Superior Court of New Jersey

Appellate Division

Docket No. A-003084-22T2

BERNADETTE STAVROS,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
Plaintiff-Respondent,	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	CHANCERY DIVISION,
	:	FAMILY PART,
	:	CAMDEN COUNTY
THOMAS STAVROS,	:	
	:	Docket No. FM-04-1507-09
	:	
Defendant-Appellant.	:	Sat Below:
		HON. JAMES BUCCI, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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Date Submitted: April 22, 2024

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PRELIMINARY STATEMENT

This case involves a dispute between former spouses over the meaning of the word "sale" as it relates to a property owned by the Husband's family, the terms for the division of which is set forth in the parties' Property Settlement Agreement prepared by the Wife's attorney, executed by the parties and made part of the Final Judgment in Divorce in 2009. The PSA refers to any proceeds of the "sale" of the business only, not a State "taking" of any parcel(s) of land upon which the business itself was situated. Almost fourteen years after the entry of the Final Judgment in Divorce, Wife filed a Motion to Enforce the Property Settlement Agreement because she believed that the business in question was sold in 2014 and she never received her one-half share of Husband's interest in the business.

The property in question was subject to an Eminent Domain proceeding even before the execution of the Property Settlement Agreement and it was never Husband's intent that Wife receive any share of the monies received from the NJ DOT as just compensation for the Eminent Domain proceeding because the "taking" did not constitute a sale of the business as was the intent of the Property Settlement Agreement.

While Husband's family did receive just compensation from the NJDOT for the Eminent Domain taking, it is the compensation from Husband's Inverse Condemnation Lawsuit that the Superior Court determined Wife should receive a fifty percent share of Husband's interest therein.

Husband disputes Wife's entitlement to any of the monies received from the Inverse Condemnation lawsuit as this money was payment because Husband was deprived of all or substantially all of the beneficial use of the totality of his property, no title or transfer of property was made in exchange for this payment and, in fact, the property in question was sold via Sheriff Sale resulting in no payment of funds to Husband.

Husband is requesting that the Superior Court's Order awarding Wife a 50% of Husband's interest in the Inverse Condemnation lawsuit be reversed.

PROCEDURAL HISTORY

On September 8, 2022, Plaintiff filed a Notice of Motion to Enforce the Property Settlement Agreement and other Relief. (Da 17).[1]

On October 27, 2023, Defendant filed his Certification in Response to Plaintiff's Notice of Motion to Enforce the Property Settlement Agreement. (Da 58).

[1]Da_ refers to Defendant's Appendix

On November 1, 2023, Plaintiff filed a Notice of Order to Show Cause (Da 68), together with the Certification of Bernadette Stavros in Support of Order to Show Cause. (Da 71).

On November 8, 2023, Plaintiff's Letter Brief in support of Plaintiff's Response to Defendant's Certification. (Da 71).

On November 9, 2022, a Zoom Hearing was held before the Honorable James Bucci at which time an Order was entered denying Plaintiff's Order to Show Cause, without prejudice. (Da 89).

On January 19, 2023 an Order was entered by the Honorable James Bucci following the January 6, 2023 Hearing, on setting forth the deadlines for discovery, depositions and the filing of Trial Memoranda, as well as scheduling a Plenary Hearing for March 20, 2023. (Da 91).

On January 20, 2023, Plaintiff served a Notice of Deposition, (Da 100- Da 101), and a Request for Production of Documents upon the Defendant (Da 107), to which Defendant provided his Response on February 9, 2023. (Da 110).

On March 12, 2023, Plaintiff filed their Trial Memorandum, together with Plaintiff's trial exhibit lists (Da 92).

On March 16, 2023, Defendant filed their Trial Memorandum, together with Defendant's trial exhibit lists (Da 282- Da 299).

On March 27, 2023, Defendant filed their Brief Regarding NJ Rule 4:50:1.

On March 28, 2023, the trial of this matter was held before the Honorable James Bucci with both parties and their counsel present. (2T).[2]

On May 3, 2023, a zoom conference was held before the Honorable James Bucci at which time an Order was entered granting Plaintiff's Motion to Enforce Litigant's Rights, and ordering Defendant to pay Plaintiff the amount of $91,250.00 within thirty days of the May 3, 2023 Order. (Da 1) (3T)

On June 5, 2023, Defendant filed a Notice of Order to Show Cause requesting that an Order be entered staying the distribution from Plaintiff's counsel of the $91,250.00 Judgment awarded to Plaintiff under the Order of May 3, 2023 pending the outcome of Defendant's Appeal and ordering Plaintiff's attorney to immediately place said funds into an interest bearing escrow account. (Da 261).

On June 5, 2023 Defendant filed his Certification in support of his Notice to Show Cause. (Da 264).

[2] 1T_ refers to Transcript of Testimony of Thomas Stravos, dated November 9, 2022; 2T_refers to Transcript of Hearing, dated March 28, 2023; 3T_refers to Transcript of the Decision, dated May 3, 2023.

On June 6, 2023, Plaintiff filed a letter brief in response to Defendant's Motion for Stay, and a Hearing was held before the Honorable James Bucci at which time an Order was entered denying Defendant's Motion for Stay.

On June 9, 2023, Defendant filed his Notice of Appeal to this Court. (Da 3)

On June 12, 2023, Defendant filed his Civil Case Information Sheet. (Da 7)

On July 7, 2023, an Order was entered by the Honorable James Bucci confirming the May 3, 2023 Order as the Final Decision of the Court. (Da 2).

On August 9, 2023, Plaintiff filed her Civil Case Information Statement. (Da 11).

STATEMENT OF FACTS

Bernadette Stavros (hereinafter referred to as "Plaintiff") and Thomas Stavros (hereinafter referred to as "Defendant") were married on June 17, 1989. Plaintiff and Defendant ultimately decided to dissolve their marriage by divorcing. A Property Settlement Agreement (hereinafter referred to as the "PSA"), (DA 282), was executed by the parties on April 10, 2009 and was incorporated into the Final Judgment of Divorce entered on June 4, 2009 (DA 94), by the Honorable Gwendolyn Blue, J.S.C. Among other issues it

resolved, the PSA (DA 282) provided for the equitable distribution of any proceeds from the sale of the only real property at issue in the divorce, specifically, the famed Olga's Diner, formerly of Marlton, NJ. The PSA refers to any proceeds of the "sale" of Olga's Diner only. It does not state that Plaintiff should share in any monies from the sale of the land that the diner was situated on. No sale of the land ever took place as it was foreclosed upon in 2014.

Between the years of 1980 and 2009, Stavros, Inc. leased parcels of property from the State of New Jersey which would grant Olga's Diner access to Route 70 with Old Marlton Pike on the South side and Route 73 to the East. These parcels accounted for two driveways behind Olga's Diner. (3T). On September 19, 2008, the Court entered an Order for Final Judgment permitting the DOT to exercise its' power of Eminent Domain and appointing commissioners to fix the compensation to be paid for the DOT's acquisition of Stavros, Inc.'s leased parcels of property. Stavros, Inc. did not object to the Order. (3T). Olga's Diner permanently closed for business in or about November of 2008 for reasons unrelated to the Court Order of Eminent Domain. On April 1, 2009, the DOT issued a letter to Stavros, Inc. cancelling Stavros, Inc.'s access to Route 70, which became effective April 15, 2009. Sometime between April 1 and April 15, 2009 an **informal** meeting took place between the DOT, South

State, Inc. and Stavros, Inc.'s representatives at the DOT's request. This meeting was not held in accordance with any statutory or administrative requirements, no prior notice of the meeting was given, and there is no official record of what occurred. At the time of the aforementioned **informal** meeting, Defendant, a representative of Stavros, Inc., reasonably believed he had no basis to object to the DOT's decision to erect a fence on Stavros, Inc.'s property subject to eminent domain. On April 15, 2009, the DOT provided reasonable alternative access to Stavros, Inc.'s property. However, the reasonable alternative access was not actually available for use until November of 2011, which resulted in a lengthy court battle under Stavros, Inc. vs. State of New Jersey, by the Commissioner of Transportation v. South State, Inc., Superior Court of New Jersey Appellate Division Docket No. A-0959-17T2. The parties in the aforementioned case disputed the amount of compensation owed to Starvos, Inc. under eminent domain. On May 30, 2014, the jury awarded $998,400.00 to Stavros, Inc. as just compensation for the value of the land that was taken by NJ Dot. Defendant's 25% share of the net proceeds was $7,544.93.

In 2017, Stavros, Inc. filed for inverse condemnation due to the fact that they did not have access to its property for two and one half years. In November of 2021, Stavros, Inc. settled the inverse condemnation lawsuit for $1.8 Million

Dollars, $80,000.00 from which was paid for attorney's fees. Defendant received $185,000.00. (3T). Defendant did not share any of the net money that was received from the settlement of the inverse compensation lawsuit with Plaintiff as it was not related to any "sale" of the Olga's Diner as provided for in the PSA (Da 282). It was never the parties' intent that Plaintiff would share in any other compensation received from the condemnation or any other disposition of the parcel(s) of land that was being taken by eminent domain or inverse condemnation. (2T)

At all times prior to the PSA (Da 282) and after the PSA, (Da 282), Plaintiff was aware that there were ongoing proceedings having to do with the "taking" of part of the parcels of land which allowed access to Olga's Diner. She was also aware this "taking" was in no way a sale of Olga's Diner. Plaintiff testified to these facts during her deposition on February 23, 2023, and she signed the PSA (Da 282) in full knowledge of same. (Da 242).

ARGUMENT

I. THE HONORABLE JAMES BUCCI ABUSED HIS DISCRETIONARY POWER IN HIS INTERPRETATION OF THE MEANING OF THE WORD "SALE" AS IT RELATED TO EMINENT DOMAIN OF THE PROPERTY IN QUESTION (Da 1)

The property in question was actually parcels of land leased from the State of New Jersey which granted Olga's Diner access to Route 70 with Old Marlton Pike on the South side and Route 73 to the East. On April 1, 2009, the DOT issued a letter to Stavros, Inc. cancelling Stavros, Inc.'s access to Route 70, which became effective April 15, 2009 and "taking" these parcels of land under eminent domain. After engaging in a lawsuit to determine the amount of just compensation that should be paid to Stavros, Inc, a jury awarded Stavros, Inc. $998,400.00. It is Defendant's position that his "taking" was not a sale of the Olga's Diner as agreed to in the parties' PSA as Defendant was not the actual owner of the parcels of land originally taken under Eminent Domain.

It is further Defendant's position that Plaintiff was not entitled to any share of the settlement funds received by Stavros, Inc. from the State of New Jersey in settlement of his inverse condemnation lawsuit as the proceeds of the settlement also do not fall under the purview of the PSA. It is important to understand that the diner itself ceased operations and permanently closed in or

about November, 2008 due to numerous business complications rendering the day-to- day operations impossible. LSD Law defines "sale of land" as "...the transfer of ownership of a piece of real estate from one person to another through a contract of sale. It is also known as a conveyance" Hofmann, A. (2019). LSD. Oxford University Press. In this case, there was no transfer of ownership of real estate through a contract of sale, but rather a "taking" of certain parcels of land under eminent domain. There was no "contract" or "agreement of sale" between the State of New Jersey for the sale of any portion of the land or business known as Olga's Diner. It was never the intent of the Defendant that the eminent domain taking would constitute a sale of Olga's Diner. There was no fixed sales price agreed upon between the State of New Jersey and Defendant. In Stavros, Inc. vs. State of New Jersey, 2019 N.J. Super. Unpublished Lexus 188, (App. Div. September 12, 2019) (Da 35), (opinion not relied upon for precedent, but for background and factual information), the parties disputed the amount of just compensation owed to Starvos, Inc. under the eminent domain taking. A Jury awarded Stavros, Inc. $998,400.00. The net amount to be divided among Defendant and his siblings was $30,179.77 which would mean Defendant's 15% share was $7,544.93. Stavros, Inc. subsequently filed an Inverse Condemnation lawsuit seeking a fair and reasonable compensation for the **loss of use** of his

remaining parcel of land. Through an inverse condemnation proceeding, a property owner seeks compensation for a de facto taking of his property. Pinkowski v. Township of Montclair, 299 N.J. Super. 557, 575, 691 A.2d 837 (App.Div. 1997). "[A] property owner is barred from any claim to a right to inverse condemnation unless deprived of all or substantially all of the beneficial use of the totality of his property as the result of excessive police power regulation". Orleans Builders Developers v. Byrne, 186 N.J. Super. 432, 446-447, 453 A.2d 200 (App.Div. 1982) (citing Penn Central Transportation Co. v. New York City, 435 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), reh'g denied, 439 U.S. 833, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978)). In an inverse condemnation case, the "property owner is required to show that there has been a substantial destruction of the value of the property and that the defendant's activities have been a substantial factor in bringing this about." Township of West Windsor v. Nierenberg, 150 N.J. at 134, 695 A.2d 1344 (1997) (quoting Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975) which was what occurred in this situation causing Defendant from using his property for any viable purpose for over two and one half years.

In its decision in Stavros v. State of New Jersey, the court determined a regulatory taking occurred because Defendant was deprived of substantially all

of the economically viable use of the property for two and one-half years, the lack of reasonable access and the construction around the property interfered with Defendant's investment-backed expectations. This was the basis of the settlement amount received under the inverse condemnation action in which the DOT did not take physical possession or ownership of Defendant's property which would be the basis for an involuntary "sale" of the property, but deprived Defendant access to the property resulting in a regulatory taking for which he received compensation.

Stavros, Inc. remained the owner of the land upon which Olga's diner was situated following the settlement of the inverse condemnation lawsuit until the property was sold at sheriff sale on September 12, 2014 as the result of the foreclosure action filed by Joseph J. Bennis, Jr. And Christopher P. Falzio for the non payment of a mortgage granted on December 15, 2003 in the amount of $2,262,274.87. Stavros, Inc. never received any money from the sheriff sale of his property and, therefore, no money is due to Plaintiff pursuant to the terms of the PSA.

II. THE HONORABLE JAMES BUCCI FAILED TO CONSIDER AND/OR APPLY THE PAROLE EVIDENCE RULE TO THE PROPERTY SETTLEMENT AGREEMENT (Da 1)

In New Jersey, a Property Settlement Agreement is one of the most important parts of the divorce process. The clearer and more detailed it is, the less of a risk of more litigation after the divorce is finalized. A Property Settlement Agreement, also known as a Marital Settlement Agreement, is the final agreement between two ex-spouses pertaining to all issues regarding their divorce. Not only does this contract determine the distribution of property and assets, but it includes rules about child custody, parenting time, child support, and alimony.

A good Property Settlement Agreement should encompass everything and carefully detail the rights and responsibilities of each party and creating a comprehensive contract should be a couple's main goal during divorce proceedings.

A skilled lawyer in the area must consider the likely outcomes regarding any Property Settlement Agreement they draft, the parties fully execute and is filed with the court. It is the drafting attorney's duty to conduct his/her due diligence with regard to every issue encompassed within the Property Settlement

Agreement. Additionally, the drafting attorney must contemplate potential problems that may arise down the road and address them in the document to avoid future conflicts. It is not enough for the drafting attorney to simply draft a Property Settlement Agreement only focusing on the current issues, they have a duty to go beyond same, as the Property Settlement Agreement is and will become the most valuable document the divorcing parties will use. Planning for future concerns or conflicts is one of the most important elements of a good property settlement agreement. A qualified legal professional could take potential issues into account during the drafting process and analyze likely outcomes based on their own experience in this field and the two parties' specific circumstances. A lawyer cannot guarantee a certain outcome in the future, but there is language that can be put into a marital settlement agreement to protect the parties in the event of a dispute later on.

The distribution of assets and liabilities is a central component of a New Jersey property division settlement. It addresses shared assets, marital and pre-marital debts, loans, and tax implications and who should bear them. It also takes into account what the equitable distribution of the property should be and should address all outstanding issues.

For the property settlement agreement to be enforceable, it needs to be submitted to the court along with the Final Judgment of Divorce. This document is important because it will essentially serve as a post-divorce manual. Whenever there is a question about an expense, an investment, or a piece of property, the ex-spouses will consult the agreement, as it is constructed to provide guidance on numerous scenarios. Because this document will likely be revisited many times in the years after a divorce, it is critical that all relevant information is included. The more detail, the better chance that there will be no post-judgment litigation, which can be expensive and emotionally overwhelming.

In the instant case, Mr. Nussey was Ms. Stavros' divorce attorney and drafted the Property Settlement Agreement entered into between the parties on April 10, 2009. (Da 282). Mr. Nussey has been certified by the Supreme Court of New Jersey as a Matrimonial Attorney. By definition, a New Jersey Certified Matrimonial Law Attorney is an official designation given by the New Jersey Supreme Court to attorneys who have demonstrated a specific skill set in the areas of family and matrimonial law and whose experience meets the highest standard of client care. Like any certification process, this one is offered to individuals who have mastered this subject area and possess the ability to

demonstrate superior knowledge in a number of diverse practice issues. With such distinguished credentials, Mr. Nussey should have preformed his due diligence and investigated the status of Olga's Diner prior to the execution of the Property Settlement Agreement by both his client and Mr. Stavros, who was a Pro Se litigant at the time. Had Mr. Nussey done so, he would have found that the property upon which Olga's Diner was situated was subject to an Eminent Domain action by the State of New Jersey, a Condemnation Complaint having been filed by the State of New Jersey on June 12, 2008, and that Olga's Diner business had permanently closed in or about November, 2008 PRIOR to the signing of the Property Settlement Agreement. Defendant's previously filed Trial Memorandum goes into detail regarding the closure of Olga's Diner. With regard to the Eminent Domain action, Eminent Domain is a complicated and lengthy process which leads to foreseeable appeals and a foreseeable counter-action, more specifically, an Inverse Condemnation action. Therefore, Mr. Stavros should not be penalized by the Court by reopening the Property Settlement Agreement pursuant to NJ Rule 4:50-1, since all relevant information pertaining to Olga's Diner was available to Mr. Nussey at the time the Property Settlement Agreement was drafted by him, presented for signature to both parties on April 10, 2009 and incorporated into the Final Judgment of Divorce

entered by the Superior Court of Camden County on June 4, 2009. Again, I will reiterate that Ms. Stavros was aware of a pending lawsuit, as she testified to at the time of her deposition taken on February 23, 2023). Morever, Plaintiff, does not work within any capacity of the legal profession, therefore, it is fair to conclude that she is a "lay-person" when it comes to legal terminology, like most people outside of the legal profession. The point being here, that when Plaintiff was questioned during her deposition about her knowledge of any lawsuit, she described the lawsuit in question as dealing with the business property, loss of money and the state... terms which are most notably used to describe Eminent Domain:

> "Q. When you signed your agreement -- in the months leading up to signing the agreement when this marital settlement agreement was negotiated, did Mr. Stavros ever tell you that there might be an eminent domain settlement or lawsuit filed regarding Olga's Diner and the land and the business?
>
> So go back 12 years." Did you have any idea that there was eminent domain?
>
> A. Not eminent domain, but I know that they were going to file a lawsuit.
>
> Q. Did he tell you what the lawsuit was for?
>
> A. I think he told me property damage and because the diner was losing money and they blamed the State for it.

> Q. Okay." But you had no idea what the basis was but for what he told you?
>
> A. No."
>
> (DA42)

Rule 4:50-1 is designed to "reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." Baumann v. Marinaro, 95 N.J. 380, 392 (1984). Consequently, under Rule 4:50-1, a litigant has one year from the date that a judgment is entered to move to vacate that judgment, provided that his motion to vacate a judgment is based on mistake, newly discovered evidence or fraud. It is best to make the application as soon as possible. When a court considers a motion to vacate a default judgment, such a motion must be "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super.313, 319 (App. Div.), aff'd, 43 N.J.508 (1964). This is particularly true in the case of default judgments entered in family court because default judgments, as stated by the Appellate Division, are "not favored in divorce suits." Curry v. Curry, 108 N.J. Super.527, 530 (App. Div. 1970).

It is more difficult to vacate a divorce judgment after a signed settlement agreement has been entered into. Marital agreements are presumed to be valid and the state has a public policy to enforce agreements entered into between divorcing spouses. However, only those agreements that are "fair and just" will be enforced. Petersen v. Petersen, 85 N.J. 638, 642 (1981). A spousal agreement may be reformed when it is "unconscionable" or when "it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship," Dworkin v. Dworkin, 217 N.J. Super. 518, 523 (App.Div.1987), or when, due to "common mistake [ ] or mistake of one party accompanied by concealment of the other, the agreement fails to express the real intent of the parties". Miller v. Miller, 160 N.J. 408, 419 (1999). Fraud and unconscionability have been recognized as two separate and independent bases for setting aside property settlement agreements. Massar v. Massar, 279 N.J. Super. 89, 93 (App.Div.1995). If there are compelling circumstances, a judgment may be set aside based on a showing of inequity and unfairness under the catch-all section of R. 4:50-1(f). Rosen v. Rosen, 225 N.J. Super. 33, 36 (App. Div.), certif. denied, 111 N.J. 649 (1988). To determine whether compelling circumstances are present, the court must look to the totality of the facts and on a case-by-case basis to determine whether enforcement of the

judgment would be unjust, oppressive or inequitable. In re Guardianship of J.N.H., 172 N.J. 440, 473–74 (2002); Quagliato v. Bodner, 115 N.J. Super. 133, 138 (App. Div.1971).

Once a Final Judgment of Divorce has been approved by the New Jersey Superior Court: Family Part, there are means by which a mistake within can be corrected; however, the path to correction isn't straight and narrow, and not all mistakes can be corrected in any circumstance. The difference between a mistake that a New Jersey Trial Court will consider correcting and a mistake that either or both of the separated spouses must accept depends on specific factors as laid out within New Jersey Court Rule 4:50-1, which addresses when a party may seek 'Relief From Judgment or Order." The Relief from Judgment or Order Rule states that there are six circumstances under which the Court will entertain a change to a Final Judgment of Divorce. The New Jersey Court Rule 4:50-1 outlines the circumstances under which "relief" can be gained by a party bound by a Final Judgment of Divorce using the following language:

"(a) mistake, inadvertence, surprise, or excusable neglect;

> (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial;

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

While the terms of the Rule are fairly clear that a court can correct a mistake or other circumstance, it is not always easy to gain relief. For one, there is a timing component to the rule. For parts (a), (b), and ©, the request for relief must be made within one year after the judgment or order. All other bases for relief (parts (d), (e) and (f)) must be made "within a reasonable time".

In this case NJ Rule 4:50-1 A through E are not applicable. More specifically, NJ Rule 4:50-1 A through C, have a Strict Statute of Limitations, which is one (1) year from the time the Judgment is entered or in this case one (1) year from the time the PSA was signed. Additionally, no pleadings, evidence and/or testimony has alluded that Rule NJ 4:50-1(d) and (e) pertain to the instant action. Only 4:50-1 (f) the "catch-all," is the only sub-section left for Plaintiff

to try and convince this Honorable Court to re-open and re-draft the PSA clause at issue. Let's not forget Mr. Nussey drafted the PSA which the parties executed and which was filed and incorporated within the parties divorce action approximately fourteen (14) years ago. As one can see, there are strict yet multiple means by which a divorced spouse can appeal to the court for a change to the Final Judgment of Divorce. The first step to reopening a marital settlement agreement is the filing of a Motion. Under 4-50-1(a) – (f) a Motion must be filed within a "reasonable time" which "necessarily depends on the specific circumstances of each case according to Pressler & Verniero, Current N.J. Court Rules, comment 3 on R. 4:50-2 (2015).

Unhappy parties to a divorce may move to reopen only if a strong and compelling argument shows proper grounds. In Rosen v. Rosen, 225 N.J. Super. 33, 36, 541 A.2d 716 (App. Div.), the court specifically addresses subsection (f) and it's capability of reopening cases, or vacating judgments, "for any other reason justifying relief from the operation of the judgment or order." When using subsection (f), there is no "perfect" situation to apply it. It may only be used in "exceptional cases" so that there can be "equity and justice" reached for both parties.

Courts have typically granted this kind of motion, or have vacated judgments, for situations involving a showing of fraud or misconduct by one party lying about their assets. Rosen also provides that if over a year has passed since the entry of the final judgment of divorce, there MUST be a "showing of inequity and unfairness" for the court to grant relief under subsection(f).

Reopening cases and vacating final judgments of divorce typically involve the equitable distribution of marital assets. This is the most common reason courts will vacate final judgments of divorce. Anything that is subject to the common "changed circumstances" standard used for alimony, child support, etc., would not be addressed after a final judgment has been vacated. Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004).

In Zuba v. Zuba, 2015 N.J. Super. Unpub. LEXIS 818, the Court reopened a final judgment of divorce after the plaintiff (wife) discovered the defendant's purchase of property in Costa Rica and that he "wired substantial funds to a Belize bank account during" the marriage. Obviously, this would have met the standards under subsection (b). This case puts forth an analysis starting with public policy considerations. Courts will typically act in accordance with their strong belief that the parties should be inclined to settle cases and therefore clear the court's docket of unnecessary litigation. Though reopening cases can be

useful in hasty settlement decisions, Rule 4-50(1) is used "sparingly." Zuba states "the Rule does allow for relief where the facts and equities compel it, particularly in contexts involving the equitable distribution of marital assets."

In New Jersey, the law clearly promotes settlements, which is usually memorialized in writing in a property settlement agreement that is prepared by an attorney once a divorce agreement has been achieved. However, there are times that a divorce agreement can be set aside, by way of a post-judgment motion, by a lawyer, or by a judge of the Family Part of the Superior Court of New Jersey. Following is a legal analysis of this issue as it pertains to both a lack of financial disclosure, ambiguous language in the property settlement agreement and cases wherein no lawyers were involved.

While New Jersey Family Part courts favor the enforcement of agreements, there is a case to be made that these agreements should be thrown out in equity because neither party was represented by counsel, the terms were not clear, and there was no fair financial disclosure made before the agreements were signed because the parties did not exchange case information statements, nor did the agreements explicitly state each account or asset. Here, Plaintiff was not only represented by counsel, she was represented by counsel the Supreme Court of NJ certified as a Matrimonial Attorney.

New Jersey has a strong public policy that favors stability in matrimonial matters. Quinn v. Quinn, 225 N.J. 34, 36 (2016) (where the Court enforced the termination of an alimony obligation according to the parties' settlement agreement). The Supreme Court of New Jersey held that there was no compelling reason for them to depart from the unambiguous, clear, and mutually understood language in the property settlement agreement. Similarly, in Avelino-Catabran v. Catabran, 445 N.J. Super 574, 589 (App. Div. 2016), the New Jersey Appellate Division found that the Family Part correctly enforced the terms of a property settlement agreement that required plaintiff mother to be equally responsible for college contributions. The appellate panel reiterated the "compelling reasons to depart form the clear, unambiguous, and mutually understood terms standard".

Property settlement agreements are given substantial weight in relation to their enforceability and validity, as long as they are fair and just. Dolce v. Dolce, 382 N.J. Super. 11, 20 (App. Div. 2006). If there is no evidence of inequity or unanticipated change of circumstances, the Family Part has a duty to enforce the terms of the marital settlement agreement as long as it was executed and entered into by fully informed parties, each represented by counsel, without any proof of fraud, overreaching, or coercion. Avelino-Catabran v. Catabran, 445 N.J.

Super 590 (App. Div. 2016). In the present case, the parties were not fully informed because the contract does not list all of the accounts with values, nor did the parties exchange case information statements. Furthermore, neither party was represented by counsel.

Disputes within a PSA regarding a dispute of material fact should not be resolved in reliance of ambiguous terms in a property settlement agreement. Palmieri v. Palmieri, 388 N.J. Super. 562, 564 (App. Div. 2006). Furthermore, when there is a dispute as to how a marital settlement agreement should be applied, a Family Part Court has the authority to apply basic principles of equity in an effort to resolve the ambiguities that stem from the absence of clarifying language. In the case at hand, the divorce agreement does not explicitly state which accounts each spouse would get nor does it mention the value of those accounts. While it states that "Individual and joint accounts, all accounts will be divided equally (50% to each)," it never states how many accounts there are, or the value of those accounts. The parties did not have the benefit of exchanging case information statement's either, therefore one possible argument could be that the parties did not have true knowledge of what they were agreeing too, and equity would be better served by holding the agreements non-binding.

Post nuptial agreements made at the end of a marriage made while the parties are contemplating divorce are enforceable as long as: (1) the agreement is in writing; (2) the agreement is notarized; and (3) the agreement must be done with fair disclosure between the parties. Pacelli v. Pacelli, 319 N.J. Super. 185, 188 (App. Div. 1999). Fair disclosure means that the agreement can be made "only after full disclosure of relevant information regarding the parties' assets." Id. Furthermore, while Pacelli does not state that both parties "must" be represented by counsel, it did state that they "should be represented by counsel." Id. (emphasis added). Here neither party was represented by counsel.

In the case of Orner v. Liu, 419 N.J. Super. 431 (App. Div. 2011). This case involved a motion under several sections of Rule 4:50-1 for relief from a judgment. Defendants, the movants, waited until one day less than one year from the entry of the judgment to make that motion. The Law Division denied the motion. On appeal, using the "clear abuse of discretion" standard that is applicable to decisions on motions under Rule 4:50-1, the Appellate Division affirmed. Judge Fisher wrote the opinion. The most significant part of the decision was Judge Fisher's discussion of the issue of timeliness. The Law Division found, as one of the bases for its ruling, that the motion came too late. Defendants contended that they were timely, since they filed their motion within

the one year period permitted for such motions by Rule 4:50-2, but the Appellate Division correctly observed that the one-year deadline "represents only the outermost time limit for the filing of a motion" based on certain subparts of Rule 4:50-1. Though Judge Fisher noted that there had been "few reported decisions interpreting the relationship between the reasonableness requirement and the one-year provision of Rule 4:50-2," he turned to the many decisions under a parallel federal rule, Federal Rule of Civil Procedure 60(b)[3], that have required

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[3]Rule 60. Relief from a Judgment or Order
(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

motions for relief. In the context of contract law, "reasonable time" is a vague, and largely disfavored, qualifier used to connote a period by which an act should be performed. What is a reasonable time is a fact-intensive inquiry, often a question for the jury to decide. A 2012 Texas Court of Appeals opinion, Daimler Chrysler Motors Co., LLC v. Manuel, 362 S.W.3d 160 (Tex. App. 2012), summarized the fact-intensive nature of what is a reasonable time by stating that, "[w]hat is a reasonable time depends upon the facts and circumstances as they existed at the time the contract was formed." That is, courts will look to the contracting parties' intent, and the circumstances surrounding the contract formation, to determine what the parties meant by reasonable time. The Uniform Commercial Code echoes the factual-nature of what constitutes reasonable time, and § 1–205 states that "[w]hether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action." Furthermore, even when there is no explicit

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(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

contractual provision stating time of performance, courts may imply that parties must perform in a reasonable time. For example, the Supreme Court of Alaska found, in Laybourn v. City of Wasilla, 362 P.3d 447 (Alaska 2015), that a construction projected that unsuccessfully ran from 2003–2006 had progressed in a reasonable time, as the evidence during the formation of the contract indicated that the parties envisioned the project running through 2005 from a judgment to be filed within a reasonable time, even if they were filed within one year.

In conclusion, here we have a PSA that was drafted, executed and filed nearly fourteen (14) years ago and said PSA was drafted by an attorney whom has been appointed by the NJ Supreme Court as a Certified Matrimonial Attorney. As for the Statue of Limitations issue, thirteen (13) years, going by the date the Motion to Enforce was filed, is beyond reasonable. Especially in light of the fact that Mr Nussey should have taken into account the intricacies involved in an Eminent Domian action and he should have known that Olga's Diner had permanently closed six to seven months prior to the execution of the PSA.

Quite frankly, based on the above, NJ Rule 4:50-1 (f) should not apply in this situation, Plaintiff hired a extremely qualified matrimonial attorney to

represent her approximately fourteen (14) years ago, she had knowledge of a lawsuit which involved the land, the state and loss of money re: Olga's Diner. As for the Statute of Limitations, thirteen-fourteen years is completely unreasonable, especially when a few specific sentences or a specific clause could have accounted for any and all unforeseen outcomes of the legal "beast" known as Eminent Domain. With that being said, it is the Parole Evidence Rule that governs the specific clause (s) of the PSA at issue.

It is important to note that Plaintiff and Defendant have been and are still currently living in the same home and it is Defendant that is responsible for paying all the household bills and expenses, to which he is still currently providing for Plaintiff as if they were husband and wife.

III. THE HONORABLE JAMES BUCCI FAILED TO TAKE INTO ACCOUNT THE 2014 EMINENT DOMAIN VERDICT (Da 1)

Due to the fact that reasonable alternative access was not actually available for use by Stavros, Inc. until November of 2011, a lengthy court battle ensued under Stavros, Inc. vs. State of New Jersey, by the Commissioner of Transportation v. South State, Inc., Superior Court of New Jersey Appellate Division Docket No. A-0959-17T2. (DA 35). The parties in the aforementioned case disputed the amount of compensation owed to Starvos, Inc. under eminent

domain. On May 30, 2014, the jury awarded $998,400.00 to Stavros, Inc. as just compensation for the value of the land that taken by eminent domain. The net proceeds of this verdict only resulted in a payment to Stavros, Inc. in the amount of $ 30, 179.73 The proceeds of this verdict were distributed as follows: (Da 172).

$ 998,400.00	Verdict
$ 202,103.09	Interest on Verdict
$1,200,503.09	Total Compensation
-$ 361,167.70	Legal Fees (Duane Morris)
$ 43,456.14	Legal Expenses (Duane Morris)
$ 77,059.17	Appraisal Fees and Expenses
$ 410,000.00	Deposit
$ 300,000.00	Lienholders (Fazzio and Bennis)
$1,191,683.01	
$ 8,820.08	
+$ 21,359.65	Trust Account (Duane Morris)
$ 30,179.73	Net proceeds

If this Honorable Court determines that the proceeds received for just compensation from the eminent domain 'taking", are to be considered a "sale" of Olga's Diner as set forth in the Property Settlement Agreement, then Plaintiff would only be entitled to 50% of Defendant's 25% interest in the actual net proceeds. Defendant's 25% interest was $7, 544.93. Therefore, Plaintiff's 50% share would be $3,772.46.

CONCLUSION

For the reasons stated above, Defendant Thomas Stavros respectfully requests that this Honorable Court enter an Order reversing the decision of the Honorable James Bucci entered on May 3, 2023 and directing the Plaintiff to immediately return the full judgment amount of $91,250.00 delivered to her counsel by Defendant on June 2, 2023 and awarding Defendant counsel fees and costs associated with this appeal in an amount to be determined by this Honorable Court.

Respectfully submitted,

ROVNER, ALLEN, ROVNER,
ZIMMERMAN and LUKOMSKI

/s/ AMY D. COX, ESQUIRE
AMY D. COX, ESQUIRE
Attorneys for Defendant

Date: April 22, 2024

BERNADETTE STAVROS,	**NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION**
Plaintiff/Respondent,	**DOCKET NO.: A-003084-22T2**
v.	**Appeal from the Chancery Division, Family Part, Camden County Docket No.: FM-04-1507-09**
THOMAS STAVROS,	**ON APPEAL FROM FINAL ORDER**
Defendant/Appellant.	**The Hon. James Bucci, J.S.C. Sat Below**

BRIEF OF PLAINTIFF/RESPONDENT

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Date submitted: June 7, 2024

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PRELIMINARY STATEMENT

The parties obtained a Final Judgment of Divorce ("FJOD") on June 4, 2009, which incorporated their Property Settlement Agreement ("PSA"), signed on April 10, 2009. The PSA provided for the equitable distribution of the only significant asset at issue in the divorce, Olga's Diner, in which Defendant owned a 25 percent interest through his family's company, Stavros, Inc. The PSA provided that Olga's was currently listed for sale for $5.8 million and that upon the sale of Olga's, Plaintiff would receive fifty percent of the proceeds received by Defendant. Plaintiff had been a homemaker during the marriage while Defendant worked in his family business. The proceeds from Olga's were to be the only equitable distribution Plaintiff would receive under the PSA, other than being able to retain her car.

Unbeknownst to Plaintiff, who had no involvement with Defendant's family business, the Diner was never going to be sold. Rather, it was already the subject of eminent domain proceedings by the State of New Jersey, a fact well-known to Defendant, who for years had been dealing with the New Jersey Department of Transportation ("DOT") as the representative of Stavros, Inc.

By the time the parties signed the PSA on April 10, 2009, the New Jersey DOT had already successfully obtained a court order allowing it to proceed against the Olga's property through eminent domain. This happened with Defendant's

direct knowledge and involvement, and with no knowledge or involvement by Plaintiff. There is no dispute about this. Indeed, within the two weeks prior to signing the PSA, Defendant received a letter from DOT canceling the lease which allowed access to Olga's Diner through Route 70. The State was moving ahead with its eminent domain condemnation.

Nonetheless, on April 10, 2009, Defendant signed the PSA with Plaintiff, promising that she would share equally with him in the proceeds from the sale of Olga's. The PSA said nothing about the eminent domain proceedings which had been going on for months. Plaintiff had no idea.

Beginning in April 2009, DOT proceeded with a governmental taking of the access lots to Olga's along with a portion of the Olga's property which it used as a construction yard. DOT was supposed to provide alternative access to the diner, but failed to do so. The issue of just compensation for DOT's governmental taking led to a lawsuit and a 2014 jury verdict in Stavros, Inc.'s favor for $998,400, of which Defendant received nothing after legal expenses and other obligations were satisfied.

In a separate bench trial, Stavros, Inc. pursued a claim for inverse condemnation for loss of use of the property due to the governmental taking. Again, Stavros, Inc. was the prevailing party. Ultimately, all claims were settled, and in

December 2020, Defendant, as the Stavros, Inc. representative, received a settlement check for $1 million. Defendant retained $182,250 as his share, and he admits he told Plaintiff nothing about it.

Defendant's position is that the Olga's proceeds came to him through eminent domain, not technically a "sale;" therefore, he owes Plaintiff nothing. **2T121.**

After learning about the settlement from a third party, Plaintiff filed a motion to enforce her rights under the PSA in September 2022. Following a plenary hearing on March 28, 2023, the Trial Court ruled, sitting in equity, that the undefined term "sale" in the parties' PSA is broad enough to include eminent domain and related proceedings, awarding Plaintiff half of Defendant's share of the Olga's proceeds. Defendant filed this appeal.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On June 4, 2009, the parties obtained a Final Judgment of Divorce ("FJOD") **(DA94)**, incorporating their PSA, signed on April 10, 2009. **DA282**. The PSA provided for the equitable distribution of the only significant asset at issue in the divorce, Olga's Diner, formerly of Marlton, New Jersey, in which Defendant owned a 25 percent interest through his family's company, Stavros, Inc. **DA288, para. 25.**

The contractual term that Plaintiff and Defendant would share equally in the proceeds from the sale of Olga's appears at two places in the PSA, paragraph 25 and paragraph 32, as follows:

> *25.* ***REAL PROPERTY****:*
>
> i. The parties acknowledge that they own no residential property. However, Husband holds a twenty-five percent (25%) interest in Olga's Diner and the land it is located on, at the intersection of Route 70 and Route 73, Marlton, New Jersey. Olga's Diner and the land [are] currently listed for sale at the price of $5.8 Million Dollars ($5,800,000). Upon the sale of Olga's Diner, the proceeds from the sale will be utilized to pay down the parties['] credit card debt and will thereafter be split equally between Husband and Wife.
>
> * * *

[1] The Procedural History and the Statement of Facts have been consolidated to avoid repetition and for the convenience of the reader.

> 32. BUSINESS: It is acknowledge[d]that the Husband hold[s] a twenty-five percent (25%) interest in Stavros, Inc., a closely held New Jersey Corporation, which owns Olga's Diner. Presently, Olga's Diner is listed for sale for $5.8 Million Dollars ($5,800,000.00). Upon sale of said diner, Husband agrees to provide Wife with fifty percent (50%) of the proceeds of sale. Before the proceeds are split equally between Husband and Wife, all credit card debt to be paid down.

Da288, Da290.

The proceeds from Olga's were to be the only equitable distribution Plaintiff would receive under the PSA, other than being able to retain her car. **DA282; 2T 37-38.**[2]

What Defendant already knew at the time of signing the PSA, and Plaintiff did not, was that the Olga's property was never going to be sold. Rather, it was already the subject of eminent domain proceedings by the State of New Jersey. Plaintiff testified at trial that the $5.8 million listing price which appears in the PSA "came from Tom." **2T14.** Defendant's testimony was less succinct on this point, but it is clear he knew the property was never going to sell. He was so sure of this that he considered the $5.8 million listing price language to be "meaningless." He testified:

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[2] Adopting Defendant's designations, 1T__ refers to the Deposition Transcript of Thomas Stavros dated 11/9/22; 2T__ refers to the Trial Transcript of 3/28/23; and 3T__ refers to the Transcript of the Court decision of 5/3/23.

Q: So you then acknowledged in this agreement that Olga's Diner was for sale. It was your intent back then to sell it, correct?

A: Our [intention] was to sell it many years prior.

Q: Okay.

A: Back – in fact, it – my father actually at one point actually wanted 9.75 million for the property.

Q: Okay.

But then [you] came down to 5.8 million in the --

A: **It didn't matter. It – it was never going to sell.**

Q: Okay.

But the $5.8 million didn't come from [Ms.] Stavros. It came from you for this terms of this agreement, correct?

A: I did not give the term – I never came up with the 5.8 million, but I says -- I just, you know, shrugged my shoulders, says if that's what was written down that's what written down. **It's meaningless because it never became.**

2T87-88 (emphasis added).

HISTORY OF THE EMINENT DOMAIN PROCEEDING

On June 12, 2008, the DOT filed a complaint for the condemnation of parts of the Olga's property by eminent domain. *See Stavros, Inc. v. State*, No. A-0959-17T2, 2019 N.J. Super. Unpub. LEXIS 1888, *6 (Super. Ct. App. Div. Sep. 12,

2019). **Da36**.[3] This was a good 10 months before the parties signed the PSA. The condemnation proceeding arose in the context of a major construction project to eliminate the traffic circle at Routes 70 and 73. **(Da36).** As part of this project, DOT would take the lots which connected Olga's Diner to Route 70 and Route 73, and Olga's Diner would be left without viable public access for the duration of the project.

On September 19, 2008, *over six months before the PSA was executed,* the court entered an order permitting the DOT to exercise its power of eminent domain with respect to Olga's Diner. **Da37**. Olga's closed for business in November, 2008. **2T134**.

By way of brief background, Olga's Diner did not have frontage on either Route 70 or Route 73, despite its position at the circle where the two major roads intersected. Since the early 1980s, Stavros, Inc., which owned Olga's Diner, had enjoyed access to these routes through parcels which were leased or were the subject of access permits with the State and a private owner. **Da36.** As early as July 30, 2004, the State Department of Transportation (DOT) issued Stavros Inc. a "Change of Access Letter," which proposed eliminating the Route 70 access to Olga's Diner.

[3] This is an unpublished opinion. It is offered not as legal authority, but to establish the relevant facts of this case.

Da37. On January 28, 2005, the State proposed eliminating the Route 73 access to the diner, and advised Stavros, Inc. of its right to a hearing. There ensued meetings between Stavros, Inc. and the State, which were attended by Defendant personally on behalf of Stavros, Inc. **Da37**. On February 21, 2006, the DOT Commissioner issued a final access decision which left intact the State's plan to revoke the diner's access. Stavros, Inc. did not appeal, accepting the DOT determination. **Da37.**

In June of 2008, the State moved to proceed by eminent domain, and that application was granted in September, 2008, as the court appointed commissioners to set the amount of just compensation to be paid for the Olga's property. D**a37**.

Within the week or so prior to signing the PSA on April 10, 2009, Defendant received a letter from DOT canceling the lease of the state-owned lot which allowed Olga's access to Route 70 (**Da38**); without doubt, the State's condemnation was happening. Nonetheless, Defendant signed the PSA which said nothing about eminent domain, but which instead promised Plaintiff half his proceeds from the sale of Olga's, listed for $5.8 million. **Da282**. At trial, the Court asked Defendant directly whether he knew, prior to entering into the PSA, that the State was pursuing a claim for the land through eminent domain. Defendant answered yes. **2T163.** Defendant added, "[t]hey've been trying to take the [land] since 2004 to be quite honest with you." **Da167**. Defendant testified that he understood that in the PSA,

he was promising that Plaintiff would receive half of his net proceeds from the sale of Olga's. **2T165-66**.

Sometime during the first two weeks of April 2009, the very timeframe of signing the PSA, Defendant attended a meeting with DOT and its subcontractor, at which the construction plans and their impact on Olga's Diner were hashed out in detail. A sketch was presented showing how DOT's subcontractor intended to use a portion of the Olga's property as a construction yard and staging area. **Da38**.

On April 15, 2009, DOT's subcontractor moved onto the State lot and cut off access to Olga's Diner through both Routes 70 and 73, setting up a construction yard/staging area on Olga's property. **Da38**. Olga's easement access to Route 73 was terminated no later than September 2009. **Da38**.

In November, 2010, there was a Commissioners' hearing as to the State's condemnation action, from which the State and Stavros, Inc. both appealed in December 2010. Stavros, Inc. filed an inverse condemnation action on March 22, 2013. **Da39**.

On May 30, 2014, a jury awarded Stavros, Inc. $998,400 as just compensation for the value of the property the State acquired through eminent domain. **Da39**. Defendant testified that his share of the verdict would have been $7,544.93. He

received nothing from that verdict, after payment of attorney's fees and other obligations. **2T142.** He did not tell Plaintiff about this jury verdict. ("No, she was not involved in the process.") **2T94.** In a separate bench trial on Stavros, Inc.'s inverse condemnation claim, the court found that Stavros, Inc. had been deprived of access to the Olga's Diner for two and a half years, from April 2009 to November 2011. The Trial Court held this to be a taking by the State which required compensation. **Da40**. This holding was affirmed by the Appellate Division, in an opinion dated March 27, 2019. **Da36**.

Stavros, Inc. entered into a settlement agreement with DOT, under which Stavros, Inc. received $1million, after attorneys' fees were deducted. **3T11**. That settlement agreement, dated November 5, 2020, was signed by Defendant on behalf of the company. **3T20**. Stavros, Inc. was defunct by the time the money was received. The evidence at trial was that the money went to various family members, and Defendant retained $182,250 as his share of the proceeds. **3T12, 20. Da172.**

It was in 2022 that Plaintiff first heard the term "eminent domain," from a nurse who was taking care of Defendant's mother. **2T18.** Prior to this, Plaintiff was unaware that any proceeds had been received for Olga's. **2T18.** Plaintiff called Defendant that same day and asked whether the diner had sold, and he admitted that it had. **2T19**. Plaintiff asked for her share, but Defendant told her she was not

entitled to anything. **2T21.** Plaintiff believed Defendant. **2T22.** Plaintiff did not understand that Defendant was claiming she was not entitled to money because the proceeds came through an eminent domain proceeding, as opposed to a traditional sale. He did not mention eminent domain. **2T22.** This conversation occurred on July 26, 2021. **2T23.**

Defendant was Stavros, Inc.'s representative and had intimate knowledge of the eminent domain proceedings from the start. Back in 2005, it was Defendant who retained attorneys at the law firm of Duane Morris to represent Stavros, Inc. in connection with the eminent domain proceeding. **2T126, Da145.** He participated in meetings and negotiations with the State pertaining to eminent domain. **Da37, Da38.** In 2009, it was again Defendant who signed the retainer agreement on behalf of Stavros, Inc. in order to pursue legal claims against the State. **2T125-26, Da141.** It was Defendant who testified on behalf of Stavros, Inc. when the eminent domain actions went to trial. **Da47.** When the inverse condemnation case settled in 2020, Defendant was the one who signed the settlement agreement. He was the only one with the authority to do so. **2T124, Da161-65.** At trial, Defendant testified that for Stavros, Inc., "I was the [lone] representative." **2T157-158.**

Plaintiff was not involved in the business. **2T121**. She was a homemaker during most of the marriage. She became a bus aid in 2008 (**2T42**), and after the divorce she became a school bus driver. **2T36.**

From the settlement, Stavros, Inc. received $1 million. **2T133**. Defendant allowed Plaintiff no disbursement from the million dollar settlement. **2T133**. He did not tell her about it. **2T100**. When she asked about it, he told her she was not entitled to anything. He did not explain his reasoning nor the eminent domain proceeding. **2T22.**

In 2022, Plaintiff was looking through documents for an unrelated matter when she came across the PSA and realized she was entitled to one-half of the proceeds from the sale of Olga's. She approached Defendant, who continued to insist that she did not "deserve anything." **2T23-24.** At that point Plaintiff contacted an attorney and filed her Motion to Enforce the PSA on September 8, 2022. **Da17**.

The hearing on Plaintiff's Motion to Enforce the marital settlement agreement went forward on March 28, 2023. **2T.** On May 3, 2023, the Trial Court read its findings of fact and conclusions of law into the record. **3T.**

B. FINDINGS AND CONCLUSIONS OF THE TRIAL COURT

The Trial Court made the following findings and conclusions on the record on May 3, 2023.

The PSA "is a binding contract between the parties." **3T14.** The parties understood what they signed. **3T15.** It was the parties' intention to settle their divorce litigation, and the settlement was to include financial consideration to Plaintiff. During the marriage, Plaintiff did not work, but Defendant did. She did not receive alimony or equitable distribution under the PSA, other than a car. **3T18.**

Plaintiff testified "very credibly" that she expected to receive money from the sale of the business. "The PSA expressly states in two places that her consideration for entering into the agreement is money from the business's sale." **3T18-19.** The Court found Plaintiff's testimony at trial "was credible in all respects." **3T19.** Defendant claimed that the parties "never intended to honor [the PSA] because he said that the parties were headed towards bankruptcy and he wanted to protect the plaintiff and their assets." The Court "just did not find that to be credible," noting that this claim was never even raised until trial. **3T14-15.**

At the time the PSA was executed by the parties on April 10, 2009, the New Jersey DOT had already been granted the final order permitting it to exercise its

power of eminent domain. **3T13-14, 20.** Defendant was well aware of his fact when he signed the PSA. **3T20.** There was "no credible evidence that the property was listed for private sale" when the PSA was signed. **3T20.** The Court specifically found that Defendant's testimony that the property was for sale when the PSA was entered into "was not credible." **3T21.** Plaintiff testified "that she did not know about the status of the discussions with the DOT," and the Court found this testimony to be "credible, especially compared to the defendant's testimony." **3T20.** "Plaintiff didn't even know there was an eminent domain proceeding going on." **3T21.**

Defendant did not share any of the proceeds he received from DOT with Plaintiff. When Plaintiff first learned about the proceeds, Defendant told her she was not entitled to anything. **3T14.**

There was no evidence that the parties intended to limit Plaintiff's entitlement to the diner proceeds to situations involving a traditional, voluntary sale. It was Defendant's position that, even though the property was in the midst of eminent domain proceedings at the time the parties signed the PSA (which he knew about but did not tell Plaintiff), he should not have to pay Plaintiff from the proceeds because the property was not "transferred away from the Stavros family by a traditional sale." **3T21**. The Court found that to construe the agreement as urged by Defendant would lead to an "absurd" and "grossly unfair" result. **3T21-22.**

Sitting in equity, the Court held that in this case, where the property was already involved in an eminent domain proceeding, the term "sale" is broad enough to include an involuntary sale, such as through eminent domain. **3T22**. The Court found that it was the intention of the parties "to provide plaintiff with consideration in the form of money from the business...[and] the source of the money was not intended to be limited to a traditional sale versus a forced sale, through eminent domain proceedings or through condemnation, or inverse condemnation, or even a settlement of the legal action." **3T22-23, 25.**

Having found that there was a sale under the PSA, the Court found Plaintiff was entitled to fifty percent of the proceeds Defendant received. In withholding those proceeds from Plaintiff, Defendant breached the PSA. **3T28**. Accordingly, the Court awarded Plaintiff $91,250. Having found for Plaintiff on her contract claim, the Court did not consider Plaintiff's claim in the alternative for reformation of the contract, which the Court interpreted as falling under Rule 4:50. **3T29**.

STANDARD OF REVIEW

Appellate review "of Family Part orders is limited." *Gormley v. Gormley*, 227 A.3d 851, 856 (App. Div. 2019). Only when the trial judge's findings are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice" is reversal warranted. *Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am.*, 65 N.J. 474, 484 (1974) (quoting *Fagliarone v. Township of N. Bergen*, 78 N.J. Super. 154, 155 (App. Div. 1963)). "This standard applies equally to the Trial Court's decisions regarding alimony [and] child support." *Lombardi v. Lombardi*, 447 N.J. Super. 26, 33 (App. Div. 2016) (citations omitted).

In *Guglielmo v. Guglielmo,* 253 N.J. Super. 531 (App. Div. 1992), the court held:

> The law grants particular leniency to agreements made in the domestic arena, and likewise allows judges greater discretion when interpreting such agreements. *See* N.J.S.A. 2A:34-23. Such discretion lies in the principle that although marital agreements are contractual in nature, "contract principles have little place in the law of domestic relations." *Lepis v. Lepis*, 83 *N.J.* 139, 148, 416 *A.*2d 45 (1980).

The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the "expressed general purpose." *Pacifico v. Pacifico*, 190 N.J. 258 (2007), *citing Northern*

Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953); *accord Dontzin v. Myer*, 301 N.J. Super. 501, 507, (App.Div.1997).

LEGAL ARGUMENT

POINT ONE

THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION IN HOLDING THAT THE TERM "SALE" IN THE PARTIES' PSA INCLUDED AN INVOLUNTARY SALE THROUGH EMINENT DOMAIN.

Defendant's lead argument is that the Trial Court erred in holding that the eminent domain proceedings here constituted a "sale" under the parties' PSA, because "Defendant was not the actual owner of the parcels of land originally taken under eminent domain." **Db9**. It appears Defendant is arguing that the governmental taking is unlike a sale, because the property taken was never owned by Stavros, Inc., and thus Stavros, Inc. did not transfer away title, even involuntarily. Defendant offers no citations for the facts which underpin this argument, but a review of the Appellate Division's opinion in *Stavros, Inc. v. State* offers a firm rebuttal to Defendant's premise.

In a thorough recitation of the case's history, the court described the traffic circle elimination project and New Jersey Department of Transportation's actions as follows: "The project also included the DOT's permanent fee taking of *three*

portions of Stavros's property and a temporary fee taking of a construction easement." *Stavros, Inc. v. State*, No. A-0959-17T2, 2019 N.J. Super. Unpub. LEXIS 1888 at *3 (Super. Ct. App. Div. Sep. 12, 2019) (emphasis added; specific descriptions of the land by block and lot numbers omitted).

The court explained that Stavros, Inc. was ultimately awarded $998,400 by a jury "as just compensation for the value of property the DOT acquired as of June 2008..." *Stavros, Inc. v. State* at *13. The jury considered the value of the fee takings and temporary taking of a work area belonging to Stavros, Inc., "but did not consider the impact of the DOT's takings on the rest of the Stavros, Inc. property or Stavros, Inc.'s claim that the DOT denied its rights of reasonable access over the two and one-half years of construction." *Id.*

In a separate bench trial on Stavros, Inc.'s inverse condemnation claim, the court held that without full access it had previously enjoyed to major roadways, Stavros, Inc. could not use the property for its permitted commercial uses, and had no choice but to lease it to the DOT's agent, South State, for the non-permitted use of a construction yard. *Id.* at *16. The court determined that Stavros, Inc. "[c]learly and convincingly established that a taking of its right of reasonable access occurred for a two and one-half year period from April 15, 2009 to November 4, 2011."

Thus, the trial judge concluded, "regardless of the takings jurisprudence utilized, *the State's activities require a takings conclusion and thus required compensation.*" *Id.* (citing the lower court with approval, internal quotations omitted; emphasis added). **Da40**.

While "[t]he basic contractual nature of matrimonial agreements has long been recognized" it is also true that "the law grants particular leniency to agreements made in the domestic arena," thus allowing "judges greater discretion when interpreting such agreements." *Pacifico v. Pacifico*, 190 N.J. at 265-66 (2007), *quoting Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App.Div.1995) (*citing Petersen v. Petersen*, 85 N.J. 638, 642 (1981); *Massar v. Massar*, 279 N.J. Super. 89, 93 (App.Div.1995), *and quoting Guglielmo v. Guglielmo*, 253 N.J. Super. 531, 542 (App.Div.1992).

The *Pacifico* Court went on to provide the following guidance for contract interpretation:

> As a general rule, courts should enforce contracts as the parties intended. *Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 439 (D.N.J.2001); *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43, (1960). Similarly, it is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. *Tessmar v. Grosner*, 23 N.J. 193, 201 (1957). The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a

> rational meaning in keeping with the "expressed general purpose." *Northern Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 302 (1953); *accord Dontzin v. Myer*, 301 N.J. Super. 501, 507 (App.Div.1997). That is the backdrop for our inquiry.

Pacifico at 256.

In the matter at bar, the evidence was that the property was already embroiled in an eminent domain proceeding of which Defendant was well aware, but Plaintiff was not. There was no credible evidence that the property was listed for sale for $5.8 million when the PSA was signed. Defendant was a principal in Stavros, Inc., and acted as its representative throughout the eminent domain proceedings. He agreed in the PSA that Plaintiff would receive 50 percent of whatever monies were obtained through the sale of Olga's, yet he knew that the sale would not happen. Under these facts, construing the term "sale" so narrowly as to exclude the eminent domain proceedings would lead to an absurd and grossly inequitable result, as the Trial Court found. **3T22**. It was the intention of the parties "to provide plaintiff with consideration in the form of money from the business...[and] the source of the money was not intended to be limited to a traditional sale versus a forced sale, through eminent domain proceedings or through condemnation, or inverse condemnation, or even a settlement of the legal action." **3T22-23, 25**.

POINT TWO

IN THE ALTERNATIVE, THE LOWER COURT'S RULING SHOULD BE UPHELD UNDER THE EQUITABLE THEORY OF CONTRACT REFORMATION.

SUBPOINT A

THE PSA SHOULD BE REFORMED TO REFLECT THE PARTIES' INTENT.

Even if, *arguendo,* the word "sale" were deemed too restrictive to encompass the eminent domain and related proceedings, the Court would look to the clear intent of the parties in executing the PSA to effectuate that intent. It has long been settled law in New Jersey that marital settlement agreements are enforceable only to the extent they are equitable. *Capanear v. Salzano*, 222 N.J. Super. 403, 407 (App. Div. 1988). The court in *Capanear* noted:

> Thus, a matrimonial agreement may be reformed when, through a common mistake **or the mistake of one party accompanied by the fraudulent knowledge of the other,** it does not express the real agreement of the parties.

Id. (emphasis added), citing *Brodzinsky v. Pulek*, 75 N.J. Super. 40, 48 (App. Div.1962), *certif. den.*, 38 N.J. 304 (1962).

Indeed, "[t]he equitable authority of courts to modify property settlement agreements executed in connection with a divorce proceeding is well established."

Miller v. Miller, 160 N.J. 408, 419 (1999), *citing Conforti v. Guliadis*, 128 N.J. 318, 323 (1992); *Carr v. Carr*, 120 N.J. 336, 346-49 (1990); *Rothman v. Rothman*, 65 N.J. 219, 229 (1974). The agreement must reflect the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages. *Petersen v. Petersen*, 85 N.J. 638, 642 (1981).

In *Guglielmo v. Guglielmo*, 253 N.J. Super. 531 (App. Div. 1992), the court held:

> The law grants particular leniency to agreements made in the domestic arena, and likewise allows judges greater discretion when interpreting such agreements. *See* N.J.S.A. 2A:34-23. Such discretion lies in the principle that although marital agreements are contractual in nature, "contract principles have little place in the law of domestic relations." *Lepis v. Lepis*, 83 *N.J.* 139, 148, 416 *A.*2d 45 (1980). The circumstances of this matter appear to fall squarely within the parameters for modification.

Well before the PSA was signed, eminent domain was not a mere theoretical possibility; to Defendant, it was a known fact. He testified that the State's efforts to acquire the Olga's property began in 2004. On June 12, 2008, the DOT filed a complaint for the condemnation of parts of the Olga's property by eminent domain. In September, 2008, the court granted the DOT the right to proceed by eminent domain. It was not until six months later that the parties signed their PSA on April 10, 2009, but Defendant told Plaintiff nothing about it.

Defendant's actions in entering into the PSA were duplicitous and fraudulent. In persisting in his position based on the slimmest of technicalities, Defendant has doubled-down on his bad faith. Although the Trial Court made no findings as to Plaintiff's contract reformation claim, it referred to Defendant's "intentions and actions" as "very questionable at best." **3T30**.

SUBPOINT B

DEFENDANT'S ARGUMENT THAT PLAINTIFF'S CLAIM IS UNTIMELY UNDER RULE 4:50 IS MOOT AND IGNORES DEFENDANT'S CONCEALMENT OF HER CLAIM IN EQUITY.

The Trial Court interpreted Plaintiff's alternative request for equitable reformation of the PSA to be a request pursuant to Rule 4:50, which provides:

> *Rule 4:50-1. Grounds of Motion.*
>
> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a

> prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Defendant contends that a request for relief under Rule 4:50 is untimely due to the one-year time limitation for such requests set forth in Rule 4:50-2. Defendant's argument as to timeliness is moot because, as noted, the Trial Court did not reach the reformation of contract claim, having found that Defendant had breached the contract. **3T29**. Defendant also makes several references to a "statute of limitations," without citation to legal authority or even hinting at what he believes the applicable statute of limitations might be. Plaintiff would submit that as contract reformation is a claim in equity, it would not be subject to a statute of limitations.

Despite the mootness of the point, Plaintiff is compelled to point out that Defendant ignores his own admitted role in concealing the settlement and the eminent domain proceedings from Plaintiff. When Plaintiff received the settlement check for $1 million in December 2020, he did not tell Plaintiff. **2T100**. When Plaintiff heard a rumor about a settlement in July 2021, she called Defendant and asked him about it that very day. Defendant admits to telling her she was not entitled to any of it. Plaintiff believed him. When she reviewed the PSA in August of 2022 for unrelated reasons, she went to Defendant again, who insisted she was not entitled

to any money from the Olga's settlement. At that point, she consulted her attorney, and she filed her motion to enforce the PSA the following month, on September 8, 2022. **Da17**.

Defendant never told Plaintiff about the eminent domain, nor his belief that Olga's was never going to sell. He did not tell her that the $5.8 million sale price identified in the PSA was "meaningless" in his view.

The evidence was clear that Defendant, as a principal of Stavros, Inc., was the company representative throughout the eminent domain proceedings. By contrast, Plaintiff had no involvement. Defendant cites Plaintiff's deposition testimony to argue that she must have known about the eminent domain proceedings, but she testified credibly to the opposite. She knew only that "they were going to file a lawsuit…I think he told me property damage and because the diner was losing money and they blamed the State for it." Plaintiff was asked if she had any idea what the basis for the lawsuit was, other than what she was told by Defendant, and she responded "No." **Db17-18, citing Da42**. This testimony is consistent with Defendant's as to Plaintiff's lack of a role in Stavros, Inc., and her limited knowledge of its dealings. Hearing rumblings about an intention to file a lawsuit is far different from learning of a jury verdict or settlement.

As noted, Defendant's argument as to timeliness under Rule 4:50-2 is moot, since the Trial Court did not find for Plaintiff on that basis. Moreover, the body of law cited above allowing contract reformation in the marital context based on fraud or mistake was not decided under Rule 4:50, and does not adhere to a one-year time period within which to seek reformation.

SUBPOINT C

DEFENDANT'S ATTEMPTS TO BLAME PLAINTIFF'S COUNSEL FOR HIS OWN ACTIONS ARE IMPROPER, UNSUPPORTED BY THE RECORD, AND HAVE BEEN WAIVED.

Throughout Point II of his brief, Defendant employs the admittedly stunning argument that Plaintiff' was duped not because of his own misconduct, but rather because of Plaintiff's counsel's failure to figure it out. Thus, over the course of twenty-eight pages, Defendant calls out Plaintiff's counsel by name six times, and refers to him as a certified matrimonial attorney who should have known better repeatedly. There is no basis for this transparent attempt at blame-shifting.

Preliminarily, Defendant did not raise this argument at the trial level. Thus, the argument has been waived. *State v. L.D.*, 444 N.J. Super. 45, 56 n.7, (App. Div. 2016), *N.J. Dep't of Envtl. Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 506 n.2 (App. Div. 2015).

Defendant offered no evidence at all at trial, other than examining the parties. **2T2.** Nonetheless, he now tries to proceed without any evidence on a newly raised claim that had Plaintiff's counsel done his "due diligence," he would have learned of the eminent domain proceeding. Thus, Defendant's brief argues, "...[Defendant] should not be penalized ... since all relevant information pertaining to Olga's Diner was available to Mr. Nussey at the time the Property Settlement Agreement was drafted by him, presented for signature to both parties on April 10, 2009 and incorporated into the Final Judgment of Divorce..." **Db16-17.** Defendant continues a few pages later, "Let's not forget Mr. Nussey drafted the PSA..." **(Db22)**, and "[e]specially in light of the fact that Mr. Nussey should have taken into account the intricacies involved in an Eminent Domain action and he should have known that Olga's Diner had permanently closed six to seven months prior to the execution of the PSA." **(Db30).**[4]

It bears mention at this point that the lower court specifically addressed the doctrine of *contra proferentem,* "which provides that when a contract is ambiguous, it is construed against the drafter," and found that the doctrine does not apply here,

[4] It is unclear what significance Defendant attaches to the closure of Olga's in November, 2008, a fact which appears several times in his brief. Surely Defendant is not suggesting that selling the Diner would have been impossible once it closed, or that its closure somehow should have signaled the eminent domain proceedings to Plaintiff. There is no support for either conclusion in the record. Nor does it mean that Olga's had no value. Indeed, the "just compensation" award and inverse condemnation claim were based on losses incurred after Olga's was closed.

because there is no evidence of unequal bargaining power between the parties. **3T23,** *citing Pacifico v. Pacifico*, 190 N.J. 258, 267-68 (2007).

There is no evidence as to what a due diligence search would have uncovered in the first quarter of 2009. Defendant's claims in this regard are groundless and speculative. But even more to the point, Defendant offers no authority for the claim that Plaintiff's counsel had a duty to independently verify information provided by Defendant as to the Diner's being listed for sale, let alone to discover the information Defendant had concealed; *i.e.*, that the Diner would not be sold as he had represented, and that it was already subject to eminent domain. Defendant's claim in this regard is an obvious red herring. As the Trial Court pointed out, Defendant could have removed any ambiguity in the PSA by specifically excluding any proceeds from the eminent domain, but he failed to do so. **3T22.** Now he argues, essentially, "It's their fault for believing me."

POINT THREE

THE TRIAL COURT PROPERLY AND EXPRESSLY CONSIDERED BOTH EMINENT DOMAIN PROCEEDINGS.

Without amplification, Defendant claims that the Trial Court failed to consider the first eminent domain trial, which resulted in a jury verdict in favor of Stavros, Inc. for $998,400 as just compensation for the eminent domain taking. **Db32.** Defendant argues that if this Court determines that compensation for the

eminent domain taking is to be considered a sale, then Plaintiff would be entitled only to Defendant's proceeds from the jury verdict.[5]

Defendant fails to explain the reasoning here. Nonetheless, the Trial Court properly assessed the evidence. Stavros, Inc. established a governmental taking at both trials, the jury trial and the bench trial. *See, Stavros, Inc. v. State, supra.* **Da37, Da40**. As the Trial Court held:

> The intention of the parties was to provide plaintiff with consideration in the form of money from the business. The evidence of the facts surrounding the parties at the time the PSA was entered into supports a finding that the source of the money was not intended to be limited to a traditional sale versus a forced sale, through eminent domain proceedings or through condemnation, or inverse condemnation, or even settlement of the legal action.

3T22-23. Clearly, the Trial Court considered both eminent domain actions. Sitting in equity, the Trial Court in its discretion determined that the intent of the parties was that Plaintiff would receive monies in the divorce from the proceeds of Olga's Diner, no matter whether those proceeds came about through a voluntary sale or through compensation for a forced governmental taking.

[5] Defendant says his interest allotted him $7,544.93, but he testified at trial that in reality he received nothing from this verdict, in order to reimburse his Aunt Tina for prior loans. **2T142.**

POINT FOUR

DEFENDANT'S ARGUMENT BASED ON THE PAROL EVIDENCE RULE HAS BEEN WAIVED.

In the heading to Point II in his brief, Defendant claims that the Trial Court "failed to consider and/or apply the parol evidence rule to the [PSA]." **Db13**. Defendant does not mention the parol evidence rule again until the penultimate paragraph of this section, where he states, out of the blue, "[w]ith that being said, it is the Parol Evidence Rule that governs the specific clause(s) of the PSA at issue."

The parol evidence rule addresses whether extrinsic evidence may be admitted to clarify contract terms. *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269-70 (2006). As the State Supreme Court ruled in *Conway*, New Jersey takes an expansive view of the parol evidence rule, not to alter the contract terms, but to reach the heart of the parties' intent. The *Conway* Court explained:

> Within the constraints described in *Schwimmer,* we allow a thorough examination of extrinsic evidence in the interpretation of contracts. Such evidence may "include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." *Kearny PBA Local # 21 v. Town of Kearny*, 81 N.J. 208, 221, 405 A.2d 393 (1979). "Semantics cannot be allowed to [***22] twist and distort [the words'] obvious meaning in the minds of the parties." **[*270]** *Schwimmer, supra*, 12 N.J. at 307, 96

> A.2d 652. Consequently, the words of the contract alone will not always control.
>
> In sum, we permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties. Extrinsic evidence may be used to uncover the true meaning of contractual terms. It is only after the meaning of the contract is discerned that the parol evidence rule comes into play to prohibit the introduction of extrinsic evidence to vary the terms of the contract. *Id.* at 304, 96 A.2d 652 *see also Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968).

Conway, supra, at 269-70.

The parol evidence rule was never raised at the hearing, nor argued in Defendant's opening appellate brief. Accordingly, Defendant should be precluded from addressing this issue in his reply brief or from arguing this issue to the Court. Issues not raised before the trial court are waived on appeal. *State v. L.D.*, 444 N.J. Super. 45, 56 n.7, (App. Div. 2016), *N.J. Dep't of Envtl. Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 506 n.2 (App. Div. 2015).

CONCLUSION

Defendant's position can perhaps best be described as an exercise in hair splitting to the point of absurdity. There was only one significant asset at issue between the parties in their divorce; *i.e.*, Olga's Diner. It was the clearly stated

intention of the parties that the proceeds from the sale of Olga's would be evenly divided between them, after any then-existing credit card debt was paid off.

Unbeknownst to Plaintiff when she signed the PSA, however, Olga's was never going to be sold. That was all a ruse by Defendant. He testified that the language in the PSA that the diner was listed for sale for $5.8 million was "meaningless" because he knew it would never be sold. What Defendant knew, but withheld from Plaintiff, was that the State of New Jersey had already initiated eminent domain proceedings against Olga's, as part of a major roadwork project to eliminate the traffic circle at Routes 70 and 73.

Defendant seeks to profit from his dishonesty with the argument that because the Olga's proceeds came through a forced sale (eminent domain) as opposed to a voluntary one, only he is entitled to those proceeds. According to Defendant, Plaintiff was entitled to money "if it sold, yes. But it never sold." The Trial Court, sitting in equity, would not permit Defendant to cheat his former spouse under what is, in its best light, mere semantics. Whether by traditional sale or by eminent domain, Defendant was compensated for the State's taking of this sizeable asset. Dividing the proceeds equally was the clear intent of the parties. It was also the stated purpose of the PSA to dispose of all issues between them concerning all claims and property. **Da282, para. 4.** If the disposition of Olga's through eminent domain

were not covered by the PSA, the overall purpose of the PSA to resolve all claims between the parties would be frustrated.

The Trial Court properly interpreted the PSA in a manner to effectuate its stated intention, and rejected an interpretation that would be absurd and grossly unfair. For all of the reasons stated herein, the decision should be affirmed.

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