Superior Court of New Jersey
Appellate Division
Docket No. A-3777-23

47 MERCER STREET, LLC AND
78 SUMMIT AVENUE PARTNERS, LLC,

Plaintiffs,

v.

78 SUMMIT AVENUE JC, LLC,
and TRACY ERRICO,

Defendants-Movants.

On motion for leave to appeal from the June 12, 2024 Orders of the Superior Court of New Jersey, Law Division, Hudson County, HUD-L-004219-21; Hon. Jane L. Weiner, J.S.C.

BRIEF OF APPELLANTS, 78 SUMMIT AVENUE JC, LLC AND TRACY ERRICO

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PROCEDURAL HISTORY[1]

This case arises from a residential real estate transaction involving $5 million. Plaintiffs allege violations of the Consumer Fraud Act, common law fraud, breach of contract, and related causes of action. Defendants deny plaintiffs' allegations and assert claims against plaintiffs. A44.

This appeal comes by way of the Court's August 2, 2024 Order granting defendants' motion for leave to appeal June 12, 2024 Orders entered by the Law Division, which denied the motion of Defendants 78 Summit Avenue and Tracy Errico, seeking to reinstate their Answers and Counterclaims. Law Division Judge Weiner (newly assigned to the case below) denied reinstatement of defendants' pleadings and confirmed the entry of default against both defendants because of their charged failure to provide sufficient answers to plaintiffs' discovery requests per the directives of previously assigned Judge D'Elia during the February 8, 2024 Case Management Conference the court held below. A81.[2]

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[1] References to transcripts are as follows:

1T February 8, 2024 (case management conference)
2T March 6, 2024 (motion)
3T June 12, 2024 (motion)

[2] Defendants moved for reconsideration of the court's June 12, 2024 Orders; Judge Weiner of the Law Division denied reconsideration in light of this now pending appeal (after defendants filed their motion for reconsideration to the trial court, this Court granted leave to appeal, depriving the lower court of jurisdiction).

STATEMENT OF FACTS

On June 20, 2022, Plaintiffs served their First Set of Interrogatories and First Request for Production of Documents on Defendants, 78 Summit Avenue JC, LLC and William Melms[3]. A117

On August 24, 2022, Plaintiffs filed a motion to compel discovery from Defendants, 78 Summit Avenue JC, LLC and William Melms, which the trial court granted on October 7, 2022. A12

On October 18, 2022, Defendants provided certified responses to Plaintiffs' First Set of Interrogatories and First Request for Production of Documents, in accordance with the October 7, 2022 Order. A164. Mr. Melms certified the responses in his individual capacity and as a representative of 78 Summit Avenue JC, LLC.

Plaintiffs alleged that defendants' responses were insufficient, advising defendants' counsel by January 19, 2023 letter. A214. Defendants' counsel responded by addressing plaintiffs' concerns about deficient responses to the extent they had merit, while stating that the remainder of the responses to discovery were sufficient. A218.

[3] The Law Division subsequently dismissed Plaintiff's complaint against Mr. Melms on summary judgment; he is no longer a party in this action.

The parties failed to resolve their discovery dispute. On February 16, 2023, Plaintiffs filed a motion to strike Defendants' Answers and Defenses, asserting that Defendants had failed to comply with the October 7, 2022 Order (which defendants denied was so). The trial court denied plaintiff's motion on March 3, 2023. A16.

On March 13, 2023, Plaintiffs filed another motion to strike Defendants' Answers and Defenses, restating the same grounds. This time, however, the court granted Plaintiff's motion and entered an Order striking Defendant 78 Summit Avenue JC, LLC's Answers and Defenses for failure to comply with the October 7, 2022 order. A18.[4]

On May 1, 2023, Plaintiffs filed an Amended Complaint, naming Tracy Errico a defendant.[5] On June 14, 2023, before an Answer was filed, Plaintiffs served Tracy Errico with a First Set for Production of Documents and their First Set of Interrogatories. A228.

[4] The court entered this order despite the fact that, on October 18, defendants had provided discovery to plaintiffs as directed in the October 7, 2022 Order, which defendants also supplemented on January 19, 2023. Plaintiff never filed a motion to compel more specific responses. The court struck Defendant 78 Summit Avenue's Answer and Defenses without indicating what responses were deficient and needed to be cured. A18.

[5] The court later dismissed all but two counts against Tracy Errico, leaving only the counts related to violations of the Consumer Fraud Act and Common Law Fraud Act against her.

On August 23, 2023, Plaintiffs filed a motion to compel discovery from Defendant, Tracy Errico, which was granted on September 8, 2023, ordering Errico to provide responses to Interrogatories and Document Demands by September 22, 2022. A20. Defendant, Tracy Errico, served answers to Interrogatories and responses Notice to Produce on September 29, 2023. A308.

Defendants filed an Answer on September 15, 2023. A44 (the filing of the Answer reinstated Defendant 78 Summit Avenue JC, LLC's Answer, which had been stricken on April 14, 2024).

On October 4, 2023, Plaintiffs again filed a motion to strike Defendant 78 Summit Avenue JC LLC's Answers and Defenses for failure to comply with the October 7, 2022 Order. On October 20, 2023, during argument, the Court scheduled a Case Management Conference for November 8, 2023 to discuss all purportedly outstanding discovery responses from Defendants 78 Summit Avenue JC LLC and Tracy Errico. Following the case management conference, Judge Kalimah Ahmad entered a November 9, 2023 Case Management Order providing in relevant part:

2. Punch list or highlighted specific requests of any outstanding paper discovery shall be served by existing parties by November 13, 2023.
3. The existing parties' answers to the punch list or highlighted requests of any outstanding paper discovery shall be provided by November 20, 2023.

4. Depositions of existing parties' fact witnesses shall be conduced by December 1, 2023.
5. The Plaintiffs' Motion to Strike is adjourned to December 15, 2023, with Oral Arguments set for the same date, unless the motion is withdrawn.
6. Supplemental information, if any, as to the Motion to Strike should be filed via E-Courts with hard copy mailed to the Court by December 8, 2023. [A27]

On November 20, 2023, Defendants provided responses to the "Punch List" in accordance with the November 9 Order. A68.

Plaintiffs filed another motion on November 29, asking the court to strike the Answers of both Defendants (without having filed a motion to compel more specific responses). Defendants opposed, noting that they had provided responses in accordance with the punch list the court had specified (as noted above). A68.

On December 22, 2023, however, the court granted Plaintiffs' motion to strike Defendant Errico's Answer for failure to provide discovery. A29. The court also entered an Order (that same day) against Defendant, 78 Summit Avenue JC, LLC, striking its Answer with prejudice for failure to provide discovery. A29.

Defendants continued to affirm to the trial court that they had responded to plaintiff's discovery requests by supplying all information and documents responsive to plaintiffs' discovery requests that were in defendants' possession,

custody, or control. On December 21, 2023, defendants filed a motion to restore their Answer and Defenses on this ground, detailing for the court in Certifications and attached discovery responses defendants' full compliance with discovery.[6]

On January 25, 2024, while defendants' motion to reinstate their Answers was pending, defendants submitted a supplemental Reply in further support of their motion, detailing further their compliance with plaintiffs' discovery requests. A357. Counsel for Defendants explained in her certification:

> 2. On November 9, 2023, the Court entered an Order instructing the parties to submit their final discovery punch list as it relates to outstanding discovery being requested.
>
> 3. The Defendants' answered the Plaintiffs' requested punch list on November 20, 2023.
>
> 4. The Court instructed me to produce o the Plaintiffs all of the documents that are also in possession of the Plaintiffs, which were 1) Purchase Agreement; 2) Transfer Documents that include Deed and HUD; and 3) OPRA documents. I have provided the Inspections Report that states the property in question was free and clear of any hazardous materials a month prior to the closing.[sic].
>
> 5. I have provided to the Plaintiff a copy of the Defendants' Federal and State 2019-and 2020-Income Taxes, which are the exact Income Tax years for the year of the transaction subject to this litigation.

[6] Defendant Errico explained that she had mistakenly answered Interrogatories addressed to Rocco Errico (a named defendant but subsequently dismissed and no longer a party to this case). But Ms. Errico certified that her answers to plaintiffs' Demand for Interrogatories and Demand for Production of Documents were the same. Indeed, when plaintiffs subsequently deposed Ms. Errico, plaintiffs' counsel referenced Errico's Answers to Interrogatories to question her. A353.

6. On January 25, 2024, I am in receipt of Defendants' 2015, 2016, 2017 and 2018 Tax Returns and the same was produced to the Plaintiffs. I am amending this Reply Certification to certify that the Plaintiffs are now in receipt of all the Tax Returns to the Defendant, 78 Summit Ave., JC LLC. [A357]

As defendants' counsel explained in her Certification, during the Oral Argument that took place on December 20, 2023, counsel was instructed to reach out to the banks that could have been associated with Defendants to inquire about bank statements. Counsel affirmed that she sent the letters to the Banks, and provided proof of this, affirming that defendants would amend their answers to discovery if any responses from the bank were received. Defendants provided all OPRA requests associated with repairs on the property as well. Defendants' counsel affirmed to the court that there were no other documents that defendants could produce; defendants had produced all they had. A357, A363.

Defendants' motion to reinstate their pleadings resulted in a pivotal Case Management Conference before newly assigned Judge D'Elia, which was held on February 8, 2024 (1T). Judge D'Elia reviewed in detail each of plaintiffs' requests and defendants' answers to them, focusing on the "punch list" of alleged deficient responses that had previously been provided to the court. 1T4:15-25 to 5:1-2.

In Request No. 1, plaintiffs requested the bank accounts of 78 Summit JC, LLC, to which Defendants' response was insufficient. 1T12:23-25 to 13:1- Defendants' counsel (Ms. Errico) explained that the responses to the "Punch List" were collective, from both Defendant 78 Summit Ave JC, LLC and Ms. Tracy Errico. 1T14:1-22. The court responded, "[t]here is no such thing as a collective response." The court noted that the responses were only certified by Mr. William Melms on Defendant 78 Summit Ave JC, LLC's behalf, but not by Errico, which Judge D'Elia said was also required. 1T16:16-25 to 17:1-15. Defendants' counsel affirmed that Defendant Errico's responses would be identical and that Defendant Errico's certification so affirming would be submitted that evening, which the court said was acceptable. 1T17:16-25 to 19:1-16.

With respect to the substantive response to Request No. 1, Defendants' counsel indicated that defendants had listed three potential banks with which Defendant 78 Summit Ave JC, LLC could have been associated, and counsel sent letters to each of the banks inquiring about account information for Defendant 78 Summit Ave JC LLC. 1T24:12-25 to 25:1-10. Counsel did this per Judge Ahmad's directive.

Plaintiffs' counsel (Mr. Andreou) complained that Defendants did not get any financial information from defendants other than the three letters that defendants' counsel sent to the banks inquiring about the bank information. 1T25:13-23. Judge

D'Elia advised defendants' counsel that she could not perform the due diligence on her clients' behalf because that would make her a witness; this deficiency should be corrected, Judge D'Elia said, by defendants certifying their efforts to obtain bank account information with no substantive responses from the banks. 1T28:4-25 to 30:1-21.

With respect to Requests 1 through 6, plaintiffs' counsel advised that they "relate to the bank information" and would be resolved in accordance with the court's instructions providing for defendants to provide certified responses from Mr. Melms (on 78 Summit Avenue's behalf) and Defendant Errico. 1T30:22-25 to 31:1-10. The court instructed that if Errico just says "I read everything that Mr. Melms has provided and specify in her certification what she's talking about so there's no confusion, and I have nothing more to add and I agree 100 percent with what he said, then she'll be bound what he says and you're off and running." 1T32:1-11.

Requests Nos. 7 and 8 asked for the names, contact information, and personnel documents for employees and/or independent contractors. Plaintiffs complained that Defendants only listed Tracy Errico as an employee, but not Jamal Phillips, who Plaintiffs said was a prior superintendent. 1T32:14-25 to 33:1-3. The court instructed Defendants to add to its response that there were no other employees besides Tracy Errico and Jamal Phillips, which would fix their response to Request Nos. 7 and 8. 1T33:16-25 to 35:1-25.

In Request No. 10, Plaintiffs requested that if no communications were found in response to No. 9, defendants should indicate what searches were conducted to try and find such documents. 1T36:7-10. The court indicated that Defendants had responded that "they did electronic and hard copy search." 1T36:11-12. The court advised plaintiffs' counsel that any problems with this response or its credibility should be addressed on a cross-examination, but it did not invalidate the propriety of the discovery response by the defendants. 1T36:13-25 to 37:1-4.

In Request No. 11, Plaintiffs asked who was responsible for communicating with the tenants of the property. 1T37:6-10. The Court instructed Defendants to "clarify who the superintendent is via the proper certification from both individuals, Melms and Tracy." 1T37:18-20.

With respect to Request Nos. 12 and 13, the court said that defendants' responses were sufficient. 1T37:24-25, 38:4-7.

In Request No. 14, Plaintiffs sought records related to improvements made on the property prior to tenants occupying the property. The court said that Defendants' "answer is fine, as long as Tracy Errico give[s] the certification." 1T38:10-18. Similarly in Request No. 15, Plaintiffs sought who was responsible for performing or coordinating repairs on the property, to which the court said, "[t]he answer is fine, as long as Tracy Errico give[s] the answer." 1T38:19-23. The court explained to Mr. Andreou, "[l]isten, your job here is to bind them to these answers, both of them, so

that when they testify you're going to blow them out of the water on credibility." 1T38:24-25 to 39:1-2.

The court said that Defendants' answers to Nos. 16, 17, and 18 were sufficient subject again to Errico providing her certification. 1T39:5-25 to 40:1-8.

In Request No. 19, Plaintiffs requested the lease agreement at the property from January 1, 2014 through September 27, 2019. The court said that in response to this Request, Tracy Errico must produce a certification and describe the efforts made to locate the lease agreements. 1T41:15-24.

Plaintiffs did not have an issue with Defendants' response to No. 20.

With respect to Request No. 21, the court instructed Defendants to describe the efforts made to find the documents and provide a certification from Tracy Errico, and to clarify that OPRA documents were the only ones Defendants had in response to this Request. 1T42:18-25 to 43:1-25.

In Request No. 22, Plaintiffs requested the insurance policy on the property from 2014 to 2019. The court instructed defendants to describe the efforts made to locate the policy and provide a certification, which would make defendants' response sufficient. 1T45:2-25 to 46:1-16.

In Request No. 23, Plaintiffs requested that defendants identify the custodian of records for the property. The court instructed defendants to clarify that Rocco

Errico was the record-keeper for the property and which records had been produced in discovery to plaintiffs. 1T46:18-25 to 48:1-14.

The parties agreed that Defendants' responses to Request Nos. 24, 25, 26 and 27 was sufficient subject to Tracy Errico providing her certification. 1T48:17-25.

When plaintiffs' counsel attempted to add further complaints about defendants' discovery responses, Judge D'Elia told plaintiffs' counsel that what was being discussed, and what was relevant, were the claimed deficiencies regarding the punch list – that defendants' Answer "was suppressed for these reasons that we just went through. That's all I'm dealing with. If those things get cleared up, then the reasons for suppressing the answer just two month[s] ago are gone if they get cleared up the way I ordered." 1T49:6-25 to 50:1-7.

On February 12, 2024, following the February 8, 2024 Conference with Judge D'Elia, Defendants served amended answers to the Punch List, certified by William Melms on behalf of 78 Summit Avenue and by Tracy Errico as instructed. A81, A6.

In response to Plaintiff's Request Nos. 1 through 6, defendants submitted the following certified answer: "On Friday, February 9, 2024, I personally contacted the three possible banking institutions Bank of America, Valey Bank, and TD Bank, I was informed by the banks' representative that no accounts are found in these banks as it relates to 78 Summit Ave., JC, LLC. I have searched all electronic and hard copy records to determine if and what banking intuition was utilized by the LLC,

there are none. The Property in question was sold in 2019, the closing records that were retained in reference to the LLC were in possession of Rocco Errico, Esq., which was provided to the Plaintiffs. I have examined the tax returns which were also produced to the Plaintiffs, to determine if the bank is listed, but have not seen it stated. Defendants reserve the right to amend this answer in accordance with the Court Rules." A81

In response to Request No. 7, Defendants certified, "Tracy Errico contact (201) 647-3445; No contact is retained for Mr. Jamal Philips. Defendants reserve the right to amend this answer in accordance with Court Rules."

In response to Request No. 9, defendants certified, "a. Rocco Errico retained all property transfer documents, such Deed and Purchase Agreement, 2019 and 2020 corporate tax returns that were provided and in possession of the Plaintiffs. b. None were retained as to Tracy Errico. c. None were retained as to Steve Caraccio. f. No knowledge as to Jamal Phillips. Defendants reserve the right to amend this answer in accordance with Court Rules." A81.

In response to Request No. 10, Defendants said they had searched "[a]ll electronic and hard copy searches. . . from the inception of discovery to the present." A81.

In response to Request No. 11, Defendants certified that the Superintendent was responsible for communicating with tenants at the property regarding their units and/or any issues they experienced. This answer is certified by Tracy Errico. A81.

In response to Request Nos. 12 through 18, Defendant Errico provided the requested certification for the amended responses.

With respect to Request 19, which the court indicated that Defendants needed to provide a certification from Defendant Errico and to describe the efforts made to locate the lease agreements, defendants submitted an amended response, certified by Defendant Errico, providing, "Objection, the question is harassing, broad and vague, no lease agreements were retained by the Defendants from January 1, 2024, through September 27, 20219. Notwithstanding this objection, all the Leases were transferred to the Plaintiffs and in their possession on or before the closing date of September 27, 2019. Defendants reserve the right to amend this answer in accordance with Court Rules." A81.

In response to Request No. 21, Defendants certified, "OPRA reports provided on December 21, 2023, related to the inspections performed by the municipal authorities. Defendants reserve the right to amend this answer in accordance with Court Rules."

In response to Request No. 22, Defendants provided an amended response as follows: "I amend the previously provided answer. The policy was with Providence

Mutual, Policy No.: [redacted] The current Complaint and coverage was denied on December 21, 2021, under Claim # [redacted]. Defendants reserve the right to amend this answer in accordance with Court rules."

With respect to Request No. 23, Judge D'Elia had instructed Defendants to clarify who was the record keeper for the property, and which records were provided in response to this Request. Defendants provided an amended response as follows: "Objection, the question is broad, unclear and vague. Notwithstanding the objection the closing records, such as Purchase Agreement, Transfer Deed, 2019 and 2020 Tax Returns as to the LLC and the Property were kept by its attorney Rocco Errico, Esq. and was provided in discovery and were also in possession of the Plaintiffs. All tax returns 2016, 2017, 2018, 2019 and 2020 were kept by Internal Revenue Service and was provided in January 2024. All OPRA reports as to repairs, permits and inspection of the property were kept by the Jersey City Municipal Authority and were provided in discovery on December 21, 2023. Defendants reserve the right to amend this answer in accordance with Court rules."

The trial court said that defendants' answers to Request Nos. 24, 25, 26 and 27 were sufficient provided that Defendant Errico certified the responses. Defendants provided this certification in their amended response. A81.

Following service of their amended and newly certified responses to plaintiffs' discovery, per Judge D'Elia's directives at the February 8 case

management conference, defendants moved to reinstate their Answers, but Judge D'Elia denied relief to defendants. At the March 6, 2024 motion hearing (2T), Judge D'Elia said there remained deficiencies with defendants' responses, noting the impropriety of raising objections, reserving their right to amend answers, insufficient responses, and not providing answers/documents for requested time frames. "For example, when asked to provide information about payments or reimbursements made by Defendants between 2014 and 2019, they attached copies of tax returns from 2016 through 2020" (as Judge Weiner noted in her Amplification at para. 28). Judge D'Elia said that "the time to object to the written discovery is long gone. The time to raise any issues relating to the written discovery is long gone." Defendants' response that they could amend their answers "is an unacceptable discovery response to this Court because it defeats the purpose of written discovery, which is supposed to be to pin down people on what they know, when they know it," A6 (para. 29). Judge D'Elia denied defendants' motion to reinstate for these reasons.

On May 8, 2024, Plaintiffs filed another Motion to Strike, this time to strike the Answer of Defendant Errico with prejudice, citing the same insufficient discovery ground. Defendants opposed and filed a Cross Motion to Reinstate, stressing again that all discovery and information that was responsive to plaintiffs' requests and was in defendants' possession, custody, or control had been provided. Defendants' counsel submitted to the court the responses to plaintiffs' discovery

demands that had been provided per Judge D'Elia's directives at the February 8 Case Management Conference. Defendants' counsel affirmed,

> 2. On February 8, 2024, the Court held on the record [a] hearing in reference to all Plaintiffs' outstanding discovery demands as it relates to the Punch List pursuant to Court's Order of November 9, 2023.
>
> 3. In accordance with the Court's instructions, further due diligence was conducted by the representative of the Defendant, 78 Summit Ave., JC, LLC and a proper certification was executed by the Defendant, Tracy Errico.
>
> 4. Attached to this Certification is the Defendants' Amended Answers to the Plaintiffs' Punch List demands.
>
> 5. Based on the aforesaid, I request for the Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants.
>
> ***
>
> 12. The Defendants fully complied with all the on the record instructions given by the Court on February 8, 2024. Defendants' Amended Certified Answers and Objections attached as Defendants' Exhibit "D" precisely confirming as to what was stated on the record by Judge D'Elia. Since 2021, this case had the turnout of four (4) Hudson County Superior Judges who provided completely different instructions to the Defendants as the record reflects on February 8, 2024.
>
> 13. The February 8, 2024, was the most recent case management in this matter during which Judge D'Elia instructed on the record what is needed from Tracy Errico and 78 Summit Ave JC LLC in order to restore the Defendants' Answer and Counterclaims. All Tracy Errico needed to do is to certify that she agrees to be bound by the answers provided by the member of 78 Summit Ave JC, LLC, as the Court can examine Tracy Errico's Certification and that she is in complete compliance with Judge D'Elia's instructions on the record dated February 8, 2024.

> 14. Based on the aforesaid, I request for the Cross Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants, 78 Summit Ave., JC LLC or Tracy Errico.

Newly-assigned Judge Weiner heard the motions on June 12 (3T) but, once again, no relief was provided defendants from defaults and striking of their Answers and Counterclaims. Judge Weiner granted Plaintiffs' Motion to Strike the Answer of Defendant Errico with prejudice for failure to comply with plaintiffs' discovery requests, and denied defendants' Motion to Reinstate their Answers and Counterclaims. 3T15-19. Judge Weiner noted the March 6 proceeding before Judge D'Elia, said that Judge D'Elia had ruled that defendants had not sufficiently complied with plaintiffs' discovery requests, and that defendants took no steps after the March 6 hearing to provide sufficient responses:

THE COURT: Did Judge D'Elia say you have not complied with their discovery demands and he's denying your motion?

MS. ERRICO: Judge, he denied the motion. He denied my motion from December 20th. That's correct. We did not review the case management conference that would have specific instructions on the -- on February 8th. We did not --

THE COURT: Did he indicate you had not complied with discovery when he heard your case on March 6th?

MS. ERRICO: On March 6th, he denied my motion. He did not say I did not comply with discovery. He denied my motion to restore.

Defendants' counsel disagreed with Judge Weiner's statement that Judge D'Elia went "line by line" in reviewing defendants' discovery responses and compliance with the February 8 "punch list." Defendants' counsel stressed to Judge Weiner, "I specifically highlighted and provided every single question that was in that -- the case was dismissed based on the punch list, okay. There was 27 question[s] on the punch list. We went through on February 8th – through the questions, which I provided to the Court in a transcript -- literally question by question for three hours, specifically in which Judge D'Elia states that this is acceptable, this is acceptable, this is acceptable, this is acceptable. It's in the transcript, Judge." 3T16-18. But Judge Weiner replied, "Whatever he said on February 8 is of no moment … We're talking about March 6th. Whatever he said on February 8th, on March 6th he said you did not comply with the discovery demands."

THE COURT: … What have you done since March 6th to rectify these issues other than attach a certification?

MS. ERRICO: The certification was attached. The punch list specifically that was requested has been provided and answered to in detail with everything that was instructed.

THE COURT: When did you do that?

MS. ERRICO: I did that, Judge, after the case of the February 8th.

THE COURT: After March 6th? After March 6th?

MS. ERRICO: After February 8th, I did that.

THE COURT: After March 6th, what did you do?

Defendants' counsel responded, "After March 6th, Judge, it was specifically -- everything was done. Everything was done. … There was nothing else – there was nothing else there, Judge." Judge Weiner nonetheless denied defendants' motion to vacate the defaults against them and reinstate their Answers: "Judge D'Elia went line by line as to items that you did not comply with. So your cross-motion to reinstate your answer is denied based on your refusal to provide discovery. The motion to strike is granted in light of the representations made to the Court, in light of the failure to provide discovery and, again, it will only be with respect to Tracy Errico in light of the fact that defaults have already been entered against 78 Summit, LLC." 3T18-19 (Judge Weiner filed an Amplification following grant of leave to appeal, A6, reiterating that the court denied relief to defendants because they remained noncompliant in answering plaintiffs' discovery requests as Judge D'Elia had previously directed).

Defendants now appeal and ask this Court to vacate the Law Division's June 12 Orders and remand this matter with direction that the defaults against defendants be vacated and defendants' Answers and Counterclaims be reinstated for trial on the parties' respective claims.

ARGUMENT

THE COURT SHOULD VACATE THE DEFAULTS WITH PREJUDICE AND SUPPRESSION OF THE ANSWERS AND COUNTERCLAIMS OF DEFENDANTS 78 SUMMIT AVENUE AND TRACY ERRICO, AS ENTERED IN THE LAW DIVISION'S JUNE 12 ORDERS, AND REMAND THIS MATTER WITH DIRECTION THAT DEFENDANTS' ANSWERS AND COUNTERCLAIMS BE REINSTATED FOR TRIAL ON THE PARTIES' RESPECTIVE CLAIMS (A3; 3T15-19).

The Appellate Division reviews for abuse of discretion a trial court's order dismissing a pleading for failure to make discovery, or an order denying a subsequent motion to reinstate the pleading. An abuse of discretion occurs when the order was "'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Wear v. Selective Ins. Co., 455 N.J. Super. 440, 459 (App. Div. 2018) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)); Lipsky v. New Jersey Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 463–64 (App. Div. 2023).

A lower court's application of the law is reviewed *de novo*. Factual findings are reviewed for clear abuse of discretion, U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012); Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). Factual findings must be supported by sufficient credible evidence in the record presented to the lower court, State v. S.S., 229 N.J. 360, 365 (2017).

We submit that Judge Weiner abused her discretion in entering her June 12, 2024 orders denying defendants' motion to vacate the defaults against them and reinstate their Answers and Counterclaims, because,

- The record shows that defendants complied with plaintiffs' discovery requests as Judge D'Elia directed in the February 8, 2024 Case Management Conference where the court specified what was required under the "punch list." There is not sufficient credible evidence in the record presented to the lower court to sustain the lower court's finding that defendants did not follow Judge D'Elia's directives.
- Whatever remaining discovery deficiencies can be found in the defendants' amended and newly certified response to plaintiff's discovery requests, the record does not support the lower court's application of the "ultimate sanction" imposed upon the defendants – i.e., striking or suppressing of their Answers and resolution of plaintiff's claims against them by default rather than on their merits. Judge Weiner failed to apply governing law prescribing the factors a court must consider before enforcing the ultimate sanction upon a party, and the record does not support imposing the sanction on the defendants in this case.

A. The Defendants complied with plaintiffs' discovery requests by providing amended, newly certified responses to the "punch list" as Judge D'Elia directed in the February 8, 2024 Case Management Conference (A3; 3T15-19).

As summarized in the Statement of Facts above (incorporated by reference) and the record shows, defendants complied with Judge D'Elia's directives on what was required to satisfy the "punch list" of contested discovery response. Defendants provided the amended responses and certification that Judge D'Elia directed defendants to provide.

There is not sufficient credible evidence in the record presented to the lower court to sustain Judge Weiner's factual findings at the June 12 motion hearing (3T), or Judge D'Elia's statements at the prior March 6 motion hearing (2T, where the court denied defendants' motion to reinstate their Answers), that defendants did not at least substantially comply with the directives that Judge D'Elia gave counsel at the February 8 Case Management Conference. Judge Weiner said that Judge D'Elia had found defendants' amended discovery responses to remain deficient -- "including that raising objections, reserving their rights to amend their answers, insufficient responses, and not providing answers/documents for the requested time frames. For example, when asked to provide information about payments or reimbursements made by Defendants between 2014 and 2019, they attached copies of tax returns from 2016 through 2020." A6, para. 28. Judge D'Elia stated at the March 6, 2024 hearing that "the time to object to the written discovery is long gone.

The time to raise any issues relating to the written discovery is long gone." Defendants' response that they could amend their answers "is an unacceptable discovery response to this Court because it defeats the purpose of written discovery, which is supposed to be to pin down people on what they know, when they know it." A6, para. 29.

None of that was sufficient ground on which to deny defendants' motion to reinstate their Answer and vacate the defaults against.

The responses that defendants provided shows that defendants' amended answers, with the certifications the court requested be provided, properly responded to the punch list as Judge D'Elia directed at the February 8 Case Management Conference; there is not sufficient credible evidence to show they were not.

There is no proper ground to deny reinstatement of defendants' Answers because defendants reserved the right to amend or supplement their answers. This is provided by R. 4:18-1(b)(3), which imposes a continuing obligation to supplement written responses on a party. This is all defendants did in their responses.

There is no proper ground to deny reinstatement of defendants' Answers because defendants recited objections. Defendants' recitation of objections were followed by substantive responses to plaintiffs' discovery requests in any event.

Judge Delia said, at the March 6 hearing, that defendants' answer with regards to Punch List Request No. 6, which requested all payments and/or reimbursements

made by 78 Summit Avenue for any reason from January 2014 through September 2019, were insufficient. 2T10:6-11-25 to 11:1-17. But Defendant 78 Summit Avenue certified that it had no records from 2016-2020; failing to include 2014 and 2015 was an oversight, but the answer remained the same – and could simply have been clarified.

Most of plaintiffs' complaints about defendants' discovery responses have centered on documents or information that defendants have affirmed, in their responses, they do not have (or have control over). Our Court Rules require a party to produce documents that are responsive to an opposing party's discovery requests and are in the "possession, custody or control" of the answering party, R. 4:18-1(a); R. 4:10-1; Lipsky v. New Jersey Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 464 (App. Div. 2023). Defendants have complied with this requirement. Likewise, if a witness is unable to recollect information, '[t]he trial court should not enter an order requiring a witness to more specifically answer a question to which he has already responded by saying he does not recollect unless it appears 'beyond reasonable doubt that the statement of lack or recollection was willfully false and deliberate effort to evade a true and responsive answer to the questions." Pressler & Verniero, Rules Governing the Courts of the State of New Jersey, R. 4:23-1, Comment 2.2 [2024] (citing Nusbaum v. Newark Morning Ledger Co., 33 N.J. 419, 426 (1960)).

Defendants' counsel affirmed all this to Judge Weiner in defendants' filings leading to the June 12 motion hearing below. Counsel affirmed that defendants were compliant with plaintiffs' discovery demands and with the directives of Judge D'Elia. There is no outstanding discovery or any other documents or information that defendants could produce. Counsel affirmed,

> 2. On February 8, 2024, the Court held on the record [a] hearing in reference to all Plaintiffs' outstanding discovery demands as it relates to the Punch List pursuant to Court's Order of November 9, 2023.
>
> 3. In accordance with the Court's instructions, further due diligence was conducted by the representative of the Defendant, 78 Summit Ave., JC, LLC and a proper certification was executed by the Defendant, Tracy Errico.
>
> 4. Attached to this Certification is the Defendants' Amended Answers to the Plaintiffs' Punch List demands.
>
> 5. Based on the aforesaid, I request for the Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants.
>
> ***
>
> 12. The Defendants fully complied with all the on the record instructions given by the Court on February 8, 2024. Defendants' Amended Certified Answers and Objections attached as Defendants' Exhibit "D" precisely confirming as to what was stated on the record by Judge D'Elia. Since 2021, this case had the turnout of four (4) Hudson County Superior Judges who provided completely different instructions to the Defendants as the record reflects on February 8, 2024.
>
> 13. The February 8, 2024, was the most recent case management in this matter during which Judge D'Elia instructed on the record what is needed from Tracy Errico and 78 Summit Ave JC LLC in order to restore the Defendants' Answer and Counterclaims. All Tracy Errico needed to do is to certify that she agrees to be bound by the answers provided by the member of 78 Summit Ave JC, LLC, as the Court can examine Tracy Errico's Certification and that she is in complete

compliance with Judge D'Elia's instructions on the record dated February 8, 2024.

14. Based on the aforesaid, I request for the Cross Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants, 78 Summit Ave., JC LLC or Tracy Errico.

[Certifications of A. Errico, Esq., at A57, A77, A91 (incorporated by reference)]

B. Whatever discovery responses remained deficient after the February 8, 2024 Case Management Conference, it was not sufficient ground on which to maintain default against defendants as Judge Weiner did in her June 12 Orders (A3; 3T15-19).

The "ultimate sanction of dismissal" is to be used "only sparingly." Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995) (quoting Zaccardi v. Becker, 88 N.J. 245, 253 (1982)). "If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint [or, here, suppression of answers to a complaint with counterclaims] is not appropriate and constitutes an abuse of discretion." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988).

"The Supreme Court has instructed that the assessment of the appropriate sanction for the violation of an order requires consideration of 'a number of factors, including whether the plaintiff acted willfully and whether the defendant suffered harm, and if so, to what degree.'" N.J. Div. of Youth & Fam. Servs. v. M.G., 427 N.J. N.J. Super. 154, 171 (App. Div. 2012). "The 'overriding objective' remains to allow 'the defaulting party his [or her] day in court.'" See Hip v. Quevedo, A-0485-

22, 2024 WL 410719, at *4 (N.J. Super. Ct. App. Div. Feb. 5, 2024) (drastic sanction of dismissal unwarranted. There existed lesser alternative sanctions to address plaintiff's failure to complete the deposition, such as payment of reasonable expenses and fees); Williams v. Am. Auto Logistics, 226 N.J. 117, 124 (2016) (quoting Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 115 (2005) ("trial court has an array of available remedies to enforce compliance with a court rule or one of its orders" and must consider "[t]he varying levels of culpability of delinquent parties"); Georgis v. Scarpa, 226 N.J. Super. 244, 25 (App. Div. 1988) (noting need to consider "extent to which [one party] has impaired [the other's] case may guide the court in determining whether less severe sanctions will suffice"); Williams, supra, 226 N.J. 125 (same).

Judge Weiner did not apply those principles during the June 12 hearing or in entering the June 12 Order, nor did Judge D'Elia in denying defendants reinstatement of their Answers in the March 6 hearing (2T). The failure of the lower court to cite and apply the governing standards cited above before confirming that judgment of default would be entered against these defendants is reversible error.

The record and procedural history of this case does not support the ultimate sanction of dismissal on these defendants, moreover (*see* Statement of Facts, incorporated here by reference). Until the February 8 Case Management Conference before Judge D'Elia, the trial court did not specify which of defendants'

discovery responses were deficient and what was required for compliance, see Adedoyin v. Arc of Morris Cnty. Chapter, Inc., 325 N.J. Super. 173, 181 (App. Div. 1999). "[I]ncomplete answers cannot be automatically considered as a failure to answer under R. 4:23-5[,]" nor can the party seeking answers "control the future course of the proceeding simply by asserting that the answers were not fully responsive.") Where a court determines there is a "dispute over responsiveness or insufficiency of interrogatory answers, the judge should first identify those questions[,]" and if more complete answers are needed, the court should adjourn the motion to allow such answers, rather than dismiss a case or suppress answers with prejudice, St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480, 486 (App. Div. 2008); Zimmerman v. United Servs. Auto. Ass'n, 260 N.J. Super. 368, 377–78 (App. Div. 1992). After Judge D'Elia held the February 8, 2024 Case Management Conference and clarified what defendants were required to provide in order to cure their deficiencies, defendants provided amended, newly certified responses to the outstanding punch list items that Judge D'Elia had identified during the conference. As defendants' counsel subsequently affirmed to Judge Weiner,

> 2. On February 8, 2024, the Court held on the record [a] hearing in reference to all Plaintiffs' outstanding discovery demands as it relates to the Punch List pursuant to Court's Order of November 9, 2023.
>
> 3. In accordance with the Court's instructions, further due diligence was conducted by the representative of the Defendant, 78 Summit Ave., JC, LLC and a proper certification was executed by the Defendant, Tracy Errico.

4. Attached to this Certification is the Defendants' Amended Answers to the Plaintiffs' Punch List demands.

5. Based on the aforesaid, I request for the Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants.

***

12. The Defendants fully complied with all the on the record instructions given by the Court on February 8, 2024. Defendants' Amended Certified Answers and Objections attached as Defendants' Exhibit "D" precisely confirming as to what was stated on the record by Judge D'Elia. Since 2021, this case had the turnout of four (4) Hudson County Superior Judges who provided completely different instructions to the Defendants as the record reflects on February 8, 2024.

13. The February 8, 2024, was the most recent case management in this matter during which Judge D'Elia instructed on the record what is needed from Tracy Errico and 78 Summit Ave JC LLC in order to restore the Defendants' Answer and Counterclaims. All Tracy Errico needed to do is to certify that she agrees to be bound by the answers provided by the member of 78 Summit Ave JC, LLC, as the Court can examine Tracy Errico's Certification and that she is in complete compliance with Judge D'Elia's instructions on the record dated February 8, 2024.

14. Based on the aforesaid, I request for the Cross Motion to Reinstate be granted, NO discovery is outstanding on behalf of the Defendants, 78 Summit Ave., JC LLC or Tracy Errico.

Judge Weiner said that defendants had "added absolutely nothing to their discovery responses" following the March 6 hearing before Judge D'Elia. But defendants did not have anything to add; they had no other documents or information to provide to the plaintiffs, as defendants certified in their discovery responses that they provided on February 20. A81.

Defendants properly filed a cross-motion to restore their Answers, which should have been granted, the record shows. The lower court orders providing for this case to be resolved by default rather than on its merits contravenes New Jersey law stressing that determination of court disputes by default should be avoided wherever possible. This is not a case where a party failed to respond to discovery requests. Defendants answered plaintiffs' requests several times, the record shows, by initial then amended and supplemental responses. Though plaintiffs continued to claim insufficiency with defendants' responses, the record shows that Judge D'Elia reviewed this in detail, at the February 8 conference, and detailed for defendants what must be provided to obtain compliance and restore their Answer. Defendants did this – serving their amended responses with the certifications that Judge D'Elia directed. Whatever responses possibly remained deficient as the lower court said at the June 12 and prior March 6 motion hearings denying reinstatement (which defendants dispute and the record on appeal does not support), the record does not present such "drastic circumstances of noncompliance with discovery" that warrants imposing the ultimate sanction on these defendants. It was improper under the circumstances shown by this record to deprive defendants of a determination of plaintiffs' hotly contested claims on their merits.

CONCLUSION

The Court should vacate the June 12 Orders entered by the lower court and remand with direction that the Answers and Counterclaims of Defendants 78 Summit Avenue and Tracy Errico be reinstated for trial on the claims between the parties.

Respectfully submitted,

/s/ Michael Confusione
Counsel for Appellants

Dated: September 4, 2024

47 MERCER STREET and 78 SUMMIT AVENUE PARTNERS, LLC, Plaintiffs, v. 78 SUMMIT AVENUE JC, LLC and TRACY ERRICO, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A- 3777-23 On Motion For Leave To Appeal From The June 12, 2024 Orders Of The Superior Court Of New Jersey, Law Division, Hudson County, HUD-L-004219-21; Hon. Jane L. Weiner, J.S.C. .

BRIEF OF PLAINTIFFS-RESPONDENTS

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Plaintiffs-Respondents 47 Mercer Street, LLC ("47 Mercer") and 78 Summit Avenue Partners LLC ("78 Summit") (collectively, "Plaintiffs") respectfully submit this brief in opposition to the appeal of Defendants-Appellants 78 Summit Avenue JC, LLC (the "LLC Defendant" or "Defendant LLC") and Tracy Errico ("Defendant Errico") (collectively, "Defendants") from the Orders of the trial court (Hon. Jane L. Weiner, J.S.C.), dated June 12, 2024, that: (i) granted Plaintiffs' motion to suppress Defendant Errico's answer with prejudice, and (ii) denied Defendants' cross-motion to restore their respective Answers and Counterclaims (the "June 12 Orders").

PRELIMINARY STATEMENT

Plaintiffs' lawsuit arises out of significant mold damage in a residential apartment building that they discovered shortly after Plaintiffs completed the purchase of the building from the Defendant LLC. Plaintiffs learned that Defendants knew about, but affirmatively concealed, the existence of mold prior to the closing based on, among other things, conversations with the former superintendent of the building as well as emails they obtained from former tenants in which they complained to Defendant Errico (the former building manager and relative of one of the principals of the Defendant LLC) of "fungus" and extensive water infiltration into their units.

After more than three years of discovery since the lawsuit was filed, Defendants effectively produced no documents and provided no information in

response to Plaintiffs' interrogatories other than to state that Defendant Errico and the former superintendent were former building workers. That is, despite the Defendant LLC having owned the building for several years, and there being documentary evidence that Defendant Errico had communicated via email with former tenants, Defendants claimed not to have a single written communication, bank statement, maintenance invoice, or record of payment to anyone for anything. Indeed, Defendants claimed they could not recall at what bank the Defendant LLC maintained accounts. Incredibly, Defendants still swore that they had performed a diligent search for responsive documents and information, while denying that any documents had been destroyed or lost.

In the face of Defendants' recalcitrance, the trial court granted Plaintiffs' motions to strike the Defendant LLC's answer with prejudice and Defendant Errico's answer without prejudice, orders which Defendants do not challenge here. That is, Defendants do not dispute that the trial court properly struck their respective pleadings for failure to provide discovery in the first instance. Instead, Defendants appeal the June 12 Orders of the trial court that suppressed Defendant Errico's pleading with prejudice and denied Defendants' cross-motion to restore their pleadings because they had still, at that point, failed to provide "fully responsive discovery" as the Rules of Court clearly require.

While this Court, in granting Defendants' motion for leave to appeal, appears question whether the trial court's actions were too extreme, a more fulsome analysis of the proceedings below reveals that the Defendants were given every opportunity to comply with their discovery obligations. Instead, they continued to insist that after some unspecified search for information and documents that they did not have a single piece of paper having anything to do with the Defendant LLC's ownership of the building, while also maintaining that they had not lost or destroyed any documents. To make matters worse, Defendants disregarded clear directives from the trial court as to how they could cure their deficiencies, and refused even to cure those deficiencies when given yet another chance to do so.

All told, multiple judges in the proceedings below all came to the conclusion that Defendants, after several warnings and opportunities, had failed to provide discovery in any meaningful sense. Those rulings, including the rulings under review here, find ample support in the record and the law. Accordingly, this Court should affirm the June 12 Orders.

PROCEDURAL HISTORY[1]

Plaintiffs filed their lawsuit on October 29, 2021, alleging claims for breach of contract, common law fraud, unjust enrichment, breach of the covenant of good faith and fair dealing, and violation of the New Jersey Consumer Fraud Act against the LLC Defendant and William Melms, the latter of whom was later dismissed from the case. Pa4-39. On or about May 1, 2023, Plaintiffs filed a Second Amended Complaint that, among other things, added Defendant Errico as a party. Da32-43. Plaintiffs allege that Defendants affirmatively concealed certain mold damage to an apartment building that the LLC Defendant had sold to Plaintiffs. Id.

The entirety of the procedural history of this case is described in Judge Weiner's Amplification of a Prior Decision. Da6-11. For purposes of the appeal, Plaintiffs state that by December 22, 2023, the trial court (Hon. Kalimah H. Ahmad J.S.C.) struck the LLC Defendant's Answer with prejudice for failure to answer discovery, and, by Order the same day, struck Defendant Errico's Answer without prejudice, confirming a previous oral order from the bench of December 15, 2023. Da29-31, Pa1-2. On December 21, 2023, Defendants filed a motion to reinstate their respective answers. Da8, ¶ 18.

---

[1] "1T" refers to transcript of the February 8, 2024 hearing. "2T" refers to the transcript of the hearing on Defendants' motion for reconsideration and to restore their answers held on March 6, 2024. "3T" refers to the hearing held on June 12, 2024 on Plaintiffs' motion to strike Defendant Errico's answer with prejudice and Defendants' cross-motion to restore their respective answers.

On February 8, 2024, the trial court (Hon. Anthony D'Elia, J.S.C.) held a case management conference in which it went over Defendants' responses to certain "punch list" discovery demands that the trial court had previously ordered Plaintiffs to promulgate. See 1T. On March 6, 2024, Judge D'Elia heard oral argument on Defendants' motion to restore their answers, and denied them based on his finding that Defendants had not complied with his instructions at the February 8, 2024 case management conference. See 2T, Pa3.

On May 8, 2024, Plaintiffs moved to strike Defendant Errico's answer with prejudice. Da10, ¶ 31. Without providing a single bit of additional discovery, on May 28, 2024, Defendants filed a cross-motion to reinstate their answers. Da10, ¶ 32. On June 12, 2024, the trial court heard oral argument on the two foregoing motions, and granted Plaintiffs' motion and denied Defendants' cross-motion. See 3T, Da3-5. On August 2, 2024, this Court granted Defendants motion for leave to appeal the June 12 Orders. Da1-2. The trial court filed an amplification of its June 12 Orders on August 6, 2024. Da6-11.

STATEMENT OF FACTS

The Property

On July 30, 2018, 47 Mercer Street, LLC and the Defendant LLC executed a contract in which 47 Mercer Street, LLC purchased an apartment building (the "Property") located at 78 Summit Avenue from the Defendant LLC for

$5,000,000.00. Pa17-30. That transaction closed on September 27, 2019. Pa47. Among other things, the Defendant LLC warranted that there were no "Hazardous Materials on, under, at, emanating from or affecting the Property." Pa21-22. "Hazardous Materials" included "any regulated substance, toxic substance, hazardous waste, pollutant or contaminant defined or referred to in the Environmental Laws." Id.

Mold Issues

During the due diligence period, Plaintiffs were provided access to the Property by the superintendent at the time, non-party Jamal Phillips, to perform routine and customary inspections. Pa46. Mr. Phillips told Plaintiffs that he had intimate knowledge of the building because he worked for Defendants while the Property was being renovated in 2017, and that there were no known issues with the Property. Id. Mr. Phillips showed Plaintiffs various apartments during the inspection period, including Apartment 101 in which he resided. Id.

Once Plaintiffs closed on the Property, however, Mr. Phillips advised Plaintiffs that there were serious mold issues with his apartment, as well as others. Pa47-48. Mr. Phillps told Plaintiffs that, although these issues were known to him and Defendants, he was instructed by Defendants to conceal the issues before the sale of the Property, and he did so out of fear of being fired it discovery of those issues lead to the sale fell through. Pa48. Specifically, Mr. Phillips stated that he

had informed the property manager at the time, Defendant Errico, just months prior to the closing. Id. Mr. Phillips informed Plaintiffs that Tracy Errico instructed him to clean up the obvious mold from his apartment prior to Plaintiffs' site inspection and not to say anything that may interfere with the closing. Id. Mr. Phillips also said that Defendants purchased him a dehumidifier to alleviate the issues, and that he had scrubbed his apartment before the inspection of the Property so that Plaintiffs would not discover the mold. Id.

There were also similar issues of mold in Apartment 103. Specifically, in the Summer of 2019, the tenant of Apartment 103 (Kiran Phuyal) and his fiancé (Ruchi Vora), who would visit the unit during that time period, noticed what appeared to be "white fungus and/or mold" in multiple locations in the unit, which had spread to the tenant's personal belongings. Pa40. Mr. Phuyal and Ms. Vora spoke to Mr. Phillips, who, in turn, instructed them to reach out to Defendant Errico via email. Id. On July 6, 2019, Mr. Phuyal and Ms. Vora sent an email from Mr. Phuyal's email account to Defendant Errico that wrote that they "discovered white mold on Kiran's winter clothes that were packed in a box in the room closet" and that it "freaked us out when we saw the fungus and white mold." Pa41, 43. Mr. Phuyal and Ms. Vora followed up with Defendant Errico on July 11, 2019 writing: "Jamal informed us that you had emailed us regarding the HVAC guys coming to our apt to change them. However, we haven't heard from you." Pa43. As described below, Defendant Errico

claimed to have not located any communications with former tenants and denied ever speaking to them, despite this clear evidence to the contrary. See, e.g., Da86, 343.

In order to discover the source of the mold and remediate the issue, Plaintiffs expended significant money to retain an architect. Pa51-52. The architect determined that the mold was being caused by moisture coming through the front exterior walls where the apartments were half below grade, and that to cure the mold issue and prevent it from reoccurring, Plaintiffs would have to waterproof the front yard wall, install a foundation drainage system, correct grading of the front yard so the water ran away from the building rather than toward it, and provide dehumidifiers to designated areas. Pa36. Plaintiffs undertook, at great expense, to perform each of these remedial measures. Pa51-52. In addition, the cost to remediate the mold issues were significant. Id.

Defendants Provide Virtually No Discovery Resulting In The Striking Of Their Answers On December 22, 2024.

On April 5, 2022, Plaintiffs served the LLC Defendant with Plaintiffs' discovery requests. Da369. The LLC Defendant did not provide responses to Plaintiffs' discovery requests, or to a subsequent deficiency letter and follow-up requests. Id. Therefore, on August 24, 2022, Plaintiffs moved to compel the LLC Defendant to provide responses to their discovery requests. Id. On October 7, 2022, the trial court (Hon. Christine M. Vanek, J.S.C.) granted Plaintiffs' motion to compel, and ordered

that Defendant LLC provide complete responses to Plaintiff's discovery requests within seven days of the Order. Da12-13. On October 18, 2022, the Defendant LLC belatedly served its responses to Plaintiffs' discovery requests. Da369-70. However, upon review of the Defendant LLC's responses, it became apparent that its discovery responses were deficient, as it refused to appropriately respond to the majority of the requests, claiming to have no relevant information or documentation whatsoever. Da369-70.

Because of these deficiencies, on March 13, 2023, Plaintiffs moved to strike the Defendant LLC's answer, or alternatively, to compel discovery for failure to make discovery and failure to comply with the trial court's October 7, 2022 Order compelling discovery. Da370. On April 14, 2023, the trial court (Hon. Joseph A. Turula, P.J.Cv.) granted the motion and struck the Defendant LLC's answer without prejudice for failure to make discovery, as it failed to take action to provide the delinquent discovery. Da18-19.

On June 14, 2023, after having filed their Second Amended Complaint, Plaintiffs served Defendant Errico and Rocco Errico[2] with interrogatories and requests for the production of documents. Da370. Plaintiffs did not receive the requested

[2] Rocco Errico is one of the principals of the Defendant LLC and is a relative of Defendant Errico and Defendants' counsel in the proceedings below, Alexandria Errico, Esq. Pa123, 15:2-4. Rocco Errico was dismissed from the case on September 8, 2023 on a motion for summary judgment. Da20.

discovery in the timeframe outlined by the Rules of Court, and otherwise did not respond to deficiency letters. Da370-71. Therefore, on August 23, 2023, Plaintiffs moved to compel Defendant Errico to produce discovery. Da371.

On September 8, 2023, Judge Vanek entered an Order granting Plaintiffs' motion to compel discovery. Da24-25. Defendant Errico purported to respond to Plaintiffs' requests on September 29, 2023. Da309-330, 331-348. Upon review of the responses, however, it became apparent that Ms. Errico had not responded to the discovery requests that were directed to her, but rather, to the discovery requests that had been directed to Rocco Errico, who was dismissed from the case without prejudice on September 8, 2023. See id. Though similar, the requests differed in that the requests directed to Defendant Errico requested information relating to her role as property manager, her communications with tenants and/or the superintendent regarding issues with the Property, and attempts to remediate issues with the Property. Da371-72.

On October 6, 2023, Plaintiffs served a deficiency letter detailing Defendant Errico's deficiencies in failing to respond to the correct discovery requests. Da372. On October 11, 2023, counsel for Defendants filed a Consent Order, which included the condition that Ms. Errico cure her discovery deficiencies no later than October 18, 2023. Id. By October 18, 2023, Plaintiffs had not received any response whatsoever to the October 6, 2023 Deficiency Letter, and Defendant Errico had still not cured her discovery deficiencies, in direct violation thereof. Id.

Notwithstanding her failure to cure her discovery deficiencies, Plaintiffs took Ms. Errico's deposition on November 2, 2023. Despite acknowledging that she certified that she had made a good faith search for documents responsive to Plaintiffs' discovery demands, Ms. Errico admitted that she had not conducted any search of her records. Specifically:

> Q. Okay. All right, so were you asked to search for documents regarding this lawsuit at all? Do you recall?
>
> A. I don't remember that, no.
>
> Q. You don't remember being asked or you don't remember –
>
> A. I don't, in general, remember any. I don't remember, no.
>
> Q. Okay. This would have been relatively recently within the past three months or so.
>
> A. I do not have any documents pertaining to this building. It was over four years ago. I don't –
>
> Q. Did you search for any documents?
>
> A. I don't have any documents.
>
> Q. Okay. My question's a little different. Did you search for any documents?
>
> A. I wouldn't search because I don't have any documents.

Pa129-30, 41:11-42:4. Further, despite having been the property manager of the apartment building from 2018 to 2019, when Ms. Errico was questioned regarding the Property and/or her role as the property manager, on over 40 occasions throughout her approximately two-hour deposition, she responded that she could not remember. Indeed, Ms. Errico could not answer when she became the property manager (Pa124, 21:2-6), why she was asked to become the property manager (Pa124, 21:7-11), how long she served as the property manager (Pa124, 21:16-25), how she was paid (Pa128, 34:12-15), how often she was paid (Pa128, 35:21-25), or how she communicated with unit owners (Pa125, 22:15-25).

On November 9, 2023, after a case management conference held the previous day, the trial court (Hon. Kalimah H. Ahmad, J.S.C.) ordered that each party serve the other with a "punch list" of outstanding discovery by November 13, 2023, with responses to be served by November 20, 2023. Da27-28. Defendants' purported responses to Plaintiffs' "punch list" were wholly deficient. Specifically, with respect to Ms. Errico, Defendants stated that no documents were retained relating to payments made to her by 78 Summit Ave. JC, LLC for her role as property manager (Da69 at Request No. 4), failed to provide any personnel documents whatsoever pertaining to her (Da69 at Request No. 7), and claimed to not have any communications and/or documentation in her possession pertaining to the Property, the sale, mold, leaks or other issues at the Property, or tenants of the Property (Da70 at Requests Nos. 9(b);

12(b)). Nonetheless, when asked specifically if any responsive documents had been lost, deleted or destroyed, Defendants responded "Not to my knowledge." Da72-73 at Requests Nos. 24-26.

On October 4, 2023 and November 29, 2023, respectively, Plaintiffs filed motions to strike Defendant LLC's and Defendant Errico's answers due to their repeated failures to comply with discovery obligations. Da372. Judge Ahmad heard oral argument on these motions to strike on December 20, 2023, and granted the motions to strike the Defendant LLC's answer with prejudice and to strike Ms. Errico's answer without prejudice on December 22, 2023. Da29-31, Pa1-2.

With respect to Defendant Errico, Judge Ahmad found:

> Pursuant to R. 4:23-5(a)(1), R 4:23-2(b) and for the reasons set forth on the record. Defendant Tracy Errico has repeatedly failed to fulfill her discovery obligations required by the Rules of Court and Court Order. Defendant Tracy Errico has failed to conduct a proper search of her records to respond to Plaintiffs' discovery requests, failed to answer the interrogatories for Tracy Errico, and gave evasive testimony at deposition. Defendants' response by way of written answers to the incorrect interrogatories should have been cured at the time Defendant was notified in October that she responded to the wrong interrogatories. [Da30]

As to the Defendant LLC, Judge Ahmad found:

> Pursuant to R. 4:23-5(a)(2), R. 4:43-1, and for the reasons set forth on the record on 12/20/23. Defendant 78 Summit Avenue Partners JC, LLC failed to comply with the Court's case management order entered on November 9, 2023, which included a punch list or highlighted specific requests of any outstanding paper discovery to be served by November 13, 2023, answers to the punch list or

> highlighted requests of any outstanding paper discovery to be provided by November 20, 2023, and depositions of existing parties' fact witnesses to be conducted by December 1, 2023. Defendants did not fulfill their discovery obligations as identified on the record. More specifically, Defendants, for the first time during oral argument, identified three banks that Defendants had failed to identify in interrogatories or supplemental interrogatories for Plaintiffs. [Pa1-2]

Defendants Fail To Provide Fully Responsive Discovery To Restore Their Stricken Pleadings Despite Being Given Multiple Opportunities To Do So.

Before the trial court could even enter its Orders on the motions to strike, on December 21, 2023, Defendants Errico filed a motion for reconsideration and to restore her answer. Da372. The only documents Defendants provided in connection with that motion were: (i) documents provided by the City of Jersey City in response to **Plaintiff's** OPRA Request – i.e. Defendants simply "re-served" documents Plaintiffs had previously produced to Defendants; (ii) a letter sent to certain banks the Defendant LLC claimed to have used during its operation of the Property; and (iii) an IRS "Form 41506 Request for Copy of Tax Return" dated December 11, 2023. Da358-65.

On February 8, 2023, the trial court (Hon. Anthony V. D'Elia, J.S.C.) held a hearing in connection with Defendant Errico's December 21 Motion, and specifically with respect to Defendants' "punch list" responses. 1T. Judge D'Elia instructed Defendants' counsel at the outset that responses of "no recollection at this time" would be insufficient to restore Defendants' pleadings as it indicated there was "not even an attempt to find out any communications." 1T10:21-12:15. Judge

D'Elia otherwise pointed out several deficiencies with respect to the specific "punch list" responses.

For example, Request No. 1 asked Defendants to identify the bank accounts for the Defendant LLC, including basic information such as the name of the bank and the account number. Judge D'Elia made clear that the "punch list" response of "no recollection at this time" was insufficient. 1T28:13-24. Judge D'Elia also rejected Defendants' counsel's argument that she personally had gone to three banks and was supposedly told that the requested information did not exist.[3] 1T29:4-8. Instead, Judge D'Elia instructed the Defendants themselves to retrieve the requested banking information from the banks. 1T29:9-30:5.

Requests Nos. 7 through 8 asked for basic information about the Defendant LLC's employees and independent contractors and their contact information. Da69. Defendants' responses identified only two individuals, Defendant Errico and Jamal Philips, the latter of whom Defendants claimed to have had no contact information for. Given that those requests asked for information relating to "any employee and/or independent contractor of [the Defendant LLC], including but not limited to, Tracy Errico and Jamal Phillips" (Da69), Judge D'Elia instructed that Defendants needed to certify that "there are not others." 1T34:9-19.

[3] It should be noted that Plaintiffs subpoenaed each of the three banks and all three advised that Defendant LLC did not have a bank account there within the relevant time period.

Judge D'Elia similarly instructed Defendants' counsel that their response of "superintended" [sic] to Request No. 11 which asked them to identify who was responsible for communicating with the tenants at the Property (Da79) was unacceptable. Instead, Judge D'Elia made clear that both the Defendant LLC and Defendant Errico were required to "clarify who the superintendent is." 1T37:18-20.

The trial court later pointed out that Defendants' response to Request No. 19 for lease agreements with tenants residing at the Property from January 1, 2024 through September 27, 2019 of "no recollection at this time" (Da72) was unacceptable, and instructed Defendants to certify their efforts as to efforts made to locate the lease agreements. 1T41:15-23.

Request No. 21 sought documents referring or relating to inspections performed at the Property during the time it was owned by the Defendant LLC. Da72. While the Defendants' written response stated: "none in the possession of the Defendant" (Da72), Defendants' counsel referred Judge D'Elia to certain OPRA records that Plaintiffs had obtained. 1T42:19-43:8.[4] Judge D'Elia responded that Defendants were both required to certify that those OPRA documents were the only documents in their possession responsive to the request. 1T43:24-44:25.

[4] As Defendants' counsel admitted, Plaintiffs obtained the OPRA records through their own efforts and turned them over to Defendants' counsel, who, in turn, simply reproduced those documents to Plaintiffs. 1T43:20-22.

Judge D'Elia similarly found Defendants' response to Request No. 23 that they did not recall who the custodian of records was for the Defendant LLC (Da72) to be insufficient. 1T46:19-47:12. In response to Defendants' counsel's claim that Rocco Ericco, Esq. "kept the records for the transfer," Judge D'Elia instructed Defendants to certify "Rocco Errico was the record-keeper and whatever records we have were provided, and you have to specify what the records are so there's no confusion. Don't just say previously provided. That's not a valid answer." 1T47:5-48:2.

On or about February 12, 2024, Defendants purported to serve "Amended Answers to the Plaintiffs' Punch List." Da81-90. Other than to include certifications from both a representative of the Defendant LLC and Defendant Errico, it was clear that Defendants did not comply with Judge D'Elia's straightforward instructions or otherwise provide responsive information to even the most basic of Plaintiffs' "punch list" items.

Specifically, with respect to Request No. 1, Defendants did not even identify the banks where the Defendant LLC held any accounts. Instead, they merely claimed that Ms. Errico "contacted the three possible banking institutions Bank of America, Valey [sic] Bank, and TD Bank," and were "informed by the banks' representatives that no accounts are found in these banks as it relates to [the Defendant LLC]." Da84. Defendants claimed to "have searched all electronic and hardy copy records to

determine if and what banking institution was utilized by the LLC, there are none," but nevertheless reserved their right to amend their response to the request. Da84.

Defendants' response to Request No. 11, which asked who was responsible for communicating with tenants at the Property, similarly ignored Judge D'Elia's instructions to "clarify who the superintendent is" (1T37:18-20) repeating their previous terse response of "superintendent." Da86. Defendants likewise reserved their right to amend their response to that Request. Da86.

In response to Request No. 19, which asked for lease agreements with tenants residing at the Property, Defendants did not comply with Judge D'Elia's instructions to describe their efforts to actually locate the lease agreements. Instead, Defendants objected to the request as "harassing, broad and vague," and claimed that the lease agreements were transferred to Plaintiffs and were not retained, although they again reserved their right to amend their response. Da87.

Defendants' response to Request No. 21 similarly did not comply with Judge D'Elia's instructions to certify that the OPRA documents were the only documents relating to inspections performed at the Property. 1T43:24-44:25. Instead, Defendants simply referred to those OPRA documents (again documents that Plaintiffs had actually previously produced to Defendants) and again claimed they had the right to amend their response. Da88.

Defendants similarly continued to avoid identifying the custodian of the Defendant LLC's records in response to Request No. 23. Instead, Defendants objected to the request as "broad, unclear and vague" and only claimed that "the closing records, such as the Purchase Agreement, Transfer Deed, 2019 and 2020 Tax Returns as to the LLC and the Property were kept by its attorney Rocco Errico, Esq." Da88. That is, Defendants refused to identify who the Defendant LLC's record keeper actually was, but only that Rocco Errico happened to be in possession of certain documents.

Most incredible of all, despite having produced no documents other than the Defendant LLC's tax returns from 2017 through 2019, Defendants claimed, in response to Request No. 24, that none of its records pertaining to the Property were ever "lost, deleted or destroyed." Da88. Defendants again claimed, however, that they reserved their right to later identify any such documents. Id.

On March 6, 2024, Judge D'Elia held another hearing on Defendants' motion to restore their pleadings. 2T. Judge D'Elia determined that Defendants had still failed to provide fully responsive answers to Plaintiffs' discovery demands, and accordingly denied her motion to restore her answer. 2T13:9-12. Initially, the trial court pointed out that Defendants' objections to numerous requests were improper given that "[t]he time to object to the written discovery is long gone." 2T8:1-13. The trial court then pointed out that Defendants' responses were still non-responsive. For example, in

response to a request for all payments and/or reimbursements made by the Defendant LLC from 2014 through 2019, only tax returns from 2016 to 2020 were produced. 2T10:11-11:15. As the trial court pointed out, "tax returns do not reflect payments or reimbursements made by an LLC" and therefore was "not even a proper answer." Id. The trial court also pointed out that Defendants did not provide information from 2014 to 2016, observing that they "do[] not want to talk about" those years. Id. The trial court similarly pointed out that Defendants did not produce lease agreements covering any of the units in the building. 2T11:20-12:19. Accordingly, Judge D'Elia denied Defendants' motion for reconsideration and to restore their answers. Pa3.

The Trial Court's Rulings.

On May 8, 2024, Plaintiffs moved to enter default judgment against Defendants. Da10, ¶31.[5] On May 28, 2024, Defendants cross-moved to reinstate their answers, which Plaintiffs opposed on June 3, 2024. Da10, ¶ 32. Notably, Defendants motion to reinstate their respective answers did not state what they had done since the trial court denied Ms. Errico's motion to reinstate her answer on March 6. Instead, Defendants merely asserted that their responses to Plaintiffs' discovery in connection

[5] In the June 12 Orders, Judge Weiner noted that Defendant LLC was already in default and, as such, the motion is denied as moot only this respect to the Defendant LLC. Da5.

with that previous motion were sufficient to have had their answer restored. See Da91-109.

The trial court, now under the auspices of Judge Weiner, held oral argument on Defendants' motion on June 12, 2024. 3T. Counsel for Defendants argued that Defendants had provided fully responsive responses to discovery following the February 8 hearing by virtue of having provided a certification from Ms. Errico stating that she agreed with the certification of the Defendant LLC's principal, Mr. Melms, claiming that was "all [Judge D'Elia] required." 3T12:17-13:20. As counsel for Plaintiffs pointed out simply providing "[a] certification that I agree with the LLC, is not an answer to discovery." 3T13:19-14:1. Plaintiffs' counsel pointed out further:

> They certified in their interrogatories, that they barely answered, that they did not destroy any documents, but they have not given us one single document. They ran an apartment building for five years, have no maintenance records, no bank statements, no contractor bills. They – we found from tenants' emails with Tracy Errico where they were discussing the mold problem. She – oh, I have no emails. We have emails. How do you not have emails? [3T 14:11-21].

Thus, as Plaintiffs' counsel pointed out, on March 6, Judge D'Elia found that Defendants had done nothing to comply with their discovery obligations and denied their motion to restore. 3T14:22-15:11. Defendants' counsel conceded that Defendants had not done anything to cure the deficiencies that led to the denial of Ms. Errico's motion to reinstate, claiming, by then, "[e]verything was done." 3T 17:19-

18:15. Having previously pointed out that Defendants' counsel had incorrectly claimed that the March 6 hearing had only lasted a "two minutes," (Da98, 15:17-16:21) Judge Weiner denied Defendants' respective motions holding "Judge D'Elia went line by line as to items that you did not comply with," but that Defendants still "fail[ed] to provide discovery." 3T18:19-19:3. Following the hearing, the Court entered Orders denying Defendants' motion to reinstate their respective answers and suppressing Ms. Errico's answer with prejudice pursuant to R. 4:23-5(a)(2). Da3-5.

The Trial Court Amplifies The June 12 Orders.

As noted above, following this Court's grant of Defendants' motion for leave to appeal, Judge Weiner amplified the June 12 Orders. In particular, Judge Weiner provided a detailed procedural history of the case, which, among other things, described the prior rulings of the different judges that had been assigned to the case that had all found Defendants to be in default of their discovery obligations. Da6-10, ¶¶ 1-30. In detailing the history of Defendants' discovery misconduct, Judge Weiner's amplification observed: "When asked to provide any correspondence about the mold issues, Defendants responded 'none to my knowledge,' however, Plaintiffs were in possession of at least one email, on which [Defendant Errico] was copied, in which the mold issues were discussed." Da9, ¶ 24.

In describing the June 12 hearing, Judge Weiner's amplification pointed out that "Defendants acknowledged they had not provided one piece of discovery or

amended their answers since March 6, 2023." Da10, ¶ 34. Judge Weiner's amplification also pointed out Defendants' counsel's dishonesty during the June 12 hearing in which she claimed that the March 6 argument "took two minutes," when, in fact, after taking the time to listen to the audio recording of that hearing, Judge Weiner learned "[t]he hearing was over 20 minutes in which Judge D'Elia went through multiple examples of how Defendants had not complied with discovery (as noted above)." Da11, ¶ 35. Indeed, Judge Weiner's amplification observed that Defendants' counsel's claim that "'we did not go over… the February 8 case management conference'" to be "entirely false. Id.

Ultimately, Judge Weiner's amplification concluded:

> Judge D'Elia was explicit about what Defendants had to do to have their answers restored. They were not compliant. Instead of filing a Motion for Reconsideration of his decision, they waited for almost three months to file the motion again. In an almost four-year old case, the only paper discovery provided by Defendants relating to their years long ownership of a residential apartment complex were tax returns. They did not provide bank statement[s], leases correspondence… Having failed to provide the requested information and having done nothing to cure the defects noted by Judge D'Elia, th[e] proper remedy was to grant Plaintiffs' Motion to Strike with Prejudice and deny Defendants' Motion to Reinstate. [Da11, ¶ 38]

For the reasons described below, Judge Weiner's ruling should be affirmed because her conclusions as stated on the record and in her amplification find ample support in both the law and the record.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANTS HAD NOT PROVIDED FULLY RESPONSIVE DISCOVERY AFTER THEIR ANSWERS HAD BEEN PREVIOUSLY SUPPRESSED (A3, 4-5, 6-11, 3T15-19).

At the time of the June 12 Orders that Defendants have appealed here, the Defendant LLC's Answer had already been struck with prejudice and Defendant Errico's Answer had been struck without prejudice. Da29-30, Pa1-2. Accordingly, Defendants were required to demonstrate that "fully responsive discovery [had] been provided" in accordance with R. 4:23-5(a)(2). See Fik-Rymarkiewicz v. Univ. of Med. & Dentistry of N.J., 430 N.J. Super. 469, 480-82 (App. Div.), certif. den., 214 N.J. 118 (2013) (affirming trial court's dismissal of pleading where plaintiff refused to provide "fully and responsive" discovery).

A trial court's denial of a motion to reinstate a previously dismissed pleading for failure to provide fully responsive discovery is reviewed for an abuse of discretion. Cooper v. Consolidated Rail Corp., 391 N.J. Super. 17, 22-23 (App. Div. 2007). In this context, the Supreme Court has warned against "'the natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order." Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 517-18 (1995) (quoting National Hockey League v. Metro. Hockey Club, Inc.,

427 U.S. 639 (1976)). Accordingly, a reviewing court should not disturb the dismissal so long as "the record contains adequate, substantial, and credible evidence in the evidence to sustain the trial court's factual findings…." Abrax Pharm, Inc., 139 N.J. at 520 (citation omitted). The record here not only amply supports the trial court's conclusion that Defendants have never provided "fully responsive discovery," but also that they have failed to provide even basic discovery.

For starters, there is no dispute that the only documents that Defendants provided through their own efforts were tax returns for the Defendant LLC, despite the fact that the Defendant LLC had owned the Property for several years and that Defendant Errico had been its property manager from 2018-2019.[6] That is, Defendants claimed not to have a single email relevant to the allegations or their defenses, any records of any payments to any employee or independent contractor who worked on the Property, or even any awareness of where the Defendant LLC maintained its bank accounts. As Judge Weiner correctly observed, Defendants' claims that none of these documents ever existed is provably false, in that Plaintiffs obtained emails from former tenants in which they raised complaints of water infiltration and mold directly to Defendant Errico. Da9, ¶ 24, Pa43.

[6] As noted above, Defendants merely re-produced to Plaintiffs other documents that Plaintiffs had obtained through their own efforts and produced to Defendants.

The trial court was likewise fully within its discretion to reject Defendants' claims that they have ever performed any meaningful search for any of these documents, as they denied ever having lost, deleted or destroyed any records pertaining to the Property, the Defendant LLC, tenant records, employees or independent contractors, or repairs performed to the Property. Da88-89. That is, the trial court did not abuse its discretion in finding that the Defendants could not have it both ways in claiming, on the one hand, that they performed a sufficient search for documents that effectively yielded nothing while, on the other, certifying that they had never destroyed or lost any of those documents.

The record similarly provides more than enough support for the conclusions of both Judge D'Elia and Judge Weiner that Defendants, in fact, did not comply with Judge D'Elia's directives at the February 8, 2024 conference concerning their "punch list" responses. As described above, among other glaring deficiencies, Defendants failed to specifically identify the "superintendent" who was responsible for communicating with tenants, did not describe their efforts to search for lease agreements they claimed they could not find, or even certify that the only documents they had relating to inspections performed at the Property were the OPRA records that **Plaintiffs** provided to them. The record likewise demonstrates that Defendants failed to abide by Judge D'Elia's instructions to retrieve the Defendant LLC's banking records by merely asserting in their amended "punch list" responses that

they contacted "three possible banking institutions" which turned out not to be the banks where the Defendant LLC maintained accounts.

Both Judge D'Elia and Judge Weiner were likewise well within their discretion to not permit Defendants to lodge previously waived objections to Plaintiffs' discovery requests (which, in any event, were wholly unobjectionable) or reserve their right to amend their answers at a later date. That is, the trial court correctly determined that Defendants did not meet their obligation to demonstrate they had provided "fully responsive discovery" by claiming that they could provide discovery at a later date and that the discovery demanded of them was somehow objectionable.

In sum, after having their respective pleadings suppressed for failure to provide discovery – prior Orders of the trial court that Defendants do not challenge here – Defendants produced nothing other than a limited set of tax returns and the names of two people that worked at the Property. The trial court, being the closest adjudicator to the underlying facts, was well within its rights to reject Defendants' claims of an unspecified "search of all electronic [and] hard copy records" as implausible and illogical, given that they claimed never to have destroyed or lost any responsive documents. On this basis alone, the trial court's June 12 Orders should be affirmed.

II. JUDGE WEINER DID NOT ABUSE HER DISCRETION IN "MAINTAINING" THE DEFAULT AGAINST DEFENDANTS AS DEFENDANTS HAD ALREADY BEEN PROVIDED WITH THE OPPORTUNITY TO PROVIDE FULLY RESPONSIVE ANSWERS TO PLAINTIFFS' "PUNCH LIST" (A3, 4-5, 6-11, 3T15-19).

Ignoring the plain language of R. 4:23-5(b) that required Defendants to demonstrate that they had provided "fully responsive discovery" in order to have their pleadings restored, Defendants claim that Judge Weiner should have declined to "maintain" their defaults, and instead have ordered some unspecified "lesser sanction" given their selective and incomplete responses. Db27-31. Or, put another way, Defendants claim that providing something less than "fully responsive discovery" is sufficient to come into compliance with the mandate of R. 4:23-5(b). The very decisions that Defendants cite in support of this argument belie their wholly novel construction of the Rules of Court.

Specifically, Defendants do not dispute that by the time of the February 6 hearing their respective pleadings had already been suppressed under R. 4:23-5 by Orders of the trial court dated December 22, 2023, the LLC Defendant's Answer having been suppressed with prejudice and Defendant Errico's Answer having been suppressed without prejudice. Da29-31, Pa1-2. Notably, Defendants' appeal does not challenge or even address those Orders. Accordingly, as noted above, the plain

language of R. 4:23-5(b) required Defendants to demonstrate they had provide "fully responsive" discovery for their respective pleadings to be restored.

This Court, in St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super. 480 (App. Div. 2008) ("St. James") addressed the scenario where there is a "bona fide dispute" over whether the defaulted party has subsequently provided "fully responsive discovery" in accordance with R. 4:23-5(b). The Court explained that when there is such a dispute:

> "[t]he parties' subsequent actions will … be informed by a judicial determination and not the subjective view of either party. If the judge decides that it is unnecessary to compel more specific answers to interrogatories or production of documents, the motion to restore should be granted. In the opposite case, the judge should adjourn the motion and compel compliance within a reasonable period of time. **If there is no compliance, the judge should grant the motion to dismiss with prejudice.**"

St. James, supra., 403 N.J. at 486-87 (citations omitted) (emphasis added). The trial court's decision to deny or grant the motion to restore upon its review of the delinquent party's responses "'is addressed to the sound discretion of the trial court, whose determination will not be disturbed unless it results from a clear abuse of discretion.'" Id. at 487 (quoting State v. 1987 Chevrolet Camaro, 307 N.J. Super. 34 (App. Div.), certif. denied, 153 N.J. 214 (1998)).

Here, there can be no dispute that the trial court went above and beyond this procedure. As Defendants concede, Judge D'Elia, at the February 8 hearing, went

through each of Plaintiffs' "punch list" requests and gave detailed instructions as to what he would require if he were to restore Defendant Errico's pleading. As detailed above, Defendants not only refused to produce any additional documents or information, but added wholly inappropriate objections and reservations that Judge D'Elia, at the March 6 hearing, correctly observed were designed to prevent Defendants from being bound to their position that they essentially had no documents or information of any relevance to the case. And yet, Defendants elected to move once again for the same relief without taking any further efforts to cure those deficiencies, including the relatively straightforward task of removing their objections and reservations to their previously rejected responses. To make matters worse, Defendants' counsel falsely claimed that Judge D'Elia had only took a few minutes to find that they had not complied with his prior instructions, when, in fact, the audio recording revealed the hearing lasted more than 20 minutes in which he gave multiple examples of how Defendants had not complied with their obligation to provide fully responsive discovery. Far from being an abuse of discretion, the "ultimate sanction" of suppression with prejudice was more than warranted, just as the plain language of R. 4:23-5(b) as tempered by this Court's holding St. James require.

In sum, while this Court has indeed tempered the mandate of R. 4:23-5(b) in permitting the defaulted party the opportunity to be put on notice as to what is

required of it to come into full compliance with its discovery obligations, repeated bites at the apple or a compromise "lesser sanction" has never been contemplated. Indeed, Defendants were given **more** leeway than what the framework requires in that they were given a second opportunity to comply with Judge D'Elia's instructions, but, as Judge Weiner correctly observed, they chose to do nothing. Restoring Defendants' pleadings here would send the wrong message to other litigants in the courts of this State that they can willfully ignore their discovery obligations under a cynical guise of compliance, but face no meaningful consequences. Accordingly, the Court should affirm the trial court's June 12 Orders for this additional reason.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Respondents 47 Mercer Street, LLC and 78 Summit Avenue Partners, LLC respectfully request that the Court affirm the June 12 Orders.

Respectfully submitted,

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Dated: September 26, 2024

Superior Court of New Jersey
Appellate Division
Docket No. A-3777-23

47 MERCER STREET, LLC AND
78 SUMMIT AVENUE PARTNERS, LLC,

Plaintiffs,

v.

78 SUMMIT AVENUE JC, LLC,
and TRACY ERRICO,

Defendants-Movants.

On motion for leave to appeal from the June 12, 2024 Orders of the Superior Court of New Jersey, Law Division, Hudson County, HUD-L-004219-21; Hon. Jane L. Weiner, J.S.C.

REPLY BRIEF OF APPELLANTS, 78 SUMMIT AVENUE JC, LLC AND TRACY ERRICO

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THE COURT SHOULD VACATE THE DEFAULTS WITH PREJUDICE AND SUPPRESSION OF THE ANSWERS AND COUNTERCLAIMS OF DEFENDANTS 78 SUMMIT AVENUE AND TRACY ERRICO, AS ENTERED IN THE LAW DIVISION'S JUNE 12 ORDERS, AND REMAND THIS MATTER WITH DIRECTION THAT DEFENDANTS' ANSWERS AND COUNTERCLAIMS BE REINSTATED FOR TRIAL ON THE PARTIES' RESPECTIVE CLAIMS (A3; 3T15-19).

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THE COURT SHOULD VACATE THE DEFAULTS WITH PREJUDICE AND SUPPRESSION OF THE ANSWERS AND COUNTERCLAIMS OF DEFENDANTS 78 SUMMIT AVENUE AND TRACY ERRICO, AS ENTERED IN THE LAW DIVISION'S JUNE 12 ORDERS, AND REMAND THIS MATTER WITH DIRECTION THAT DEFENDANTS' ANSWERS AND COUNTERCLAIMS BE REINSTATED FOR TRIAL ON THE PARTIES' RESPECTIVE CLAIMS (A3; 3T15-19).

Respondent's Point I

In their Brief at page 24, Respondent says, "At the time of the June 12 Orders that Defendants have appealed here, the Defendant LLC's Answer had already been struck with prejudice and Defendant Errico's Answer had been struck without prejudice… Accordingly, Defendants were required to demonstrate that 'fully responsive discovery [had] been provided' in accordance with R. 4:23-5(a)(2). *See* Fik-Rymarkiewicz v. Univ. of Med. & Dentistry of New Jersey, 430 N.J. Super. 469, 480–82 (App. Div. 2013) (affirming trial court's dismissal of pleading where plaintiff refused to provide "fully and responsive" discovery)." As detailed in the Appellant's Brief at pages 2-20, defendants did provide "fully responsive discovery" because they responded to the trial court's "punch list" and provided all documents and information in their "possession, custody or control" as the rules require, R. 4:18-1(a); R. 4:10-1; Lipsky v. New Jersey Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 464 (App. Div. 2023).

Respondent cite Fik-Rymarkiewicz, supra, 430 N.J. Super. 480, but there the Appellate Division again stressed that sanctions imposed for failure to make discovery are subject "to the requirement that they be just and reasonable in the circumstances," citing the Supreme court's governing standard in Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 513 (1995). The dismissal was warranted in Fik-Rymarkiewicz, moreover, because the plaintiff literally refused to produce admittedly available and relevant discovery to the defendant. The Appellate Division noted, "Plaintiff failed to respond to the defense's document demands for tax documents and the name of her immigration attorney." Plaintiff "cancelled her fourth deposition date selected by the judge as well"; "she had failed to respond to defendant's document demands."

The trial court in Fik-Rymarkiewicz, supra, 430 N.J. Super. 469, had compelled plaintiff "to produce the three items referenced in the court's September 8, 2010 order (documents pertaining to her publications; tax returns for years 2005–2008; and the name of her immigration attorney)," yet the plaintiff refused to do so. The Appellate Division stressed in affirming the dismissal sanction, "Plaintiff's fourth deposition occurred on April 15, 2010. At this proceeding, plaintiff testified for the first time that she shredded her 2004, 2005, 2006, and 2007 tax returns. Plaintiff indicated that she did not shred her 2008 tax returns, but she refused to produce them because '2008 doesn't apply to the time I was working in Dr. Sharma's

lab.' Plaintiff also refused to produce her 2009 tax returns for the same reason. Plaintiff was adamant that even if the records existed, 'I will never produce my tax returns for you.'"

It was on that record evidence that the Appellate Division agreed "that plaintiff's 'refusal to comply [with the discovery demands]' was 'deliberate and contumacious,' and that, under the totality of the circumstances of this case, the sanctions imposed were not unjust or unreasonable." (citing Abtrax Pharmaceuticals, Inc., supra, 139 N.J. 513–14). There is no like ground shown by the record in this case before the Court here. The ultimate sanction is supposed to be employed "sparingly," our caselaw provides, and the few cases that warrant it are those where the offending party has engaged in an egregious and prolonged campaign to thwart another party's access to discovery – as in Abtrax Pharmaceuticals, Inc., supra, 139 N.J. 499 (finding the "extreme sanction" of dismissing complaint with prejudice justified where plaintiff falsely represented documents did not exist for years when they were in plaintiff's possession), and FFik-Rymarkiewicz, supra, 430 N.J. Super. 469(affirming trial court's dismissal of complaint with prejudice where for years plaintiff refused to provide responsive discovery), certif. denied, 214 N.J. 118 (2013). This case does not contain a finding that the defendants refused to produce admittedly existing discovery or lied about the existence of discoverable documents. The trial court made no such finding, nor

did the trial court assess the reasonableness of the outright suppression of defendants' answers and permitting plaintiff to obtain judgment by default in this hotly contested litigation – a reversible error as argued in our Appellant's Brief. Judge Weiner did not apply any of these principles during the June 12 hearing or in entering the June 12 Order, nor did Judge D'Elia in denying defendants reinstatement of their Answers in the March 6 hearing (2T). This shows reversible legal error.

The record does not support the ultimate sanction of suppression and default against these defendants. On page 25 of their Brief, Respondent says, "The trial court was likewise fully within its discretion to reject Defendants' claims that they have ever performed any meaningful search for any of these documents, as they denied ever having lost, deleted or destroyed any records pertaining to the Property, the Defendant LLC, tenant records, employees or independent contractors, or repairs performed to the Property." But plaintiff did not present any evidence that this was so, and defendants and their trial counsel affirmed, multiple times in written filings to the trial court, that all documents in their possession or control had been produced in response to plaintiff's discovery demands and per the trial court's "punch list."

Respondent states, "among other glaring deficiencies, Defendants failed to specifically identify the 'superintendent' who was responsible for communicating with tenants," but the record shows that plaintiffs knew that Jamal Phillips was a

prior superintendent. 1T32:14-25 to 33:1-3. At the February 8 punch list conference, the court instructed Defendants to add to its response that there were no other employees besides Tracy Errico and Jamal Phillips, which would fix their response to Request Nos. 7 and 8. 1T33:16-25 to 35:1-25. With regard to Request No. 11, in which Plaintiffs asked who was responsible for communicating with the tenants of the property, the court instructed Defendants to "clarify who the superintendent is via the proper certification from both individuals, Melms and Tracy." 1T37:18-20. In response, defendants certified that the Superintendent was responsible for communicating with tenants at the property regarding their units and/or any issues they experienced. This answer was certified by Tracy Errico. A81. This was not a "glaring omission" but a response per the court's directive.

Respondent argues that defendants "did not describe their efforts to search for lease agreements they claimed they could not find, or even certify that the only documents they had relating to inspections performed at the Property were the OPRA records that Plaintiffs provided to them." The record shows that defendants responded with the information they had. With respect to Request 19, the trial court indicated that defendants needed to provide a certification from Defendant Errico and describe the efforts made to locate the lease agreements; defendants submitted an amended response, certified by Defendant Errico, providing, "all the Leases were transferred to the Plaintiffs and in their possession on or before the closing date of

September 27, 2019." A81. In response to Request No. 21, Defendants certified, "OPRA reports provided on December 21, 2023, related to the inspections performed by the municipal authorities." Counsel for Defendants explained further in her filed Certification:

> 2. On November 9, 2023, the Court entered an Order instructing the parties to submit their final discovery punch list as it relates to outstanding discovery being requested.
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> 3. The Defendants' answered the Plaintiffs' requested punch list on November 20, 2023.
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> 4. The Court instructed me to produce o the Plaintiffs all of the documents that are also in possession of the Plaintiffs, which were 1) Purchase Agreement; 2) Transfer Documents that include Deed and HUD; and 3) OPRA documents. I have provided the Inspections Report that states the property in question was free and clear of any hazardous materials a month prior to the closing.[sic].
>
> 5. I have provided to the Plaintiff a copy of the Defendants' Federal and State 2019-and 2020-Income Taxes, which are the exact Income Tax years for the year of the transaction subject to this litigation.
>
> 6. On January 25, 2024, I am in receipt of Defendants' 2015, 2016, 2017 and 2018 Tax Returns and the same was produced to the Plaintiffs. I am amending this Reply Certification to certify that the Plaintiffs are now in receipt of all the Tax Returns to the Defendant, 78 Summit Ave., JC LLC. [A357]

Respondent complains, "Defendants produced nothing other than a limited set of tax returns and the names of two people that worked at the Property." That's all defendants had, as they and their trial counsel affirmed multiple times. There was no finding by the trial court that defendants had withheld responsive documents of any sort.

Respondent says on page 30 of its Brief that defendants "refused to produce any additional documents or information" after the February 8 "punch list" conference; on page 31, respondent says that defendants "willfully" ignored their discovery responses. The record does not show that; the record shows that defendants responded to the discovery requests and the punch list then supplemented its responses again (as detailed in Appellant's Brief at pages 2-20, incorporated by reference).

Respondent states that defendants did not produce bank statements or records of payment. The record shows that defendants' counsel indicated that defendants had listed three potential banks with which Defendant 78 Summit Ave JC, LLC could have been associated, and counsel sent letters to each of the banks inquiring about account information for Defendant 78 Summit Ave JC LLC. 1T24:12-25 to 25:1-10. Counsel did this per Judge Ahmad's directive. Judge D'Elia advised defendants' counsel that she could not perform the due diligence on her clients' behalf because that would make her a witness; this deficiency should be corrected, Judge D'Elia said, by defendants certifying their efforts to obtain bank account information with no substantive responses from the banks. 1T28:4-25 to 30:1-21. On February 12, 2024, following the February 8, 2024 Conference with Judge D'Elia, Defendants served amended answers to the Punch List, certified by William Melms on behalf of 78 Summit Avenue and by Tracy Errico as the trial court had

instructed. A81, A6. In response to Plaintiff's Request Nos. 1 through 6, defendants submitted the following certified answer: "On Friday, February 9, 2024, I personally contacted the three possible banking institutions Bank of America, Valey Bank, and TD Bank, I was informed by the banks' representative that no accounts are found in these banks as it relates to 78 Summit Ave., JC, LLC. I have searched all electronic and hard copy records to determine if and what banking intuition was utilized by the LLC, there are none. The Property in question was sold in 2019, the closing records that were retained in reference to the LLC were in possession of Rocco Errico, Esq., which was provided to the Plaintiffs. I have examined the tax returns which were also produced to the Plaintiffs, to determine if the bank is listed, but have not seen it stated." A81.

Regarding payments, defendants' answer to Punch List Request No. 6, which requested all payments and/or reimbursements made by 78 Summit Avenue for any reason from January 2014 through September 2019, certified that it had no records from 2016-2020 (as argued in Appellant's Brief, failing to include 2014 and 2015 was an oversight, but the answer remained the same and could simply have been clarified; it did not justify suppression of defendants' Answers with default).

Respondent states that defendants failed to produce documents related to payments made to Ms. Errico, personnel documents, communications or documentation related to the Property, its sale, mold, leaks, or other issues, and

tenant information. Defendants provided whatever information they possessed or had access to; plaintiff did not present any evidence to the trial court that this was not the case other than counsel's musings about what other information or documents must exist. The record shows that defendants provided discovery responses and responded to the trial court's directives::

- On October 18, 2022, Defendants provided certified responses to Plaintiffs' First Set of Interrogatories and First Request for Production of Documents, in accordance with the October 7, 2022 Order. A164. Mr. Melms certified the responses in his individual capacity and as a representative of 78 Summit Avenue JC, LLC.
- Defendant, Tracy Errico, served answers to Interrogatories and responses Notice to Produce on September 29, 2023. A308.
- On November 20, 2023, Defendants provided responses to the "Punch List" in accordance with the November 9 Order. A68.

As defendants' counsel explained in her Certification to the trial court below, during the Oral Argument that took place on December 20, 2023, counsel was instructed to reach out to the banks that could have been associated with Defendants to inquire about bank statements. Counsel affirmed that she sent the letters to the Banks, and provided proof of this, affirming that defendants would amend their answers to discovery if any responses from the bank were received. Defendants

provided all OPRA requests associated with repairs on the property as well. Defendants' counsel affirmed to the court that there were no other documents that defendants could produce; defendants had produced all they had. A357, A363.

Judge D'Elia reviewed in detail each of plaintiffs' requests and defendants' answers to them, focusing on the "punch list" of alleged deficient responses that had previously been provided to the court. 1T4:15-25 to 5:1-2. The record does not show that defendants did not in good faith comply with the punch list directives. The record shows that they did.

In response to Plaintiff's Request Nos. 1 through 6, defendants submitted the following certified answer: "On Friday, February 9, 2024, I personally contacted the three possible banking institutions Bank of America, Valey Bank, and TD Bank, I was informed by the banks' representative that no accounts are found in these banks as it relates to 78 Summit Ave., JC, LLC. I have searched all electronic and hard copy records to determine if and what banking intuition was utilized by the LLC, there are none. The Property in question was sold in 2019, the closing records that were retained in reference to the LLC were in possession of Rocco Errico, Esq., which was provided to the Plaintiffs. I have examined the tax returns which were also produced to the Plaintiffs, to determine if the bank is listed, but have not seen it stated. Defendants reserve the right to amend this answer in accordance with the Court Rules." A81

In response to Request No. 7, Defendants certified, "Tracy Errico contact (201) 647-3445; No contact is retained for Mr. Jamal Philips. Defendants reserve the right to amend this answer in accordance with Court Rules."

In response to Request No. 9, defendants certified, "a. Rocco Errico retained all property transfer documents, such Deed and Purchase Agreement, 2019 and 2020 corporate tax returns that were provided and in possession of the Plaintiffs. b. None were retained as to Tracy Errico. c. None were retained as to Steve Caraccio. f. No knowledge as to Jamal Phillips. Defendants reserve the right to amend this answer in accordance with Court Rules." A81.

In response to Request No. 10, Defendants said they had searched "[a]ll electronic and hard copy searches. . . from the inception of discovery to the present." A81.

In response to Request No. 11, Defendants certified that the Superintendent was responsible for communicating with tenants at the property regarding their units and/or any issues they experienced. This answer is certified by Tracy Errico. A81.

In response to Request Nos. 12 through 18, Defendant Errico provided the requested certification for the amended responses.

With respect to Request 19, which the court indicated that Defendants needed to provide a certification from Defendant Errico and to describe the efforts made to locate the lease agreements, defendants submitted an amended response, certified by

Defendant Errico, providing, "Objection, the question is harassing, broad and vague, no lease agreements were retained by the Defendants from January 1, 2024, through September 27, 20219. Notwithstanding this objection, all the Leases were transferred to the Plaintiffs and in their possession on or before the closing date of September 27, 2019. Defendants reserve the right to amend this answer in accordance with Court Rules." A81.

In response to Request No. 21, Defendants certified, "OPRA reports provided on December 21, 2023, related to the inspections performed by the municipal authorities. Defendants reserve the right to amend this answer in accordance with Court Rules."

In response to Request No. 22, Defendants provided an amended response as follows: "I amend the previously provided answer. The policy was with Providence Mutual, Policy No.: [redacted]. The current Complaint and coverage was denied on December 21, 2021, under Claim # [redacted]. Defendants reserve the right to amend this answer in accordance with Court rules."

With respect to Request No. 23, Judge D'Elia had instructed Defendants to clarify who was the record keeper for the property, and which records were provided in response to this Request. Defendants provided an amended response as follows: "Objection, the question is broad, unclear and vague. Notwithstanding the objection the closing records, such as Purchase Agreement, Transfer Deed, 2019 and 2020 Tax

Returns as to the LLC and the Property were kept by its attorney Rocco Errico, Esq. and was provided in discovery and were also in possession of the Plaintiffs. All tax returns 2016, 2017, 2018, 2019 and 2020 were kept by Internal Revenue Service and was provided in January 2024. All OPRA reports as to repairs, permits and inspection of the property were kept by the Jersey City Municipal Authority and were provided in discovery on December 21, 2023. Defendants reserve the right to amend this answer in accordance with Court rules."

The trial court said that defendants' answers to Request Nos. 24, 25, 26 and 27 were sufficient provided that Defendant Errico certified the responses. Defendants provided this certification in their amended response. A81.

Respondent's Point II

At page 28 of its Brief, Respondent ignores the governing Supreme Court standard that dismissal or suppression of a party's pleading, and resolution of a case by default rather than on its merits, is to be used "only sparingly." Abtrax Pharm., Inc., supra. "If a lesser sanction than dismissal suffices to erase the prejudice to the non-delinquent party, dismissal of the complaint [or, here, suppression of answers to a complaint with counterclaims] is not appropriate and constitutes an abuse of discretion." Georgis v. Scarpa, 226 N.J. Super. 244, 251 (App. Div. 1988). Respondent cites St. James AME Dev. Corp. v. City of Jersey City, 403 N.J. Super.

480, 487 (App. Div. 2008), but there the Court ruled "that the granting of the City's motion to dismiss with prejudice resulted in a misapplication of discretion."

In sum, defendants' multiple responses to plaintiff's discovery requests and claims of insufficient responses, and the detailed responses of defendants and their counsel to the trial court's directives and punch list, do not reflect a knowing or flagrant refusal to provide available discovery as in Abtrax and Fik-Rymarkiewicz; the record thus does not support the trial court's imposition of the most drastic remedy of suppression and default in favor of plaintiff against defendants below.

CONCLUSION

The Court should vacate the June 12 Orders entered by the lower court and remand with direction that the Answers and Counterclaims of Defendants 78 Summit Avenue and Tracy Errico be reinstated for trial on the claims between the parties.

Respectfully submitted,

/s/ Michael Confusione
Counsel for Appellants

Dated: October 8, 2024