I think I was missing one and I had to get it from the IRS. . . . Q And did you receive a 1099 for all of your different roles or was it a separate one for each different role? A No. There was one with a total amount. It -- Q Do you know what those 1099s reflect, those payments? A Excuse me? Q Can you recall, let's say, for 2014, what your 1099 from MHA, the total amount was? A No, I don't.

21-82[6], and 76:1-10. With the discovery end date passed, Plaintiff issued an out of time subpoena on Diana Zhellandkovah, a month after the discovery end date and one month before the then scheduled trial date of August 15, 2022. *See* Pa101-103. This individual was first identified to Defendants when their counsel received the subpoena. Diana Zhellandkovah was never identified in any discovery produced in this case and could not even be named by Plaintiff at his own deposition, simply recalling that he had private conversations with a "Russian girl". *See* Pa63-100 at 48:14-49:25. Plaintiff made no attempts to amend/supplement his prior discovery responses, nor extend discovery, at any time prior to the discovery end date on May 26, 2022. Similarly, Plaintiff has never asserted that Defendants' productions were incomplete and have never served Defendants with a deficiency letter or moved to compel any discovery alleged to be owed by Defendants.

Presented with an out of time subpoena on a witness that was never disclosed by Plaintiff, on July 5, 2022 Defendants filed a Motion to Quash the

[6] "Q . . . for at least 2011, you have not produced a 1099 from MHA; correct? A Again, that would be -- I would have to talk to the accountant. Q Okay. If I were to tell you that if we were to go through the years 2012, '13, '14, '15, '16 and '17, it would be the same; would that surprise you? A Yeah. Of course. Q Would you like to go through each one? A No. I would, again, refer to the accountant. Q Right. But you're the plaintiff in this case. You brought this . . . action. A Yeah. Q So you understand that it's your obligation to demonstrate that you're owed this money; correct? A Yes."

Subpoena as out of time. *See* Pa35-36. The next day Plaintiff filed a "Motion to Amend his Third Amended Complaint, Extend Discovery, and Secure Compliance with Defense Counsel's Agreement to Produce Tamara Duanev For Deposition" (hereinafter the "Motion to Amend"), seeking to reinstate HRH as a Defendant and to plead new facts concerning an individual named Diana Zheludkova.[7] *See* Pa104-105. Defendants then filed a Motion to Bar evidence

[7] Contrary to Plaintiff's self-serving assertions, Defendants' counsel never indicated that Tamara Dunaev would not be made available for a deposition after the discovery end date. To this effect, even though Defendants had filed a motion to quash the Subpoena, Plaintiff's counsel insisted on appearing before a court reporter on the date the Subpoena noticed Diana Zhellandkovah. During this interaction on the record, Plaintiff's counsel kept insisting that Defendants were not producing Ms. Dunaev for deposition, which Defendant's counsel refuted repeatedly:

Mr. Bardis - "So Ben, are you saying that you're not looking to have the deposition of the other two parties [i.e. Ms. Dunaev and Dr. Lipsky] either now?
Mr. Parisi - "No, we are. We're giving you them."
Mr. Bardis - "Yes?"
Mr. Parisi - "Yes, I just need dates for them. They're busy."
Mr. Bardis - "You know what, let's just do that through the motion because obviously, I know they're busy, but-
Mr. Parisi - "What do you mean?"
Mr. Bardis - "Busier than you and me? Is it because they got money or is it something like that?"
Mr. Parisi - "Yes. I mean, they have busy lives and we're going to produce them."
Mr. Bardis - "You know what we'll do, we'll put this in the motion and you and I can just wash our hands of it and let them explain why they're so busy"
Mr. Parisi - "You can put whatever you want in opposition to my motion."

produced after the discovery end date because Plaintiff used documents to support his Motion to Amend that were not previously produced within the discovery period. *See* Pa122-123. On August 5, 2022, the trial court denied Plaintiff's Motion to Amend, citing procedural grounds stating "Denied as the movant fails to provide the Court with a courtesy copy of this 136-page motion, which is in violation of the Chief Justice's Omnibus Order requiring all submissions exceeding 35 pages to be made to the Court in hard copy." *See* Pa133-134. Simultaneously, the trial court granted Defendant's cross-motion to bar Plaintiff from introducing evidence produced after the close of discovery, stating:

> The motion to amend was denied on procedural grounds. The motion to bar is granted because discovery was obtained outside the discovery end date. The Plaintiff did not seek to extend discovery beyond the May 26, 2022 discovery end date but rather went ahead and conducted discovery without seeking that permission. As such, the discovery conducted beyond the discovery end date is barred. Trial remains.
>
> *See* Pa134.

Also on August 5, 2022, the trial court granted Defendants' Motion to Quash the Subpoena after hearing oral argument. *See* Pa135. In its decision, the trial court specifically instructed Plaintiff's counsel that he needed to make a motion

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See Da46, at 3:11-4-8

to reopen discovery (and consequently meet the exceptional circumstances standard) stating "You've got to make a motion to reopen discovery in front of Judge Turula. That's how Hudson County Local Rules are… You want to try to make that argument, you make a Motion to Reopen Discovery with Judge Turula." T1[8] at 5:1-23. However, despite both Judge Turula telling Plaintiff that the motion was denied on procedural grounds for failing to submit courtesy copies and Judge D'Elia telling Plaintiff to file a Motion to Reopen Discovery, Plaintiff elected not to do so.

After months passed, Defendants filed their Motion for Summary Judgment on December 9, 2022, which set Plaintiff's opposition due date for December 27, 2022. As more fully set forth in Defendants' Opposition to Plaintiff's Motion to File his Appellate Brief as within time, Plaintiff failed to respond to Defendants' summary judgment motion entirely, instead filing a correspondence on January 8, 2023 alleging that Defendants' motion for summary judgment was non-compliant and asking the Court to disregard the motion. *See* Da50. The Court rejected this argument advising that the hearing date would remain and noted that "Summary Judgment was properly filed" and

[8] T1 refers to the August 5, 2022 transcript on Defendant's Motion to Quash. T2 refers to the February 28,2023 transcript of Motion for Summary Judgment. T3 refers to the April 14, 2023 transcript of Plaintiff's Motion for Reconsideration.

that "oral argument will be heard on January 17, 2023 at 11:30 am ***as previously scheduled***…" *See* Da51 (emphasis added).

A week later on January 14, 2023, one business day before the hearing date, Plaintiff filed correspondence now asserting that Mr. Bardis had been sick with COVID-19 from December 28, 2022 through January 12, 2023. *See* Da52. On January 17, 2023, Defendants appeared before the trial court when Plaintiff simply failed to appear. The trial court nevertheless again sympathized with Plaintiff and rescheduled the hearing date for February 3, 2023, giving Plaintiff another opportunity to submit an opposition by January 24, 2023 (effectively giving Plaintiff two additional months to brief his opposition). *See* Da54. Despite this, Plaintiff could not manage to file his opposition on time yet again, and after allowing the January 24, 2023 deadline to pass, a week later on January 31, 2023, Plaintiff unilaterally filed an untimely opposition with no explanation to Defendants or the trial court. On February 1, 2023, the trial court informed Plaintiff his opposition would not be considered. *See* Da55. That same day, Plaintiff filed a letter to the trial court reasserting the same COVID-19 excuse and attaching the ***same surgeon's note with the same dates of illness***, although now counsel claimed that his symptoms had been continuous for the relevant time periods. *See* Da56-57. As a result of this representation, the trial court allowed the opposition to be considered.

In direct defiance of the trial court's order granting Defendants' motion to bar evidence outside discovery, Plaintiff's opposition relied on the information that was specifically barred by the order and additional information outside of any discovery produced by the parties. Some of these documents were irrelevant to Plaintiff's claims and were submitted only to smear Defendants and cloud the fact that they were including barred information.[9] Despite Plaintiff's best efforts, the trial court found in favor of Defendants and specifically noted that Plaintiff "admitted he cannot tell if he was paid in full for all of his jobs".[10] The trial court continued that there was nothing in the record that a rational jury could conclude "whether all, some or what part of the $255,000 should be apportioned for 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017" and thus, "[a]ny claims for the period six years prior to November 24,

[9] This same tactic is being used on appeal, with Plaintiff's brief also attaching articles and Administrative Law decisions that were not disclosed during the discovery period and are entirely irrelevant as to whether Plaintiff is owed money from Defendants. See Pb4-5. None of these documents were produced in discovery, and Plaintiff continues to flaunt the trial court's order barring Plaintiff from using such "evidence" in this case.

[10] "For the purposes of the Summary Judgment Motion I am finding that the – that the plaintiff admitted he cannot tell if he was paid in full for all of his job… I think the plaintiff's deposition testimony page 19 line 4 to 11, he further testified that he got 1099 forms each year while working for the defendant but he doesn't have any 1099 forms in either his personal or business tax return productions in this case." *See* T2 at 30:3-12.

2020, i.e. November 24, 2014 are barred by the Statute of Limitations." 2T at 34:16-18 and 35:5-7. Therefore, the trial court dismissed the complaint for "failure and inability to be able to prove the amount of damages which survive after application of the Statute of Limitation." *Id.* at 35:13-15.

After the complaint was dismissed on summary judgment, Plaintiff filed a motion for reconsideration on March 20, 2023. The trial court denied the motion on April 14, 2023, highlighting that it was Plaintiff's burden to prove how much was allegedly owed in what year between 2010 and 2017, and that Plaintiff admitted he has "zero idea how much to a portion [sic] amongst the various years." *See* T3 at 15:10-15. The Court also addressed Plaintiff's sham affidavit ruling that his deposition testimony and the new affidavit "directly contradicted him." *Id.* at 14:9-12.

STATEMENT OF FACTS

Plaintiff first began working as an independent contractor for MHA in 2010 when he assumed the role of Co-Medical Director of the Pulmonary Unit at Meadowlands Hospital. From 2010 through 2017, Plaintiff's role at the hospital increased over time, ultimately with Plaintiff being engaged in four separate agreements with MHA for different roles. In December of 2017, MHA sold its interest in Meadowlands Hospital and since then has been winding down

its operations, going from hundreds of employees to only a couple in the years after selling its interest. Plaintiff's contracts with MHA are summarized below:

The First Contract

Plaintiff entered the "Co-Medical Director Agreement" with MHA sometime on or around December 16, 2010. *See* Pa149-159. Under the terms of this agreement, Plaintiff accepted the role of Co-Medical Director of the Pulmonary Unit within the Hospital.

The Second Contract

Plaintiff entered the "Meadowland Hospital Medical Center Employment Agreement, Director of Sleep Center" agreement (hereinafter the "Sleep Center Agreement") with MHA in June 2011. *See* Pa160-165. Plaintiff's obligations under the Sleep Center Agreement included management and supervision of individuals at the Sleep Center, assuring performance of medical staff functions, and compliance with MHA policies and procedures.

The Third Contract

Eighteen months later, Plaintiff entered into the President of Medical Staff/Co-Director of ICU Agreement (hereinafter "President/Director Agreement") with MHA on December 11, 2012. *See* Pa166-177. This contract had two roles, President of the Medical Staff and Co-Director of the Intensive Care Unit. Plaintiff testified that one of the responsibilities for physicians was

to complete their medical records, and that his role as President of the Medical Staff would be to supervise and ensure physicians were completing their medical records on time. *See* Da67 at 33:1-21.

The Fourth Contract

Nearly two years later, Plaintiff entered into the Meadowlands Hospital Medical Center Chief Medical Officer agreement (hereinafter "CMO Agreement") with MHA on September 1, 2014. Plaintiff testified that MHA policy was to complete patient reports in a timely manner, and that it was his responsibility "to make sure that the physicians at the hospital were complying with any policies or procedures implemented by the hospital." Da72 at 56:17-22. Plaintiff further admitted that "if you don't do or complete your paperwork in a matter of time, you could be suspended." *Id.* at 58:10-18.

Plaintiff's Breach of All Four Agreements with MHA

Plaintiff was continuously in breach of all four contracts with MHA. Plaintiff was habitually and consistently on delinquent patient record lists throughout his time with MHA. Plaintiff was one of if not the worst offender with not completing patient reports/records, as testified to by both Lynn McVey (MHA's former President) and Tamara Dunaev (a partial owner of MHA during relevant times). *See* Da96-124 at 13:9-11, 19:15-18; and 125-157 at 31:17-33:24. Plaintiff even admits that he had an issue with his paperwork being

delinquent, because when asked whether he had an issue with completing the medical records, Plaintiff stated "**I'm sure.** I had times I was delayed with my paperwork due to the -- I mean, I had a busy schedule at the hospital. Uh, with all the jobs that I had to do. So yes, I was behind." *See* Da58-95 at 58:20-59:4 (emphasis added).

Plaintiff was routinely given notice that his records were delinquent. *See* Da96-124 at 34:2-5;[11] and 125-157 at 34:6-35:10.[12] Every year he was working for MHA, Plaintiff failed to meet his contractual obligations of timely completing his patient records, as well as failing to properly supervise his direct reports to timely complete their patient records. *See* Da133-134 at 31:1-35:25. Plaintiff was aware that his habitual failure to comply with his contractual obligations contributed to substantial financial damages to MHA. *See* Da134 at 36:5-23.[13] Ms. Dunaev further testified to the magnitude of Plaintiff's late

[11] "Q. That Dr. Bellifemine was given notice that his records were delinquent many times? A. I would agree that the data was delivered many times and discussed."

[12] "Q. Can you give an approximation as to the number of times that you talked to Dr. Bellifemine about the charts being incomplete? A. More than 10. Q. And what time period are you talking about when you had more than 10 discussions with Dr. Bellifemine about the charts being late? A. '14, '15, '16, '17. That's the years. 2014, that's how much I recall."

[13] "Q. Okay. Say whatever you want. Give a big answer. A. Dr. Bellifemine was never a single target. There was a policy at the hospital in the late 2015, when

reports and his failure to properly manage the physician staff on this front, stating it was "a big deal" that cost the Hospital "hundreds of thousands of dollars" and that the Hospital had liens placed on it because of the failure to properly get reimbursed because of the reports being so untimely. *See* Da134-135 at 37:19-38:15.

Despite Plaintiff's dreadful record of delinquent patient records, he was paid in full for all obligations under his agreements with MHA. *See* Da125-157

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doctors start -- even '14, when the doctors stopped, you know, basically, when they did not cooperate with the medical records, there was a policy established that if any of those doctors that are on some sort of hospital stipend, or whatever, like Dr. Bellifemine was, those doctors' payments were delayed until they fulfilled their obligations. Q. Do you know how that policy was communicated to Dr. Bellifemine? A. I don't know exactly, but I know that everybody, every physician had received the letters and the email messaging from the medical records, from the revenue cycle, from VP operating cycle, message that, you know, what the policy is, that they have to comply with the policy."

at 13:1-19;[14] 23:7-15;[15] 30:7-31:1.[16] After the sale of the Hospital and Plaintiff's role with MHA was terminated in December 2017, Plaintiff erroneously demanded additional payments from MHA, despite being paid in full for all services. *Id.* Nevertheless, MHA agreed to remit a final payment of $10,000 to

[14] "Q. Let me finish. What is the basis for your belief that Dr. Bellifemine accepted the $10,000 as a full and final release of all the obligations of MHA, LLC, to him? A. May I answer? Q. Sure. That's the idea. A. Okay. He never asked me again about money. He has, at least he had at the time my telephone number. He never called me. He never said anything to me about any sums that we still owe him. After that conversation. Q. Do you know if he -- do you have a number that you believe would have been owed Dr. Bellifemine if the $10,000 that you paid him was not a complete settlement? A. I didn't think that we owe him anything. I still don't. Q. Okay. A. And I cannot speculate on something that I don't believe exists."

[15] "Q. Is it your testimony that MHA, LLC, doesn't owe Dr. Bellifemine any money because he billed Medicare, he billed Medicare and insurance companies for patients that he saw? A. No, it's not my testimony. My testimony is that we did pay him. He did receive the payments. He did receive the payments. Sometimes the payments were not coming, you know, timely, but everything was reconciled and he was receiving his payments."

[16] Q. . . .Was Dr. Bellifemine's failure to perform any of his functions properly one of the reasons why Dr. Bellifemine was not paid the full amounts due under these contracts with MHA, LLC? MR. PARISI: Objection to the form of the question. That was not her prior testimony. Her testimony was that he was paid. You can answer, Tamara. A. Exactly. That's what I was going to say, that he -- I never said that he was not paid completely or whatever. He was paid. That is my testimony. And my testimony, when he accepted the check, and he put it through the bank and he cashed it, and he never bothered me ever since or, you know, he never made any claims ever since until he came up with this lawsuit. He was okay with it. That means that for a few years, you keep silence and you don't ask anything, that means that he was satisfied. That he accepted."

Plaintiff for any alleged unpaid services owed by MHA. *Id.* MHA issued the check on January 26, 2018 and Plaintiff received the payment on February 8, 2018 without objection. *See* Da30. After receiving the payment, Plaintiff had no further contact with Defendants until filing this lawsuit, nearly three years after MHA sold its interest in the hospital and when MHA had nearly ceased operating entirely. *See* Da125-157 at 12:1-13:21; and 160.[17]

Despite Plaintiff's continual breach of all his contracts with Defendants, and a final payment discharging all potential claims, Plaintiff has not provided any evidence that he did not receive payments due to him. The extent of the documents produced by Plaintiff amounts to copies of some checks in 2016 and 2017, with no method of ascertaining what was paid to Plaintiff and what was not. *See* Da69-70 at 41:3-47:24. Indeed, Plaintiff's entire case remains to be based on secret monthly conversations that Plaintiff had with an unknown "Russian girl":

> "Q Right. And so how did you keep a record -- how much are you suing MHA for? A 255,000. Q How did you come up with that number? A Through the person who was doing the accounting for MHA. Q Who was that? A Uh, I think the -- it was a Russian girl. I don't remember her name offhand, but I can -- Q When did you

[17] In Defendants' request for admissions, Plaintiff was asked to "admit that from February 8, 2018 through the filing of this lawsuit, you did not communicate with Defendants regarding any alleged outstanding amounts claimed to be owed to you." In response, Plaintiff stated "Admitted. No communication was made from February 2018 to the time the lawsuit was created."

> speak to her? A On a monthly basis… Q Did you ask for that ledger? A No. Q Other than the ledger that she -- that person that we can't remember whose name it was, would tell you existed, do you have any other knowledge of such a ledger being in the possession of MHA? A No. Q Do you have any other way of verifying that such an amount was owed to you other than what this woman told you? A Well, she was the accountant, so I believe what she said."
>
> Da70-71 at 48:14 - 49:25

Regardless, Plaintiff admits that he received at least some form of payment from MHA dating back to 2011, but then later agreed that no such evidence has been produced in this lawsuit. Da68 at 38:18-39:19;[18] Da69 at 44:7-13.[19] Plaintiff further testified that dating back to his 2011 Sleep Center Agreement he does not "have any way of ascertaining one way or the other if this contract [he was] paid in full versus any other contracts." Da63 at 19:4-11.[20] Finally, Plaintiff testified that he received 1099 forms each year while working for Defendants, however Plaintiff then admitted that there are no 1099 forms in

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[18] *See, supra*, p. 6 n.2

[19] "Q So previously you had testified that you had provided checks from 2011 through the end of your time at MHA, but now that you've seen what I just showed you, would you agree that only from September of 2016 through the end of 2017 are checks that you provided? A Yeah, I assume so."

[20] "Q Do you have any way of ascertaining one way or the other if this contract you were paid in full versus any other contracts? A No, except that I did provide the checks that were given to me from Meadowlands Hospital, and that was total compensation, uh, that I received. So what part of it went to the sleep lab, I don't know."

his either his personal or business tax return productions. Da77 at 76:3-20;[21] Da78 at 80:8-81:5.[22]

Plaintiff's Sham Affidavit and the Motion for Summary Judgment

Without any documentary evidence showing what Plaintiff was paid during the years of which he is claiming damages (going back to 2011), in a thinly veiled attempt to defeat summary judgment, Plaintiff conjured an affidavit submitted in opposition to summary judgment that directly contradicted Plaintiff's prior discovery responses and deposition testimony. Plaintiff's affidavit dated January 30, 2023 (eight (8) months after the close of discovery), conveniently presented new "facts" to defeat summary judgment, "facts" which completely contradict the record in this case. To demonstrate the extent of this prejudice, below is a chart of each inaccuracy contained within Plaintiff's improper affidavit:

Plaintiff's Sham Affidavit *See* Pa393-397	**Facts From The Record**
Plaintiff claims in paragraph 3 that "…I complained about MLA's [sic] failure to pay all the monies I was due to Lynn Wilson…" and cites to Plaintiff's deposition transcript in Da68 at 40:9-19.	The cited deposition testimony has nothing to do with any alleged complaints to Ms. Wilson and instead reads: "Q Well, then how -- my question is how did you know that you weren't being paid properly if you weren't

[21] *See, supra,* p. 7 n.5.

[22] *See, supra*, p. 7 n.6.

	keeping track of what each check was paying you for? A Well, it was always one sum. It was -- Q What was that sum? A I think it was 10,000 and change, and that was on a monthly basis. The monthly basis would go -- started fine. Then it went to three months behind, four months behind, and then it went years behind." See Da68 at 40:9-19.
In paragraph 4, Plaintiff claims "… I was never advised that the reason I was not paid my full salaries was that my patient charts were late." And cites to his transcript at Da73-74 at 60-23 to 61:3 and then Da75 at 67-1 to 12. Similarly, Plaintiff in paragraph 5 claims that the first time he was made aware that payments could be withheld from him because of his delinquent patient reports was in this lawsuit.	Plaintiff's contracts explicitly provide that completion of the patient medical charts was a material term of his contracts with MHA. Furthermore, Plaintiff conceded that even if such language was missing from his agreements, under each contract Plaintiff was required to abide by the Hospital's policies and procedures, which included the timely submission of patient charts.[23] It was MHA's policy to not release checks if physicians are delinquent with patient reports. *See* Da74-86 at 64:1-69:25.

[23] "Q It says that one of your responsibilities is to, quote, "counsel, advise and admonish individual department members in instances of disregard for department rules and bylaws, lack of respect for co-workers and others, inefficient practice, suspected impairment for practicing outside the limits of hospital privileges that have been awarded"; did I read that correctly? A Correct. Q And would you agree that that provision made it your responsibility, either wholly or in part, to make sure that the physicians at the hospital were complying with any policies or procedures implemented by the hospital? A Yes. Q And what is it ever the policy of the hospital that physicians needed to complete their patient reports in a timely manner? A Yes." *See* Da72 at 56:8-57:1.

	Plaintiff conveniently skips over the most relevant portion of his testimony, when he was presented with MHA 314-315, marked at his deposition as exhibit D-4, in which Plaintiff was copied on an e-mail and a letter that stated "This letter is to serve as notice that you have one week to complete all patient documentation. There are 257 delinquent charts dating back to December 2013. Of the 81 physicians who have 257 delinquencies, 14 of you are responsible for 128, 50 percent of all delinquencies… if delinquencies remain, [MHA] will be forced to **report your incomplete records to the Board of Medical Examiners**." *See* Da74 at 61:1-62:15, and Da162. (emphasis in original). In an internal e-mail between Sandra George (an MHA employee) and Tamara Dunaev dated 8/10/17, Ms. George wrote that "Dr. Bellifemine came into Medical Records while I was there and spoke to Marcia about his [delinquent chart] list advising that he was completing all. Dr. Bellifemine has not complied[.] Angely has gone to his office with the list and Marcia has continued to pursue him. All of the items on his list are not dictated. There are a significant number of accounts for each doctor which needs attention." *See* Da164
Plaintiff states that he spoke with an individual named Diana	Plaintiff could not identify the individual he allegedly spoke to

Zhellandkovah on a monthly basis for over four years about alleged unpaid monies, and that Ms. "Zhellandkovah" looked at a ledger and advised that Plaintiff was owed $255,000.00. *See* Plaintiff's Affidavit at paragraphs 6 and 7. Plaintiff cites to his deposition transcript at 48:24-49-10 to support this.	regarding unpaid amounts. "Q That's what I want to know. A Very easy. The person that -- I'm not sure if she's still there. I would go on a regular basis to the accountant and asked them, which you should have a record of, what they owe me. Q And what would they tell you? A The exact amount of what was owed to me, which is the matter of this lawsuit. Q Right. And so how did you keep a record -- how much are you suing MHA for? A 255,000. Q How did you come up with that number? A Through the person who was doing the accounting for MHA. Q Who was that? A Uh, I think the -- it was a Russian girl. I don't remember her name offhand, but I can -- Q When did you speak to her? A On a monthly basis." *See* Da70 at 48:6-25.[24]
Plaintiff claims that on specific dates, namely 1/15/15, 3/13/15, 4/14/16, and in December of 2017 he asked Ms. Dunaev for payments. See Plaintiff's Affidavit at paragraph 8. Plaintiff similarly claims he met with Ms. Dunaev after the sale of the hospital and now claims that she made promises to Plaintiff to pay him the	Except for alleging one meeting at a Christmas party in December of 2017, Plaintiff never identified any dates or promises made by the Defendants in his deposition or in his interrogatory answers, or in any other discovery prior to the discovery end date. This is because the actual record reflects: • In response to Defendants'

[24] Plaintiff could not recall who the person he was speaking with, despite claiming having discussions on a monthly basis, about his alleged unpaid fees. Plaintiff never identified Ms. Zhellandkovah in his interrogatories as a person with knowledge of facts in this case. In fact, Plaintiff tried to subpoena a Ms. Diana Zheludkova, not "Zhellandkovah", a month after the Discovery End Date on June 21, 2022, which the trial court quashed for the same reasons.

owed sums that form the basis of this lawsuit. Plaintiff claims this occurred on February 22, 2019. See Plaintiff's Affidavit at paragraphs 9-13.	request for admissions, Plaintiff admitted that from February 8, 2018 through the filing of this lawsuit, he did not communicate with Defendants regarding any alleged outstanding amounts claimed to be owed to him. *See* Plaintiff RFA response #22 attached as Exhibit L to the Parisi Cert. • In response to Defendants' interrogatories, Plaintiff claimed that he spoke to Tamara Dunaev and Richard Lipsky (co-owner of MHA, LLC) "approximately once a month" about alleged monies Plaintiff was owed, but provided no dates. Later in the same interrogatory responses, Plaintiff claims would go to the "CEO" (This was Lynn McVey for a time, but several individuals held this title while Plaintiff worked at the hospital) "monthly for at least a year" about monies he was owed. *See* Parisi Supp. Cert. Ex. A. • Plaintiff was asked at his deposition if he ever had conversations with either Tamara Dunaev or Richard Lipsky about any alleged amounts he was owed, to which he stated "Yes. We -- again, it was during the Christmas event, which was at the end of December of 2017, and myself and another physician who was owed money, too, we

	approached Dr. Lipsky and said you know you're selling the hospital but we haven't gotten paid. And he said don't worry. The new owners have six years to pay us and we'll pay you." *See* Da79 at 83:19-25. Plaintiff made no mention of any other communications with Ms. Dunaev or Richard Lipsky. • Tamara Dunaev testified that "we did pay him [Plaintiff]" and that "I never said that he was not paid completely or whatever. He was paid. That is my testimony." *See* Da133 at 30:16-19. • Regarding the $10,000.00 check, Ms. Dunaev testified that "when he accepted the check, and he put through the bank and he cashed it [in January 2018], and he never bothered me ever since or, you know, he never made any claims ever since until he came up with this lawsuit. He was ok with it. That means that for a few years, you keep silence and you don't ask anything, that means he was satisfied. That he accepted." *See* Da133 at 30:16-31:1.

Presented with such stark contradictions, in granting summary judgment in favor of Defendants the trial court highlighted that "Plaintiff had many occasions to respond to specific discovery requests and at the time of deposition

to bring out any and all statements that were relevant to this case from the defendants or their representatives." *See* T2 at page 33. Because of this, the trial court decided to not consider "any statements in paragraphs 8 through 12 of the certifications that were submitted in opposition to the [Summary Judgment Motion] to support a finding that there's a question of fact as to whether the plaintiff was actually ever told to wait until the hospital was sold." *Id*. Indeed, the Court went further and correctly pointed out that:

> "Nowhere on this motion record did the plaintiff disclose in discovery that they were told to wait until the hospital was sold by anybody, not the Russian accountant, not [Lipsky], not Dunaev, not anybody. So even giving the plaintiff the benefit of all reasonable doubt I am finding on this motion record that there's no genuine issue of material fact: i.e. the plaintiff was never told to wait until the hospital was sold, and the hospital was sold in December of 2017." *Id*. at 33-34.

After the trial court granted summary judgment and dismissed this case, Plaintiff moved for reconsideration on March 20, 2023, raising the same contentions that Plaintiff now raises on appeal. Steadfast, the trial court was unimpressed with Plaintiff's sham affidavit, which the court emphasized corrected Plaintiff's evidentiary deficiencies on summary judgment once Plaintiff realized he could not support what amounts were owed within the limitations period versus what amounts were owed prior to the limitations period:

> In a nutshell, I stand by my ruling about the sham affidavit. I think the problem was noticed by the plaintiff in defendant's opposition brief, and it was all -- the defendant's opposition brief was all based upon just sworn testimony from the plaintiff. Did you have any discussions with the defendant about the money that was owed? Yes, at the Christmas Party in December 2017. And then when he saw the brief, all of a sudden this new affidavit comes from the plaintiff, he wants to bring these discussions all the way back to, I think it was 2015. I stand be [sic] my ruling that that is a critical, significant, issue on the case. And that the plaintiff, a Doctor was sworn under oath at his deposition testimony, and that the affidavit directly contradicted him on those conversations.
>
> *See* T3 at 13:21-14:12.

In addition to the sham affidavit ruling, during oral argument Judge D'Elia struck at the heart of the issue, explaining that all of Plaintiff's cited discovery cannot satisfy the bar to toll the statute of limitations, stating:

> THE COURT: Wait, wait. So being told at a Christmas Party in 2017 to wait while we're going to sell the Hospital. Did that toll the Statute of Limitations for any money that was owed in 2010?
>
> MR. GUTWIRTH: Yes.
>
> THE COURT: Going back seven years prior.
>
> MR. GUTWIRTH: That's another issue that I touched upon in my --
>
> THE COURT: I explained to you, your yes answer too. If you're owed money in 2010, you don't do anything until 2017. You ask the guy to get paid for 2010. Let's say the guy never worked there again after 2010. He sees him in December of 2017, he goes, by the way, you owe me money for 2010. And the guy says, wait, I'm selling the Hospital. He goes all right, I'll wait. How does that toll the six-year Statute of Limitation for the money that was owed in 2010?
>
> MR. GUTWIRTH: It lulls the plaintiff into a sense of security, and --

> THE COURT: But the Statute had already run by December of 2017 under my scenario, when he spoke to the guy who allegedly owes him the money.
>
> MR. GUTWIRTH: That's assuming you're, a finding that there is no equitable tolling by the statements that was cited in the deposition.
>
> THE COURT: How could you have equitable tolling before the Statute runs on the 2010 claim?
>
> MR. GUTWIRTH: Well, there's something that I think we should consider here. It's basically the Last Payment Rule. And it's basically in the -- it's a Supreme Court Case Brett versus –
>
> THE COURT: Well, that's not in your brief anywhere. And by the way, Last Payment is a whole different thing. The guy was claiming he wasn't paid what he was owed in 2010, and '11, and '12, and '13, '14, '15, '16, '17. He got paid something.
>
> *See* T3 at 6:10 - 7:21.

LEGAL ARGUMENT

Plaintiff brings this appeal with three misguided contentions that should be rejected by the Appellate Court. First, Plaintiff misunderstands the trial court's ruling on summary judgment claiming that Defendants failed to meet its burden for a statute of limitations defense. As set forth below, this argument completely ignores that the trial court granted summary judgment not entirely because of a statute of limitations defense, but because Plaintiff failed to present evidence that any portion of his alleged damages occurred within the limitations period, which goes to Plaintiff's burden of proof to show damages as part of his *prima facie* case. Second, Plaintiff contends that his surprise affidavit, submitted for the first time in opposition to summary judgment nearly eight (8)

months after the close of discovery, was not a sham affidavit as held by the trial court. This similarly ignores the direct contradictions this affidavit contained when compared to the evidence in the record (during the discovery period). Lastly, Plaintiff contends that the trial court erred in denying Plaintiff's Motion to Amend, ignoring that this motion was denied on procedural grounds and that Plaintiff was instructed to re-file his motion by Judge D'Elia during oral argument on the motion to quash, which Plaintiff elected not to do.

I. PLAINTIFF CANNOT MEET HIS BURDEN TO APPORTION ANY AMOUNTS OWED WITHIN THE STATUTE OF LIMITATIONS PERIOD.

Plaintiff fundamentally misunderstands the trial court's ruling as it relates to the statute of limitations problem he faces. It is the Plaintiff's burden to demonstrate, with reasonable certainty, his damages so that a reasonable factfinder would not be speculating as to how much the Plaintiff is owed if successful at trial. It is fundamental that a plaintiff must prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the fact to make a fair and reasonable estimate. *Kelly v. Berlin*, 300 N.J. Super 256, 268 (App. Div. 1997). Damage awards may not be based on mere speculation. *Ibid.* Under such circumstances where the trier of fact will be speculating on damages, summary judgment is appropriate. *See American Sanitary Sales Co. v. State,* 178 N.J. Super. 429, 436 (App. Div.

1981) ("We emphasize that we do not expect nor ask the trial judge to engage in mere speculation [in assessing damages.]"); *Lewis v. Read,* 80 N.J. Super. 148, 174 (App. Div. 1963) ("The law abhors damages based upon mere speculation."). As Judge D'Elia stated to Plaintiff during argument on summary judgment:

> THE COURT: No, you got the burden of proving the amount of damages so a jury doesn't speculate. How is the jury going to apportion what was owed in '11 if anything, in '12 if anything, in '13 if anything and almost all of '14 if anything if that's all barred by the Statute of Limitations?
>
> *See* T2 at 24:1-6.

By Plaintiff's own admissions he is claiming damages that allegedly began in 2010 and ran all the way through 2017. It would seem to be a simple enough exercise for Plaintiff to simply show what he was paid for each year and then subtract that amount from what he claims he was supposed to be paid. However, for reasons known only to Plaintiff, he refused to produce his 1099's (that he admitted he received from MHA), bank statements, or checks that would shed light on this issue and provide some level of clarity. Instead, Plaintiff produced a handful of checks for 2016 and 2017, and now tries to reverse engineer his damages on appeal. Aside from his own testimony, Plaintiff cannot point to a single proof to support his contention that any amounts are owed to him by the Defendants. After nearly two years of discovery and ample

opportunity for Plaintiff to provide a shred of evidence supporting his theory, the record is bereft of any documentary evidence that contradicts Defendants' position – i.e. Plaintiff was paid in full for all of his work with MHA.

The statute of limitations for a breach of contract claim is **six years**. *N.J.S.A.* 2A:14-1. Plaintiff alleges that beginning with his first contract as Director of Sleep Center in June of 2011 he did not receive full payment for his services under his contracts. *See* Da63 at 19:1-25. Plaintiff testified that he was allegedly not completely compensated "throughout the five or six years that [Defendants] owned the hospital" which similarly began in 2010. *Id.* Plaintiff filed this lawsuit on November 24, 2020 and, as a result, any claims for damages prior to November 24, 2014 are barred by the statute of limitations.

During oral argument, the trial court correctly deduced that because this case was filed on November 24, 2020, "any claims for the period six years prior to November 24, 2020, i.e. November 24, 2014 are barred by the Statute of Limitations." *See* T2 at 35:5-7. "[I]t's impossible for any rational juror to apportion what part of the $255,000 was for 2010, '11, '12, '13 up until November 2014…" *Id*. at 35:8-11. To this end, the trial court repeatedly asked Plaintiff's counsel to show where in the record (i.e. before the discovery end date) did Plaintiff raise the issue that he was deliberately told, **on many occasions**, to wait until the hospital was sold before he could get paid? In other

words, show the court that Defendants misled Plaintiff into allowing the statute of limitations to expire:

> THE COURT: "[D]id the plaintiff identify in discovery that either Dunaev and or Li[p]sky said to him **on many occasions**, I know we owe you some money but wait until we sell the hospital? Did plaintiff identify those type of statements?"

Id. at 7:18-22 (emphasis added).

Unable to point to a single piece of testimony or evidence on the spot, Plaintiff now appeals in the hopes that an off-comment Plaintiff made to Dr. Lipsky days before the closing of the hospital will suffice to address the concerns of the Court. Not only does Plaintiff's cited testimony not address the Court's concerns, but Plaintiff's cited testimony further highlights the inconsistencies of his sham affidavit submitted in opposition to Defendants' motion for Summary Judgment. Plaintiff was asked at his deposition whether he **ever** had any conversation with either Dr. Lipsky or Tamara Dunaev about any alleged amounts he was owed, and his response made no reference to any conversation prior to December of 2017. Amazingly, after depositions, Plaintiff's January 30, 2023 affidavit suddenly mentions, for the first time, conversations (now with specific dates) on "January 15, 2015, March 13, 2015, April 14, 2016, and the office Christmas party of December 2017" where he

claims to have spoken to Ms. Dunaev about his alleged owed amounts.[25] Construing all facts in the Plaintiff's favor, the trial court believed that Defendants made several promises to pay Plaintiff "some money", but without such promise being tied to the sale of the hospital it was not enough to toll the limitations period in Plaintiff's favor so that he could claim all years at issue:

> THE COURT: Okay. Now, the other thing I wanted to ask before we get into some discussion is this, is there a, Mr. Parisi, did the plaintiff identify in discovery that either Dunaev and or Linsky (sic.) said to him on many occasions, I know we owe you some money but wait until we sell the hospital? Did plaintiff identify those type of statements?
>
> MR. PARISI: The -- the -- the interrogatory response that you referred to earlier, but other than that, no.
>
> THE COURT: Well that's -- the interrogatory response that I read does not say wait until we sell the hospital. I'm talking about waiting until we sell the hospital. Was that type of a statement disclosed by the plaintiff in discovery?
>
> *Id.* at 7:16-8:5

Here, the evidentiary record is absent of any missing payments, let alone evidence that would support such a significant sum of $255,000.00 as Plaintiff alleges. Plaintiff's production includes merely 1-2 years of checks in 2016 and

[25] Plaintiff's reference to his answer in interrogatory number 24 that "Defendants repeatedly promised to pay plaintiff bu[t] did not do so. They said that they had six years to pay him but have taken no action to do so since the hospital was sold" similarly misses the mark and highlights Plaintiff's inconsistencies. This response does not identify any time periods when such "promises" were made and does not tie paying the plaintiff to the sale of the hospital.

2017, and completely omits any copies of checks in 2011, 2012, 2013, 2014, 2015, or 2018, which Plaintiff admitted he received and did not produce. Additionally, Plaintiff admits that he did not provide any 1099 forms in his personal or business tax returns from 2011 through 2017, despite admitting having received a 1099 from MHA for each year, while also admitting "he was compensated pursuant to his President/Director Agreement" that was entered into in December 2012. *See* Da67 at 34:6 – 35:21. Plaintiff has been given all benefits and opportunity to provide support for his allegations and there simply is nothing to substantiate Plaintiff's claims except for self-serving assertions. There are no genuine issues of material fact challenging the evidence Defendants have provided. There is no proof at all that Defendants did not perform under the contract, only evidence that payments were made, which Plaintiff himself freely admitted.

Plaintiff's 2016 and 2017 Checks do not Provide any Clarity on Plaintiff's Damage.

On appeal, Plaintiff now tries to back into damages by totaling the checks Plaintiff produced and then subtracting that from the total due under the contracts for the same periods. At the outset, this argument was not made before

the trial court and should not be considered on appeal.[26] Ignoring this glaring deficiency, Plaintiff's logic raises more questions for his case than it answers. At his deposition, Plaintiff was specifically asked how he was coming up with the alleged $255,000.00 in unpaid services in the context of his produced checks in 2016 and 2017. At no point did Plaintiff say, as he is now, that he added up the totals of the checks and subtracted it from the amount owed under the agreements. What he said was he came up with $255,000.00 because that was what a "Russian girl" at MHA told him, though he could not identify who until after the discovery period ended. Specifically, Plaintiff said:

> Q No. I mean, we could keep going, but would you agree you received regular checks in 2017?
> A Not regularly. You went from February to May and then June. And you asked me a question, how did I know what was –
> Q That's what I want to know.
> A Very easy. The person that -- I'm not sure if she's still there. I would go on a regular basis to the accountant and asked them, which you should have a record of, what they owe me.
> Q And what would they tell you?
> A The exact amount of what was owed to me, which is the matter of this lawsuit.

---

[26] *See J.K. v. N.J. State Parole Bd.*, 247 N.J. 120, 138 n.6 (2021); *State v. Jones*, 232 N.J. 308, 321 (2018); *State v. Lawless*, 214 N.J. 594, 605 n.2 (2013); *State v. Robinson*, 200 N.J. 1, 20-22 (2009); *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on *R*. 2:6-2 (2022). *See also State v. Cabbell*, 207 N.J. 311, 327 n.10 (2011) (Court declined to consider an argument first raised in a supplemental brief to the Court); *Hirsch v. State Bd. of Med. Exam'rs*, 128 N.J. 160, 161 (1992) (Court declined to address a claim presented after the Court granted a petition for certification).

Q Right. And so how did you keep a record -- how much are you suing MHA for?
A 255,000.
Q How did you come up with that number?
A Through the person who was doing the accounting for MHA.
Q Who was that? A Uh, I think the -- it was a Russian girl. I don't remember her name offhand, but I can --
Q When did you speak to her?
A On a monthly basis.
Q From when until when?
A Uh, probably from 2013 or '12 to December of 2017.
Q It was the same person for that five year period?
A Yes.
Q And each time you would speak to her, she would tell you you're owed X amount?
A Yeah. She would have a ledger and in the ledger, that's where the numbers were.
Q Do you have a copy of that ledger?
A No. I'm not entitled to that.
Q Did you ask for that ledger?
A No.
Q Other than the ledger that she -- that person that we can't remember whose name it was, would tell you existed, do you have any other knowledge of such a ledger being in the possession of MHA?
A No.
Q Do you have any other way of verifying that such an amount was owed to you other than what this woman told you?
A Well, she was the accountant, so I believe what she said.

See Da70-72 at 134a – 171a at 47:25-49:25.

Ignoring Plaintiff's contradictions, Plaintiff's latest argument highlights the need for Plaintiff's 1099's and tax information that he refused to produce and was the subject of lengthy discovery motions (one of which resulted in the case being dismissed with prejudice). Plaintiff has not asserted that the checks he produced constitutes a complete record of all the amounts he received in 2016

and 2017, just that those are the checks he was able to "dig up". While Plaintiff's checks for 2016 and 2017 paint a picture of sporadic payments by MHA, Plaintiff did not produce the check he received in 2018 that we know was received and cashed by him. *See* Da128 at 12:1-13:21 and at Da30.[27] Curiously, Plaintiff's brief also neglects to include the 2018 payment in his calculations. This is not the only time Plaintiff has provided an incomplete production in attempt to muddy the waters and ignore his burden of proof on his damages. For example, when asked if he produced his 1099's in this case, Plaintiff answered "Yes. I think I did, and then I requested some from the IRS." *See* Da78 at 77:12-15. However, when presented with the tax returns he actually produced, Plaintiff was forced to admit that **none** of his 1099's were produced, though he did claim that this was a "surprise". Da78-79 at 80:8-82:4. Thus, faced with an Plaintiff who withholds checks (i.e. the 2018 payment) and states that he produced materials that he did not, there is no basis for the Court to rationally

[27] In MHA's response to Plaintiff's interrogatories, MHA stated "Plaintiff constantly asked MHA, LLC for more money than he was entitled to. After his role with MHA, LLC was terminated in December of 2017, Plaintiff asked for payment for alleged services from MHA, LLC, and agreed to a final payment of $10,000.00. As a result, MHA, LLC paid Plaintiff via check #0035895 the amount of $10,000.00 on January 26, 2018, which he received without objection on February 8, 2018. Defendants understood that this final payment was satisfactory to Plaintiff and no further amounts were owed." *Id.*

conclude that the checks he did produce constitutes a complete record of his payments in 2016 and 2017.

> A Well, I have the checks to my bank and know the months that I worked there. Q When you say you have the checks, did you produce those checks in this litigation? A Yes, I did. Q And what year did those checks reflect? A I assume from the beginning, 2000 -- is it 2011? I think so. Because I went to my bank and asked them to give me all the checks from MHA from those years. I think Constantine has those checks. MR. PARISI: I'm going to share a document that I'll be marking as D-7. Q These are the checks that were produced in this case by your attorney. A Uh-huh. Q Are these the checks you're referring to? A Yes. Q So is it your assertion that you have provided all the checks that you had going back to 2011 from MHA? A Yeah, I assume so, because I went to the bank and asked them to give me all the checks from MHA for those years.
>
> Da69 at 41:1-25.

Distilled to its essence, Defendants did not induce Plaintiff into his statute of limitations problems, and Plaintiff's sham affidavit in combination with his newly referenced testimony highlights Plaintiff's lack of candor and further demonstrates why the lower Court's ruling in granting Defendant's summary judgment was correct and should not be disturbed.

> "Having said that, the big problem for the plaintiff is, he has no idea how much of the $250,000 was due from 2010 and the year of 2011 before the six- year Stature would have run, up until to December of 2017. He had zero idea how much to a portion amongst the various years. So therefore, those portions that would have been barred, even if the defendant was equitably estopped as of December 2017, for 2010, 2011 would have been pure guess work by a jury."

See T2 at 15:10-19.

II. PLAINTIFF CANNOT POINT TO ANY EVIDENCE PRODUCED DURING DISCOVERY THAT DEFENDANTS EVER PROMISED TO PAY PLAINTIFF UPON THE SALE OF THE HOSPITAL.

Plaintiff's January 30, 2023 Affidavit was a Sham in a Bad Faith Effort to Defeat Summary Judgment.

Despite Plaintiff's assertions, Plaintiff's affidavit made on January 30, 2023 directly contradicts Plaintiff's request for admission responses, interrogatory responses and deposition testimony. In response to Defendants' request for admissions, Plaintiff admitted that from February 8, 2018 through the filing of this lawsuit, he did not communicate with Defendants regarding any alleged outstanding amounts claimed to be owed to him. *See* Da160. However, in his affidavit Plaintiff later stated that he met with Ms. Dunaev after the sale of the hospital and claims that Ms. Dunaev made promises to Plaintiff to pay him the owed sums that form the basis of this lawsuit. *See* Pa 393-397. Plaintiff claims this occurred on February 22, 2019, which obviously contradicts his request for admission response that no communications occurred with Defendants after February 8, 2018.

Plaintiff's sham affidavit also directly contradicts the testimony of Ms. Dunaev, who testified that "we did pay him [Plaintiff]" and that "I never said that he was not paid completely or whatever. He was paid. That is my testimony." *See* Da133 at 30:16-19. Regarding the $10,000.00 check paid in

January of 2018, Ms. Dunaev testified that "when he [Plaintiff] accepted the check, and he put through the bank and he cashed it [in January 2018], and he never bothered me ever since or, you know, he never made any claims ever since until he came up with this lawsuit. He was ok with it. That means that for a few years, you keep silence and you don't ask anything, that means he was satisfied. That he accepted." *Id.* at 30:16-31:1. As a result, all the evidence in the record confirms that the parties had no interaction with each other after the January 2018 payment was made, until Plaintiff contradicted this in his sham affidavit submitted in opposition to Defendants' summary judgment motion.

In answering Defendants' interrogatories, Plaintiff claimed that he spoke to Tamara Dunaev and Richard Lipsky (co-owner of MHA, LLC) "approximately once a month" about alleged monies Plaintiff was owed but provided no dates. *See* Pa578 - 587. Later in the same interrogatory responses, Plaintiff claims would go to the "CEO" (this was Lynn McVey for a time, but several individuals held this title while Plaintiff worked at the hospital so it is unclear who he meant) "monthly for at least a year" about monies he was owed. *Id.* Then at his deposition Plaintiff was asked if he ever had conversations with either Tamara Dunaev or Richard Lipsky about any alleged amounts he was owed, to which he stated "Yes. We -- again, it was during the Christmas event, which was at the end of December of 2017, and myself and another physician

who was owed money, too, we approached Dr. Lipsky and said you know you're selling the hospital but we haven't gotten paid. And he said don't worry. The new owners have six years to pay us and we'll pay you." *See* Da79 at 83:19-25. Plaintiff made no mention of any other communications with Ms. Dunaev or Richard Lipsky in his deposition. Then in his affidavit, Plaintiff directly contradicted this testimony when he asserted specific dates that he spoke with Ms. Dunaev, **all occurring years prior to the 2017 conversation he mentioned at his deposition.** Specifically, Plaintiff's affidavit claims that on specific dates, namely 1/15/15, 3/13/15, 4/14/16, and in December of 2017 he asked Ms. Dunaev for payments. *See* Pa393-397 at paragraph 8. This also clearly contradicts his deposition testimony that the only conversation with any of MHA's owners occurred in December of 2017.

Courts have held that "'a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict.' *Baer v. Chase,* 392 F.3d 609, 624 (3d Cir. 2004) (citing *Hackman v. Valley Fair,* 932 F.2d 239, 241 (3d Cir.1991)). This principle of summary judgment practice is often referred to as the "sham affidavit doctrine." *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 251 (3d Cir. 2007). Plaintiff has not offered a single explanation for the contradictions in his January 30, 2023 affidavit, and

instead contends that the affidavit is somehow consistent with his prior testimony. Correctly, the trial court highlighted why the sham affidavit doctrine must be applied in this case in deciding the summary judgment and reconsideration motions:

> THE COURT: I know, I know all I can say is that's a sham affidavit because when you're asking in an interrogatory to give me a summary of any and all statements that anybody made in this case that's relevant and you leave that point out, and you go through an entire deposition of May 26th of 2022 and you leave that point out about the hospital and the only time it comes up is to respond to defendant's Motion for Summary Judgment, I may rule that that's a sham affidavit because obviously it's not -- MR. GUTWIRTH: It doesn't -- THE COURT: -- got produced in discovery and it should have been."
>
> *See* T2 at 12:8-20.
>
> …
>
> THE COURT "In a nutshell, I stand by my ruling about the sham affidavit. I think the problem was noticed by the plaintiff in defendant's opposition brief, and it was all -- the defendant's opposition brief was all based upon just sworn testimony from the plaintiff. Did you have any discussions with the defendant about the money that was owed? Yes, at the Christmas Party in December 2017. And then when he saw the brief, all of a sudden this new affidavit comes from the plaintiff, he wants to bring these discussions all the way back to, I think it was 2015. I stand be [sic] my ruling that that is a critical, significant, issue on the case. And that the plaintiff, a Doctor was sworn under oath at his deposition testimony, and that the affidavit directly contradicted him on those conversations."
>
> *See* T2 at 13/21-14/12.
>
> …
>
> THE COURT: When you're asked to give every and all statements that the people make and you don't put that statement in there and

then there's a certification later on that contains the statement, that's a conflict. The absence of it in the prior responses in discovery by the parties is a conflict on a critical issue. If I -- if I -- if I said to you that -- that somebody said to me what's the weather like today? I said I'm looking outside and it's dark. And then three years later when it's an important issue I said well it was not only dark but there was snow on the ground. Well me adding snow on the ground is a conflict with the prior statement because it should have been in the prior statement. The absence is a conflict."

See T2 at 12:24-13:13.

…

THE COURT: I explained to you, your yes answer too. If you're owed money in 2010, you don't do anything until 2017. You ask the guy to get paid for 2010. Let's say the guy never worked there again after 2010. He sees him in December of 2017, he goes, by the way, you owe me money for 2010. And the guy says, wait, I'm selling the Hospital. He goes all right, I'll wait. How does that toll the six-year Statute of Limitation for the money that was owed in 2010?

MR. GUTWIRTH: It lulls the plaintiff into a sense of security, and --

THE COURT: But the Statute had already run by December of 2017 under my scenario, when he spoke to the guy who allegedly owes him the money.

See T2 at 6:18-7:7

…

THE COURT …the plaintiff had many occasions to respond to specific discovery requests and at the time of deposition to bring out any and all statements that were relevant to this case from the defendants or their representatives. Plaintiff was specifically asked that question. Nowhere on this motion record did the plaintiff disclose in discovery that they were told to wait until the hospital was sold by anybody, not the Russian accountant, not [Lipsky], not Dunaev, not anybody. So even giving the plaintiff the benefit of all reasonable doubt I am finding on this motion record that there's no genuine issue of material fact: i.e. the plaintiff was never told to

> wait until the hospital was sold, and the hospital was sold in December of 2017.
>
> *See* T2 at 33:17-34:6

Removing the Plaintiff's January 30, 2023 affidavit, there is simply nothing that Plaintiff can point to in the record that establishes that Defendants promised to pay Plaintiff anything conditioned upon the sale of the hospital. Faced with this fact, Plaintiff attempts to 'shoe-horn' such a condition into Plaintiff's deposition testimony and interrogatory answers. At his deposition, Plaintiff referenced a conversation he allegedly had with Richard Lipsky, where it was Plaintiff – not Richard Lipsky – who raised the sale of the hospital in the context of receiving alleged owed amounts:

> "Yes. We-again, it was during the Christmas party event, which was at the end of December 2017, and myself and another physician who was owed money, too, we approached Dr. Liposky and said 'you know you're selling the hospital but we haven't gotten paid.' And he [Dr. Lispky] said 'don't worry. The new owners have six years to pay us and we'll pay you.'"
>
> *See* Da79 at 83:19-25. (quotations added for clarity)

Ignoring the fact that no amount is mentioned in this conversation and subsequent to this conversation MHA did pay Plaintiff $10,000.00 in 2018, nowhere in the above interaction did Dr. Lipsky say that payment is contingent upon anything occurring. At best, Dr. Lipsky mentioned that MHA would be receiving money from the new owners, but this is a far cry from satisfying the

standards for equitable estoppel. Regardless, as Judge D'Elia highlighted in his opinion, even if Dr. Lipsky's comment did rise to the level of equitable estoppel for statute of limitations purposes, it doesn't save Plaintiff from his problem of allocation because 2010 and almost all of 2011 would remain barred by the six-year limitations period.

The same is true regarding Plaintiff's interrogatory responses. In Plaintiff's interrogatory response #4, Plaintiff claimed "Defendants repeatedly promised to pay plaintiff and did not do so. They claimed that they had six years to pay him but have taken no action to do so since the hospital was sold." *See* Pa576-577. This statement does not say that Defendants conditioned paying Plaintiff on the sale of the hospital and is likely the Plaintiff referring to the same conversation in December of 2017 that he referenced at his deposition. This response is Plaintiff noting that Defendants have not paid him since the hospital was sold but makes no mention of repeated assurances by Defendants that he should keep working at the Hospital for all of those years and he will be paid once a sale occurs. Thus, granting every reasonable inference in favor of the Plaintiff, once the sham affidavit is removed there simply is not enough evidence to support Plaintiff's newly devised theory that equitable tolling should apply to save his claim. Accordingly, the Court's application of the sham affidavit doctrine and granting summary judgment should be affirmed.

III. PLAINTIFF NEVER PROPERLY FILED A MOTION TO EXTEND DISCOVERY AND THERE ARE NO EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY A DISCOVERY EXTENSION.

Plaintiff's brief completely ignores that his Motion to Amend, which offhandedly requested an extension of discovery, was denied on procedural grounds and the substance was never considered by the trial court. On August 5, 2022, the trial court denied Plaintiff's Motion to Amend, citing procedural grounds stating "Denied as the movant fails to provide the Court with a courtesy copy of this 136-page motion, which is in violation of the Chief Justice's Omnibus Order requiring all submissions exceeding 35 pages to be made to the Court in hard copy." *See* Pa133 - 134. Simultaneously, the trial court granted Defendant's cross-motion to bar Plaintiff from introducing evidence produced after the close of discovery,[28] reiterating that the Motion to Amend was denied because of a procedural deficiency:

> Granted. The motion to amend was denied on procedural grounds. The motion to bar is granted because discovery was obtained outside the discovery end date. The Plaintiff did not seek to extend discovery beyond the May 26, 2022 discovery end date but rather went ahead and conducted discovery without seeking that permission. As such, the discovery conducted beyond the discovery end date is barred. Trial remains. *Id*.

[28] The trial court did not bar the deposition of Ms. Dunaev, contrary to Plaintiffs assertions on appeal, because that deposition occurred with all parties' consent. Regardless, there is nothing cited by Plaintiff in Ms. Dunaev's deposition that supports the arguments Plaintiff has put forward on appeal.

In the motion to quash the out of time subpoena on Diana Zhellandkovah, the trial court also told Plaintiff that if he wished to reopen discovery to take the deposition of Ms. Zhellandkovah, he would need to move before Judge Turula to do so. "You've got to make a motion to reopen discovery in front of Judge Turula. That's how Hudson County Local Rules are… You want to try to make that argument, you make a Motion to Reopen Discovery with Judge Turula." *See* T1 at 5:1-23. However, despite both Judge Turula telling Plaintiff that the motion was denied on procedural grounds for failing to submit courtesy copies and Judge D'Elia telling Plaintiff to file a Motion to Reopen Discovery, Plaintiff elected not to do so.

Ignoring this reality, Plaintiff blames Defendants for his own failures to demonstrate his damages, claiming that Defendants "did not list Diane Zhellandkovah as an individual having relevant knowledge of the facts of the case and failed to produce a witness having relevant knowledge of the amounts of defendants financial obligations to Dr. Bellifemine." Plaintiff's Brief pg. 030. This places reality on its head because Defendants have no way of knowing about one-on-one conversations Plaintiff claims he had with a "Russian girl". The plaintiff bears the burden of proof and if Plaintiff was having conversations to this effect it was up to Plaintiff to identify such an individual during discovery (or at a minimum attempt to amend his discovery once the identity of this

individual became clear to Plaintiff). It was not until Plaintiff's disastrous deposition, where he conceded he did not produce relevant documents and conceded that he has no way of ascertaining any amounts owed to him by Defendants, if at all, that Plaintiff suddenly recalled the name of this individual. Rather than moving to reopen discovery (and complying with the trial court's procedural requirements for such a motion) or attempting to amend his prior interrogatory responses (or correcting his deposition testimony for that matter), Plaintiff sat on his hands after August 5, 2022 and made no attempt to correct the record. Under such circumstances, there is no basis for this Court to reverse the trial court's denial of the Motion to Amend and correct the litigation strategy of the Plaintiff.

CONCLUSION

For the foregoing reasons, this Court should uphold the decisions of the trial court and dismiss Plaintiff's appeal.

Respectfully submitted,

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Dated: October 26, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MORRIS BELLIFEMINE, MD, PA, *Plaintiff-Appellant,* vs. MEADOWLANDS HOSPITAL MEDICAL CENTER, MHA, LLC F/D/B/A MEADOWLANDS HOSPITAL MEDICAL CENTER, LYNN MCVEY, TAMARA DUNAEV JOHN DOE, JANE ROE, ABC CORP, DEF LLC, being fictitious parties whose identities are currently unknown, both jointly and severally *Defendants,*	**DOCKET NO.: A-002670-22-T2** *CIVIL ACTION* *ON APPEAL FROM:* SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY DOCKET NO.: HUD L 004332-20 SAT BELOW: HON. ANTHONY V. D'ELIA, J.S.C. HON. JOSEPH A. TURULA, P.J.Cv

PLAINTIFF-APPELLANT MORRIS BELLIFEMINE'S REPLY BRIEF

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STATEMENT OF PROCEDURAL HISTORY

Defendants' procedural history includes extensive discussions of the proceedings below that have no relevance to the within appeal. The irrelevant information includes discussions of the discovery disputes which resulted in the motion court's entry of an Order dismissing plaintiff's complaint with prejudice despite the failure of defendants to obtain a dismissal without prejudice prior to the entry of a dismissal with prejudice.(Db 4-5). The two tiered procedure of R. 4:23-5(1)which provides for the entry of a dismissal without prejudice followed by a 60 day period to give the delinquent party to provide outstanding discovery is mandatory. Salazar. MKJGC Design, 458 N.J. Super. 551, 561-563 (App. Div. 2019); Thabo v. Z Transp., 452 N.J. Super. 359, 369 (App. Div. 2019); St. James AME Dev. Corp., 403 N.J. Super. 86, 95 (App. Div. 2008); Colonial Specialty Foods, Inc., 317 N.J. Super. 207 (App. Div. 1999). As the dismissal of plaintiff's case was erroneous, the complaint was reinstated (Db 5).

Defendants' Statement of Procedural History faults plaintiff's counsel for not scheduling the depositions of Tamara Dunaev and Lynn McVey until May 26, 2022(DB5, Para. 2) . The purpose of discovery end dates is to prevent adjournments which delay trials. Ponden v. Ponden,374 N.J. Super. 1 (App. Div. 2004), certif.

denied 183 N.J. 212 (2005); Leitner v. Toms River Regional School District 392 N.J. Super. 80, 87-88(App. Div. 2007). The scheduled trial date of February 15, 2023 at the time the discovery end date was set for May 26, 2022 was adjourned by the Hudson County Superior Court because of the Covid-19 crisis. The effect of delays caused by the Covid-19 crisis should be considered by a trial court in determining whether a discovery extension should be granted. Hollywood Café Diner, Inc. v. Jaffe 417 N.J. Super. 410, 420-421 (App. Div. 2022).

Defense counsel's criticism of plaintiff's counsel for noticing the depositions of Ms. McVey and Ms. Dunaev on May 26, 2022 is hypocritical and misleading because defense counsel did not take Dr. Bellifemine's deposition until May 26, 2022.(Vol. 1, Pa.63-100). Defense counsel's criticism of noticing Ms. McVey and Ms. Dunaev fails to disclose to the court that on May 23, 2022, three days prior to the discovery end date and the depositions noticed for Ms. McVey and Ms. Dunaev, defense counsel served plaintiff's counsel with 613 pages of document discovery pertaining to the defenses for non-payment to Dr. Bellifemine because he was late in submitting his patient charts and some of the documents were relied on in support of defendant's motion for summary judgment. (Vol. 2 Pa. 184-287). The service of 613 pages of documents three days before the discovery end date not only failed to meet the requirements of R. 4:17-7 because service of the documents was not 20 days prior

to the discovery end date, but was extremely prejudicial since depositions of defendants' representatives were scheduled for May 26, 2022.

Defense counsel asserts in his Statement of Procedural History that he agreed to produce Tamara Dunaev subsequent to the discovery end date and cites a transcript of a colloquy between counsel in which defense counsel agreed to produce Ms. Dunaev for a deposition after the discovery end date because Ms. Dunaev was "busy". (Db 5, Footnote 2). Defense counsel has not advised the court that he never withdrew his motion to bar discovery after the May 26, 2022, deadline and as a result of his motion and the denial of plaintiff's motion to extend discovery Judge Turula entered an Order barring the use of Ms. Dunaev's deposition at trial because it occurred after the discovery end date.(Vol. 1 Pa. 133-134). Defense counsel Statement of Procedural History omits any reference to his gamesmanship.

Defendant's Statement of Procedural History asserts that plaintiff " has produced no documentation evidencing support of the amount owed was $255,000.(Db6, paragraph 2). Dr. Bellifemine's' bank was unable to provide him with copies of checks deposited to his account prior to 2016, but provided him with all checks issued in 2016 and 2017. (Vol. I,Pa. 75; TR43-24 to 47-18). As plaintiff indicated in his initial brief, the checks paid to Dr. Bellifemine from defendants in 2016 and 2017 totaled $95,364.82.(Pb12, Paragraph 1). As Dr. Bellifemine's

contracts with defendant established his entitlement to $306,000 of total compensation for 2016 and 2017, Dr. Bellifemine has produced unrebutted documentation that at a minimum $210,635 of his claim for $255,000,00 asserted in his lawsuit filed on November 24, 2020 was within the six year statute of limitation of N.J.S.A. 2A:14-1.

Defendant's Statement of Procedural History devotes a page to the two adjournment s of the summary judgment motion based on Dr. Bellifemine's counsel's affliction with Covid 19 which was documented by a physician's note. (Db. 11 paragraph 2). Defense counsel asserts that plaintiff's counsel was malingering because he did not present a second doctor's note in support of the adjournment request. Defense counsel's ad hominem attack on plaintiff's counsel ignore the well established fact subject to judicial notice that the effects of Covid 19 can result in permanent injury and symptoms of Covid 19 can often occur for more than two weeks.New Jersey Rule of Evidence 201(b)(1)

Dr. Bellifemine agrees with defendant's that Judge D'Elia ruled that defendants were entitled to summary judgment because plaintiff could not establish that his claim that his $255,000.00 claim met the six year statute of limitation of N.J.S.A. 2A:14-1 and that Dr. Bellifemine' Certification in Opposition to Defendant's Motion for Summary Judgment indicating that he relied on promises of payment after

Meadowlands Hospital was a sham certification because it directly conflicted with Dr. Bellifemine's deposition testimony.(1T2 34-7 to 35-21;1T240-2 to 14; 1T2 12-8 to 13-13;1t2 12-8 to 13-13;1T2 16-6 to 19)/ Judge D'Elia held that if Dr. Bellifemine's Certification was not barred by the sham affidavit doctrine, Dr. Bellifemine's Certification would have been considered it would equitably estop defendants from relying on a statute of limitations defense.(1T2 18-1 to 9)

Judge D'Elia issued rulings against defendants on the summary judgment motion not referred to in Defendant's Statement of Procedural History or Statement of Facts.. Judge D'Elia ruled that the statement made by defendant's bookkeeper Diana Zhellandkovah n December of 2017 that defendant's owed Dr. Bellifemine was the statement of a party opponent admissible to establish that defendants owed Dr. Bellifemine $255,000.00 (1T2 31-4 to 32-4). Dr. Bellifemine asserts that Judge D'Elia's ruling was correct. N.J.R. E. 803(b)(1); Hassan v. Williams, 467 N.J. Super. 190,207-216(App Div 2021 (trial court erroneously excluded deposition testimony of safety department employee and investigation report of safety department of company which employed defendant because testimony and documents acknowledging that and the driver was negligent constituted statements of a party opponent and statements of a party representative which was admissible pursuant to N.J R. E. 803(b)(1)); Parker v. Poole, 440 N.J. Super. 7, 16-21 (App. Div. 2005 (trial

court's failure to admit deposition testimony of defendant in a medical malpractice action constituted reversible error because testimony was admissible pursuant to N.J R. Evidence 803(b)(1); Knopp v.Rosen, 425 N.J. Super. 391, 419-420 (App. Div. 2012).

Defendants brief includes five pages asserting that any non payment of fees to Dr. Bellifemine was justified because he was late in completing his patient charts which constituted a material breach of contract. (Db 14-19) . Defendants have failed to advise the Court that Judge D'Elia rejected defendants argument that summary judgment should not be granted to defendants based on Dr. Bellifemine's late completion of patient charts because the issue of whether delays in completion of the charts constituted a material breach of contract represented a jury question. (IT2 38-2 to15). Judge D'Elia stated that if a jury accepted Dr. Bellifemine's contention that defendants continued to retain Dr. Bellifemine and promised to pay him for his services, defendants failure to pay Dr. Bellifemine would give rise to a claim for unjust enrichment and a breach of a covenant and good faith and fair dealing. (IT2 38-7 to 39-6). Dr Bellifemine asserts that Judge D'Elia's ruling that the issue of whether Dr. Bellifemine's lateness in completing his charts was a material breach of contract constituted a jury question was correct. Roch v. BM Motoring, 228 N.J. 163, 174-175 (2017); Magnet Resources, Inc v Summit MRI Inc. 318 N.J. Super. 275,

286-287 (App. Div. 1998); Lo Re v. Tel-Air Communications, 200 N.J. Super. 59, 72-73 (App. Div. 1985); Du Ponte v. Mutual Contracting Co. , 18 N.J. Super. 142, 146 (App. Div. 1952)

Defendant's claim that Dr. Bellifemine agreed to accept $10.000 to compromise his claim for $255,000.00 in unpaid fees and the payment constituted an accord and satisfaction of Dr. Bellifemine's claim against defendants. (Db 40, paragraph 2 to Db 41, paragraph). Judge D'Elia held that defendants failed to present the Court with a copy of the cashed $10,000.00 check and a copy of a release indicating that Dr. Bellifemine's receipt of the check constituted a compromise of his disputed claim.(1T2 37-13 to 38-1). Dr. Bellifemine's asserts that defendant' failure to present the deposited check to Dr. Bellifemine's and a release signed by Dr. Bellifemine indicating that his acceptance of the money was a compromise which extinguished all claims against defendants precluded defendant's argument that the alleged payment constituted an accord and satisfaction of all claims against defendant. Zekker v. Markson Rosenthal & Company, 299 N.J. Super. 461 (App. Div. 1997); Peterson v. Hartford Accident & Indemnity Co., 32 N.J. Super. 23, 31-32 (App. Div.1958).

Defendants failure to advise the Superior Court, Appellate Division that the Law Division rejected most of the arguments advanced in support of its Motion for

Summary Judgment is disingenuous and misleading.

STATEMENT OF FACTS

Dr. Bellifemine relies on the statement of facts set forth in his initial brief. (Pb 3-17). In opposition to defendants' motion for summary judgment, Dr. Bellifemine relied on the contracts between him and defendants which were submitted in support of defendants' motion for summary judgment (Vol. 1 Pa. 159-177). Defendants have not contested Dr. Bellifemine's contention that he was entitled to $306,000.00 for his services for his positions at Meadowlands Hospital. Although Dr. Bellifemine was unable to produce checks he deposited in his bank account prior to 2016, Dr. Bellifemine was able to obtain all checks issued to him by MHA, LLC in 2016 and 2017 (Vol. I, Pa. 75; TR 43-24 to 47-18). Dr. Bellifemine's answer to defendant's Statement of Undisputed Material Facts listed all the checks issued to him by Meadowlands Hospital (Vol. III, Pa. 389). Defendants do not dispute that the correct total for all the checks produced by Dr. Bellifemine from MHA, LLC or 2016 and 2017 was $95,364.82 (Vol. III Pa. 405-415). As Ms. Diana Zhellandkovah, Defendant MHA LLC's bookkeeper advised Dr. Bellifemine that $255,000.00 in December of 2017, the checks submitted to the motion court establish that $210,635.00 of the $255,000.00 claim for damages accrued in 2016 and 2017 which were respectively within four and three years of the filing of Dr. Bellifemine's Law

Division Complaint. When Dr. Bellifemine received payments from MHA LLC he received one check for all his positions (Vol. 1 Pa. 75). None of the checks issued by MHA LLC designated a specific period time for which MHA LLC sought to apply the payment for its debt to Dr. Bellifemine (Vol. 3 Pa. 404-415).

ARGUMENT

I. DR. BELLIFEMINE'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PRESENTED AMPLE PRESENTATION TO THE MOTION COURT THAT DR. BELLIFEMINE'S CLAIMS FOR COMPENSATION FOR 2016 AND 2017WERE NOT TIME BARRED

(Volume I, Pa. 75; Pa. 150-184; Vol. III Pa. 389; Pa. 405-415;)

Defendants contention that Dr. Bellifemine did not present evidence to the motion court that his claims for past due compensation were not time barred ignores the fact that Dr. Bellifemine presented all the checks he received from MHA LLC IN 2016 and 2017 to the motion court and the checks he received amounted to $95,364.82 while the money due Dr. Bellifemine for 2016-2017 was $306,000.00. In Johnson v. McClellan, 468 N.J. Super., 562,(App. Div. 2021) plaintiff who filed a consumer fraud action against an out of state attorney which asserted that the out of state status caused plaintiff to receive a low settlement claimed that the defendant attorney raised new issues on appeal which should not be considered by the Appellate Court. In rejecting plaintiff's argument, the court stated:

> We reject plaintiff's argument as the record shows that all issues raised on appeal were before the motion judge. In Nieder, the plaintiff sought to introduce affidavits and

> factual evidence to the Supreme Court that was not presented to, nor discussed by, the trial court or this court. Id. at 234-35, 300 A.2d 142. That did not occur here. Defendant has not attempted to introduce new evidence on appeal. Moreover, the judgment under review resulted from plaintiff's motion; hence, plaintiff bore the burden of proof under summary judgment standards. Plaintiff's claim that defendant waived certain arguments because he did not make precisely the same arguments in the trial court clearly lacks merit. "[E]ven in an uncontested motion, the judge must consider whether undisputed facts are sufficient to entitle a party to relief. It is not enough to suggest that there is no opposition, especially if the facts do not warrant the granting of relief in the first instance." Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 302, 974 A.2d 1102 (App. Div. 2009). Johnson v. McClellan, supra 498 N.J. Super at 591-592

In Docteroff v. Barra Corp. of America Inc,, 282 N.J. Super., 230, 236-237 (App. Div. 1995), plaintiff homeowner asserting a breach of warranty claim against the distributor of roofing material asserted that the 6 year statute of limitations in N.J.S.A. 2A:14-1 applied to their cause of action despite the fact that plaintiff's stated in the trial court that the four year statute of limitations of the Uniform Commercial Code of N.J.S.A. 12A:2-725 should be tolled. Defendants contended that plaintiff's failure to assert that the six year statute of limitations applied on the motion for summary judgment barred plaintiffs from raising the issue for the first time on appeal. Id. In rejecting the defendant's contention, the court stated:

> Defendants are correct that we will not ordinarily consider an issue raised for the first time on appeal unless it relates

> to "jurisdiction of the trial court or concern[s] matters of great public interest," or otherwise constitutes "plain error." See Nieder v. Royal Indemnity Insurance Company, 62 N.J. 229, 234, 300 A.2d 142 (1973). See also Hamilton, Johnston v. Johnston, 256 N.J .Super. 657, 662, 607 A.2d 1044 (App. Div.), certif. denied, 130 N.J. 595, 617 A.2d 1219 (1992); R. 2:10–2. However, we need not get caught up in the question concerning the extent to which plaintiffs have shifted gears or changed their position regarding the appropriate statute of limitations. Because the issues before the trial judge dealt with whether the suit was timely and what the controlling limitations period was, we will consider the same issues as presented to us, regardless of whether plaintiffs' principal theory has changed. Id.

In the case at hand, the Court should apply the reasoning of Johnson v. McClellan, supra because Dr. Bellifemine presented unrebutted evidence to the motion court that his claim for damages of $210,635.00 were not time barred because his complaint was filed in 2020 and the claim accrued in 2016 and 2017. The evidence included all the checks Dr. Bellifemine received from MHA LLC from 2016 and 2017 (Vol. III, Pa. 405-415). Dr. Bellifemine relied on the contracts between him and MHA LLC submitted in support of defendants' motion for summary judgment to establish that the monies he was paid by MHA LLC was $210,635.00 less than the amount he was due pursuant to his contracts with MHA LLC. Dr. Bellifemine's Answer to Defendants' Statement of Undisputed Material Facts included the assertion that the difference between the monies he was paid for 2016 and 2017 was less than he was owed by MHA LLC. Defendants' contention that Dr. Bellifemine did not

state that the amounts he was owed by defendants for 2016 and 2017 was not presented to the motion court asks the Appellate Division to ignore contracts submitted in support of defendants' motion for summary judgment and the checks from MHA, LLC to Dr. Bellifemine for 2016 - 2017. Unambiguous contracts are admissible as documents which reflect the intention of the parties to litigation. Globe Motor Corporation v Igdalev, 225 N.J. 469, 482(2016); CSFB 2001Park Corporate Center LLC v SB Rental 1, LLC, 410 N.J. Super. 114, 120 (App. Div. 2009). The checks submitted by Dr. Bellifemine in opposition to defendants motion are bank records admissible pursuant to NJRE 803(c)6; Garden State v. Graef, 341 N.J. Super.241, 244-246 (App. Div. 2001). Dr. Bellifemine's submissions to the motion court are unrebutted admissible evidence that his contention that $210,635.00 of the $255,000 claim against defendants was not time barred. Dr. Bellifemine's submissions to the motion court contradict Judge D'Elia's conclusion that a jury's analysis of the timeliness of plaintiff's claim would be based on total speculation.

II. DR. BELLIFEMINE PRESENTED AMPLE EVIDENCE TO THE MOTION COURT THAT THE PAYMENT APPLICATION RULE BARRED DEFENDANTS' STATUTE OF LIMITATIONS DEFENSE
(Volume 1, Pa.83; Bellifemine, TR 75-1 to 10; Volume III, Pa. 389, 405-415)

Defendants' argument that Dr. Bellifemine did not raise the payment application below ignores the evidence presented by Dr. Bellifemine presented to the motion court and the arguments presented by counsel. Whenever Dr. Bellifemine

received a check from MHA, LLC, the check was compensation for all Dr. Bellifemine's positions and did not identify a specific date of service. The checks Dr. Bellifemine received from MHA, LLC. never requested that the services be applied to a specific time period. In the absence of a request from a debtor to apply a payment to a specific time period, the payment application rule permits a creditor to apply a payment to the debtor's oldest debt. Craft v. Stevenson Lumbar Yard Inc., 179 N.J. 56, 72-76 (App. Div. 1965); General Elec. Co v. Fred Sulzer & Co, 86 N.J. Super. (App. Div. 1996). Dr. Bellifemine not only presented unrebutted documentary evidence that none of the checks issued to him by MHA, LLC requested application of the payment to a specific time, but application of the payment application rule which would defeat defendant's statute of limitations defense was argued by counsel at plaintiff's motion for reconsideration. Pursuant to Doctoroff v. Barra Corporation, supra, 230 N.J. Super. at 236-237, the Appellate Division reviewing a motion court's decision based on statute of limitation grounds " should consider all issues presented to us regardless of whether plaintiff's principal theory has changed." In the case at hand the payment application was argued below. The issue of the payment application doctrine was asserted adequately for appellate review.

III. THE PRESIDING CIVIL JUDGE'S DENIAL OF DR BELLIFEMINE'S MOTION TO EXTEND DISCOVERY CONSTITUTED AN ABUSE OF DISCRETION BECAUSE THERE EXISTED GOOD CAUSE TO EXTEND DISCOVERY

The denial of Dr. Bellifemine's motion to extend discovery from May 26, 2023 ignores the reality that the trial date of February 13, 2023 in place when the Court heard the motion could not occur because of the Covid 19 pandemic . The holdings in Leitner v. Toms River Regional School District 392 N.J. Super., 80, 87-88 (App. Div. 2007); Pondon v. Pondon, 374 N.J. Super. 1, 9 (App. Div. 2005) which state that in the absence of an arbitration or trial date, a motion to extend discovery should be granted if it is supported by good cause. A court should consider the effect of the Covid 19 crisis on court calendars in determining whether good cause justifies an extension of discovery. Hollywood Café Diner v. Jaffe, 417 N.J. Super. 420-421(App. Div. 2022).

In the case at hand, there existed good cause to extend discovery to take Diana Zhellandkovah's deposition because she possessed a ledger which documented the amounts Dr. Bellifemine was owed by defendants to Dr. Bellifemine which defendants claimed they had no records on the monies paid to Dr. Bellifemine. A significant factor which supported Dr. Bellifemine's motion to extend discovery is that the statute of limitations constituted an affirmative defense on which defendant has the burden of proof. R. 4:5-4; Citibank N.A. v. Estate of Simpson, 290 N.J. Super.

519, 523 (App. Div. 1996). Defendants claimed that they had no record of the 1099 forms issued to Dr. Bellifemine and did not produce a witness on May 26, 2023 who had relevant knowledge of the payments made by MHA, LLC. to Dr. Bellifemine pursuant to the deposition notice served on defendants. Even if the trial date of February 15, 2023 had not been cancelled because of the Covid 19 crisis, the deposition of Ms. Zhellandkovah would not have necessitated the adjournment of the trial date.

The Presiding Judge's Order contained a provision indicating that the deposition of Tamara Dunaev could not be used despite the parties agreement to take the deposition which occurred on July 21, 2022. Although defense counsel produced Tamara Dunaev for a deposition, defense counsel takes the position that the deposition cannot be used in future proceedings because it occurred after the discovery end date. The deposition thus had no purpose other than to accumulate billable hours for defense counsel. Defendants posture in the within case constitutes unconscionable, toxic gamesmanship. After failing to produce a witness having relevant knowledge of the payments made to Dr. Bellifemine within the discovery period and the 1099 forms MHA, LLC which were required to be issued to Dr. Bellifemine, defendant objected to the deposition of a subpoenaed witness who has a ledger indicating the amounts paid and owed to Dr. Bellifemine. The Presiding Civil

Judge's reward to defendants gamesmanship constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Court should reverse the summary judgment entered in favor of defendants an order a reopening of discovery to permit the deposition of Diana Zhellandkovah.

/s/ Constantine Bardis
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