M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP and MICHAEL GOLOWSKI,

Appellants/Plaintiffs,

v.

OCEANSIDE CONTRACTING; EDWARD D. NELSON; CENTRAL JERSEY CONTRACTING, JAMES THOMAS, ALL COUNTY ENTERPRISES, INC. and ERIK RUSEK ELECTRIC, STATE OF NEW JERSEY, WILLIAM FERGUSON, BOROUGH OF SEASIDE HEIGHTS, CHARLES LASKEY and MELISSA NELSON

Respondents/Defendants.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-003778-22

Civil Action

On Appeal From:

Superior Court of New Jersey, Law Division, Ocean County

Sat Below:

Honorable Craig L. Wellerson, J.S.C.
Docket No. OCN-L-70-18

Date Submitted: November 28, 2023

BRIEF ON BEHALF OF APPELLANTS/PLAINTIFFS, M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP AND MICHAEL GOLOWSKI

STARK & STARK
A Professional Corporation
100 American Metro Boulevard
Hamilton, New Jersey 08619
(609) 895-7346 (Phone)
(609) 895-7395 (FAX)
chilliard@stark-stark.com
Attorneys for Plaintiffs

OF COUNSEL AND ON THE BRIEF:
Craig S. Hilliard, Esq.

ON THE BRIEF:
Yaritza S. Urena-Mendez, Esq.

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PRELIMINARY STATEMENT

This action arises out of Plaintiffs M.G. Sheridan Avenue Family Limited Partnership (M.G. Sheridan) and Michael Golowski's (Mr. Golowski) efforts to rebuild a home after Superstorm Sandy caused extensive structural damage to the previous home. Plaintiffs hired Defendant Oceanside Contracting (Oceanside) and Edward D. Nelson (Nelson) to serve as general contractors on the construction project. Oceanside, in turn, hired several subcontractors to work on the project. The result was disastrous.

Despite the various defendants' assertion that they did everything right, Plaintiffs are left with a home containing severe structural defects. Nelson purchased smaller, weaker, cheaper materials than those specified on the approved structural drawings. Beams were incorrectly installed, manufacturing instructions were not followed, and incorrect joists were installed, to name only a few of the myriad construction errors. In sum, the home is currently uninhabitable. In fact, a single weather event could cause a total collapse of the structure and place potential lives at risk. The property should have never been issued a certificate of occupancy and the Borough's willingness to permit anyone to step foot inside the home is egregious.

Further exacerbating these issues, the Borough of Seaside Heights (the Borough) permitted Oceanside to obtain a certificate of occupancy for the home

without completing the statutorily required framing checklist and unlawfully allowing a waiver of the new homeowner's warranty. The State of New Jersey (the State), for its part, failed to investigate the Borough or require the Borough take corrective action to remedy its unlawful actions. The State also failed to have a licensed inspector inspect the framing and approve the UCC required forms.

Plaintiffs brought suit on their claims against the various defendants. The trial court ultimately granted summary judgment in favor of the Borough, State, and their respective employees, erroneously finding that Plaintiffs did not have a sufficient due process interest in obtaining a valid certificate of occupancy. The trial court also erroneously dismissed Plaintiffs' claims, with prejudice, against the remaining defendants, finding M.G. Sheridan lacked standing to pursue a suit because it did not possess a certificate of authority from the State of New Jersey.

For the reasons set forth in detail below, Plaintiffs respectfully request the Court remand and reverse the trial court's entry of summary judgment in favor of Defendants. Plaintiffs also respectfully request the Court reverse and vacate the trial court's dismissal of Plaintiffs' complaint.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Background Facts

Plaintiffs commenced this action on January 12, 2018. (Pa0001-Pa0009).[2] [3] The issues raised in this appeal concern Plaintiffs' Fourth Amended Complaint (FAC), filed on July 15, 2021 which alleged claims against Defendants Oceanside, Nelson, Central Jersey Contracting (Central Jersey), James Thomas (Thomas), All County Enterprises, Inc. (All County), Erik Rusek Electric (Rusek), the State, William Ferguson (Ferguson), the Borough, Charles Laskey (Laskey), and Melissa Nelson (Melissa).[4] (Pa0102-Pa0119)

The facts underlying the FAC relate to real property located at 268 Sheridan Avenue in Seaside Heights (the subject property). (Pa0103). The property is owned by M.G. Sheridan and occupied by Golowski, the general partner with approximately 96% ownership. (Pa0103); (Pa0445); (Pa0446). M.G. Sheridan was formed in 2003 pursuant to the laws of the State of Nevada. (Pa0445). It is a closely

[1] Because the facts and procedural history of this case are inextricably intertwined, they are combined to avoid repetition and for the Court's convenience.

[2] Citations to "Pa" refer to the Plaintiff/Appellant's Appendix.

[3] An amended complaint was filed on April 19, 2019, a second amended complaint was filed on August 11, 2020, and a third amended complaint was filed on June 14, 2021. (Pa0010-Pa019); (Pa0064-Pa080); (Pa0083-Pa0101).

[4] Because two defendants share a surname, Plaintiffs will refer to Defendant Melissa Nelson as Melissa. Plaintiffs intend no disrespect by this action.

held limited partnership comprised of members of the Golowski family. (Pa0445). Golowski is the sole occupant of the subject property and M.G. Sheridan does not collect rent on the property. (Pa0980-Pa0981). M.G. Sheridan does not have any offices, employees, or income-producing property in the State of New Jersey. (Pa0981).

The original structure located on the subject property was damaged when Superstorm Sandy struck on October 29, 2012. (Pa0104). Due to the extensive damage sustained by the original structure, Plaintiffs decided to demolish the home and build a new one. (Pa0048). To that end, Plaintiff hired Oceanside and Nelson to rebuild the home. (Pa0048); (Pa0104). Oceanside, in turn subcontracted with Central Jersey and Thomas, All County, and Rusek to perform framing, roofing, and electrical work on the home, respectively. (Pa0104-Pa0105).

A permit for the construction of a new home was issued by the Borough on May 6, 2014. (Pa0122); (Pa0187). In or around 2016, Plaintiffs began observing severe structural deficiencies with the construction, including:

- impermissibly substituting inferior framing materials;
- impermissibly relocating framing members (e.g. failing to uniformly and properly space floor joists/beams);
- impermissibly relocating or improperly locating walls (i.e. girders, beams and posts);
- inadequately or improperly reinforcing structural components (e.g. violating beam details on approved structural drawings and

manufacturer's specifications, failing to construct shear walls according to approved structural drawings and eliminating numerous fasteners;

- inexplicably failing to adhere to specific manufacture instructions (e.g. incorrectly drilling and notching holes in critical shear and moment areas of pre-engineered lumber and the main load bearing girder);

- impermissibly changing structural connections (e.g. failing to install web stiffeners either on both sides of or at all on certain beams);

- inexplicably installing a weaker skewed girder in the wrong location, which, as not properly aligned under the posts, caused approximately twenty (20) joists to be cut too short;

- failing to double up the floor beams under the posts as clearly called out on the approved structural drawings;

- inexplicably installing lag bolts in the incorrect location (i.e. above the bottom sill plate) in an attempt to connect the deck to the house;

- using incorrect carriage bolts without washers in conjunction with the lag bolts in the wrong location, all of which in plain view to any inspector; and

- failing to abide by the New Jersey Uniform Construction Code (UCC) by (a) permitting a contractor who is not a registered new home builder to construct a new home and (b) failing to maintain the required, completed UCC Form F390 framing checklist, N.J.A.C. 5:23-4.5(b)(2).

[(Pa0485-Pa0566).]

Plaintiffs subsequently discovered the Borough failed to: have a licensed framing inspector inspect the framing or not inspect the framing at all; instruct its employees of the UCC's requirement of maintaining an F390 framing checklist, and

in fact maintained a policy of not requiring the form's use. (Pa0194). Due to the Borough's customs and practices, an invalid certificate of occupancy was issued by the municipality on July 10, 2015. (Pa0122).

Moreover, the Borough, and its employees, unlawfully permitted a waiver of the new homeowner's warranty thereby depriving Plaintiffs of pursuing that remedy. (Pa0743). In the application for the certificate of occupancy, the following is stated "h/o waived h/o warranty." (Pa0122). This "waiver" was done by Melissa without Golowski's authority or consent. (Pa0226). In addition, the document was altered to remove critical information such as the date. (Pa0227). Thereby, Defendant Melissa Nelson committed the crimes of forgery, N.J.S.A. 2C:21-1, official misconduct, N.J.S.A. 2C:30-2, pattern of official misconduct, N.J.S.A. 2C:30-7, and tampering with public records or information, N.J.S.A. 2C:28-7. In response to these facts, Melissa invoked the Fifth Amendment privilege against self-incrimination seventy-five times during her deposition. (Pa0771).

The Borough also employed Charles Lasky as a construction official. (Pa0738). Lasky was Melissa's supervisor. (Pa0181). Despite working for the Borough for ten years, Lasky testified he did not have knowledge of the municipal procedures manual. (Pa0737-Pa0738); (Pa0741). He also testified to a Borough practice, based upon his understanding "from the state" that a new homeowner's warranty could be waived. (Pa0743).

Plaintiffs also discovered unlawful conduct by the State and its employees. Ferguson was an employee of the State with the Department of Community Affairs (DCA) and worked as a code inspector. (Pa1137); (Pa0049-Pa0050). Ferguson never inspected the subject property. (Pa0198); (Pa0405). Additionally, once the State was placed on notice by Plaintiffs of the Borough's failure to comply with the UCC regulations relating to certificates of occupancy, the DCA took no action against the Borough in contravention of N.J.A.C. 5:23-4.3(f)(1). (Pa0048); (2T7:10-17).

Trial Court Proceedings

The FAC asserts the following counts: negligent construction (count one); breach of express warranties (count two); breach of implied warranties (count three); negligent misrepresentation (count four); New Jersey Consumer Fraud Act (CFA)[5] violations (count five); *respondeat superior* against the State and Borough (counts six and seven); negligent supervision against the State (count eight); negligent hiring, training, supervision, and retention against the Borough (count nine); public employee wrongfully enforcing law against the State and the Borough (counts ten and eleven); violation of constitutional rights against the State and the Borough (counts twelve and thirteen); violation of the New Jersey Civil Rights Act[6] (NJCRA)

[5] N.J.S.A. 56:8-1 to -227.

[6] N.J.S.A. 10:6-1 to -2.

against the Borough (count fourteen); and common law fraud (count fifteen). (Pa0102-Pa0119).

Plaintiffs served Tort Claims Act (TCA) notices pursuant to N.J.S.A. 59:8-3 on the State and the Borough on November 20, 2019 and November 14, 2019, respectively. (Pa0023); (Pa0030); (Pa0048). The trial court stayed the proceedings to permit an investigation related to the notices under N.J.S.A. 59:8-8. (Pa0023-Pa0024); (Pa0056-Pa0057). The trial court reinstated the matter on June 26, 2020. (Pa0062-Pa0063).

Plaintiffs deposed Melissa on February 3, 2022, August 9, 2022, and August 26, 2019. (Pa0160); (Pa0203) (Pa0126). Plaintiffs also deposed Lasky on October 26, 2022. (Pa0732).

On January 13, 2023 Plaintiffs filed a motion for discovery sanctions against the Borough and Melissa pursuant to Rule 4:23 and sought an order stating that: the Borough and Melissa did not follow the UCC, the Borough and Melissa destroyed the checklist, and a framing inspection was not conducted on the subject property, among other relief.[7] (Pa0156).

[7] This motion was initially filed on October 20, 2021 but later withdrawn without prejudice.

Motions for Summary Judgment

Melissa cross-moved for summary judgment on February 7, 2023, arguing Plaintiffs had no constitutionally protected property interest under the due process clause. (Pa0357).

Likewise, on February 9, 2023, the Borough and Lasky cross-moved for summary judgment also alleging Plaintiffs had not demonstrated the Borough had a policy or custom which would violate a constitutional right, and that Plaintiffs lacked standing because M.G. Sheridan failed to obtain a certificate of authority. (Pa0646).

Joining in the other defendants' arguments, the State and Ferguson moved for summary judgment on March 3, 2023 arguing the State and Ferguson had absolute immunity for their actions under the TCA. (Pa0673).

On February 6, 2023, Plaintiffs opposed the Borough, Lasky, and Melissa's dispositive motions arguing Plaintiffs held a constitutionally protected substantive due process property interest in obtaining a valid certificate of occupancy. (Pa0427).

Trial Court's Decision on Motions for Summary Judgment

The trial court held oral argument on the summary judgment motions on March 17, 2023. (1T).[8] At the end of oral argument, the Court directed Plaintiffs'

[8] The citation "1T" refers to the transcript of the trial court's hearing on summary judgment, held on March 17, 2023.

The citation "2T" refers to the transcript of the trial court's hearing, held on April 28, 2023.

counsel to provide case law supporting Plaintiffs' constitutional violation argument. (1T49:12-50:2).

A second hearing was held on April 28, 2023, at which oral argument on the motions for summary judgment continued. (2T). Oral argument focused on whether the Borough and State, along with its employees, were entitled to immunity under the TCA for the Plaintiff's substantive due process claims. (2T). The trial court concluded it "doesn't find any violation of any constitutional right here. The obligation of the Borough to have a checklist for framing is not a constitutional right." (2T41:10-13). The trial court explained the certificate of occupancy was issued, which was "not a violation of any property right." (2T41:21-42:5). Based on these findings, the trial court granted summary judgment in favor of the State and its employees as well as the Borough and its employees. (2T42:23-44:17).

Motions to Dismiss

Further, Oceanside and Nelson moved to dismiss the FAC for lack of standing arguing M.G. Sheridan's failure to obtain a certificate of authority in New Jersey should preclude it from maintaining this action. (Pa0361). All County, Melissa, the

The citation "3T" refers to the transcript of the trial court's hearing on the motions to dismiss, held on June 9, 2023.

The citation "4T" refers to the transcript of the trial court's hearing on Plaintiff's motion for reconsideration, held on July 21, 2023.

Borough, and Lasky also moved to dismiss based on the reasons set forth by Oceanside and Nelson. (Pa0666); (Pa0667); (Pa0670).

Plaintiffs opposed Oceanside and Nelson's motion to dismiss stating M.G. Sheridan does not transact business in New Jersey and therefore was not required to obtain a certificate of authority. (Pa1037).

The trial court heard oral argument on the motions to dismiss on June 9, 2023. (3T). Plaintiffs argued they were not transacting business within the definition of N.J.S.A. 42:2A-60 and, as such, were not required to obtain a certificate of authority. (3T6:9-23). Plaintiffs contended that mere ownership of property did not require them to obtain a certificate of authority. (Ibid.). Oceanside and Nelson pointed to the formation documents for M.G. Sheridan which stated its purpose was to buy, sell, and develop properties, among other purposes. (3T16:6-25). Defendants argued these formation documents as well as the contracts entered into with contractors and subcontractors related to the instant litigation demonstrated that M.G. Sheridan engaged in business "transactions" for which it required a certificate of authority. (3T19:3-25).

The trial court concluded Plaintiffs lacked standing to pursue the litigation because it was engaged in business transactions for which it needed a certificate of authority. (3T33:12-25). The judge relied upon its interpretation of N.J.S.A. 14A:13-11 which states, "[n]o foreign corporation transacting business in this

State without a certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority." (3T31:8-22). The trial court relied upon Seven Caesars, Inc. v. Dooley House, No. A-4747-12, 2014 N.J. Super. Unpub. LEXIS 2222 (App. Div. Sep. 11, 2014), and SMS Fin. P., LLC v. M.P. Gallagher, LLC, 2019 N.J. Super. Unpub. LEXIS 355 (Law Div. Jan. 25, 2019). (3T3:2-11). An Order dismissing Plaintiffs' Fourth Amended Complaint for lack of standing was entered on June 9, 2023. (Pa1175); (Pa1176-Pa1177).

Motion for Reconsideration

Thereafter, Plaintiffs moved to vacate the court's June 9, 2023 order pursuant to Rule 4:50-1, and for reconsideration pursuant to Rule 4:49-1. (Pa1178). The court heard oral argument on Plaintiffs' motion on July 21, 2023. (4T). Plaintiffs stated they filed an application to register M.G. Sheridan as a limited partnership with the Department of Treasury. (4T6:6-13). Because M.G. Sheridan had now obtained the certificate of authority, Plaintiffs argued the court's June 9, 2023 Order should be vacated and/or subject to reconsideration. (4T6:14-23).

The trial judge pointed to the standard for a motion for reconsideration and noted, "[t]he [c]ourt's ruling was June 9, 2023. The subsequent actions of the plaintiff don't void the [c]ourt's ruling, which was made on the merits at the time."

(4T7:11-14). Accordingly, the court denied Plaintiffs' motion. (4T7:20-24); (Pa1242).

Plaintiffs filed a timely notice of appeal on August 9, 2023 and an amended notice of appeal on August 11, 2023. (Pa1244-Pa1253); (Pa1254-Pa1264).

STANDARD OF REVIEW

The appellate court reviews a trial court's grant of summary judgment "in accordance with the same standard as the motion judge." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits," shows no genuine issue of material fact and "that the moving party is entitled to a judgment . . . as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). The evidence should be construed in the light most favorable to the non-moving party. See Globe Motor Co., 225 N.J. at 480 (quoting Durando v. Nutley Sun, 209 N.J. 235, 253 (2012)). "When no issue of fact exists, and only a question of law remains, [a reviewing court] affords no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp, 224 N.J. at 199.

Here, the trial court determined there is no constitutional violation by the

Borough of Seaside Heights or the State of New Jersey. Because this is purely a legal question, this Court reviews this determination *de novo*. See RRI Realty Corp. v. Southampton, 870 F.2d 911, 918 (2d Cir. 1989) ("the question of whether an applicant has a [constitutionally protected] property interest will normally be a matter of law for the court."). Likewise, the trial court's determination that M.G. Sheridan had no standing to bring this suit is also subject to *de novo* review.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING PLAINTIFFS LACKED STANDING TO BRING THIS LITIGATION. (Raised Below at (Pa1175); (Pa1176-Pa1177); (3T5:1-15:19)).

A. M.G. Sheridan Was Not Required to Obtain a Certificate of Authority Because It Does Not "Transact Business" in New Jersey. (Raised below at 3T13:13-15:19).

The trial court determined M.G. Sheridan does not have standing to maintain the suit because it had not obtained a certificate of authority to transact business in New Jersey. N.J.S.A. 42:2A-60 states "[a] foreign limited partnership transacting business in this State may not maintain an action in any court of this State until it has obtained a certificate of authority to transact business in this State." Contrary to the trial court's finding, M.G. Sheridan was not required to obtain a certificate of authority because it does not "transact business" in New Jersey.

Although no case has yet to interpret N.J.S.A. 42:2A-60 or the failure of

a limited partnership to obtain a certificate of authority, the case law on corporations is instructive here. The New Jersey Business Corporation Act has an analogue requirement for corporations to obtain a certificate of authority if they are "transacting business." See N.J.S.A. 14A:13-11 ("No foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority."). Yet, "a foreign corporation may not be compelled to obtain a license or certificate of authority to do business in a state unless the corporation is engaged in intrastate business activities in that state." First Family Mortg. Corp. v. Durham, 205 N.J. Super. 251, 256 (App. Div. 1985).

In Bonnier Corp. v. Jersey Cape Yacht Sales, Inc., 416 N.J. Super. 436, 441-44 (App. Div. 2010), this Court summarized the case law regarding a foreign corporation's obligation to obtain a certificate of authority if it was engaged in intrastate business. That court concluded that each case requires a fact-sensitive analysis of multiple factors, including whether: the company maintained offices in New Jersey; the entity employed individuals in New Jersey; and the entity solicited business or directly sold products to customers in New Jersey. Id. at 441-43. Although the existence of any one factor (e.g.,

mere solicitation of business in New Jersey)[9] was not determinative to a court's inquiry, the presence of multiple factors (e.g., maintaining offices and employees in New Jersey and directly selling products to New Jersey customers),[10] favored a finding that the corporation was engaged in intrastate commerce (i.e., "transacting business") and, thus, needed a certificate of authority.

In Empresas Lourdes, S.A. v. Kupperman, Civil Action No. 06-cv-5014(DMC), 2007 U.S. Dist. LEXIS 70910, at *8 (D.N.J. Sep. 24, 2007), the federal district court, applying New Jersey law, found one commercial transaction for the sale of approximately $150,000 of grape juice did not constitute a foreign corporation "transacting business" in New Jersey.

Also, it is instructive to look to N.J.A.C. 18:7-1.9, which defines the term “doing business” as it relates to corporations that may be subject to taxation in New Jersey. The statute is inapplicable to M.G. Sheridan because it has not – and is not – carrying out any activity using labor or time to generate profits or losses. As a result, if M.G. Sheridan was a corporation, it would not be subject to the taxation code in New Jersey.

[9] See Materials Rsch. Corp. v. Metron, Inc., 64 N.J. 74 (1973) (applying principles set forth in Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961)).

[10] See Eli Lilly & Co., 366 U.S. at 280.

This interpretation is in accordance with the tax court's interpretation pursuant to Thomson-Leeds Co., Inc. v. Taxation Div. Dir., 8 N.J. Tax 24, 32 (1985). There, the court set forth the relevant factors under N.J.A.C. 18:7-1.9(b) for determining whether a corporation was "doing business" in New Jersey:

> 1. the nature and extent of the activities of the corporation in New Jersey;
>
> 2. the location of its offices and other places of business;
>
> 3. the continuity, frequency and regularity of the activities of the corporation in New Jersey;
>
> 4. the employment in New Jersey of agents, officers, and employees;
>
> 5. the location of the actual seat of management or control of the corporation.
>
> [Thomson-Leeds Co., 8 N.J. at 32 (citing N.J.A.C. 18:7-1.9(b)).]

The court confirmed no single factor is determinative in the inquiry, but rather, a totality of the circumstances approach is favored. Ibid.

Applying these guiding principles, it is clear that M.G. Sheridan was not "transacting business" in New Jersey and as such, was not required to obtain a certificate of authority to maintain this action. The trial court ignored the factors articulated by this Court in Bonnier and instead relied exclusively on the fact that M.G. Sheridan's formation documents stated that it was formed for the purpose of development, resale, leasing, and management purposes. However,

there is no evidence in the record that M.G. Sheridan has ever sold property in New Jersey. The only asset owned by M.G. Sheridan is the subject property which is being used as a private residence where a member of the subject "family" limited partnership presently resides without paying rent to the partnership. (Pa0980-Pa0981); (Pa 0452). The property was acquired from Golowski. (Pa0459). M.G. Sheridan does not collect income from the subject property.

There is no evidence that M.G. Sheridan produces income through the sale or rental of real estate, despite what its formation documents state. M.G. Sheridan's Certificate of Limited Partnership permits it to "hold, develop, buy, sell and lease real and personal property and equipment" as well as various other enterprises. (Pa0445). Despite the statements in the certificate, during the relevant time period for purposes of this litigation, M.G. Sheridan was not engaged in any of these transactions. (Pa0980-Pa0981). There was nothing in the record before the trial court indicating M.G. Sheridan was anything other than a closely held limited partnership which happened to own real property in New Jersey.

Further, M.G. Sheridan does not solicit business in New Jersey, conduct advertising in New Jersey, nor does it maintain offices or employees in New Jersey. (Pa0980-Pa0981). There are simply insufficient acts by M.G. Sheridan

that would constitute transacting business within New Jersey. The relevant factors determining whether a foreign entity transacts business in New Jersey are not present in this action. As such, M.G. Sheridan is not obligated to obtain a certificate of authority to maintain this action.

Moreover, the trial court's reliance on Seven Caesars was misplaced. The facts of Seven Caesars were markedly different from the instant case. There, the foreign corporation plaintiff did not hold a valid certificate of authority at the time it filed the complaint because its corporate charter had been revoked. Seven Caesars, Inc., 2014 N.J. Super. Unpub. at *20-21. While the corporation later cured the deficiency, the appellate panel did not find that the standing status could be conferred retroactively. Id. at *24. Thus, Seven Caesars stands for the proposition that a foreign corporation cannot retroactively cure a lapsed certificate of authority. See id. at *3. It is not however, instructive on whether an entity is required to obtain a certificate of authority in the first place.

The trial court also relied upon SMS Fin. P., LLC v. M.P. Gallagher, LLC, 2019 N.J. Super. Unpub. LEXIS 355 (Law Div. Jan. 25, 2019), which, like Seven Caesars, is factually distinguishable from the facts raised in this case. In SMS Fin. P., LLC, the plaintiff, a limited liability company, was registered in New Jersey but its charter was subsequently revoked. Id. at *2. While its charter was revoked, the plaintiff purchased a bank note, which was the subject of

litigation. Id. at 6. Also like in Seven Caesars, the plaintiff later cured the deficiency by obtaining the necessary certificate of authority. Ibid. The court found that the plaintiff was transacting business in other states as well as New Jersey because it was in the business of purchasing bank debts and pursuing collection of those debts through the New Jersey Court system. Id. at *15. Those circumstances are markedly different from the facts here which do not show that M.G. Sheridan was conducting business in states outside New Jersey, much less that it was conducting business anywhere in this State.

For these aforementioned reasons, the trial court's conclusion that M.G. Sheridan was required to obtain a certificate of authority to prosecute this action was error.

B. The Trial Court Erred in Dismissing Plaintiffs' Complaint with Prejudice. (Raised below at 3T34:2-5).

Although the trial court determined M.G. Sheridan lacked standing to pursue the action, it should have dismissed the action without prejudice to permit Plaintiffs the opportunity to refile the action if and when it obtained a certificate of authority. Instead, the trial court granted All County's motion to dismiss with prejudice. (Pa1175); (Pa1176-Pa1177). This was done despite Plaintiffs' counsel requesting the Order be entered without prejudice. (3T34:2-10). The trial court erroneously concluded it had to enter the order with prejudice "because it's a decision on the merits." (3T34:11-12).

Generally, an order entering involuntary dismissal against a plaintiff is without prejudice, unless a limited exception applies. See R. 4:37-2. Further, the trial court found dismissal was appropriate on standing grounds. Our courts, as well as federal courts, have consistently held that a decision on standing is not an adjudication of the merits of a claim. See Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 416 (1991) ("Standing is not listed in Federal Rule of Civil Procedure 41(b) as a basis for a dismissal not on the merits."); Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 364 (Ch. Div. 2010) (finding the plaintiff lacked standing to file suit and their complaint should have been dismissed without prejudice to allow filing of a new action once standing was acquired). Where a court finds it must dismiss a complaint, it is cautioned that "barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).

Here, once the trial court determined that it was going to dismiss the FAC, it should have entered the dismissal without prejudice. Plaintiffs would thereafter have been permitted to amend their complaint, provided they obtained a certificate of authority from the State.

C. Michael Golowski Has Standing to Pursue Claims in an Individual Capacity. (Raised below at (Pa1181); (Pa0430)).

The trial court entered its dismissal of the FAC against M.G. Sheridan and

Golowski, individually. (Pa1175); (Pa1176-Pa1177). This was error. The FAC includes both Golowski and M.G. Sheridan as Plaintiffs. (Pa0102). In addition, the contract entered into by Oceanside to serve as general contractor, was with Golowski, individually. (Pa1218). As such, the underlying business relationship was between Golowski and Oceanside. Further, Plaintiffs provided a certification from Golowski stating that he made payments from his personal checking account as well as cash payments to Oceanside for its work on the property. (Pa1181). Goloswki's certification attached a ledger of payments supporting his claims. (Pa1181); (Pa0430).

In its oral decision, the trial court never addressed why it was dismissing the complaint as to Golowski, individually, despite also being named Plaintiff. (3T). The trial court only summarily stated: "I'll strike and dismiss the complaint." (3T33:22-25). The trial court's failure to explain its reasoning on this issue is sufficient basis to vacate the entry of dismissal. See Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999) ("In a non-jury action, the court, whe[n] deciding the matter on a motion . . . should support its decision with adequate findings of fact." (citing R. 1:7-4)).

II. THE TRIAL COURT ERRED IN FINDING PLAINTIFFS HAVE NO SUBSTANTIVE DUE PROCESS PROPERTY RIGHT IN OBTAINING A CERTIFICATE OF OCCUPANCY. (Raised below at 2T:41-10-13).

A. Plaintiffs Have a Property Interest in Obtaining a Valid Certificate of Occupancy.

Under the principle of substantive due process, the government cannot arbitrarily interfere with a citizen's property rights. See N.J. Const. art. I, ¶ 1. See also U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law[.]"). Pursuant to the NJCRA, a party may bring a civil suit for a deprivation of a substantive due process right under the State Constitution. See N.J.S.A. 10:6-2(c). To show a deprivation of a property right under substantive due process principles, a party must first show a sufficient property interest, and second, that the interest was interfered by the government in an arbitrary or discriminatory manner so as to "shock the conscience," in a constitutional sense. See Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998); UA Theatre Circuit v. Twp. of Warrington, 316 F.3d 392, 398-99 (3d Cir. 2003); Chainey v. Street, 523 F.3d 200, 218-19 (3d Cir. 2008).

The central issue here is whether Plaintiffs have a property interest in obtaining a valid and legitimate certificate of occupancy. The relevant authority supports a finding that they do.

At both the federal and state level, courts have found that property

interests are protected by the substantive due process clause. See e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); Twp. of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1, 5 (App. Div. 1988) (finding a tax certificate holder had a property interest protected by the due process clause). Moreover, in DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600 (3d Cir. 1995), the Third Circuit Court of Appeals explicitly held that "ownership is a property interest worthy of substantive due process protection." The property interest derived from the ownership of land extends to "cases involving 'zoning decisions, building permits, or other governmental permission required for some intended use of land.'" Cherry Hill Towers, L.L.C. v. Twp. of Cherry Hill, 407 F. Supp. 2d 648, 654 (D.N.J. 2006) (quoting Indep. Enters., Inc., v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1179 n.12 (3d Cir. 1997)).

Of course, not every property interest has been deemed to be constitutionally protected. However, the issue of a certificate of occupancy is intricately tied to a property owner's ability to lawfully transfer an interest in their property, as well as their use and enjoyment of the property. For instance, N.J.S.A. 52:27D-133 requires a structure to have a certificate of occupancy before it can be occupied. Further, the certificate "shall be issued by the

enforcing agency when all of the work covered by a construction permit shall have been completed in accordance with the permit, the code, and all other applicable laws and ordinances." N.J.S.A. 52:27D-133. The statute clarifies that the purpose of the certificate of occupancy is to "certify that the building or structure has been constructed in accordance with the provisions of the construction permit, the code, and other applicable laws and ordinances." Ibid. Thus, a property owner in possession of an invalid, and, thus, unlawful certificate is denied the full use and enjoyment of the subject real property. Moreover, the statute itself states the certificate is a declaration that the structure has been constructed according to the applicable laws. This assurance is inherently a benefit to the property owner assuring their property is of sound structure in the situation where the state requires this certificate in the first place to serve the public interest of life safety.

In addition to the New Jersey statute, at the local level, the Borough of Seaside Heights has also adopted ordinances consistent with N.J.S.A. 52:27D-133. First, no residential or commercial property may be sold in the Borough without first obtaining a valid certificate of occupancy. See Borough of Seaside Heights, NJ, Ord. § 55-2. Once the Code Enforcement Officer certifies that "the property is in compliance with all applicable zoning and property maintenance laws of [the Borough of Seaside Heights], site plans, building permits and Tax

Assessor records," the certificate will be issued. See id. at § 55-2(A). The ordinances also provide a comprehensive inspection framework. See id. at § 55-3; § 55-7; § 55-14. A defective/invalid certificate of occupancy would therefore prohibit a property owner from occupying their property (pursuant to N.J.S.A. 52:27D-133) as well as prohibit them from selling the property under the Borough's ordinances. In sum, the applicable state statutes and local ordinances go to the heart of property ownership and public interest – the ability to safely enjoy, use, and dispose of one's property.

This view of a certificate of occupancy within the framework of substantive due process was endorsed by the Second Circuit in Sullivan v. Salem, 805 F.2d 81 (2d Cir. 1986). There, the plaintiff, a developer, sued the defendant town for, among other issues, denying the developer's homes certificates of occupancy. Id. at 83. The town informed the developer it could not issue the certificates until the subdivision's roads were approved by the town. Ibid. However, the town delayed approving the roads until after the suit was filed – despite the fact that the roads met and exceeded the town's requirements. Ibid.

The court of appeals reversed the district court's finding that the developer could not have a legitimate claim of entitlement to the certificates of occupancy. Id. at 84. The appellate court first pointed to the fact that the town conceded

there was no lawful basis for refusing the certificates because the subdivision's roads were not yet approved. Id. at 85. By denying the developer the certificates that he would have otherwise been entitled to, the town deprived him of his right "to sell the houses for use in the manner they were intended." Ibid. Thus, "[u]nder those circumstances, denial of the certificates of occupancy . . . would constitute a deprivation of property." Ibid. (citing Acorn Ponds v. Inc. Vill. Of N. Hills, 623 F. Supp. 688, 692 (E.D.N.Y. 1985)).

Moreover, the Sullivan court found the developer could have Monell[11]-type claims against the town for the policy that led to the deprivation of property. Id. at 86 ("the town itself could be liable if its policy or the implementation thereof caused the denial of the certificates of occupancy and the deprivation of property."). If the developer did seek to pursue such a claim, the key factor for the court would be "whether it was the policy of the town generally to refuse certificates of occupancy to residential developers until their roads had been accepted for dedication, or whether this requirement was imposed by the building inspector only randomly and without the authority of the town as an entity." Ibid.

Likewise, the court's decision in DeBlasio, 53 F.3d at 592, is analogous to

[11] Monell v. Dep't of Social Servs., 436 U.S. 659 (1978), holding a municipality could be held liable for violations of Constitutional rights pursuant to 42 U.S.C. § 1983.

the facts of this case. There, the property owner leased the property to a battery distribution business. Id. at 594. After receiving a citizen's complaint, the town determined the business was an expansion of a pre-existing conforming use and therefore violated the town's zoning ordinance. Id. at 595. The property owner then sought a variance from the zoning board, which was ultimately denied. Ibid. The property owner then sued the town alleging violation of his substantive due process rights for the denial of the use variance. Id. at 598.

The DeBlasio court held that "ownership is a property interest worthy of substantive due process protection." Id. at 600. Further, the court stated that in cases concerning "land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges the decision limiting the intended land use was arbitrarily or irrationally reached." Id. at 601. Thus, the court concluded the plaintiff had shown a constitutionally protected property interest – i.e., the use and enjoyment of his property. Ibid.

Applying the DeBlasio principles, if a wrongfully denied use variance constitutes a sufficient property interest for substantive due process purposes, then a wrongfully denied valid certificate of occupancy is also entitled to constitutional due process protection. Further, if the denial of a use variance

"impinges" on a property owner's use and enjoyment of their property then it follows that the issuance of an invalid certificate of occupancy – preventing a property owner from selling their real property – also "impinges" on a property right.

Similar to the circumstances of Sullivan and DeBlasio, the Plaintiffs here have had the use and enjoyment of their property damaged as a result of Defendants' improper actions. As noted above, N.J.S.A. 52:27D-133 ensures a property owner will receive a valid certificate of occupancy after the certifying authority confirms the construction was done in accordance with the permit, the code, and other applicable laws and ordinances. Further, the Borough's ordinances state a certificate will be issued upon completion of the inspection process. See Borough of Seaside Heights, NJ, Ord. § 55-1 to -17. The Borough also prohibits a residential property from being sold without a valid certificate of occupancy. See id. at § 55-2(A).

Thus here, the failure to obtain a valid certificate of occupancy renders Plaintiffs unable to sell the property without engaging in fraud. And, more importantly, Plaintiffs have been denied the rightful use and enjoyment of the property because, as discussed in further detail below, the Borough failed to issue a legitimate/valid certificate of occupancy. Because the Borough did not follow the statutory procedure for issuing a valid certificate of occupancy, the

mere fact that the certificate was issued to Plaintiffs here does not abrogate the government's liability because the certificate was nevertheless deficient. Plaintiffs have a right to obtain a valid certificate of occupancy to be able to use and enjoy their property. The government's failure to provide same was a violation of Plaintiffs' substantive due process rights.

B. The Borough Should Not Have Issued Plaintiffs a Certificate of Occupancy.

Here, a certificate of occupancy for the subject property should have never been issued. Plaintiffs demonstrated, through an expert report, that Defendant Oceanside Contracting substantially deviated from the construction plans it submitted to the Borough. (Pa0485-Pa0543); (Pa0544-Pa0566). The following are a few of the actions taken by Oceanside:

- impermissibly substituting inferior framing materials;
- impermissibly relocating framing members (e.g., failing to uniformly and properly space floor joists/beams);
- impermissibly relocating or improperly locating walls (i.e., girders, beams and posts);
- inadequately or improperly reinforcing structural components (e.g., violating beam details on approved structural drawings and manufacturer's specifications, failing to construct shear walls

according to approved structural drawings and eliminating numerous fasteners);

- inexplicably failing to adhere to specific manufacture instructions (e.g., incorrectly drilling and notching holes in critical shear and moment areas of pre-engineered lumber); and
- inexplicably failing to abide by the New Jersey Uniform Construction Code (NJUCC) (e.g., failing to maintain a completed UCC Form F390 framing checklist).

(Ibid.).

As noted in the last point, the Borough failed to maintain a framing checklist in the file for this project. (Pa0516-Pa0518). Pursuant to N.J.A.C. 5:23-4.5(b) municipalities are required to use and maintain the F390 "Framing Checklist" form. Had the F390 form been used and followed, the aforementioned deviations would have alerted the Borough that a certificate of occupancy should not be issued for the property.

Pursuant to Monell and its progeny, "a municipality can be held liable as a person under section § 1983 when it unconstitutionally implements or enforces 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by' the officers of that municipality." Langford v. City of Atl. City, 235 F.3d 845, 847 (3d Cir. 2000) (quoting Monell, 436 U.S. at 690). See

also Loigman v. Twp. Comm., 185 N.J. 566, 590 (2006). Further, municipal liability can attach where "a deliberate choice to follow a course of action is made from among various alternatives by the officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). In addition, the New Jersey Supreme Court has held a municipality liable for violating an individual's substantive property rights under both § 1983 and New Jersey's Civil Rights Act. Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 194 (2021).

Here, Plaintiffs established that Borough employee, Melissa Nelson, had final authority to issue or deny a certificate of occupancy. See (Pa0195). Regarding the F390 framing checklist, Nelson acknowledged the form is "required by the building subcode." (Pa0194). However, when asked about the Borough's own view on the form, she stated:

> It's kind of gray because I was led to believe that it was always supposed to be in a jacket for a new home and sometimes when it's not, the building inspector, if they are going out for an inspection I will say do you have the framing checklist. I will say it's not in the jacket. They will say no so they will ask the contractor on site and receive it on site.
>
> [(Pa0194).]

Nelson further testified while the F390 form was "required" by statute, the Borough had a policy of "leniency with th[at] particular document." (Pa0194).

Consistent with that policy of "leniency," the Borough failed to require and maintain a framing checklist in Plaintiff's application file. Despite this defect, the property received a certificate of occupancy.

C. The Borough Had a Clear Unlawful Policy to Allow a "Waiver" of a New Homeowner's Warranty.

The Borough also maintained an explicit policy to allow waiver of a new homeowner's warranty, in clear violation of the UCC. N.J.A.C. 5:23-2.15 requires a construction permit application to contain the following information:

> (b) In addition to the requirements at (a) above, the following information shall be required on any application for a construction permit when such information is available, but not later than the commencement of work.
>
> 1. The names and addresses of all contractors engaged or planned for engagement by the owner in the execution of the work.
>
> i. A current validated State builder registration card shall be shown by the contractor and the registration number of the contractor shall be recorded on the permit, **pursuant to the New Home Warranty and Builder's Registration Act** (N.J.S.A. 46:3B-1 et seq.), if the project is a one or two family dwelling, condominium or cooperative, unless it is to be built in whole or in part by an owner, in which case an affidavit shall be filed by the owner on a form prescribed by the Department of Community Affairs, **in which he acknowledges that work done by him, or by a subcontractor working under his supervision, is not covered under the New Home Warranty and Builders' Registration Act and states that he will disclose this information to any person purchasing the property from him within 10 years** of the date of issuance of a certificate of occupancy.

[Emphasis added.]

In addition, N.J.S.A. 46:3B-5 requires a builder engaged in constructing new homes to comply with certain registration requirements as well as "participation in the new home warranty security fund or an approved alternate new home warranty security program." Moreover, N.J.S.A. 46:3B-7.1 explicitly states that the New Home Warranty and Builders' Registration Act, "**require[s]** that newly constructed homes conform with certain construction and quality standards and **provides buyers of new homes with insurance-backed warranty protection** in the event such standards are not met." (Emphasis added); see also Ivashenko v. Katelyn Court Co., Inc., 401 N.J. Super. 99, 106 (App. Div. 2008) (stating the New Home Warranty and Builders' Registration Act "**require[s]** that new homes conform to minimum construction and quality standards, and provide new home purchases with warranty protection.") (emphasis added). Taken together, the codes, statutes, and case law, clearly set forth a requirement that all new homes are warranted by the builder. There is no support in the Act for Defendants' position that the warranty provision is permissive.

Contrary to the statutes, code, and case law, the application for the subject property here states "H/o waived H/o warranty." (Pa0122). During his deposition, Borough employee Charles Lasky testified:

> Q. Now, is it your understanding that new home builders who are registered must offer a warranty to the homeowner?

> A. A New Home Warranty Act is done on a single family dwelling, yes, some sort of it. It doesn't have to be the state, but it could be any company that issues a home warranty.
>
> Q. So, the registrant would have to offer either a state warranty, something through the state or a private warranty plan?
>
> A. Correct.
>
> . . .
>
> Q. Is it your understanding these warranties could be waived?
>
> A. Yes.
>
> . . .
>
> Q. When you say waive, under what circumstances could it be waived?
>
> A. The homeowner resident can say that they don't need a warranty. The homeowner builder can do it.
>
> [(Pa0743).]

Lasky's testimony evidences a custom or practice of the Borough to permit the waiver of a new home warranty in contravention of New Jersey law. This unlawful practice further deprived Plaintiffs of their due process property rights by precluding them from having a remedy for the egregious construction defects in the subject property.

D. The State of New Jersey Violated Plaintiffs' Property Rights by Failing to Investigate the Borough's UCC Violations.

The State of New Jersey, through the actions of defendant William Ferguson, endorsed the Borough's unconstitutional policy. If the Borough did

not obtain the required framing checklist, Ferguson, as inspecting authority for the State, should have requested the form. Ferguson's failure to do so results in liability by the State for abiding by the Borough's unconstitutional policy.

In addition, the New Jersey Department of Community Affairs ("DCA") had an unlawful practice to not investigate building code violations while there was pending litigation. This policy is also unconstitutional.

The DCA is empowered to administer and enforce New Jersey's UCC. N.J.A.C. 5:23-4.11. The UCC specifically provides its purpose is "to insure public safety, health and welfare insofar as they are affected by building construction, through structural strength. . . ." N.J.A.C. 5:23-2.1(d). Accordingly, the DCA has a duty to investigate all code violations, place the relevant municipality on notice, and ensure the violations are abated. See N.J.A.C. 5:23-4.3. See also N.J.A.C. 5:23-2.30; N.J.A.C. 5:23-2.35; N.J.A.C. 5:23-3.11.

Here, the DCA received a complaint of code violations from Golowski in or around Fall 2018. (Pa1143); (Pa1145). Thus, the DCA should have commenced an investigation and ensured the violations were abated. Instead, Mr. Dotoli, an employee for the DCA's Division of Codes and Standards, testified to the contrary. See (Pa1113). According to Mr. Dotoli, once the DCA receives notice of ongoing litigation concerning the alleged violations, the DCA

will "shut down" their investigations. (Pa1117). Mr. Dotoli stated this was "the office policy as long as [he] ha[s] been there." (Pa1117). As a result, in this case, the DCA failed to investigate the code violations at issue due to the ongoing litigation. (Pa1117).

Like the Borough, the State's unconstitutional policy resulted in a deprivation of Plaintiffs' right to use and enjoy their property. Had the DCA investigated the code violations and abated them, Plaintiffs would have a property free of code violations and a valid certificate of occupancy accompanied by a new homeowners' warranty. Plaintiffs would also not live in constant fear that a storm could cause them to lose their home. Further, the DCA should have, upon notice that the Borough was not carrying out its duty to investigate code violations, sent the Borough notice of their failures and the corrective action the Borough was required to undertake to remedy the issue. N.J.A.C. 5:23-4.3(f)(1). Here, the DCA took no action whatsoever. Consequently, the DCA's actions arbitrarily and capriciously deprived Plaintiffs of their property interest in a valid certificate of occupancy; the failure by the DCA to investigate the code violations and the Borough's failure to require form F390 deprived Plaintiffs of the full use and enjoyment of their property. Plaintiffs therefore respectfully request the trial court's entry of summary judgment in favor of Defendants be vacated and this matter remanded for further

proceedings.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the trial court's grant of summary judgment and dismissal of Plaintiff's Fourth Amended Complaint should be reversed.

Respectfully submitted,

STARK & STARK
A Professional Corporation

By: *Craig S. Hilliard, Esq.*
CRAIG S. HILLIARD, ESQ.
YARITZA S. URENA-MENDEZ, ESQ.

Dated: November 27, 2023

M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP AND MICHAEL GOLOWSKI, **Plaintiffs/Appellants** **v.** **OCEANSIDE CONTRACTING, EDWARD D. NELSON, CENTRAL JERSEY CONTRACTING, JAMES THOMAS, ALL COUNTY ENTERPRISES, INC., ERIK RUSEK ELECTRIC, STATE OF NEW JERSEY, WILLIAM FERGUSON, BOROUGH OF SEASIDE HEIGHTS, CHARLES LASKY, AND MELISSA NELSON AND ALL COUNTY ENTERPRISES, INC.** **V.** **NEW IMAGE MAINTENANCE, CO. AND VA SIDING, INC.** **Defendants/Respondents**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003778-22T4 On Appeal From: Superior Court of New Jersey Law Division – Ocean County Docket No. OCN-L-70-18 Sat Below: Hon. Craig L. Wellerson, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT, MELISSA NELSON

Kevin B. Riordan, Esquire
Attorney I.D. No.: 011541984
20 Hadley Avenue
Toms River, NJ 08753
(732) 240-2250; Fax (732) 240-3334
File No. 0100-062
E-mail: kriordan@kbrlawfirm.com
Defendant/Respondent, Melissa Nelson

On the Brief:

Kevin B. Riordan, Esq.
Attorney I.D. No.: 011541984

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INTRODUCTION

> The aim at generalization is sound, but the estimate of success is exaggerated. There are two main forms of such overstatement. One form is what I have termed, elsewhere, the 'fallacy of misplaced concreteness.' This fallacy consists in neglecting the degree of abstraction involved when an actual entity is considered merely so far as it exemplifies certain categories of thought. There are aspects of actualities which are simply ignored so long as we restrict thought to these categories. Thus the success of a philosophy is to be measured by its comparative avoidance of this fallacy, when thought is restricted within its categories.
>
> Whitehead, Alfred North. Process and Reality (Gifford Lectures Delivered in the University of Edinburgh During the Session 1927-28) pg. 10-11.

Stated differently, thought is prone to error when we confuse a mere abstraction for concrete reality. Words are mere abstractions.

The text of the Fourteenth Amendment uses the word "property" without qualification. "No State shall . . . deprive any person of life, liberty, or **property**, without due process of law . . .." The constitutionally-protected right in such cases is ill-defined. The referent is different depending on the context. For example, the referent of the word "property" for procedural due process purposes is different than it is for substantive due process purposes, than it is in the law of real estate conveyances, than it is in the UCC, and than it is in ordinary discourse.

Here Appellants mistake the right to develop property with the service of approving the construction on that property. There is no dispute but that substantive

due process is what protects a property owner denied a permit to develop property, when he is otherwise entitled to that permit. The cases refer to the rights implicated in such cases as "property rights."

Appellants argue that the same "property rights" that protect them from the conscience-shocking denial by government of a permit they are entitled to have, protects them from the government **approving** a permit they argue should not have been approved. But these are two very different cases. The Appellants have no right to have a CO they have applied for denied. In other words, there is no guarantee government will only approve COs when they should. See N.J.S.A. 59:2-5.

And although there is a right not to have a CO denied, there is no right to have the government protect the homeowner by denying a CO when government should deny the CO. The words "property rights" have very different meanings when a denial is at issue than when an approval is at issue.

> While, as we have discussed above, it is well settled that state-created property interests, including some contract rights, implicate the protection of the procedural aspect of the due process clause, the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court and is subject to varying analyses and conclusions by the lower courts. See Regents of the Univ. Of Mich. v. Ewing, 474 U.S. 214, 228, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring) (state-created property interest not necessarily "property" for substantive due process purposes). Reich v. Beharry, 883 F.2d 239, 243 (3d Cir. 1989).

"[T]he property interests protected by substantive due process are narrower than the interests protected by procedural due process"—"[o]nly those . . . interests that are 'fundamental' under the . . . Constitution are worthy of substantive due process protection." DeBlasio v. Zoning Bd. of Adjustment for Twp. of W. Amwell, 53 F.3d 592, 601 (3d Cir. 1995), abrogated on other grounds by United Artists Theatre Cir., Inc. v. Twp. of Warrington, PA, 316 F.3d 392 (3d Cir. 2003); Gikas v. Washington Sch. Dist., 328 F.3d 731, 736 (3d Cir. 2003).

To state a substantive due process claim, "a plaintiff must have been deprived of a particular quality of property interest." DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995). The case law provides very little guidance as to what constitutes this "certain quality" of property interest worthy of protection under the substantive due process clause. Homar v. Gilbert, 89 F.3d 1009, 1021 (3d Cir. 1996), rev'd and remanded on other grounds, 520 U.S. 924, 117 S.Ct. 1807 (1997).

Appellants ask this Court, for the first time, to extend substantive due process protections to services government can choose not to provide, thus abrogating the purpose behind the Tort Claims Act, while doing nothing to promote the values embodied in the Constitution.

These government services, by their very nature, are voluntary. The purpose of the Tort Claims Act is to encourage government to perform these voluntary services, such as the CO at issue here. App. Brf. at 1-2. Having chosen to provide

the service, the government is required to provide fair procedures, and thus procedural due process rights attach to these services. DeBlasio, supra, at 596-598. But no one is entitled to have these services performed. No fundamental rights are implicated by voluntary government services, thus substantive due process protections do not attach to a property owner because of government's alleged improper approval of building permits, or COs;[1] it is only the conscience shocking improper denial that triggers substantive due process protection.

LEGAL ARGUMENT

POINT I
APPELLANTS DO NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT

The substantive component of the due process clause "limits what [the] government may do regardless of the fairness of procedures that it employs," Steele v. Cicchi, 855 F.3d 494, 501 (3d Cir. 2017), (citation omitted), "in order to 'guarantee protect[ion] against government power arbitrarily and oppressively exercised.' " Id. (quoting Cty. Of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719 (1997); see also Reno v. Flores, 507 U.S. 292, 301-

[1] It should be noted that, although owners of an improperly granted permit do not have substantive due process rights, neighbors do have such rights in certain circumstances. See e.g. DeBlasio at 594.

302 (1993). None of those fundamental rights demanding heightened protection are implicated in this case. There are no First Amendment rights involved; no alleged racial discrimination. This is a dispute about the actions, or inactions, of the Borough building department personnel concerning the construction of a home.

In the case at bar, Appellant attacks a non-legislative act---the issuance of a Certificate of Occupancy (CO). Appellant alleges that his protected property interest is to own, use, enjoy and dispose of real property. App. Brf. at 24-29. No one is arguing that Appellants do not have the right to own property, to use property, to enjoy property or to dispose of property. But here the government did nothing more than issue a CO. This is something that governments do every day. The Tort Claims Act immunizes governments from any incorrect decision to issue a CO that does not both impact a fundamental property right and shock the conscience.

Unlike in the cases relied on by Appellants in their brief, the government has not prohibited the ownership, use, enjoyment, or disposal of the property in this case. Instead, government has merely, according to Appellants, granted an approval when the approval, a CO, should not have been given. App. Brf. 1-2.

The Tort Claims Act specifically immunizes government employees, and the governmental entity they work for, from liability for enforcing any law N.J.S.A. 59:3-3 to 59:3-5; 59:2-4 to 59:2-5, or failing to enforce any law. N.J.S.A. 59:3-4, 59:2-4. In fact, N.J.S.A. 59:2-5 reads:

> A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.

The cited cases abrogate the immunity only when the denial of a permit to which the owner is otherwise entitled shocks the conscience. It is only these kinds of denials, not approvals, that trigger a substantive due process analysis.

The "right" to so-called "peaceful" enjoyment of property unfettered by government regulation simply does not exist. Research has not revealed any controlling authority establishing a constitutionally-protected property interest in the use and enjoyment of one's land. Plaintiff has not cited any such authority. The only case discussing the issue held there was no such right. See Tri–Cnty. Concerned Citizens Ass'n v. Carr, Civ. 98–4184, 2001 WL 1132227, at 3–5 (E.D. Pa. Sept. 18, 2001), aff'd, 47 Fed. Appx. 149 (3d Cir. 2002) (dismissing procedural and substantive due process claims after failing to find a protected property interest in the right to use and enjoy land, the right to be free from common nuisances such as odor, noise, pollution, and the right to not have property value diminished, among others). In the absence of a protected-property interest, Appellants' Amended Complaint fails to state a claim under N.J.S.A. 10:6-2. See also Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 185 (App. Div. 2023).

While it is uncontroverted that Appellants have property ownership rights, Appellants' constitutionally protected property interests do not extend to a right to "maintain and enjoy its property, to conduct business, and to contract with a landlord and customers. . .. But these are not the type of fundamental liberties with which the Due Process Clause is concerned." CBS Outdoor, Inc. v. Vill. of Plainfield, Ill., 959 F. Supp. 2d 1054, 1067 n.4 (N.D. Ill. 2013), quoting Albright v. Oliver, 510 U.S. 266, 272 (1994) (aside from the rights encompassed in the Bill of Rights, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity").

Appellants state that Sullivan v. Salem, 805 F.2d 81 (2d Cir. 1986), supports the notion that entitlement to a certificate of occupancy is a constitutionally-protected property interest. App. Brf. 26-29. We agree, Sullivan, DeBlasio, United Artists, etc. all stand for the proposition that substantive due process prohibits conscience shocking activity that prevents development that would otherwise be allowed. But none of these cases support the proposition that the approval, as opposed to the denial, of a permit, implicates a constitutionally-protected property interest for substantive due process purposes.

In DeBlasio, a neighbor challenged Plaintiff DeBlasio's use of his property arguing the use was not permitted in the zone according to the municipal zoning ordinances. Id. at 594-595. Plaintiff DeBlasio argued that the use was permitted and

that the refusal to grant a variance was arbitrary because it was motivated by personal reasons not connected to government, so called "improper motives." Id. The Court described the question before it as follows:

> This case raises important questions regarding the extent to which the due process clause of the Fourteenth Amendment may serve to protect landowners against **arbitrary governmental regulation of land use**. Id. at 594. (emphasis supplied).

In the instant matter, there is no concern with arbitrary government regulation restricting use. The mere recitation of property ownership, as Appellants argue in this case, is not enough. It was not enough in DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir. 1995), Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988), or United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392 (2003). In each of those cases it was not the ownership of property that was protected, but the right to develop and use the property as desired. The denial of this right is what triggered substantive due process protection. See, e.g. Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988)(denial of permission to build), United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392 (2003)(denial of permission to build).

The DeBlasio Court addressed the nature of the property right entitled to substantive due process protection:

> Before addressing the sufficiency of DeBlasio's evidence of improper motive, we must first determine: (1) whether a

> plaintiff such as DeBlasio must, as a predicate to a substantive due process claim, establish possession of a property interest worthy of substantive due process protection; and (2) if so, whether DeBlasio possesses a property interest worthy of protection under substantive due process. See Ersek v. Township of Springfield, Delaware County, 822 F.Supp. 218, 220 (E.D.Pa.1993). DeBlasio at 598.

The first point made by the DeBlasio Court was that the class of protected property interests for procedural due process purposes is larger than the class of property interests protected by substantive due process.

> In Reich v. Beharry, 883 F.2d 239 (3d Cir.1989), we observed that the issue of whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court. Reich, 883 F.2d at 243. Without attempting to define the set of state-created property interests protected by the concept of substantive due process, **we concluded in Reich: "[i]t is apparent ... that, in this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process.**" Id. at 244. (emphasis supplied).

The DeBlasio Court noted that in Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) it was held that when complaining of a violation of substantive due process rights, a plaintiff must prove that the governmental authority "**acted to 'infringe [ ] a property interest encompassed by the Fourteenth Amendment**.' " Acierno, 40 F.3d at 616 (quoting Midnight Sessions, 945 F.2d at 679)(emphasis supplied); accord Taylor Investment v. Upper Darby Township, 983 F.2d 1285, 1292 (3d Cir. 1993) (stating, in dicta, that to prevail on a substantive due process claim, a plaintiff

"must demonstrate that an arbitrary and capricious act deprived them of a protected property interest").

The DeBlasio Court held that to state a substantive due process claim, a plaintiff must have been deprived of a "particular quality of property interest." Id. at 600. Specifically, **the Court held that when a government action is alleged to have infringed on a landowner's use of his property, the right to use one's own property is protected by substantive due process.** Id. But that is not this case. In this case, Plaintiff does not complain that his right to use his property has been infringed by government regulation.

Appellants state:

> Applying the DeBlasio principles, if a wrongfully denied use variance constitutes a sufficient property interest for substantive due process purposes, then a wrongfully denied valid certificate of occupancy is also entitled to constitutional due process protection. Further, if the denial of a use variance "impinges" on a property owner's use and enjoyment of their property then it follows that the issuance of an invalid certificate of occupancy — preventing a property owner from selling their real property — also "impinges" on a property right. App. Brf. at 28-29 (emphasis supplied).

But it does not follow. An improper issuance of a CO is immunized by the Tort Claims Act. The conscience shocking failure to issue a CO implicates substantive due process principles; the improper issuance of a CO does not.

Even in those cases where a permit is denied, the decisions emphasize that that Appellants must establish "entitlement" to zoning and occupancy permits

themselves, not merely to the use of their land, before they can properly invoke constitutional protections. See, e.g. WVCH Comm'ns, Inc. v. Upper Providence Twp., 27 F.3d 561 (3d Cir. 1994) (holding that Appellants could not establish a protected property interest "unless and until it is proven that they are entitled to the zoning variance which they sought").

Thus, in the context of land use regulation, that is, in situations **where the governmental decision denies a landowner's use and enjoyment of property**, a land-owning plaintiff states a due process claim where he or she alleges that the **prohibition of the intended land use shocked the conscience. When the governmental action at issue is the denial of a permit the Plaintiff must demonstrate a right under state law to obtain the permit in question.**

The case at bar is different. In this case Appellants do not claim that they were improperly DENIED a CO; Appellants allege they were improperly GRANTED a CO. No decision has been found holding that the improper granting of a CO impacts a constitutionally-protected property right of the **PROPERTY OWNER** for due process purposes. There are cases discussing the due process rights of neighbors when a CO is improperly granted. See e.g. DeBlasio, supra, at 594; Harz v. Borough of Spring Lake, 234 N.J. 317 (2018). But there is no decision holding that the rights of the property owner are violated when he is improperly granted something he requested.

The fatal flaw in Appellants' argument is that there is no constitutional right to the protections of government provided services. The immunities afforded by the Tort Claims Act protect municipalities from liability when the services are not up to our standards, when they are provided negligently. This is so because, without those protections, governments could not afford to provide the services at all. Appellants seek to negate these immunities by raising a mere negligence claim to a constitutional claim.

In the case at bar, Appellants argue that "the issue of a certificate of occupancy is intricately tied to a property owner's ability to lawfully transfer an interest in their property, as well as their use and enjoyment of the property." App. Brf. at 24. We agree with that statement. But the failure to properly deny a CO, as opposed to the failure to grant a CO to which the owner is entitled, is a much more difficult case to make because: 1) there is no constitutionally-protected property interest as argued above; and 2) because the improper approval of a requested CO is seldom, if ever, conscience shocking-----after all the approval was requested by the one now complaining the approval was given.

The trial court was correct, the Appellants do not have a constitutionally-protected property interest at issue in this case.

POINT II
MS. NELSON'S CONDUCT DID NOT CAUSE PLAINTIFF DAMAGE OR VIOLATE PLAINTIFF'S RIGHTS

A. There is no causal connection between any conduct of Ms. Nelson and Appellants' damages

Appellants argue that the Borough improperly approved the CO. But Ms. Nelson is not empowered to, and did not, approve the CO. She is a Technical Assistant Construction Officer. See N.J.A.C. 5:23-5.19H – "Technical assistant to the construction official requirements." Ms. Nelson did not issue any COs, do any inspections, or set any policy.[2] Instead, the real gravamen of the complaint against Ms. Nelson surrounds an alleged alteration of documents.

> Moreover, the Borough, and its employees, unlawfully permitted a waiver of the new homeowner's warranty thereby depriving Plaintiffs of pursuing that remedy. (Pa0743). In the application for the certificate of occupancy, the following is stated "h/o waived h/o warranty." (Pa0122). This "waiver" was done by Melissa without Golowski's authority or consent. (Pa0226). In addition, the document was altered to remove critical information such as the date. (Pa0227). Thereby, Defendant Melissa Nelson committed the crimes of forgery, N.J.S.A. 2C:21-1, official misconduct, N.J.S.A. 2C:30-2, pattern of official misconduct, N.J.S.A. 2C:30-7, and tampering with public records or information, N.J.S.A. 2C:28-7. In response to these facts, Melissa invoked the Fifth Amendment privilege against self-incrimination seventy-five times during her deposition. (Pa0771).

[2] Appellants, at pg. 32, allege Ms. Nelson issues the CO. This is misleading. Ms. Nelson processes the CO, after the inspections and approvals have been done by others. Her task is secretarial, not decision-making.

But this alleged alteration occurred years after the CO was issued and the allegedly negligent construction was completed. The record established that these alterations were done after Ms. Nelson's first deposition on August 26, 2019. Pa 225-229. Appellants cannot, and do not, argue that events that took place subsequent in time were an influential cause of events that occurred prior in time. The construction was completed in June of 2015. The CO issued for this property on July 8, 2015. Pa 0030. Thus, none of the damages already in place at the time the home was completed in 2015 were cause by the alterations that took place in 2019.

Further, the documents with the additions and deletions are irrelevant to the issues in this case. Those documents may be relevant to the state of mind of the individual making those markings, but that was long after the incidents of which Plaintiffs complain. Stated differently, actions in 2019 prove nothing about events in 2014 and 2015 that are the subject of a Complaint filed in 2018.

Appellants have demonstrated that there are two separate instances of two different copies of the same document. The alleged alteration of the documents proves nothing about the quality of the construction by Co-Defendant; the alleged alteration of the documents proves nothing about whether or not Plaintiffs' constitutional rights were violated by the Borough or my client, Ms. Nelson.

Appellants allege they would have had access to the remedies available with a new home warranty if Ms. Nelson had not improperly waived the warranty. But

Ms. Nelson's comments are not dispositive on the existence of the warranty. Those with a new home builders license are enrolled in the program and provide the warranty through the State. See N.J.S.A. 46:3B-1. In this case, the Appellants hired a home improvement contractor, not a new home builder, and thus, were not entitled to the warranty. That decision had nothing to do with the 2019 addition of the words "new home warranty waived."

B. Ms. Nelson's conduct is not constitutionally conscience shocking

In a land use context, a substantive due process claim requires evidence of governmental action that "shocks the conscience." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366 (1996); accord United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 401–02 (3d Cir. 2003); Dotzel v. Ashbridge, 306 F. App'x 798, 800 (3d Cir. 2009) ("We utilize the 'shocks the conscience test' set forth in County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), to determine whether land-use decisions violate substantive due process.")

The 'shocks the conscience' test "encompasses only the most egregious official conduct." Dotzel, 306 F. App'x at 800 (quoting United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 401 (3d Cir. 2003)). "To shock the conscience, the alleged misconduct must involve more than just disagreement

about conventional zoning or planning rules and ***rise to the level of self-dealing, an unconstitutional taking, or interference with otherwise constitutionally protected activity on the property.***" Id. at 801 (citation and internal quotation marks omitted). ***The reason for this high standard of proof is to prevent zoning appeals from being converted into civil rights claims***. United Artists, supra, 316 F.3d at 402.

The Appellants' complaints in this matter are examples of the kind of disagreements that are frequent in disputes over building projects----i.e. whether the construction was done properly. The local officials are not accused of seeking to hamper development in order to interfere with otherwise constitutionally-protected activity on the property, or because of some bias against an ethnic group. There is no virtual "taking" as in Conroe Creosoting Co. v. Montgomery County, 249 F.3d 337 (5th Cir. 2001).

Everyone disappointed within an adverse ruling of the local zoning and building officials involves some claim of abuse of legal authority, but "it is not enough simply to give these appeals constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial question of a constitutional violation. United Artists, 316 F.3d at 402 (quoting Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982)), Eichenlaub v. Twp. of Ind., 385 F.3d 274, 279 (3d Cir. 2004).

The Complaint by Appellants in this case involves conduct that is far less egregious than that of the Board in Eichenlaub, supra. In Eichenlaub, the judicial conscience was not shocked by the property owner's evidence that zoning officials "applied subdivision requirements to [the Plaintiffs'] property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; that they improperly increased tax assessments; and that they maligned and muzzled the [Plaintiffs]." Id. at 286. In affirming the district court's grant of summary judgment on the Plaintiffs' substantive due process claim, the Third Circuit explained that "these complaints are examples of the kind of disagreement that is frequent in planning disputes," emphasizing that they involved "no allegation [s] of corruption or self-dealing." Id.

In the case at bar, Appellants allege they were improperly granted a CO by Respondents Borough and Ms. Nelson, among others. These actions by Respondents are insufficient, as a matter of law, to shock the conscience.

The instant action on its face does contain a whiff of self-dealing. After all, Ms. Nelson is the wife of the builder who is alleged to have built the house improperly. Appellants don't allege Ms. Nelson built anything improperly; but that she tried to cover up improprieties.

Unfortunately for Appellants, there is no substantive right to have the government perform building department functions, or to perform the function correctly. The Appellants' remedy is against the builder who, Appellants allege, built the house poorly; not the building department of the Borough who approved the construction.

In the instant case, Appellants have attempted to raise the normal operation of a building department to a constitutional level. The Constitution does not govern the operation of a building department where no constitutionally-prohibited deprivation of property has occurred. In these cases, challenges to the township's action are all governed by state law. Wagner v. Harmar Twp., 651 F. Supp. 1286, 1288–89 (W.D. Pa.), aff'd, 826 F.2d 1058 (3d Cir. 1987).

POINT III
DEFENDANT MS. NELSON IS ENTITLED TO QUALIFIED IMMUNITY

It is often stated that qualified immunity protects all except the plainly incompetent and the evil-intentioned. Of course, in this case Appellants allege that Ms. Nelson altered documents. Such conduct is alleged to be both evil-intentioned and plainly incompetent. Yet Ms. Nelson is still entitled to the protections of qualified immunity if the constitutional right violated is not well established. It has been argued above that no constitutional right has been violated. Thus, in the absence of a constitutional violation, Ms. Nelson is entitled to judgment.

But even if this Court were to establish a constitutional right to building department services for the first time in this case, this Defendant, Ms. Nelson, cannot be liable, because the constitutional right at issue was not well established. While it certainly can be argued Defendant knew her alleged conduct was wrong, but there is no way, in the absence of clearly established precedent, Ms. Nelson could have known her conduct violated the Constitution. Certainly, if Ms. Nelson is guilty of the conduct complained of, Appellants have a number of remedies under state law as argued above and, in that sense, what Ms. Nelson is alleged to have done is "illegal." But such conduct has never been held to violate the Constitution. Thus, Ms. Nelson is entitled to judgment even if her conduct violated Appellants' constitutional rights because these rights were not clearly established at the time Ms. Nelson acted.

CONCLUSION

For all the above reasons it is respectfully requested that Appellants' motion for sanctions against Defendant Melissa Nelson be denied and Defendant Melissa Nelson's Motion for Summary Judgment be granted dismissing Appellants' Complaint as to Defendant Melissa Nelson, with prejudice.

Respectfully submitted,
KEVIN B. RIORDAN, ESQ., LLC

/s/ Kevin B. Riordan

Kevin B. Riordan

Dated: January 26, 2024

PARTNERS
Laura M. Halm
Jean L. Cipriani
Melanie S. Appleby
Robin La Bue
Michael S. Nagurka
Andrea E. Wyatt

r|m|s|n|c

Rothstein, Mandell, Strohm, Halm & Cipriani, P.A.

ATTORNEYS AT LAW

ASSOCIATES
Danielle Rosiejka
Matthew J. Donohue
Brandon A. Klimakowski

OF COUNSEL
Charles H. Mandell
Brian C. Bartlett
Joseph C. Falk

January 26, 2024

Joseph Orlando, Clerk
ATTN: Ms. Marcella Coley
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex, P.O. Box 006
Trenton, New Jersey 08625-0006

Re: M.G. Sheridan Avenue Family Limited Partnership, et al. v. Borough of Seaside Heights, et al.
Appellate Division Docket No. A-03778-22
Civil Action: On Appeal from a Final Decision of the Ocean County Superior Court

Sat Below: Hon. Craig L. Wellerson, P.J.Cv.

Letter Brief on the Merits of the Appeal on behalf of Appellees, Borough of Seaside Heights and Charles Lasky

Dear Mr. Orlando:

Please accept this letter brief in opposition to M.G. Sheridan Avenue Family Limited Partnership and Michael Golowski's appeal of Judge Wellerson's April 28, 2023 Order granting summary judgment to the Borough of Seaside Heights and Charles Lasky. (Pa1167-Pa1168).[1]

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[1] This order granted summary judgment to multiple defendants.

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PRELIMINARY STATEMENT

This matter arises from Appellants' allegations that the Borough of Seaside Heights, Charles Lasky, and others, violated his constitutional rights. Unrelated, there are construction defects claims against several other defendants not relevant to this application. Appellants allege that the Borough failed to properly inspect the home and issued an *invalid* certificate of occupancy.

In October 2012, Superstorm Sandy ravaged the northeast, including the Borough of Seaside Heights. Due to the significant amount of oversight and work that needed to be completed, the State of New Jersey brought inspectors to assist the Borough, including the since-deceased William Ferguson, with the extensive rebuilding that was necessary after many residents lost their homes or suffered debilitating damage. Mr. Ferguson worked extensively within the Borough after the storm made landfall.

Both Melissa Nelson and Charles Lasky operated the Borough of Seaside Heights Construction Department within the relevant timeframe outlined in this case. Additionally, Ms. Nelson is the neighbor of Appellant Golowski. After Superstorm Sandy damaged Mr.

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Golowski's home, he made a request to Ms. Nelson's husband, who owns and operates Oceanside Contracting, to rebuild his damaged home.

Despite the Appellants' allegation that the Borough was to blame for his damaged home due to faulty inspections, a Tort Claims Notice was not filed until November 14, 2019. After a motion to dismiss, Appellants' tort claims were dismissed, and their Complaint was limited to Constitutional claims against the Borough, Charles Lasky, and Melissa Nelson.[2] Importantly, that order has not been appealed here. In fact, it was not even attached to the Appellants' Appendix. This forecloses any attempt to overturn the dismissal of all tort-related claims against the Borough, Ms. Nelson, and Mr. Lasky.

Throughout the entirety of two-and-a-half years of discovery, Appellants never sought discovery to support their Constitutional allegations. Instead, Appellants sought to embarrass Ms. Nelson with countless discovery requests, a motion for sanctions, and various attempts to tie her admittedly sloppy recordkeeping into a grand conspiracy where Ms. Nelson worked in connection with her husband, Edward Nelson and Oceanside Contracting, to violate Mr. Golowski's rights. This is pure fantasy.

While Ms. Nelson had just begun her career within the Construction Department, she wrote notes to herself, including the oft-referenced "H/O Waived Warranty" notation. There has never been a policy of the Borough of Seaside Heights to waive a homeowner warranty. Ms. Nelson's note to herself had no practical effect and the warranty was never waived. As is the case with any home that is built, the issue of a homeowner warranty rests with the contractor, not the Borough.

[2] At the time of the referenced motion, this office represented Melissa Nelson.

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Throughout the entirety of this litigation, Appellants sought to conflate their construction defect claims with their Constitutional claims against the Borough Defendants. The condition of the subject home is irrelevant to the causes of action against the Borough and Mr. Lasky. All of the counts that Appellants seek to reactivate are flimsy Constitutional violations and not monetary damages for an allegedly irreparably damaged home.

The full thrust of Appellants' allegations against the Borough Defendants is the lack of framing checklist and the issuance of an *invalid* certificate of occupancy. After you strip away the ethical and criminal allegations against Ms. Nelson, that is the entirety of the allegations against the Borough. Appellants are attempting to pull the wool over this Panel's eyes by trying to turn sloppy paperwork by a combination of Mr. Ferguson and Ms. Nelson into a Constitutional claim so that Mr. Golowski can continue his farcical crusade against Ms. Nelson at her place of employment.

Under these circumstances, the inconvenient truth is there is no causal connection between paperwork completed by Ms. Nelson, whether it was correctly done or not, and issues with construction. There is no controlling authority and no robust consensus of cases of persuasive authority that turns the issuance of a certificate of occupancy and/or notes written on municipal paperwork by the Technical Assistant into a series of cognizable Constitutional violations.

Thus, this Panel should deny Appellants' appeal and affirm The Honorable Craig L. Wellerson, P.J.Cv.'s opinions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[3]

[3] Because they are closely related, the Statement of Facts and Procedural History have been combined for the convenience of this Court and to avoid repetition.

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After construction was completed on his property, on or about January 12, 2018, Mr. Golowski highlighted a number of issues with the construction and brought a construction defect case against the parties he believed were responsible for those alleged defects. (Pa1). After two and a half years of litigation, Appellants filed a motion to amend their complaint and add several counts against the Borough of Seaside Heights, Charles Lasky, and others. (Pa102). After brief motion practice, on or about August 11, 2020, Appellants filed an Amended Complaint seeking relief for alleged Constitutional violations. (Pa102).

Throughout this unnecessarily elongated matter, Appellants never supplied a response when the Borough Defendants made a request for actual damages incurred as a result of the Borough Ms. Nelson, and Mr. Lasky's conduct. (Pa403). The totality of the allegations against the Borough Defendants revolves around Ms. Nelson's alleged changes made to the construction jacket, including the writing of "H/O waived warranty" and the lack of a UCC Form 390 framing checklist. (Pa102).

Ms. Nelson has operated as the Technical Assistant in the Borough since January 1, 2014. (Pa612). Ms. Nelson was effectively Mr. Lasky's assistant. Mr. Lasky operated as the Construction Official during the relevant period.[4] (Pa181). After Superstorm Sandy, the state was responsible for doing a majority, if not all inspections within the Borough of new home construction and repairs. (Pa127). Ms. Nelson would communicate with the State of New Jersey, and they would tell her who would be inspecting on a particular week. (Pa127). Ms. Nelson testified that the office policies did not deviate from the Uniform Construction Code in any way. In fact, Administrator for the Borough, Christopher Vaz testified the State of New

[4] Mr. Lasky no longer works for the Borough of Seaside Heights in any capacity.

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Jersey makes he regulations for the Construction Official and the law and regulations speak for themselves. (Pa664).

Appellants deposed Ms. Nelson three separate times. (Pa126, 160, 203, 612, 654, 769). She testified the final inspection for 268 Sheridan Avenue was made by William Ferguson. (Pa127). Significantly, she testified the warranty was between Mr. Nelson and Mr. Golowski. (Pa613). The writing of "H/O waived warranty" is irrelevant and had no practical effect. (Pa613). Further, as is made clear through Ms. Nelson's final deposition, the alterations that Appellants go through great pains to describe occurred well after the events that gave rise to this case. (Pa772-776). Even had Ms. Nelson made alterations to the construction jacket, they had no practical effect upon whether a warranty was issued or not, whether inspections were made or not, and rose simply to shoddy bookkeeping. (Pa613).

After an avalanche of extraneous discovery requests upon the Borough and Ms. Nelson, on February 9, 2023, the Borough, and Mr. Lasky filed a motion for summary judgment. (Pa646). During oral argument on March 17, 2023, counsel for Appellants could not specify one custom, policy or practice the Borough implemented that led to a violation of Appellants' substantive due process rights. (1T, 49:12-49:25). Despite this, Appellants were given two weeks to specify what substantive due process violation occurred. (1T, 49:23-49:25). During those two weeks, counsel for Appellants found no such support and the Court rendered its decision. (2T, 43:22-44:5). More specifically, "[t]he Court finds that the only way that [the Governmental Entities] would be liable is if there was a constitutional violation, and the Court finds none." (2T, 44). On April 28, 2023, Judge Wellerson granted the Defendants-

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Appellees motion for summary judgment. (Pa1167).[5]

STANDARD OF REVIEW

The standard of review is absolutely critical in any appeal. Our Appellate Courts review decisions granting summary judgment *de novo*. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). The standard of review requires this Panel to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. A grant of summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party is entitled to judgment "as a matter of law." R. 4:46-2(c).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THAT APPELLANTS DO NOT HAVE STANDING TO BRING THEIR COMPLAINT (Response to Appellants Point I)

While the Court had already dismissed all the municipal entities when the decision was made, this point was argued in our summary judgment brief, and we must respond to this point. M.G. Sheridan Avenue Family Limited Partnership (hereinafter "M.G. Sheridan, LP") was formed in the State of Nevada, not New Jersey. At no point prior to the litigation nor during the litigation was this Limited Partnership registered in New Jersey.

In order for a Foreign Limited Partnership to maintain a case of action in New Jersey,

[5] While the Borough Defendants filed a summary judgment on both the lack of a Constitutional violation and the lack of a proper certification for the LP, the motion was granted for Appellants failure to prove a Constitutional violation. (2T).

certain requirements must be met, including those set out in N.J.S.A. 42:2A-60, L. 1983, C. 489 § 59; Amended 1988, C.130. § 30. Under subparagraph (a), a foreign limited partnership transaction business in the State may not maintain an action in ay court of this state until it has obtained a Certificate of Authority to transact business in this State. This is unambiguous and was violated by Appellants when they brought this case. No Certificate of Authority was ever obtained despite conducting business since 2003. This shows a failure to comply with subparagraph (a), as well as failing to comply with N.J.S.A. 42:1A-49 regarding annual reporting.

As set forth in New Jersey Transaction Guide relative to Limited Partnerships, Section 11.28A, entitled "Formation and Operation of Limited Partnerships," M.G. Sheridan, LP was required to apply to the New Jersey Division of Revenue for a Certificate of Authority to transact business pursuant to N.J.S.A. 42:2A-57. As a foreign limited partnership, M.G. Sheridan, LP was required to file an application with the Secretary of State executed by Michael Golowski, as its General Partner, setting forth (a) the name of the foreign limited partnership…; (b) the name and business address of each general partner; (c) the amount of cash and description and statement of the agreed value of the other property or services contributed by all partners…; (d) the state and date of its formation; (e) the general character of the business it proposed to transact in New Jersey; (f) the name and address …of the agent for service of process on the foreign limited partnership…; (g) a statement that the Secretary of State is appointed the agent of [the LP]…; (h) the address of the office required to be maintained in the State…; and (i) permits the Secretary of State to issue a Certificate of Authority to transact business within the State of New Jersey if subparagraphs (a) through (h) are complied with. This did not occur.

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Importantly, one of the purposes behind the requirement that foreign Limited Partnerships obtain a Certificate of Authority prior to doing business in New Jersey is to eliminate the need for a business to incorporate a new entity. M.G. Sheridan, LP should have obtained this certificate when it acquired 268 Sheridan Avenue. Further, pursuant to N.J.S.A. 42:2A-60(a), a foreign LP cannot maintain a cause of action until it has obtained authority to transact business.

The trial court used a case, at least partially, under a similar statute relative to foreign corporations in making its determination. See Seven Caesars, Inc. v. Dooley House, 214 N.J. Super. Unpub. 2014 WL 4450441 *8 (September 11, 2014). In that matter, the court held by the terms of N.J.S.A. 14A:13-11(1) unmistakenly demands if a foreign corporation fails to procure the required certificate of authority then it is prohibited by law from maintaining any action in any court of this state. See also Davis & Dorand v. Patient Care Med. Servs., 208 N.J. Super. 450, 455 (Law Div. 1985) citing N.J.S.A. 14A:13-11. Moreover, the Appellate Panel in Seven Caesars noted that N.J.S.A. 14A:13-11 does not provide for the retroactive validation of a foreign corporation registration; see also SMS Financial P, LLC v. M.P. Gallagher, LLC, 2019 WL 5459849 (Law Div., January 25, 2019), (Bergen County Superior Court granted a defendant's motion to dismiss for lack of subject matter jurisdiction where the plaintiff only obtained a Certificate of Authority during the litigation).

Appellants could have obtained that Certificate of Authority when this issue was raised, but it chose not to. Now, after realizing the error of their ways, after a motions to dismiss were granted and their motion for reconsideration denied, they seek to have this matter returned to the trial court so they can inexplicably do what they should have done when this issue was raised to begin with. Instead, as is true with this case that has been ongoing

since 2018, Mr. Golowski and his LP seek to overturn the trial court's decision, despite having five months to obtain a certificate, and make the argument that retroactive application should be sufficient. Appellants waited until the close of discovery to reveal the statements wherein it averred in the various Complaints and discovery that it was organized pursuant to New Jersey law were in fact, false.

While we would have argued retroactive application would be insufficient in this matter, as this LP has been operating in contravention of New Jersey Statutes since ink hit paper on the purchase of 268 Sheridan Avenue, Appellants seek to have a third bite at the apple after losing two separate times. In baseball, a batter can only foul off so many pitches, that slider eventually hits the dirt, and you swing over the top of it. Similarly, here, this Court should not entertain this many thinly veiled attempts at ignoring this state's statutory requirements in hopes the court will save them from their own failings. Appellants eventually have to walk back to the dugout with a strikeout.

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE BOROUGH OF SEASIDE HEIGHTS AND CHARLES LASKY ON COUNTS THIRTEEN AND FOURTEEN (Response to Appellants Point II)

The trial court was correct in dismissing Appellants' claims under Counts Thirteen and Fourteen of their Fourth Amended Complaint and the order should be affirmed as the Appellants did not even forward an argument that Mr. Lasky does not enjoy qualified immunity and similarly, cannot assert that the Borough Defendants violated their substantive due process rights. The trial court properly considered the arguments made by the Appellants

on various dates, giving them an overabundance of opportunity to prove the existence of a violation of their substantive due process rights. They could not do so.

While Appellants failed to even forward an argument in their brief explaining why Mr. Lasky does not enjoy qualified immunity, the hard fact is qualified immunity protects government officials from liability under 42 U.S.C. § 1983 "unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct." Plumhoff v. Rickard, 572 U.S. 765, 778 (2014). "'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear' that 'every reasonable official would understand that what he is doing' is unlawful." Dist. of Columbia v. Wesby, 583 U.S. 577, 589 (2018) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). An official is immune unless there was either "controlling authority" or a "robust consensus of cases of persuasive authority" on the books when the official acted that placed the unlawfulness of the official's conduct "beyond debate." al-Kidd, 563 U.S. at 741; see also Williams v. Sec'y Pa. Dep't of Corr., 848 F.3d 549, 570 (3d Cir. 2017) ("[A] qualified immunity analysis looks through the rearview mirror, not the windshield. The inquiry focuses on the state of the relevant law when the violation allegedly occurred."). This standard is a "demanding" one, Wesby, 583 U.S. at 589, and it is "tilted in favor of shielding government actors." Zaloga v. Borough of Moosic, 841 F.3d 170, 175 (3d Cir. 2016).

The Supreme Court has "repeatedly told courts not to define clearly established law at too high a level of generality." City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021). "The dispositive question is whether the violative nature of particular conduct is clearly established," Mullenix v. Luna, 577 U.S. 7, 12 (2015) (emphasis in original), so the inquiry "must be undertaken in light of the specific context of the case, not as a broad general

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proposition." Saucier v. Katz, 533 U.S. 194, 201 (2001). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." al-Kidd, 563 U.S. at 742. Otherwise, plaintiffs could "convert the rule of qualified immunity" into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights," thus "making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages." Anderson v. Creighton, 483 U.S. 635, 639 (1987).

Instead, because the "clearly established" standard requires "a high 'degree of specificity,'" the "legal principle" at issue must "clearly prohibit the [official's] conduct in the particular circumstances before him." Wesby, 138 S. Ct. at 590 (quoting Mullenix, 577 U.S. at 13); see also White v. Pauly, 580 U.S. 73, 79-80 (2017) (stating that "the clearly established law must be 'particularized' to the facts of the case"); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (stating that an official is immune unless prior case law "squarely governs" the specific conduct at issue). "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Id. (citing Reichle v. Howards, 566 U.S. 658, 666 (2012)). Thus, without "sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited," an official is immune. Mammaro v. N.J. Div. of Child Prot. & Permanency, 814 F.3d 164, 169 (3d Cir.), cert. denied, 137 S. Ct. 161 (2016) (citation omitted).

For the plaintiffs to overcome qualified immunity, "the clearly established right must be defined with specificity" and "not . . . at [such] a high level of generality." City of

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Escondido v. Emmons, 586 U.S. ___, 139 S. Ct. 500, 503 (2019) (quoting Kisela v. Hughes, 584 U.S. ___, 138 S. Ct. 1148, 1152 (2018)). Appellants must identify a case similar to the one at issue that would rise to the level of a constitutional violation by Mr. Lasky. Unfortunately for Appellants, their research has not revealed a single case, let alone any "controlling authority" or a "robust consensus of cases of persuasive authority," holding that an official violates a plaintiff's constitutional rights by failing to "protect the property of plaintiff." Appellants might as well have taken out a highlighter and told the Court it had no interest in arguing qualified immunity. Mr. Lasky is entitled to qualified immunity.

Appellants seek to overturn the trial court decision based on the Borough issuing an *invalid* certificate of occupancy, and despite not being able to point to one case in support of this argument during the multiple motion hearings, now again assert they have a constitutionally protected property interest in obtaining a *valid* certificate of occupancy. Factually, this argument fails before any legal argument is made.

The substantive component of the due process clause "limits what [the] government may do regardless of the fairness of procedures that it employs," Steele v. Cicchi, 855 F.3d 494, 501 (3rd Cir. 2017), "in order to 'guarantee protect[ion] against government power arbitrarily and oppressively exercised.' " Id. (quoting Cty. Of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719 (1997); see also Reno v. Flores, 507 U.S. 292, 301-302 (1993). Appellants have failed to demonstrate a fundamental right that demands heightened protection in this construction defect matter that has been dressed up and paraded around as a constitutional violation case.

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In a land use context, a substantive due process claim requires evidence of governmental action that "shocks the conscience." Rivkin v. Dover Tp. Rent Leveling Bd., 143 N.J. 352, 366 (1996); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 401–02 (3d Cir. 2003); *Dotzel v. Ashbridge*, 306 F. App'x 798, 800 (3d Cir. 2009) ("We utilize the 'shocks the conscience test' set forth in *Lewis*, 523 U.S. 833, to determine whether land-use decisions violate substantive due process.")

Courts have applied and upheld actions taken by public employees under their 'shocks the conscience' test for only the "most egregious official conduct." *Dotzel,* 306 F. App'x at 800 (quoting *United Artists Theatre Circuit, Inc*, 316 F.3d at 401). "To shock the conscience, the alleged misconduct must involve more than just disagreement about conventional zoning or planning rules and rise to the level of self-dealing, an unconstitutional taking, or interference with otherwise constitutionally protected activity on the property." *Id.* at 801 (citation and internal quotation marks omitted). The reason for this high standard of proof is to prevent zoning appeals from being converted into civil rights claims. United Artists, supra, 316 F.3d at 402.

For example, in Conroe Creosoting Co. v. Montgomery County, 249 F.3d 337 (5th Cir. 2001), the Court of Appeals determined that whether a plaintiff's substantive due process had been violated by local officials was a triable allegation. In that matter, this was not a question of whether documents had been altered or whether an inspection had been performed; Rather, plaintiffs charged the officials fraudulently converted a tax levy for a $75,000 deficiency into an unauthorized seizure by forcing the sale and destruction of an $800,000 ongoing business. The principal defendant conceded the sale was unauthorized. The facts carried a whiff of self-dealing, since the principal defendant's friends were alleged to

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have been engaged to perform auction services. In effect, the court found that the facts asserted amounted to a claim of an unconstitutional "taking" without just compensation, in violation of the Fifth Amendment, or an improper seizure, in violation of the Fourth Amendment. Id. at 340 n. 9.

Appellants have failed to present a scintilla of evidence that would support a violation that rises above our court's strict "shock the conscience" test. Appellants assert that building officials failed to enforce the applicable standards as they expected. As all of Appellants' tort violations were dismissed due to a failure to properly file a timely Tort Claims Notice, and not appealed here, plaintiffs must prove their constitutional rights were violated by the Borough's actions and/or inactions. Appellants' allegations are simply too vague, too flimsy, and they cannot demonstrate conduct that shocks the conscience, as is required by the law.

CONCLUSION

Despite not having standing to bring this case in the first place due to Appellants' failure to file simple paperwork in compliance with New Jersey statutory requirements for Limited Partnerships, Appellants' trivial complaints against the Borough of Seaside Heights and Mr. Lasky in this matter are examples of the kind of disagreements that are frequent in disputes over building projects. The local officials are not accused of seeking to hamper development in order to interfere with otherwise constitutionally protected activity on the property or due to a bias of some sort. Shoddy recordkeeping by a combination of the Technical Assistant and former State employee in the backdrop of a natural disaster does not rise to the level of Constitutional violations. Appellants appeal should be denied, and the trial court's decisions upheld.

Respectfully submitted,

/s/ Michael S. Nagurka

MICHAEL S. NAGURKA
For the Firm
mnagurka@rmshc.law

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MG SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP and MICHAEL GOLOWSKI, Plaintiffs/Appellants, v. OCEANSIDE CONTRACTING, EDWARD D. NELSON, CENTRAL JERSEY CONTRACTING, JAMES THOMAS, ALL COUNTY ENTERPRISES, INC. and ERIC RUSEK ELECTRIC, STATE OF NEW JERSEY, WILLIAM FERGUSON, BOROUGH OF SEASIDE HEIGHTS, CHARLES LASKEY, and MELISSA NELSON, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION DOCKET NO.: A-3778-22 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION OCEAN COUNTY DOCKET NO.: OCN-L-70-18 SAT BELOW: HON. CRAIG L. WELLERSON, J.S.C.

JOINT BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS, OCEANSIDE CONTRACTING, EDWARD D. NELSON, AND ALL COUNTY ENTERPRISES, INC.

Of Counsel:
Denise M. Montgomery, Esq.
Brian Peoples. Esq.
James F. Sullivan, Esq.
Michael F. Lynch, Esq.
On the Brief:
Neal A. Thakkar, Esq.

SWEENEY & SHEEHAN, PC
Sentry Office Plaza
216 Haddon Avenue, Suite 300
Westmont, NJ 08108
(856) 869-5600 (phone)
(856) 869-5605 (facsimile)
neal.thakkar@sweeneyfirm.com

Counsel List

Attorneys for Oceanside Contracting and Edward D. Nelson

Neal A. Thakkar, Esq.
Attorney I.D. 043542004
Denise M. Montgomery
Attorney I.D. 025741996
SWEENEY & SHEEHAN, P.C.
Sentry Office Plaza
216 Haddon Avenue, Suite 300
Westmont, NJ 08108
(856) 869-5600 (phone)
(856) 869-5605 (facsimile)
Neal.thakkar@sweeneyfirm.com
Denise.montgomery@sweeneyfirm.com

Brian Peoples, Esq.
Attorney I.D. 042081990
Leary Bride Mergner & Bongiovanni
7 Ridgedale Ave.
Cedar Knolls, NJ 07927
(973) 539-2090 (phone)
(973) 539-0806 (facsimile)
bpeoples@lbmblaw.com

Attorneys for All County Enterprises, Inc.

James F. Sullivan, Esq.
Attorney I.D. 020961975
Sullivan and Graber
60 Maple Avenue
PO Box 912
Morristown, NJ 07963-0912
(973) 540-0877 (phone)
jsullivan@sullivangraberlaw.us

Michael F. Lynch, Esq.
Attorney I.D. 044502003
Law Office of Linda S. Baumann
50 Millstone Road
Building 300, Suite 140
East Windsor, NJ 08250
(609) 371-1533 (phone)
Michael.lynch2@thehartford.com

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PRELIMINARY STATEMENT

Defendants, Oceanside Contracting, Edward D. Nelson, and All County Enterprises, Inc., hereby submit that the trial court's order dismissing this matter with prejudice due to the failure of plaintiff, M.G. Sheridan Family Limited Partnership, to obtain a certificate of authority was correctly entered, as was its determination that Michael Golowski lacked standing to sue in his individual capacity. Furthermore, the trial court correctly denied reconsideration, as a lawsuit that is dismissed for lack of standing is a nullity from the outset, and the plaintiffs' subsequent attempt to cure the lack of standing does not retroactively validate the complaint.

This appeal, as it relates to these contractor defendants[1], presents two concise and narrow issues – whether M.G. Sheridan, a Nevada limited partnership whose business is, in part, "to hold, develop, buy, sell and lease real estate and personal property…" was precluded from maintaining this action stemming from its efforts to develop real estate in New Jersey due to its failure to obtain a certificate of authority pursuant to N.J.S.A. 42:2A-60. The second question is whether Michael Golowski, in his individual capacity and

[1] Oceanside Contracting, Inc., Edward D. Nelson, and All County Enterprises, Inc. jointly submit this brief and are referred to herein as the "contractor defendants" to distinguish from the "Borough defendants," against whom plaintiffs claim constitutional violations.

not as a member of the limited partnership, has standing to maintain this action, notwithstanding that M.G. Sheridan was the record owner of the real estate in question and that any actions taken by Golowski were done in his capacity as a partner and for the benefit of the limited partnership. Because the plaintiffs' fourth amended complaint leaves no question that this lawsuit arises out of M.G. Sheridan's business transactions in New Jersey, and because Golowski in his individual capacity is not entitled to a legal remedy for wrongs allegedly done to the limited partnership, the trial court properly dismissed this matter. For these reasons, as amplified below, defendants respectfully request that the orders of June 9 and June 12, 2023, dismissing plaintiffs' complaint against these contractor defendants for lack of standing, as well as the order of July 21, 2023, which denied plaintiffs' motion for reconsideration, be affirmed.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendants generally concur with the procedural history and statement of facts set forth in plaintiffs' brief but write separately to emphasize the following facts relevant to the issues on appeal involving these defendants.

The first paragraph of plaintiffs' initial complaint and all subsequent amended complaints alleged that the "M.G. Sheridan Avenue Limited Family Partnership is a limited partnership organized and existing under the laws of

the State of New Jersey and is the owner of a single-family residence located at 268 Sheridan Avenue, Seaside Heights, New Jersey. Plaintiff, Michael Golowski, is the General Partner of M.G. Sheridan Avenue Family Limited Partnership." See Pa0001, Pa0010, Pa0065, Pa0084, Pa0103. None of the pleadings filed by plaintiffs allege that Golowski is suing in his individual capacity.

Oceanside and Nelson filed a motion for partial summary judgment on January 13, 2023, (Da001) and plaintiffs filed a cross motion for summary judgment in opposition on February 6, 2023.[2] (Da010). In their responsive statement of material facts, plaintiffs admitted that "all payments were made by M.G. Sheridan and signed by [p]laintiff Michael Golowski to Defendants Oceanside Contracting and Edward D. Nelson." Da011 (¶-7). They did not allege that Golowski made any payments in his individual capacity for which he received no reimbursement from the partnership.

The fact that M.G. Sheridan was not, in fact, organized under New Jersey law was not disclosed to the court or the litigants until it filed its cross motion. Pa0366 at ¶-18. Plaintiffs provided, as an exhibit to their cross motion, a copy of the Certificate of Limited Partnership of the M.G. Sheridan Avenue

[2] Oceanside and Nelson's motion for partial summary judgment was denied by order dated May 2, 2023. Pa1171. That order is not being appealed.

Family Limited Partnership, which revealed that it was a Nevada limited partnership whose business:

> [S]hall be to hold, develop, buy, sell and lease real and personal property and equipment; to offer and provide management, business and general consulting and supervision services; to buy, sell and invest in securities, commodities, futures, stocks, bonds, certificates of deposit, mutual funds, negotiable instruments, currencies and all other items offered for sale or investment, either publicly or privately; to engage in any lawful business or endeavor.
>
> [Pa0445.]

Based on the revelation that M.G. Sheridan was not a New Jersey entity and armed with the information contained in the partnership formation documents, Oceanside and Nelson filed their motion to dismiss for lack of standing on February 9, 2023. Pa0361. Defendants urged the court to consider that M.G. Sheridan's application for an employer identification number listed "investment" as its business, Pa0451, that it owned real property located at 268 Sheridan Avenue, Pa0454, and that upon formation of the partnership, Michael Golowski in his individual capacity deeded the property to the partnership on December 1, 2003. Pa0459. Pa0367 (cert. of counsel).

In addition to filing the motion to dismiss for lack of standing, Oceanside and Nelson served a supplemental notice to produce on plaintiffs on February 13, 2023, seeking to discover additional documentation concerning

the partnership's business activities from 2014 through 2023. Da026. Plaintiffs did not respond, and on April 25, 2023, defendants moved to dismiss for failure to provide discovery. Da018. When plaintiffs finally responded on May 23, 2023, they provided only redacted tax returns from 2021 and 2022, and no documents from any previous year. Da035-061.

In response to plaintiffs' incomplete document production, Oceanside and Nelson filed a reply brief in support of the discovery motion, as well as a reply in support of the motion to dismiss for lack of standing. In the latter, they attached a series of checks drawn on an account held by M.G. Sheridan to pay for the development of 268 Sheridan Avenue. Pa1048-1059. Additionally, the reply included certifications signed by Michael Golowski in his capacity as Managing Member of a company called Kimba Medical Supply in which it sought to recover costs for medical devices supplied to several defendants, Pa1065-1071, six Special Civil Part complaints where Kimba alleged that its offices are located 268 Sheridan Avenue in Seaside Heights. Pa1073-1099, and an Experian Business Data lookup showing that Kimba's registered address is 268 Sheridan Avenue. Pa1101.

At oral argument on June 9, 2023, counsel for Oceanside and Nelson argued that plaintiff's lack of responses frustrated their ability to investigate whether M.G. Sheridan was transacting business in New Jersey and the extent

of its operations. 3T 15:22 – 26:11. As the argument encompassed both the motion to dismiss for lack of standing and the motion to dismiss for incomplete discovery, the court's decision to dismiss for lack of standing rendered the other motion moot, and it does not appear that an order disposing of the discovery motion was entered.

As the matter presently stands, plaintiffs did not disclose much of the information sought by Oceanside and Nelson relevant to M.G. Sheridan's business transactions in New Jersey from 2014 through 2023, and it is not a part of the record, either before the trial court or on appeal. What is contained in the record is proof that much of the payments for the development of 268 Sheridan Avenue were made from a checking account belonging to M.G. Sheridan, and that Kimba Medical Supply ran its business operations from that address as well.

Defendant All County Contracting joined in Oceanside and Nelson's motion to dismiss for lack of standing, Pa0670, and filed a letter brief joining in Oceanside and Nelson's opposition to plaintiffs' motion for reconsideration. These three defendants now submit this joint brief in response to plaintiffs' appeal.

LEGAL ARGUMENT

I. THIS COURT APPLIES DE NOVO REVIEW TO QUESTIONS OF STATUTORY INTERPRETATION AND STANDING

This case was dismissed for plaintiffs' lack of standing to maintain this action pursuant to N.J.S.A. 42:2A-60, which states that "a foreign limited partnership transacting business in this State may not maintain an action in any court of this State until it has obtained a certificate of authority to transact business in this State." The trial court held, based on the factual record before it, that M.G. Sheridan was precluded from maintaining this suit due to its failure to obtain a certificate of authority. Although the contractor defendants' motion was styled a "motion to dismiss," it was made following extensive discovery and it relied on matters outside of the pleadings. Regardless of whether it is considered a motion under R. 4:6-2(e) or R. 4:46-2, the same standard of review applies. Courts "review issues of statutory interpretation de novo." Matter of Commitment of W.W., 245 N.J. 438, 448 (2021). Likewise, "the issue of standing presents a legal question subject to [this Court's] de novo review." Courier Post Newspaper v. County of Camden, 413 N.J. Super. 372, 381 (App. Div. 2010).

As for review of the order denying reconsideration, an appellate court reviews a trial court's reconsideration decision for an abuse of discretion.

Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Absent a clear abuse of discretion, an appellate court will not disturb the trial court's decision. Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)). With regard to that standard, our Supreme Court has stated:

> Although the ordinary "abuse of discretion" standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. It may be an arbitrary, capricious, whimsical, or manifestly unreasonable judgment. Ordinarily, an abuse of discretion will be manifest if [a party] can show that a discretionary decision (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.
>
> [Flagg v. Essex Co. Prosecutor, 171 N.J. 561, 571 (2002) (citations omitted).]

With regard to a motion to vacate a judgment under R. 4:50-1, the Supreme Court has held that on appeal, "the trial court's determination under the rule warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion." US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012), citing DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009). In order to constitute a clear abuse of judicial discretion, "the judicial

action must have been clearly unreasonable in the light of the accompanying and surrounding circumstances ... [and] a mere difference in judicial opinion concerning the feasibility, expediency or pragmatical propriety of the ruling is [not] synonymous with abuse of judicial discretion." Smith v. Smith, 17 N.J. Super. 128, 133 (App. Div. 1951), certif. denied, 9 N.J. 178 (1952).

II. BECAUSE M.G. SHERIDAN WAS TRANSACTING BUSINESS IN NEW JERSEY AT ALL RELEVANT TIMES, THE TRIAL COURT CORRECTLY HELD THAT IT LACKED STANDING TO SUE DUE TO ITS FAILURE TO OBTAIN A CERTIFICATE OF AUTHORITY

The trial court appropriately determined that by entering into contracts for the sale of goods and provision of services to be provided at a New Jersey address, M.G. Sheridan was transacting business in New Jersey, and therefore foreclosed from maintaining this suit due to its failure to obtain a certificate of authority pursuant to N.J.S.A. 42:2A-60. This was an easy conclusion to reach, as M.G. Sheridan's Certificate of Limited Partnership expressly states that it was organized "to hold, develop, buy, sell and lease real and personal property and equipment." In purchasing, holding, and redeveloping 268 Sheridan Avenue, the partnership engaged in exactly the type of business for which it was formed, and the trial court correctly dismissed this action due to its failure to comply with New Jersey law.

Article 9 of the Uniform Limited Partnership Law mandates that foreign partnerships obtain a certificate of authority in order to transact business here. N.J.S.A 42:2A-55. If they fail to do so, N.J.S.A. 42:2A-60 provides several punitive enforcement mechanisms. Relevant to this matter is the first, which provides that "A foreign limited partnership transacting business in this State may not maintain an action in any court of this State until it has obtained a certificate of authority to transact business in this State." N.J.S.A. 42:2A-60(a).

The ability of the State to require out-of-state business entities to obtain a certificate of authority for engaging in intrastate commerce is well-established. See Bonnier Corp. v. Jersey Cape Yacht Sales, 416 N.J. Super. 436, 441 (App. Div. 2010). While no case has interpreted N.J.S.A. 42:2A-60, defendants agree with plaintiffs that guidance can be found in the New Jersey Business Corporation Act's certificate of authority requirement and the case law interpreting it. N.J.S.A. 14A:13-11. The point of disagreement is whether M.G. Sheridan's business transactions made within this state relating to the redevelopment of 268 Sheridan Avenue fall within the meaning of the statute.

To determine if a foreign business entity is transacting business in New Jersey, this Court is to inquire as to the local nature of the business activity versus interstate commerce. Materials Research Corp. v. Metron, Inc., 64 N.J.

74, 79 (1973). Solicitation of business within New Jersey with additional elements take a foreign corporation "across the threshold of interstate commerce." Davis & Dorand v. Patient Care Med. Secs., 208 N.J. Super. 450, 455 (Law Div. 1985), citing Materials Research Corp., 64 N.J. at 84. Accordingly, in assessing whether M.G. Sheridan was transacting business in New Jersey, this Court should consider the local nature of any business transactions; the residency of the partners; whether the partnership maintained property in New Jersey; and whether the partners entered into any contracts or otherwise bound the partnership while in New Jersey.

It is undisputed that in 2003, M.G. Sheridan was formed, in part, "to hold, develop, buy, sell and lease real and personal property and equipment." In furtherance of that aim, it purchased 268 Sheridan Avenue from Golowski in 2003 for consideration. In 2014, Golowski, who is indisputably a resident of New Jersey and acting in his capacity as the managing partner, entered into a contract with Oceanside to redevelop the property after it had been damaged by Superstorm Sandy. Presumably that contract was executed in New Jersey, and the place for performance was here. The factual record further shows that during 2015, many of the checks that M.G. Sheridan used to pay Oceanside and other contractors were paid using Bank of America checks that list M.G. Sheridan's address as 1675 Route 88, Suite 2, Brick, New Jersey, which

implies that it maintained an office address separate from the residence. See Pa1052-1057.

While plaintiffs argue that there is no evidence that M.G. Sheridan sold property in New Jersey or produces income through the sale or rental of real estate, and that it does not solicit business or advertise in New Jersey or maintain offices or employees, the fact is that M.G. Sheridan provided a woefully incomplete response to Oceanside's discovery demands intended to uncover just that. Oceanside sought documentation dating to 2014 that would fully flesh out the extent of M.G. Sheridan's business transactions, and in response only received heavily redacted tax returns from 2021 and 2022. In fact, the bulk of Oceanside's counsel's argument on the return day of the motion to dismiss for lack of standing focused instead on the missing discovery.

Importantly, from the date of its formation, M.G. Sheridan had the ability to rent the property, to sell it, and to contract with New Jersey residents and businesses to maintain and improve it. Even if it did nothing with the property, merely holding it as an asset is part of the purpose of the limited partnership. Clearly, M.G. Sheridan is involved in commerce, as its first official act was to purchase the property from Golowski. It is not interstate commerce; rather, as the contracts and contacts that form the basis of this

lawsuit occurred here, M.G. Sheridan was required to obtain a certificate of authority prior to suing the people and entities it claims botched the redevelopment of its primary asset. Its failure to do so was fatal, and the trial court correctly dismissed this action.

III. GOLOWSKI DID NOT ALLEGE THAT HE WAS HARMED IN HIS INDIVIDUAL CAPACITY, AND THEREFORE HE WAS APPROPRIATELY DISMISSED FOR LACK OF STANDING

As the fourth amended complaint does not allege that Golowski sustained damages in any capacity other than as the general partner of M.G. Sheridan, the trial court appropriately dismissed the complaint in its entirety. It was not until plaintiffs moved for reconsideration that Golowski alleged, for the first time, that he had written some of the checks to Oceanside from his own personal checking account, but it is well-settled that the reconsideration process is not intended to allow a party to introduce new arguments it could have raised at the summary judgment stage. In any case, if he expended personal funds and was not reimbursed by the partnership, his remedy lies against the partnership, and not the defendants.

In New Jersey, standing is governed by R. 4:26-1, which provides that"[e]very action may be prosecuted in the name of a real party in interest…" To have standing in a case, our Supreme Court has held "a party must present a sufficient stake in the outcome of the litigation, a real adverseness with

respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County., 170 N.J. 439, 449 (2002). Stated differently, "a party must have a sufficient stake and real adverseness with respect to the subject matter of the litigation." Lopresti v. Wells Fargo Bank, N.A., 435 N.J. Super. 311, 318 (App. Div. 2014). While "[a] financial interest in the outcome ordinarily is sufficient to confer standing[,]" it is not automatic. EnviroFinance Grp., LLC v. Environmental Barrier Co., LLC, 440 N.J. Super. 325, 340 (App. Div. 2015). Moreover, a litigant usually does not have standing "to assert the rights of a third party." Ibid. (quoting Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 436 (App. Div. 2011)).

Here, it is not disputed that M.G. Sheridan is the record owner of 268 Sheridan Avenue. In the party identification section of plaintiffs' complaints, Michael Golowski is identified as "the General Partner of M.G. Sheridan Avenue Family Limited Partnership" and not as a litigant in his individual capacity. He represented to the trial court in his cross motion for summary judgment against Oceanside that "all payments were made by M.G. Sheridan and signed by [p]laintiff Michael Golowski to Defendants Oceanside Contracting and Edward D. Nelson." Da011. There was no suggestion, in the original and four amended complaints or in any of the responses to discovery

provided by plaintiffs during this litigation that Michael Golowski had been damaged, in his individual capacity, for the alleged construction defects to property owned by the partnership. In fact, in their brief, plaintiffs assert that Golowski presently resides at 268 Sheridan Avenue without paying rent to the partnership. (Pl. Br. At 18). As for the checks that Golowski wrote from his personal account, they are not contained in the record, as he references only a handwritten ledger and not the canceled checks themselves. Pa0430. He never disclosed whether he received reimbursement from the partnership. The record shows that Golowski is merely a guest of the partnership, and a houseguest has no standing to assert property rights that rightfully belong to the owner.

Additionally, this was not an argument that plaintiff raised in responding to defendants' motion to dismiss for lack of standing. It was raised for the first time on reconsideration, and it is well-settled that this is an improper litigation tactic. See Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015) ("Filing a motion for reconsideration does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying motion."). The dismissal of Golowski's individual claims – which were never properly pled – was correct and should be affirmed.

IV. THE TRIAL COURT CORRECTLY DISMISSED THE CONTRACTOR DEFENDANTS WITH PREJUDICE, AS A COMPLAINT FILED BY A LITIGANT WHO LACKS STANDING IS A NULLITY

As the requirement that a foreign partnership obtain a certificate of authority to transact business in this State is more than a mere formality, the trial court correctly dismissed this matter with prejudice following argument on the contractor defendants' motion to dismiss. Furthermore, given that M.G. Sheridan did not obtain a certificate until after the motion to dismiss had been granted, the court correctly denied reconsideration. Under settled law, the initial complaint and all amended pleadings were null and void, and plaintiffs' attempt to cure the lack of standing came too late to save its cause of action. The order denying reconsideration should therefore be affirmed.

Standing is "the legal right to set judicial machinery in motion." Repko v. Our Lady of Lourdes Med. Ctr., 464 N.J. Super. 570, 574-75 (App. Div. 2020). It is "a threshold justiciability requirement." Id., citing Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 424 (1991). "It neither depends on nor determines the merits of a plaintiff's claim." Ibid. "Unlike subject-matter jurisdiction, which focuses on a court's legal authority to decide a controversy, standing's focus is on the plaintiff's ability to invoke that authority." Ibid., citing In re Adoption of Baby T, 160 N.J. 332, 340 (1999). "A lack of standing

by a plaintiff precludes a court from entertaining any of the substantive issues presented for determination."

As M.G. Sheridan had never obtained a certificate of authority from 2003 until 2023, its efforts to set the judicial machinery in motion were null and void. N.J.S.A. 42:2A-60 provides that "[a] foreign limited partnership transacting business in this State may not maintain an action in any court of this State until it has obtained a certificate of authority to transact business in this State." Litigants may file whatever they want with the court; but a defendant can preclude them from maintaining an action through any of the defenses afforded by R. 4:6-2 and R. 4:46-2. That is what happened here.

There are no reported New Jersey cases that address a plaintiff's belated attempt to cure a defect in jurisdiction by obtaining a certificate of authority during the pendency of litigation. In Clyde Assocs., LLC v. McKesson Corp., 2020 WL 7778067 (D.N.J. 2020), the court observed the following:

> A survey of the sparse caselaw on this issue reveals some New Jersey courts have allowed a plaintiff to cure a certificate of authority deficiency and others have not. Compare Berlin, Sachs & Werkstell v. Cart-Wright Indus., Inc., No. 89-1781, 1990 U.S. Dist. LEXIS 11335, 1990 WL 126197, at *4 n.2 (D.N.J. Aug. 27, 1990) (noting "that the practice of many New Jersey courts has been to allow the plaintiff an opportunity to comply with the New Jersey law during the pendency of the litigation"), Materials Research Corp. v. Metron, Inc., 64 N.J. 74, 77 n.1, (1973) (noting that "[c]ompliance with [this] requirement

> during the course of trial has been held sufficient for a plaintiff unqualified at the action's inception to avoid being precluded from maintaining suit"), and Basement Store Franchise Corp. v. Natoli, No. A-6092-12T4, 2014 WL 4328218, at *4 (N.J. Super. Ct. App. Div. Sept. 3, 2014) (reversing dismissal of the complaint and denial to reinstate the complaint where plaintiff complied with the requirement during the pendency of the litigation), with Seven Caesars, Inc. v. Dooley House, No. A-4747-12T2, 2014 WL 4450441 (N.J. Super. Ct. App. Div. Sept. 11, 2014) (finding that a foreign corporation which loses its certificate of authority due to a lapse in its corporate status cannot cure the lapse by later obtaining a renewed certificate, and thus "may not file suit to enforce claims arising from the business transacted during the period of its lapse"); SMS Financial P, LLC v. M.P. Gallagher, LLC, No. BER-L-5804-17, 2019 WL 5459849 (N.J. Super. Ct. Law Div. Jan. 25, 2019) (granting the defendant's motion to dismiss for lack of subject matter jurisdiction where the plaintiff only obtained a certificate of authority during the litigation).
>
> [Clyde Assocs., 2020 WL 7778067 at *8.]

The District Court observed that these unpublished cases drew a clear line between a situation where the defect in jurisdiction was cured during the pendency of the lawsuit versus a situation where the case is dismissed before the plaintiff obtained a certificate. Published authority, in the form of Repko, supra, holds that a complaint filed by a plaintiff who lacks standing is a nullity, and that subsequent efforts to amend or otherwise cure the defect do not relate back to the original filing. Repko, 464 N.J. Super. at 576. This

Court's decision in Seven Caesars is most in line with Repko and applicable to the case at bar, as there the Court held:

> [A] foreign corporation which loses its certificate of authority to transact business in New Jersey may not file suit to enforce claims arising from the business transacted during the period of its lapse. Moreover, curing the defect and obtaining a reissued certificate to conduct business will not retroactively validate the prior action.
>
> [Seven Caesars, supra, 2014 WL 4450441 at *3.]

Continuing, this Court observed that although Seven Caesars might easily cure the defect, this "does not defeat the court's inability to act in the first instance." Id. at *24. "N.J.S.A. 14A:13-11(1) does not provide for retroactive validation of a foreign corporate registration" Id. at *26.

Here, it is undisputable that M.G. Sheridan did not possess a valid certificate of authority until after the matter had been dismissed with prejudice on June 9, 2023. While the unpublished authorities cited by the District Court suggest that plaintiff could have cured the defect during the pendency of the litigation (now a questionable proposition given Repko), once a final order is entered that opportunity is gone.

As M.G. Sheridan did not obtain the certificate until after the matter had been dismissed, the question for this Court's consideration is whether the trial court abused its discretion by denying reconsideration under R. 4:49-2 or a

motion to vacate under R. 4:50-1. The trial court observed that its "ruling was June 9, 2023," and that "the subsequent actions of the plaintiff don't void the [c]ourt's ruling, which was made on the merits at the time." T4 7:11-14. The court also stated that "my distinct recollection is that there was an argument prior to June 9th where the court made the suggestion that it may behoove the plaintiff to register. That urging of the [c]ourt was received and ignored." T4 10:12-17. This colloquy reveals that the trial court was well aware of the applicable case law, and that plaintiff acted at its peril by failing to register during the pendency of the underlying suit. Had plaintiff cured the defect prior to June 9, 2023, a case could be made that it could proceed with this action. However, M.G. Sheridan's failure to obtain a certificate prior to the dismissal of this action means that it was a nullity, and that there is nothing that can be cured. The trial court, therefore, appropriately recognized that under R. 4:49-2 and R. 4:50-1, there was no basis to reconsider or vacate the order dismissing this action with prejudice. This decision was correct and should be affirmed.

CONCLUSION

For the foregoing reasons, defendants, Oceanside Contracting, Edward D. Nelson, and All County Enterprises, Inc. respectfully request that the orders of June 9, 2023, which dismissed this action with prejudice, and of July 21, 2023, which denied plaintiffs' motion for reconsideration, be affirmed.

Respectfully submitted,
SWEENEY & SHEEHAN
Attorneys for Defendants, Oceanside Contracting, Edward D. Nelson

By: *Neal Thakkar*
Neal A. Thakkar

Dated: January 26, 2024

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 116
TRENTON, NJ 08625-0116

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

January 26, 2023

VIA eCOURTS
Joseph H. Orlando, Clerk
Superior Court of New Jersey, Appellate Division
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 006
Trenton, New Jersey 08625-0006

Re: M.G. Sheridan Avenue Family Limited Partnership and Michael Golowski v. Oceanside Contracting, Edward D. Nelson, Central Jersey Contracting, James Thomas, All County Enterprises Inc., Erik Rusek Electric, State of New Jersey, William Ferguson, Borough of Seaside Heights, Charles Lasky, and Melissa Nelson
Appellate Division Docket No.: A-3778-22

On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Ocean County, Docket No. OCN-L-70-18
Sat Below: Hon. Craig L. Wellerson, J.S.C.

Letter Brief on behalf of Defendants-Respondents, State of New Jersey and William Ferguson

Dear Mr. Orlando:

Please accept this letter brief on behalf of Defendants-Respondents, State of New Jersey and William Ferguson (State Defendants), in the above-referenced appeal.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This case involves claims related to alleged defects in construction work, and governmental approvals related to such work, for a residential property owned by Appellants, M.G. Sheridan Avenue Family Limited Partnership and Michael Golowski (collectively, "Golowski"), that sustained substantial damage from Superstorm Sandy and necessitated the rebuilding of the property's first floor. (Pa468).[2]

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[1] Because they are intertwined, the procedural and factual histories are combined to avoid repetition and for the court's convenience.

[2] "Pa" refers to Plaintiff's Appendix; "Pb" refers to Plaintiff's Brief. "1T" refers to the April 28, 2023 transcript.

The Borough of Seaside Heights ("Borough") issued a permit for the construction on October 2, 2014. (Pa124). Construction was completed in July 2015. (Pa486). On July 10, 2015, Golowski received a Certificate of Occupancy for the residence. (Pa122).

After observing alleged defects in the construction, Golowski filed a complaint in Superior Court on July 12, 2018 against Oceanside Contracting, Edward D. Nelson, Central Jersey Contracting, and James Thomas alleging negligent construction, breach of express and implied warranties, negligent misrepresentation, and a violation of the Consumer Fraud Act. (Pa1-9). As discovery progressed, Golowski filed multiple amended complaints before filing the operative pleading at issue in this appeal, the fourth amended complaint, on July 15, 2021. (Pa102-20). Among other things, this amended complaint brought claims against State Defendants for alleged torts and constitutional violations. Ibid.

The allegations against State Defendants relate to the Borough's issuance of the Certificate of Occupancy. State Defendant William Ferguson ("Ferguson"), now deceased, was employed by the State of New Jersey Department of Community Affairs ("DCA") as a code investigator. (Pa49-50; Pa1137). Ferguson was assigned to the Borough to assist the Borough's Construction Office in the aftermath of Hurricane Sandy. Ibid. Ferguson was

responsible for the framing inspection of the subject home, but Golowski alleged that he failed to confirm the framing was in accordance with the specifications of the approved construction drawings. (Pa106; 1140). Golowski also alleged that Ferguson failed to require Oceanside Contracting, the contractor for the construction, to submit a framing checklist (Form F390) required under N.J.A.C. 5:23-4.5(b)(2). (Pa104).

According to Golowski, the Borough had a policy not to require the code investigators to use Form F390. (Pa34). Golowski also claimed the State endorsed this policy because State Defendants failed to require the framing checklist form in compliance with the New Jersey Uniform Construction Code ("NJUCC") upon inspection of Golowski's property. (Pa106).

At the close of discovery, State Defendants moved for summary judgment. (Pa673-74). The trial court granted State Defendants' motion for summary judgment on April 28, 2023, dismissing with prejudice all claims against State Defendants. (Pa1165-66). As for Golowski's constitutional claims against State Defendants, the trial court held the State Defendants could not be held liable because Golowski did not assert a violation of a constitutional right. (1T44:13-18). The trial court found no support for Golowski's position that noncompliance with regulations, and specifically the failure to use a framing checklist, violated Golowki's constitutional right to due process. (1T41:10-20).

Nor could the trial court conclude that compliance with the framing checklist requirement would have notified the parties of the alleged constructional defects. (1T41:23-42:1). Finally, the trial court highlighted that the Borough issued Golowski a certificate of occupancy, and so he had not been denied use of any land or property. (1T41:22-23).

After the trial court granted State Defendants' motion for summary judgment, additional motion practice continued between Golowski and the remaining defendants until the trial court issued its final order in the matter on July 21, 2023. (Pa1242). On August 9, 2023, Golowski filed a notice of appeal, asking this court to review the trial court's dismissal of the constitutional claims against State Defendants as set forth in Count Twelve of the fourth amended complaint. (Pa1253). Golowski did not specifically request review of his tort claims against State Defendants. (Pa116; Pa1253). Two days later, on August 11, 2023, Golowski filed an amended notice of appeal, which still did not include reference to the tort claims filed against State Defendants. (Pa1264).

This appeal follows.

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED COUNT TWELVE BECAUSE GOLOWSKI FAILED TO ESTABLISH A VIOLATION OF A CONSTITUTIONAL RIGHT. (Responding to Golowski's Point II).

The trial court's order dismissing Golowski's civil rights claim against State Defendants should be affirmed because Golowski cannot demonstrate that the State Defendants violated Golowski's right to substantive due process.

As a threshold matter, while Golowski's fourth amended complaint included claims against State Defendants under tort theories, Golowski's brief on appeal does not argue that the trial court erred in dismissing the tort claims against State Defendants. That is consistent with Golowski's notices of appeal, which indicate that, as to State Defendants, Golowski appeals only the dismissal of his constitutional claims. Because Golowski has abandoned those claims, State Defendants do not address their dismissal in this brief. See R. 2:6-2(a)(6) (requiring all legal arguments to be divided among appropriate point headings); see also Pressler & Verniero, Current New Jersey Court Rules, cmt. 5 on Rule 2:6-2 (2022) ("[A]n issue not briefed is deemed waived.").

As to the trial court's dismissal of his civil rights claims, this court reviews a grant of summary judgment de novo, using "the same standard that governs the motion judge's decision." RSI Bank v. Providence Mut. Fire Ins. Co., 234

N.J. 459, 472 (2018). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged" and that "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). Where the movant demonstrates a prima facie right to summary judgment, the non-movant must come forward with competent evidentiary material to show the existence of a genuine factual dispute. Heljon Mgmt. Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959).

To survive a motion for summary judgment, the non-moving party may not simply allege any disputed fact. Brill, 142 N.J. at 529. Instead, the evidence must demonstrate a genuine issue of material fact, such that, when viewed in a light most favorable to the non-moving party, the evidence would allow a rational factfinder to resolve the disputed issue in favor of the non-moving party. Id. at 540. An "issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

This court should affirm the dismissal of the constitutional claims against State Defendants because, under well-established law, Golowski did not and cannot establish that State Defendants violated any of Golowski's constitutionally-protected rights. Golowski's argument, at bottom, is that the State Defendants violated Golowski's substantive due process rights by allegedly endorsing the Borough's policy of failing to adhere to the NJUCC requirement to use a framing checklist during a property inspection. (Pb35-36).

As the trial court rightly observed, this proposition fails. Under the doctrine of qualified immunity, State Defendants cannot be held liable unless Golowski is able to allege a deprivation of a constitutional right and that the right was clearly established at the time of the violative conduct. Wilson v. Layne, 526 U.S. 603, 609 (1999). "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Hope v. Pelzer, 536 U.S. 730, 739 (2002). A State employee's conduct "violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (citation, brackets, and internal quotations omitted).

In White v. Pauly, 580 U.S. 73 (2017), the United States Supreme Court reiterated the strict standard for what constitutes a "clearly established" right:

> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." al-Kidd, 563 U.S. at 742 [131 S.Ct. 2074]. As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Creighton, 483 U.S. at 639, 107 S.Ct. 3034.
>
> [Id. at 552]

Although a published opinion directly on point is not required for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." al–Kidd, 563 U.S. at 741. Here, Golowski failed at the trial court level and fails in his briefing before this court to proffer case law supporting his position that failure to comply with the regulation to use a framing check list during an inspection violates a substantive right of due process. This failure is dispositive of his claims.

Golowski's reliance on DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592 (3d Cir. 1995), is misplaced. (Pb27-29). First, it does not even accurately reflect the current legal standard for evaluating claims like Golowski's. In United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d

392 (3d Cir. 2003), the Third Circuit abrogated the decision in DeBlasio and made clear that a land-use decision violates substantive due process rights only in instances involving "the most egregious official conduct" and when the government action "shocks the conscience." Id. at 400. Golowski does not come close to satisfying that exacting standard.

Second, even under the less stringent standard that would have applied if DeBlasio reflected the applicable law, Golowski still lacks a cognizable claim. In DeBlasio, plaintiffs alleged that the municipality and the individual municipal officials improperly influenced the decision to deny the plaintiffs' building permit application. Id. at 599. There, the court found:

> [I]n the context of land use regulation, that is, situations where the governmental decision impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim when he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.
>
> [Id. at 601]

The facts here are strikingly different. Unlike in DeBlasio, where the plaintiffs were denied a zoning use variance for their property, see 53 F.3d at 596, there is no dispute here that Golowski obtained a certificate of occupancy. Furthermore, to overcome qualified immunity, Golowski must show that State Defendants violated a clearly established right. DeBlasio simply does not stand

for that proposition; while Golowski alleges his certificate of occupancy is "invalid" because it was issued without following the framing checklist (Pb5-6), he offers no legal support for this position and certainly no case law to bolster it. Thus, State Defendants are entitled to qualified immunity.

Golowski's reliance on Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986), is similarly misplaced. (Pb26-27). Like in DeBlasio, the plaintiff in Sullivan was also denied "certificates of occupancy to which he was otherwise entitled[.]" 805 F.2d at 85. The Second Circuit held that the failure to receive a certificate of occupancy the plaintiff had been entitled to "thereby deprived him of property without due process." Ibid. Thus, the crucial fact that served as the basis for Sullivan's constitutional claim—denial of a right to occupy a habitable residence—mirrors the circumstance in DeBlasio, and remains the exact opposite of what occurred here.

There is no dispute that Golowski was issued a certificate of occupancy, and while Golowski continues to take issue with the procedures used, those alleged failures do not overcome State Defendants qualified immunity when Golowski can point to no clearly established constitutional violation. (Pa122). Neither DeBlasio nor Sullivan puts the "constitutional question" (failure to use a framing checklist prior to issuing a certificate of occupancy) "beyond debate" because they both address a completely separate issue. See al–Kidd, 563 U.S.

at 741. Thus, the trial court properly concluded that State Defendants cannot be held liable because Golowski failed to show a violation of a constitutional right.

Golowski also argues that DCA allegedly put in place an "unlawful practice to not investigate building code violations while there was pending litigation," which is unconstitutional as well as actionable under Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978). This argument also fails against State Defendants. As a matter of law, Monell liability attaches only to local governments and does not attach to the State or its agencies. See Monell, 436 at 690 ("Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."); see also Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, (1989) (holding Monell not applicable to States or governmental entities considered arms of State). Therefore, even under this theory of liability, State Defendants cannot be held because it is inapplicable to State Defendants.

For these reasons, the trial court correctly held that M.G. Sheridan and Michael Golowski cannot make any colorable civil rights claim against the State Defendants because they cannot establish a violation of a constitutional right.

CONCLUSION

For these reasons, this court should affirm the trial court's decision to dismiss Count Twelve of Golowski's Fourth Amended Complaint against the State Defendants with prejudice.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

/s/ Phoenix N. Meyers
Phoenix N. Meyers
Deputy Attorney General
Attorney ID: 307302019
Phoenix.Meyers@law.njoag.gov

Sara M. Gregory
Assistant Attorney General
Of Counsel

M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP and MICHAEL GOLOWSKI,
Appellants/Plaintiffs,
v.

OCEANSIDE CONTRACTING; EDWARD D. NELSON; CENTRAL JERSEY CONTRACTING; JAMES THOMAS; ALL COUNTY ENTERPRISES, INC. and ERIK RUSEK ELECTRIC; STATE OF NEW JERSEY; WILLIAM FERGUSON; BOROUGH OF SEASIDE HEIGHTS; CHARLES LASKEY and MELISSA NELSON,

Respondents/Defendants.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-003778-22

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY, DOCKET NO. OCN-L-000070-18

SAT BELOW: HONORABLE CRAIG L. WELLERSON, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS J.T.C.J. BUILDERS, INC. improperly pled as CENTRAL JERSEY CONTRACTING, and JAMES THOMAS

MENSCHING & LUCARINI, P.C.
1200 Hooper Avenue
Toms River, NJ 08753
(732) 244-3700
E-MAIL: maryellenj@ogb.us.com or
johnm@ogb.us.com
John J. Mensching, Esq. on the Brief
Attorney ID#003091984
Attorneys for Central Jersey Contracting and James Thomas
Dated: January 25, 2024

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PROCEDURAL HISTORY

Respondents agree with the factual recitation of the Procedural History set forth in Appellants' Brief (pages 3-13). Respondents do not agree with any editorial comments or legal argument set forth therein.

STATEMENT OF FACTS

Respondents generally agree with the Statement of Facts set forth in Appellants` Brief(pages 3-13). **Respondents do not agree with any editorial comments or legal argument set forth therein.**

LEGAL ARGUMENT

POINT I

STANDARDS OF REVIEW

The Appellate Court plays a limited role in reviewing the findings on which a trial judge has based a judgment. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474,484, 323 A.2nd 495

(1974). The Court will "not disturb the factual findings and legal conclusions of the trial judge unless, they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice". Ibid; (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155, 188 A.2d 43 (App. Div.), certif. denied, 40 N.J. 221, 191 A.2d 61 (1963); Allstate Ins. Co. v. Northfield Med. Ctr., 228 N.J. 596, 619 (2017). 'Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence". Rova Farms, supra, at 484 (citation omitted); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502 (2002).

However, unlike a trial judge's fact and credibility findings, the judge's "'interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'". Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). A trial judge "is in no better position than we are when interpreting a statute or divining the meaning of the law". D.W. v. R.W., 212 N.J. 232, 245 (2012). The Appellate Division reviews issues of law de novo and accords no deference to the trial judge's legal conclusions. MTK Food Servs., Inc. v. Sirius AM. Ins Co.,455 N.J. Super. 307 (App. Div. 2018). Accordingly, when considering questions of law, its review is plenary. Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123 (2017). With respect to mixed questions of law and fact, the reviewing court will give deference to the factual findings of the trial court which are supported by the record, but review, on a de

novo basis, the trial court's application of the law to such findings. State v. Harris, 181 N.J. 391 (2004).

Generally, the findings of fact of a trial court sitting without a jury should be affirmed if supported by sufficient credible evidence in the record. However if the Judge misconceived the applicable law, or misapplied it to the factual complex, a reviewing Court must adjudicate the controversy anew. Cobo by Hudson Physical Therapy Services v. Market Transition Facility by Material Damage Adjustment Corp., 293 N.J. Super. 374 (App. Div. 1996).

The appellate court is free to remand for clarification of the trial court findings where necessary for review. Balsamides v. Protameen Chemicals, 160 N.J. 352 (1999); Rule 1:7-4.

There is no deference due to a trial court's discretionary decision based on an erroneous view of the applicable law or to findings based on a misunderstanding of applicable legal principles. State v. Rose, 206 N.J. 141 (2011); T.M.S.v.W.C.P., 450 N.J. Super. 499 (App. Div. 2017).

In reviewing summary judgment Orders, the propriety of the trial court's Order is a legal, not a factual, question. Fernandez v. Nationwide Mut. Ins., 402 N.J. Super. 166 (App. Div. 2008). Accordingly, the appellate court applies the same standard as the trial court to the motion record. Green v. Monmouth University, 237 N.J. 516 (2019). An appellate court considers the correctness of the trial judge's decision on the basis of the evidential material

submitted on the motion and not any evidence which may have been developed only after the motion was decided. Zeiger v. Wilf, 333 N.J.. Super. 258 (App. Div. 2000); Lombardi v. Masso, 207 N.J. 517 (2011).

POINT II
THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PLAINTIFFS LACKED STANDING TO INSTITUTE AND MAINTAIN THIS LITIGATION

It is undisputed that, at all relevant times, Plaintiff M.G. Sheridan Avenue Family Limited Partnership (hereinafter, "M.G. Sheridan") was and remains the sole owner, in fee simple, of the real property and premises commonly known as 268 Sheridan Avenue, Seaside Heights, NJ, which consists of a lot improved with a single family detached dwelling, which has been utilized by Plaintiff Michael Golowski as his principal residence. It is also uncontroverted that M.G. Sheridan was and is a limited partnership formed in 2003 pursuant to the laws of the State of Nevada, which, on the date of institution of this litigation through the entry by the trial court of its June 9, 2023 Order dismissing Plaintiffs ` Fourth Amended Complaint for lack of standing (Pa1175), had not obtained from the State of New Jersey a Certificate of Authority.

N.J.S.A 42:2A-60(a) provides as follows: "A foreign limited partnership transacting business in this State may not maintain an action in any court of this State until it has obtained a

certificate of authority to transact business in this State." By its express terms, this statutory provision, couched in mandatory terms, creates a condition precedent to access to New Jersey courts for the purpose of advancing affirmative claims for foreign limited partnerships. In contrast, subsection (b) of that same statute provides, in pertinent part, as follows: "The failure of a foreign limited partnership to obtain a certificate of authority to transact business in this State does not...prevent the foreign limited partnership from defending an action in any court of this State."

In a similar vein, N.J.S.A 14A:13-11(1) provides, in part, as follows: "No foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority." *In Seven Caesars Inc. v. Dooley House, 2014 N.J. Super. Unpub. LEXIS 2222 (Sept. 11, 2014 App. Div.), the Appellate Division had to decide whether a foreign corporation whose certificate of authority to conduct business in this State had expired had the ability to cure that lapse and, upon the issuance of a new certificate of authority, thereby retroactively validate a Complaint which it had filed at a point in time when it did not hold the requisite certificate, as a result of which it had lost its ability to transact business in this State. That court concluded that the lapse in corporate status had*

deprived Seven Caesars of its ability to file suit and that curing that defect by restoring its corporate status during the pendency of that litigation did not operate to retroactively validate that proceeding (which is precisely what the Plaintiff in the within matter attempted to do). In First Family Mortg. Corp. v. Dunham, 108 N.J. 277 (1987), the NJ Supreme Court ruled that this State can require a foreign business entity to file certain documents with this State and can withhold access to NJ courts due to non-compliance (in that case, the Corporation Business Activities Reporting Act , N.J.S.A. 14A: 13-14 to 23) without violating any Constitutional provision. The failure of a foreign entity to undertake the non-onerous task of procuring a certificate of authority from the NJ Secretary of State subjects it to the statutory consequence of being denied access to NJ courts for the pursuit of affirmative claims. SMS Fin. P, LLC v. M.P. Gallagher, LLC, 2019 N.J. Super. Unpub. LEXIS 355 (Law Div. Jan. 25, 2019).

In turn, N.J.A.C. 18:7-1.9 provides, in relevant part, as follows:

"(a) The term "doing business" is used in a comprehensive sense and includes all activities that occupy the time or labor of men or women for profit.

1. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the

purposes of its organization within the State shall be deemed to be "doing business" for the purposes of the Corporation Business Tax Act.

2. In determining whether a corporation is "doing business", it is immaterial whether its activities result in a profit or a loss.

(b) Whether a foreign corporation is doing business in New Jersey...is determined by the facts in each case. Consideration is given to such factors as:...

2. The location of its offices and other places of business;

3. The continuity, frequency, and regularity of the activities of the corporation in New Jersey; ...

5. The location of the actual seat of management or control of the corporation....

(d)...2. Examples of additional activities or contacts with New Jersey that will subject a corporation to the tax based on or measured by income are:...

xi. Owning, leasing, or maintaining in-State facilities,...".

In the case at bar, the Plaintiff-foreign entity was organized for profit; was, by purchasing and continuing to own NJ real property, carrying out the purposes of its organization; has only one business location, namely the subject NJ real estate; has continued to carry out its organizational purposes by owning and

maintaining that property for many years since its acquisition of same; maintains, as its actual seat of management or control of the entity, one and only one location, sited in New Jersey; and owns an in-State facility (albeit, residential in nature). As such, it meets the definitional standards of "doing business".

Plaintiff's contacts with this State cannot be properly characterized as minimal, non-continuous, or irregular in nature. M.G. Sheridan, as the sole owner of the subject property, and not Plaintiff Michael Golowski individually, is the real party in interest pursuant to Rule 4:26-1. Mr. Golowski is not an administrator, guardian, or trustee which would accord to him the right to prosecute this action as a fiduciary.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that the trial court's Order entered on June 9, 2023 dismissing Plaintiffs' Fourth Amended Complaint for lack of standing (Pa1175) and Order entered on July 21, 2023 denying Plaintiffs' Motion for Reconsideration (Pa 1242) should be affirmed.

January 25, 2024

John J. Mensching, Esq.

M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP and MICHAEL GOLOWSKI, Appellants/Plaintiffs, v. OCEANSIDE CONTRACTING; EDWARD D. NELSON; CENTRAL JERSEY CONTRACTING, JAMES THOMAS, ALL COUNTY ENTERPRISES, INC. and ERIK RUSEK ELECTRIC, STATE OF NEW JERSEY, WILLIAM FERGUSON, BOROUGH OF SEASIDE HEIGHTS, CHARLES LASKEY and MELISSA NELSON Respondents/Defendants.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO. A-003778-22** **Civil Action** **On Appeal From:** Superior Court of New Jersey, Law Division, Ocean County, Docket No. OCN-L-70-18 **Sat Below:** Honorable Craig L. Wellerson, J.S.C. **Date Submitted: March 22, 2024**

REPLY BRIEF ON BEHALF OF APPELLANTS/PLAINTIFFS, M.G. SHERIDAN AVENUE FAMILY LIMITED PARTNERSHIP AND MICHAEL GOLOWSKI

STARK & STARK
A Professional Corporation
100 American Metro Boulevard
Hamilton, New Jersey 08619
(609) 896-9060
(609) 895-7395 (FAX)
Attorneys for Plaintiffs

OF COUNSEL AND ON THE BRIEF:
Craig S. Hilliard, Esq. – Attorney ID No. 046541988
chilliard@stark-stark.com

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PRELIMINARY STATEMENT

Defendants' primary argument on appeal is essentially that the State and municipal employees involved were too inept to perform their basic job functions. This argument is not only ludicrous but is also legally unavailing.

The facts underlying this case are neither complicated nor disputed. Plaintiffs hired Nelson,[1] Oceanside, Central Jersey, Thomas, ACE, and Rusek to rebuild a home after it was destroyed by Superstorm Sandy. Plaintiffs believed – as they were entitled to do – that they were hiring competent and professional individuals. This was unfortunately not so. Defendants failed to complete the most basic functions such as properly spacing floor joists using the correct, approved, stronger specified materials and placing them in the correct location. Plaintiffs are now left with a property whose structure is failing. Walls are cracking, floors are uneven, major structural girders are in the wrong location, and the roof is deficient, among many other structural deficiencies. In short, the home is uninhabitable.

To make matters worse, Plaintiffs discovered municipal and State employees blatantly violated New Jersey law and regulations by failing to use required forms under the Uniform Commercial Code (UCC)[2] and to inspect the property. The government defendants also failed to take any action (despite receiving a complaint

[1] Plaintiffs reference and incorporate the abbreviations used in their merits brief.

[2] Borough and State employees omitted or falsified statements on the UCC L710, F110, F130, F270, and F100-2 forms.

from Plaintiff, Michael Golowski) to investigate or remedy its employees' wrongful actions.

Now, Defendants allege they have done nothing wrong, and if they did, it was due to incompetence, not intentional acts. For the reasons set forth below and in Plaintiffs' opening Brief, this Court should vacate and remand the trial court's decision to grant summary judgment in favor of the government Defendants and the dismissal of Plaintiffs' remaining claims.

LEGAL ARGUMENT

I. MICHAEL GOLOWSKI HAS INDIVIDUAL CLAIMS AGAINST DEFENDANTS.

Defendants incorrectly argue Michael Golowski ("Golowski") has no individual claims because they were not pled. This is a blatant misstatement of facts. Although the hearings regarding Defendants' motion to dismiss focused on M.G. Sheridan's standing, Plaintiffs have consistently maintained that Golowski has claims in his individual capacity against Defendants. As noted in Plaintiffs' first Complaint filed on January 12, 2018, Golowski is a named Plaintiff and each and every cause of action is also asserted on his behalf. See (Pa0001-Pa0009). The same is true of each and every subsequently filed amended complaint. See (Pa0010-Pa0025); (Pa0064-Pa0080); (Pa0083-Pa0101); (Pa0102-Pa0119).

Moreover, the evidence in the record clearly establishes more than ample basis for Golowski's individual claims. The contract for the project with Oceanside lists the contracting party as Golowski—*not* the partnership. See (Pa0493). In addition, during the proceedings below, Golowski produced a ledger of payments to Oceanside and ACE made by him in a personal capacity in cash and checks drawn from his personal bank account. See (Pa0430); (Pa1181). The trial court engaged in no analysis whatsoever as to Golowski's individual standing. This failure alone is grounds for reversal.

It is well-established that New Jersey's standing requirements are broad and to be liberally interpreted. See State v. Lavrik, 472 N.J. Super. 192, 204 (App. Div. 2022) (citing Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009)). To establish standing a party needs to show "a sufficient personal stake in the controversy to assure adverseness, and the controversy is capable of resolution by the court." Our courts have routinely held that "[a] litigant with a financial interest in the outcome of the litigation will ordinarily have standing." Courier-Post Newspaper v. Cnty. of Camden, 413 N.J. Super. 372, 381 (App. Div. 2010) (citing Marshall v. Raritan Valley Disposal, 398 N.J. Super. 168, 176 (2008)).

Pursuant to these principles, Golowski clearly has standing to pursue these claims against the various Defendants. By his payments to the contractors in his individual capacity, and his entering into the contract at issue with Oceanside, Golowski has clearly demonstrated a sufficient financial interest in the litigation to confer standing.

II. M.G. SHERIDAN WAS NOT REQUIRED TO OBTAIN A CERTIFICATE OF AUTHORITY BECAUSE IT DOES NOT TRANSACT BUSINESS IN NEW JERSEY.

Oceanside, Nelson, and ACE argue that M.G. Sheridan was "transacting business" because another entity, Kimba Medical Supply, is located at 268 Sheridan Avenue. This fact is legally irrelevant to the question of whether M.G. Sheridan was transacting business within the meaning of N.J.S.A. 42:2A-60. The mere fact that another entity may be operating[3] at the same location is not probative of the issue of whether M.G. Sheridan itself transacts business.

Defendants also argue that because M.G. Sheridan had the "ability" to dispose of the Property, this constitutes "transacting" business. They further point to M.G. Sheridan hiring contractors and sub-contractors to rebuild the Property as evidence of M.G. Sheridan's business transactions. Both propositions are incorrect. Simply because an entity has the "ability" to transact business does not indicate that it should or must obtain a certificate of authority. If this were the case, *every* entity would be

[3] It is important to note that there was no evidence another entity was operating on the premises. All that was introduced by Defendants were a few years-old certifications signed by Golowski on behalf of Kimba.

required to obtain a certificate of authority, and that is plainly not the law. More importantly, there is no authority that holds that the mere entering into of a contract constitutes "transacting" business in New Jersey. In fact, N.J.S.A. 42:2A-60(b) explains that a contract shall not be deemed invalid because the contracting entity did not have a certificate of authority. Even if this carveout was not included in the statute, this is precisely the situation that arose in Empresas Lourdes, S.A. v. Kupperman, Civil Action No. 06-cv-5014(DMC), 2007 U.S. Dist. LEXIS 70910 (D.N.J. Sep. 24, 2007). There, the court explicitly refused to find that one transaction could rise to the level of transacting business within the meaning of the statute.

Last, Defendants also point to the fact that M.G. Sheridan maintained a bank account in the State of New Jersey. This is also legally insufficient to find M.G. Sheridan transacts business in the State. As set forth in N.J.A.C. 18:7-1.9(c), New Jersey's Tax Code states "[a] foreign corporation shall **not** be deemed to be doing business or employing, or owning capital or property in this State . . . by . . . [t]he maintenance of cash balances with banks or trust companies in New Jersey." (Emphasis added). Clearly, the purpose of N.J.S.A. 42:2A-60 is not to require a foreign corporation that merely holds assets to obtain a certificate of authority but rather to require entities that are actively selling goods or services to place the Secretary of State on notice that they are active within New Jersey. M.G. Sheridan was not selling goods or services in New Jersey. Nothing in the record below would demonstrate otherwise. Moreover, no party was prejudiced by M.G. Sheridan's

registration status during the course of the proceedings below. Accordingly, the trial court's conclusion that M.G. Sheridan's entire case was infirm because it failed to obtain a certificate of authority was plain error and should be reversed.

III. PLAINTIFFS HAVE BEEN DEPRIVED OF THE RIGHT TO FREELY DISPOSE OF THEIR PROPERTY.

Defendants argue that Plaintiffs have not set forth a constitutional violation of their property rights because a Certificate of Occupancy was granted to them. Defendants are in essence saying a municipal government may deprive an owner of the right to dispose of his property and there is no remedy at law for such a violation.

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and *dispose of* property." Lynch v. Household Fin. Corp., 405 U.S. 538, 544 (1972) (quoting Shelley v. Kraemer, 334 U.S. 1, 10 (1948))(emphasis added). Likewise, it cannot be disputed that Plaintiffs have a vested property right to enjoy or sell the Property as they choose.

Several federal appellate courts have taken this proposition further and found a constitutionally protected property interest in obtaining a permit. See Arrigoni Enters., LLC v. Town of Durham, 629 F. App's 23, 25 (2d Cir. 2015) ("A constitutionally cognizable property interest in a land use permit arises only when a plaintiff can show a 'clear entitlement' to the permit."); see also Bowlby v. City of Aberdeen, 681 F.3d 215, 220 (5th Cir. 2012) ("Privileges, licenses, certificates, and

franchises . . . qualify as property interests for purposes of procedural due process." (quoting Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n, 547 F.2d 938, 941 (5th Cir. 1977)). To establish such a property interest, a party has to demonstrate that "at the time the permit was denied, there was no uncertainty regarding his entitlement to it under applicable state or local law, and the issuing authority had no discretion to withhold it in [the] particular case." C.C.S.com USA, Inc. v. Gerhauser, 518 F. App'x 1, 3 (2d Cir. 2013) (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 n.1 (2d Cir. 1999)).

Further, New Jersey courts have found that a property owner who sells real property that is in a dangerous condition may be held liable for the condition. See Wickner v. Am. Reliance Ins. Co., 141 N.J. 392, 398 (1995). Naturally, local governments have an interest in protecting the public from purchasing property with serious structural defects. The Borough of Seaside Heights' own ordinance, NJ Ord. § 55-1 states that the purpose of requiring a certificate of occupancy is "to protect the health, safety and welfare of those purchasing dwelling units…." This is precisely why the Borough requires a certificate of occupancy be issued before an individual can sell their property. See Borough of Seaside Heights, NJ, Ord. § 55-2(A). Importantly, the local ordinance makes it crystal clear that any certificate of occupancy should "verify[] that the property is in compliance with all applicable zoning and property maintenance laws of this Borough, site plans, building permits and Tax Assessor records."

Defendants' arguments focus solely on the fact that Plaintiffs obtained a Certificate of Occupancy from the Borough, which they argue is distinct from a situation where Plaintiffs were denied the right to the Certificate. However, the end result in both scenarios is the same: Plaintiffs cannot dispose of their Property. Although Plaintiffs were issued a Certificate of Occupancy, the fact remains that it does not comply with the applicable UCC statutes nor is the Property safe to occupy, and there was ample support in the record below to support those claims. Because the Certificate of Occupancy does not provide these basic guarantees, it is deficient. And, without a valid Certificate of Occupancy, Plaintiffs would be in violation of Borough ordinances if they attempted to sell the Property. For these reasons, Plaintiffs asserted a valid property interest protected by the constitutional dictates of the Fourteenth Amendment, and must be allowed to proceed with their claims under it.

IV. MELISSA NELSON'S ADMITTED ALTERATION OF OFFICIAL DOCUMENTS ILLUSTRATES A DISREGARD FOR PROCEDURE AND SHOWS THE BOROUGH'S PRACTICE OF IGNORING UCC REQUIREMENTS.

Defendants also allege that Melissa Nelson's writing of "h/o waived warranty" on the Certificate of Occupancy was just "shoddy bookkeeping" and cannot support a legal claim. This argument is disingenuous, at best.

During Nelson's deposition in August of 2019, she stated that she recalled "Mr. Golowski . . . signed [the document] outside" the municipal building.

(Pa0196). She testified that she then took the document, went inside the building, and wrote the note "h/o waived warranty" for herself and initialed it. See (Pa0195-Pa0196).

Yet, during Nelson's deposition testimony of February 3, 2022, the following colloquy took place:

> Q. Ms. Nelson, if you look at that document which has been marked as MN-4, on the third page there's again an Application For Certificate, at the top of which there's some handwriting. Do you see that?
>
> . . .
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.
>
> Q. Ms. Nelson, you don't see the handwriting at the top of this document that's been marked as MN-4 at the part that reads "Application For Certificate"?
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.
>
> Q. Ms. Nelson, at the top of the document there's written H forward slash O waived H forward slash O warranty, initials MN, with a little dash at the top of the N, and then there's parentheticals on either side of that language. Do you see that language on this document?
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.
>
> Q. Ms. Nelson, did you place this handwriting at the top of this document?
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.

> Q. Ms. Nelson, when you compare MN-4 to MN-3 at that part of the document that has the Application For Certificate, and if you need to have the two documents put up side by side here in Zoom we'll do that, you'll see that the dating that was on MN-3 of 10/2/14 has been eliminated from the document that's been marked as MN-4. Do you see that?
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.
>
> Q. Ms. Nelson, did you alter the documents that have been marked both as MN-3 and MN-4 as to the Application For Certificate by removing the dating of 10/2/14?
>
> A. Upon the advice of counsel I assert my Fifth Amendment privilege and respectfully decline to answer.
>
> [(Pa0165-Pa0166).]

There can be no doubt, comparing both deposition testimonies, that Nelson contradicted and perjured herself. There is no other explanation for why the notations on the two applications are different. Moreover, Nelson was aware that her husband and Oceanside had no authority to offer a new home warranty because he was not registered to build new construction. See (2T76:13-77-3); (2T81:3-25).

Nelson's testimony is an admission that there were material changes made to Plaintiffs' application for a Certificate of Occupancy during the course of Plaintiffs' case. Nelson took it upon herself to waive Plaintiffs' right to a homeowner's warranty and then attempted to cover her tracks by removing the date on the waiver. This is not "shoddy bookkeeping" but an active concealment of the fact that Plaintiffs never waived the right to a homeowner's warranty. These actions are further

evidence that at every step of the way, Defendants have obstructed Plaintiffs' attempts to remedy the issues raised in this appeal and demonstrates the lack of care for following procedure exhibited by the Borough and its employees. These facts support Plaintiffs' claims for a violation of their constitutionally protected property rights, and those claims should proceed in the trial court.

This active misconduct by a Borough employee was wholly ignored by the trial court. The actions of Ms. Nelson show there was a policy, custom, or practice by the Borough to alter documents and ignore the requirements of the UCC. Rather than consider these issues the trial court questioned whether the Borough engaged in wrongdoing "if they decide to waive an obligation that's set forth in the statute[.]" (1T14:14-16). The point missed by the trial court is that the Borough had no authority to waive the homeowner's warranty and they certainly had no right to alter an official document to suit their own needs. As such, Melissa Nelson's deliberate and wrongful actions are the direct cause of Plaintiff's deprivation of a valid Certificate of Occupancy. See Besler v. Bd. of Educ. Of W. Windsor-Plainsboro, 201 N.J. 544, 566 (2010) ("Once the trial court has determined that an individual official has 'the power to make official policy on a particular issue,' it is then for the jury to decide whether that individual's decision 'caused the deprivation of [the right[] at issue.'" (Alteration in original) (citation omitted)).

V. CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the trial court's grant of summary judgment should be reversed, and their claims reinstated against all Respondents.

Respectfully submitted,

STARK & STARK
A Professional Corporation

By: */s/ Craig S. Hilliard*
CRAIG S. HILLIARD, ESQ.

Dated: March 22, 2024