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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2625-20

JOHN SANTUCCI, DEBRA
SANTUCCI, AND HOPE
AMARENA,

Plaintiffs-Respondents,

v.

DOLORES D. SANTUCCI,

Defendant-Appellant,

and

ESTATE OF JOHN D. SANTUCCI
(ESTATE) and DOLORES D.
SANTUCCI, INDIVIDUALLY
and as EXECUTRIX OF THE ESTATE,

Third-Party Plaintiffs-Appellants,

v.

JOHN D. SANTUCCI, CPA, DEBRA
SANTUCCI, HOPE AMARENA,
BARBARA HILL, RENEE A. PALADIN,
JOSEPH SANTUCCI, JOHN SANTUCCI
DEBRA SANTUCCI, ESTATE OF CARLO

SANTUCCI, JR., DECEASED, BNE
ACQUISITIONS, LLC, and FARKINGS
PARTNERS, LLC,

Third-Party Defendants.

Argued September 26, 2023 — Decided October 16, 2023

Before Judges Sabatino, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Essex County, Docket No. C-
000184-19.

Jeffrey Zajac argued the cause for appellants (Vyzas &
Associates, PC, and Jeffrey Zajac, attorneys; Vincas M.
Vyzas, of counsel; Brian T. Flanagan and Jeffrey Zajac,
on the briefs).

Jay J. Rice argued the cause for respondent (Nagel
Rice, LLP, attorneys; Jay J. Rice and Bradley L. Rice,
of counsel and on the brief).

PER CURIAM

Defendant Dolores D. Santucci appeals from April 5 and December 15,
2021 orders, which denied her motion for relief from summary judgment entered
in favor of plaintiffs John Santucci, Debra Santucci and Hope Amarena.¹ She

¹ Although defendant's notice of appeal and case information statement state she also appealed from: a December 13, 2019 discovery order; July 24, 2020 orders granting John and Debra summary judgment and denying defendant summary judgment; and an April 21, 2021 order denying defendant post-

also challenges the denial of her motion for attorney's fees and sanctions pursuant to Rule 4:46-5(b) and Rule 4:50-3. We affirm.

This matter involves a property ownership dispute over a one-tenth interest in a vacant lot owned by the decedent, John D. Santucci, and Hope.² The couple married in 1960, and two children were born of the marriage, John and Debra. During the marriage, decedent and Hope owned a marital home on Carlos Drive and a commercial property on Little Falls Road, both in Fairfield.

In 1967, Hope and decedent acquired a one-fifth interest in a third property—a vacant lot on the south end of Carlos Drive ("Lot 5") as tenants by the entirety with the right of survivorship. Lot 5 was one parcel of a three-lot area intended for development, which was owned by various individuals and entities related to the Santucci family.

In 1986, decedent and Hope divorced and entered a property settlement agreement (PSA). The PSA provided decedent and Hope would "remain joint

judgment discovery, defendant has not briefed arguments related to these orders. "[A]n issue not briefed is deemed waived." Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023). Nonetheless, a discussion of these orders is necessary to provide the background of this litigation.

² Because there are several parties in this matter, some of whom share the same surname, we will refer to all of them by their first names to avoid confusion, except John D. Santucci, who we will refer to as the decedent. We intend no disrespect.

owners in [the former marital residence and the commercial property] until the sale of either of the properties and [will] enter into a formal partnership agreement, should it be appropriate for income tax purposes." The PSA stated it was the parties' intent that Hope would purchase decedent's interest in the former marital residence and become its sole owner, and decedent the owner of the commercial property. The PSA permitted Hope to reside in the former marital residence, pay the carrying expenses, and sell it at her sole discretion on notice to decedent. Likewise, decedent had sole discretion to sell the commercial property. When one of the properties sold, the other would be appraised and the parties would equalize "the net equity of the value of both pieces of real estate."

As to Lot 5, the PSA stated: "The parties are owners of an undivided one-fifth . . . interest in vacant lands of approximately [two] acres at the south end of Carlos Drive They agree that they will convey their interest to their children of the marriage at a mutually agreed upon time."

By virtue of the divorce, decedent and Hope's interests in Lot 5 converted into two equal, undivided interests of one-tenth each, which they thereafter held as tenants in common. In 1989, pursuant to the PSA, decedent transferred his fifty-percent interest in the former marital residence to Hope. In exchange, she

transferred her fifty-percent interest in the commercial property to decedent. John and Debra began paying the pro rata real estate taxes for Lot 5 because Hope represented the lot had been conveyed to them pursuant to the PSA.

In 1995, decedent married defendant. In 2005, he transferred his ownership in the commercial property to plaintiffs, as co-trustees of the John D. Santucci Children's Trust. In 2012, decedent executed his last will and testament, appointing defendant as executrix of his estate. The will stated:

[1]: I give, devise[,] and bequeath all my estate and property, real, personal[,] and mixed, wheresoever situated, of which I may die seized or possessed or to which I may be entitled at the time of my death to . . . [defendant].

[2]: Whereas I have provided for . . . [plaintiffs] during their lifetime, it is my wish and desire to leave them nothing under the terms of this [w]ill.

In 2013, decedent executed a codicil, which provided the following:

[1]: Whereas I have provided for [plaintiffs] during their lifetime, it is my wish and desire to leave them nothing under the terms of this [w]ill.

Should . . . [defendant] predecease me, or die as a direct result of the same disaster, epidemic[,] or catastrophe as shall cause my death, then I give, devise[,] and bequeath my estate to my stepdaughters[,] equally by representation (per stirpes).

There is no dispute decedent executed the will and codicil of sound mind and without undue influence.

Decedent passed away in 2013. Defendant did not probate decedent's will until October 2019.

On July 11, 2016, plaintiffs and the other owners of Lots 4, 5, and 6 entered a contract with a developer to develop the lots. The contract stated the Lot 5 owners were: "JOHN D. SANTUCCI and HOPE AMARENA, husband and wife, individually; and JOSEPH SANTUCCI and JOHN SANTUCCI, DEBRA SANTUCCI as all of the surviving Executors of the Estate of Carlo Santucci, Jr." along with two other owners. The contract was amended later that month and reflected the Lot 5 owners as: "HOPE SANTUCCI (AMARENA), JOSEPH SANTUCCI and JOHN SANTUCCI individually and as all of the surviving Executors of the Estate of Carlo Santucci Jr., AMY Santucci and, Debra Santucci" and the other two owners listed on the initial contract.

In the summer of 2019, in anticipation of a potential fall closing, sellers' counsel advised John and Debra that—despite paying taxes on Lot 5 for years—neither Hope nor decedent had transferred their interest in the property as required by the PSA. Therefore, counsel asked defendant, as executrix of decedent's estate, to formally convey the interest in Lot 5 to John and Debra so

the transaction could close. In the alternative, counsel offered to escrow the proceeds pending a judicial determination of the parties' rights. Defendant refused, and this litigation commenced.

Plaintiffs filed a complaint and order to show cause in the Chancery Division to escrow funds from the closing, pending an adjudication that John and Debra were entitled to the proceeds from the sale of the one-fifth interest in Lot 5 pursuant to the PSA. Defendant contended she was entitled to decedent's half of proceeds of Lot 5 because the post-divorce real estate transactions related to the commercial property and the former marital home had modified the PSA. She counterclaimed on a myriad of grounds.

Defendant also asserted third-party claims against all other parties involved in the sale of the lots. Those parties, in turn, moved to intervene. Defendant then entered a consent order with the third-party defendants and intended intervenors, settling her claims against them for \$30,000. The closing occurred in November 2019. Lot 5 sold for \$179,577.90.

The trial judge heard this matter from inception, through final judgment, and adjudicated the post-judgment motions. He entered an order on December 13, 2019, which denied plaintiffs' order to show cause. He noted discovery was necessary regarding defendant's claim the PSA was modified when decedent and

Hope relinquished their interests in the marital home and commercial property "allegedly are contrary [to] the terms of the [PSA] and thereby may have materially impacted the subject property and the provision for [plaintiffs] pertinent to" Lot 5.

Notably, the order reflected a case management conference had occurred and addressed discovery issues. The resulting case management order stated discovery was "limited to the issues surrounding the transfer of [the former marital residence] and the creation of the [t]rust regarding [the commercial property]." The order established sixty days for discovery, permitted the parties to exchange requests for written discovery, and conduct depositions.

In July 2020, following discovery, plaintiffs moved for summary judgment. They argued Debra and John were third-party beneficiaries under the PSA, and Lot 5 was held in a constructive trust for their benefit. They asserted defendant's counterclaims should be dismissed because: the PSA was never modified; defendant lacked standing; the statute of limitations barred her counterclaims; and there was no evidence to support the counterclaims. Defendant cross-moved for summary judgment to dismiss plaintiffs' complaint on grounds of statute of limitations, laches, the statute for frauds, and judicial

estoppel, which she argued precluded plaintiffs from asserting Lot 5 was held in a trust.

The judge granted plaintiffs' motion and denied defendant's motion. He found the PSA clearly and unambiguously provided "the intent of [d]ecedent and Hope was to pass [Lot 5] to their children[.]" The PSA was neither unconscionable nor unfair and had been voluntarily entered with the advice of independent counsel. The agreement contained a provision that "[e]ach [p]arty shall, at any time and from time[-]to[-]time hereafter, take any and all steps and execute, acknowledge, and deliver to the other party, any and all further instruments . . . for the purpose of giving full force and effect to the provision[s] of this [a]greement." The judge found this provision applied to Lot 5 as well. He noted the PSA contained a provision binding the parties' "heirs, next of kin, executors and administrators[.]" which showed "the parties even anticipated that one or the other may pass before the conveyance to Debra or John." He concluded "a rational meaning in keeping with the expressed general purpose of the [PSA] leads th[e] court to conclude the parties intended for the [Lot 5 p]roperty to be conveyed to John and Debra."

The judge granted plaintiffs a constructive trust on the proceeds of the property. He found defendant's "refusals to transfer [Lot 5] to John and Debra

and to transfer the proceeds" was wrongful. Defendant's claim to the property and its proceeds would unjustly enrich decedent's estate and defendant, its beneficiary.

The judge addressed each of defendant's counterclaims in detail. He concluded she lacked the evidence to prove her claims of: undue influence; misrepresentation; duress; unfair advantage; fraud; unjust enrichment; fraudulent concealment; unconscionability; misappropriation; conversion; and breach of fiduciary duties and obligations of good faith, fidelity, and fair dealing. Defendant had certified the will and its codicil expressed decedent's true intentions and were entered of his own free will. Moreover, although she opposed the transfer of the commercial property into a trust for John and Debra's benefit, she and decedent discussed the matter, and he told her he wanted to provide for his children. The judge concluded summary judgment was appropriate because "[c]ompletely[] absent from [defendant's] description of the transaction is any assertion that Hope, John[,] or Debra exerted any of the actions alleged in the counterclaim."

Further, Hope and Debra had no fiduciary relationship to be in breach of. "Perhaps John's action on behalf of [d]ecedent as [a] CPA created a fiduciary relationship. [However], there is no evidence that any breach of the alleged

fiduciary relationships 'denied rights' or that [d]ecedent/[e]state/[e]xecutrix 'sustained damages.'"

Defendant's claim for wrongful and intentional interference with contract rights failed because there was no evidence she had any contractual entitlement. She also claimed plaintiffs interfered with a prospective economic advantage because they knew or should have known the contract to sell Lot 5 would impair the estate's rights. The judge found the contract was incorrectly executed because only decedent or his estate could execute it. However, there was no evidence the error had damaged the estate or defendant, because the court entered an order preventing Lot 5's sale without defendant's consent.

Defendant argued plaintiffs' receipt of commercial property and Hope's receipt of the former marital home qualified as substitute performance, obviating any other potential obligations from defendant. The judge rejected this argument and found "no evidence that [d]ecedent's and Hope's handling of the [m]arital [h]ome and [commercial property were] different from the provisions of their PSA, [or] in any way modified the PSA regarding [Lot 5]." As a result, defendant's claim of tortious interference with property rights, and her claim for economic damages, could not stand as well.

The judge denied defendant's claim for a constructive trust against all the estate's assets because "there is no evidence of the other assets alleged." Defendant's claims of fraudulent transfer, fraudulent conveyance, quiet title, partition, and rights against all other contract signatories were moot by virtue of Lot 5's sale.

Neither the statute of limitations nor laches barred John and Debra's cause of action because their claims did not ripen until defendant refused to comply with the PSA. Further, the PSA contained a provision permitting decedent and Hope to "sue for damages for a breach . . . or seek such other legal remedies as may be available to her or to him." The judge concluded this was further evidence "Hope and [d]ecedent . . . acknowledged that their PSA obligations would survive the date of the judgment"

Defendant claimed the PSA's provision regarding Lot 5 was merely "an agreement to agree" and decedent and Hope never entered a formal agreement to transfer ownership to Debra and John. The judge rejected this argument, citing the PSA's provision binding his estate, heirs, and next of kin to effectuate the PSA after his passing. Further, defendant's interpretation of the PSA would create a better agreement for decedent and defendant than the one struck, which was a "clear and unambiguous promise to convey" Lot 5 to Debra and John.

Defendant argued that decedent's transfer of his interest in the marital residence to Hope and the transfer of his interest in the commercial property fundamentally modified the entire PSA and effected Debra and John's rights in Lot 5. The judge found no evidence decedent and Hope had changed their minds about giving Lot 5 to Debra and John through the transfer of interests in the other properties.

Judicial estoppel did not bar relief to plaintiffs because they consistently asserted the PSA's enforceability throughout the case. Moreover, the court granted discovery on the issue of whether decedent and Hope modified the PSA and defendant was not prejudiced because she could address the arguments raised.

Defendant argued the statute of frauds defeated plaintiffs' cause of action because decedent and Hope failed to convey Lot 5 to Debra and John in writing, and an oral agreement to transfer the property did not suffice. The judge found the PSA's provision regarding Lot 5 satisfied the statute of frauds because it described the property to be conveyed, the nature of the interest, the identity of the transferor and transferees, and it was signed.

The judge granted plaintiffs' summary judgment and denied defendant's motion. He ordered the Lot 5 property proceeds distributed to Debra and John.

Prior to the entry of summary judgment, plaintiffs served defendant with a frivolous litigation letter demanding she withdraw her counterclaims. Following the summary judgment decision, plaintiffs moved for sanctions against defendant pursuant to Rule 1:4-8. Defendant filed a cross-motion for sanctions pursuant to Rule 4:46-5(b), arguing statements in John's certifications in support of plaintiffs' summary judgment motion were made in bad faith.

Plaintiffs argued defendant's counterclaims were frivolous because she lacked standing as she had no interest in Lot 5 and was not a party to the PSA, whereas Debra and John were third-party beneficiaries under the PSA, which imposed a constructive trust on their behalf. Plaintiffs' frivolous litigation letter warned defendant that any claims asserted based on decedent's conduct prior to his passing were meritless and barred by the statute of limitations. The judge found defendant had not advocated frivolously because there was a valid dispute regarding decedent's intent to convey Lot 5 to his children and the discussions he had with defendant about the property, which necessitated discovery. Therefore, they were not meritless. The judge rejected plaintiffs' arguments sanctions were warranted on grounds of laches, unclean hands, and estoppel as without merit.

Defendant's motion claimed John's certifications contained misrepresentations, including that he and Debra: paid the taxes on Lot 5 for twenty years; executed the 2016 contract to sell Lot 5 along with the other owners of the lot to developers; paid the taxes on Lot 5 only to learn later that neither decedent nor Hope ever transferred the property to him and Debra; and contacted defendant to effectuate the transfer of the property to them.³ The judge found: defendant failed to factually rebut John's contention about paying the taxes; his statement about signing the contract was not made in bad faith; his belief the property had been conveyed to him and Debra was not made in bad faith because none of the parties are attorneys who understood the requirements of property transactions; and his statement that they contacted defendant to effectuate the transfer was not in bad faith because it was sellers' real estate counsel who contacted defendant.

On February 18, 2020, defendant filed a motion pursuant to Rule 4:24-3, seeking post-judgment discovery in the form of subpoenas and authorizations from the real estate attorneys who handled the sale of the lots to the developer

³ The judge noted defendant's motion "seem[ed] to hint at other reasons for the imposition of fees and costs" but found no merit to these other reasons. We conclude likewise and decline to address these contentions in a written opinion. R. 2:11-3(e)(1)(E).

and discovery from the managing member of Fairfield Carlos, LLC, which was formed by the sellers to effectuate the transaction with the developer. Defendant argued discovery was necessary because it would show that three years prior to filing their complaint, plaintiffs agreed Debra and John each only had a one-thirtieth interest in Lot 5. Defendant argued this disproved plaintiffs' claims the PSA had set Debra and John's interest in the lot "in stone[.]" She also argued plaintiffs failed to disclose information about Fairfield Carlos, LLC, including its operating agreement.

Plaintiffs opposed the motion on grounds defendant failed to demonstrate the exceptional circumstances required to re-open discovery. Moreover, defendant was aware of the LLC's existence in 2019, including plaintiffs' role in it, and never sought the discovery. Regardless, plaintiffs argued the discovery was irrelevant.

The judge analyzed the factors to establish exceptional circumstances and re-open discovery under Rule 4:24-3. He found defendant did not present any legitimate problems that would have prevented her from seeking or obtaining the discovery prior to the entry of summary judgment. She conceded she was aware of the issues and entities involved, and "[t]he observations and arguments reviewed . . . [were] not new" because they were raised in her opposition to

plaintiffs' summary judgment motion. The judge noted plaintiffs provided the real estate contract in 2019, which clearly identified the LLC, that it was created by the owners, including plaintiffs, and its purpose. The judge found defendant had notice of the participants and entities, and even brought third-party claims against other participants, demonstrating she knew "the transaction had multiple participants[,] yet she did not seek discovery from them.

Moreover, the judge found defendant had ample and multiple opportunities prior to judgment to pursue the discovery. The judge cited the December 13, 2019 order permitting discovery and noted "[t]he discovery focused on [p]laintiff's theory . . . [the] PSA had been voided or modified by [the decedent and Hope's] actions in the years after execution" Notwithstanding the focused discovery, defendant's request for documents and interrogatories sought every written agreement regarding Lot 5. This prompted plaintiffs to object to the discovery demands as overly broad and unduly burdensome. Plaintiffs specifically objected on grounds the discovery sought exceeded the scope of the discovery order. In response, "[d]efendant did not seek or raise the issue during conference with the court; file a motion to compel; or file a motion to expand" the scope of discovery beyond the December 13, 2019 order. "In fact, defendant failed to seek any relief during or after th[e]

court held . . . case status conferences [on] February 20 and 27, 2020." The judge noted he "instructed the [p]arties to bring forth any issues" during the conferences and "[d]efendant did not raise any issues." He noted that during the February 27 conference, "[d]efendant indicated [she] had no discovery issues and planned to file for summary judgment" based on the theory the statute of limitations applied.

The judge rejected defendant's argument the post-judgment discovery would prove Debra and John were excluded from owning Lot 5 notwithstanding the PSA. He found the way the real estate transaction documents were executed was irrelevant to their ownership interests, which were clearly spelled out in the PSA.

The judge also found the parties had already spent money on discovery, motion practice, and litigating the case, and the escrowed funds had been released. Therefore, defendant's eleventh-hour request for discovery would substantially prejudice plaintiffs.

The judge concluded defendant failed to demonstrate the exceptional circumstances necessary to re-open discovery. He entered the April 21, 2021 order denying defendant's motion.

On May 20, 2021, defendant moved pursuant to Rule 4:50-1 for relief from the July 24, 2020 order granting plaintiffs summary judgment, denying her summary judgment, and dismissing her claims with prejudice. Two days later, she filed a notice of appeal. The judge stayed the proceedings pending the appeal, which prompted defendant to seek a remand to allow the judge to hear her motion. We granted defendant's motion for a limited remand.

The judge set a briefing schedule for the motion. After plaintiffs filed their opposition to defendant's motion, she filed her reply, and for the first time, appended two documents: a Memorandum of Real Estate Contract dated December 30, 2008, purporting to sell Lot 5 to a developer; and a New Jersey Department of Environmental Protection-Division of Land Use Regulation Application Form dated March 26, 2012.⁴ Both documents were signed by decedent and Hope as owners of Lot 5. She argued this was evidence decedent and Hope intended to sell Lot 5 "for themselves" and not Debra and John. Because defendant had provided the documents with her reply, the judge

⁴ The judge also relied on a third document, a November 10, 2015 Discharge of Memorandum of Contract and Notice of Termination signed by the sellers noting the cancellation of a real estate purchase and sale agreement dated December 30, 2008.

permitted the parties to file supplemental submissions to address these documents.

The matter was adjourned and conferenced several times, and delayed for more than a month because defendant claimed she had more evidence she needed to marshal before presenting it to the court in support of her motion. After oral argument, the judge issued his December 15, 2021 order and written opinion adjudicating defendant's motion. He gleaned that she sought relief under Rule 4:50-1(b), (c), and (f).

The judge found the memorandum "probably would have changed the court's decision on summary judgment" because it "raise[d] a material fact as to [d]ecedent and Hope's intent or plans, despite the [PSA], . . . for their interest in [Lot] 5." The memorandum was "relevant and perhaps controlling" and the evidence was not cumulative because it "indicated that [d]ecedent and Hope's intent and plan was other than as provided in the PSA."

However, the judge held the documents did not constitute newly discovered evidence that qualified for relief under the Rule because it was obtainable through due diligence. He reiterated the findings from his April 21, 2021 opinion, which noted defendant knew about the owner-related entities through the contract that was provided and had asserted third-party claims.

Further, the defense had the opportunity to obtain discovery, but acquiesced to a narrow scope of discovery, and "seemingly abandoned discovery and rested its defense on the statute of limitations." Therefore,

having chosen a direction or theory, [d]efendant cannot now change [her] mind[] or reopen litigation to pursue a more advantageous position. . . . Furthermore, [d]efendant's focus on post-judgment . . . rather than pre-judgment . . . proceedings twists the rule into itself. . . . [T]he import of the rule goes to a party's diligence before the entry of the judgment

The judge pointed out "all of [d]efendant's purported newly discovered evidence were acquired through the Open Public Records Act, [N.J.S.A. 47:1A-1 to -13 (OPRA)]; [the] Freedom of Information Act [5 U.S.C. §552]; online records research[;] or the New Jersey Judiciary." As such, the documents were obtainable before litigation began. Indeed, defendant initially obtained a site plan application, operating agreement, certificate of formation, and the Fairfield Carlos/Fairkings agreement within three days of her OPRA request. These documents "inspired" defendant to seek additional documents, including the memorandum. "Therefore, despite [d]efendant's theories about [p]laintiff[s] . . . [the information regarding the development of the lots] was . . . a few public document requests away" The judge concluded even accepting defendant's

theory plaintiffs were part of a conspiracy⁵ to deprive her of ownership, nothing prevented defendant from obtaining these documents, and the defense "through the exercise of diligent discovery, could have obtained what it now claims is newly discovered evidence."

The judge found defendant was not entitled to relief from the judgment pursuant to Rule 4:50-1(c) because she "failed to provide clear and convincing evidence of fraud or misrepresentation." Rather, "[d]efendant's failure to exercise due diligence in discovery and a public record search has placed [her] in the position of alleging conspiracies and asserting fraud."

The judge found no grounds for relief under Rule 4:50-1(f) because defendant's baseless fraud allegations and the failure to conduct discovery were not the exceptional circumstances necessary to grant relief under the Rule. He noted defendant was not alleging attorney error or misconduct, which "would provide exceptional circumstances warranting relief under R[ule] 4:50-1(f)." Further, "[p]laintiffs would be substantially prejudiced if compelled to reset the entire litigation . . . hav[ing] expended substantial sums on attorneys' fees and costs, and time in litigating this matter." For these reasons, and because

⁵ Later in his opinion, the judge noted "there is no actual evidence to support [d]efendant's positions that a vast web of actors conspired to prevent [her] from gaining access to these documents."

enforcement of the judgment would not be unjust, oppressive, or inequitable, the judge denied defendant relief from the judgment under Rule 4:50-1(f).

Additionally, the judge rejected defendant's argument that plaintiffs committed fraud on the court entitling her to relief pursuant to Rule 4:50-3. He concluded defendant had not met her burden because her claims were based on "conjecture or supposition . . . [and] without the necessary evidential foundation" compounded by defendant's lack of reasonable diligence to bring plaintiffs' alleged fraud to the court's attention in a timely manner.

I.

On appeal, defendant argues the judge erred when he denied her relief from the judgment under Rule 4:50-1(b) and concluded she could have obtained the newly discovered evidence through diligent discovery. She claims this evidence is contrary to the evidence on which plaintiffs won summary judgment, and the judge found it would have changed the result of the summary judgment motion. Defendant also argues the judge erred by failing to find grounds for fraud, misrepresentation, or misconduct under Rule 4:50-1(c) because plaintiffs withheld information that affected the outcome of the case.

Also, defendant argues the judge should have set aside the judgment pursuant to Rule 4:50-3. Instead, he misapplied Rule 4:50-3 and Rule 4:46-5(b).

Defendant asserts he should have awarded her sanctions and counsel fees pursuant to these rules.

II.

Rule 4:50-1 does not afford relief from a final judgment where a party "rethinks the effectiveness of [their] original legal strategy." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 261 (2009). "Rather, the rule is a carefully crafted vehicle intended to underscore the need for repose while achieving a just result." Ibid. Thus, the rule "denominates with specificity the narrow band of triggering events that will warrant relief from judgment if justice is to be served" and "[o]nly the existence of one of those triggers will allow a party to challenge the substance of the judgment." Id. at 261-62.

To constitute newly discovered evidence under Rule 4:50-1(b), the evidence must have: been "unobtainable by the exercise of due diligence[;]" "probably . . . changed the result[;]" and been "not merely cumulative." DEG, 198 N.J. at 264 (quoting Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)).

Fraud, under Rule 4:50-1(c) requires proof of: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4)

reasonable reliance thereon by the other person; and (5) resulting damages." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). Fraudulent misrepresentation occurs when an individual purports to represent a fact when it is in fact false. Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624 (1981). Legal fraud or fraudulent misrepresentation must be established by clear and convincing evidence. See Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395-96 (App. Div. 1989).

A party alleging a fraud on the court must demonstrate, clearly and convincingly, that the party committing the fraud set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237, 251-52 (App. Div. 2007). Unlike common law fraud on a party, fraud on a court does not require reliance. Ibid.

We review a decision on a Rule 4:50 motion for an abuse of discretion. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion exists "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible

basis.'" Id. at 467-68 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). However, if a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies the law to the facts, we "need not extend deference." Johnson v. Johnson, 320 N.J. Super. 371, 378 (App. Div. 1999).

Pursuant to these principles and having reviewed the totality of the record, we affirm substantially for the reasons expressed in the judge's thorough and well-reasoned opinions. We add the following comments.

The legal standard for relief under Rule 4:50-1(b) requires the movant to meet all three criteria, namely, that the evidence must not have been obtainable through due diligence, that it would have changed the outcome, and that it is not cumulative. Defendant met only the latter two criteria. Her insistence on appeal that this was enough misapprehends her burden on a Rule 4:50 motion. Regardless of the confines established by the discovery order entered during this litigation, the record amply demonstrates she could have obtained the missing evidence, as she did post-judgment and without a court order, through public records.

It was not plaintiffs' burden to provide records outside of the agreed upon scope of discovery. Defendant represented she was satisfied with discovery and

made the strategic decision to defend and pursue the summary judgment motions. The failure of this strategy was not grounds to undo a final judgment by pursuing more evidence. And the discovery of more evidence under these circumstances did not prove plaintiffs committed fraud, let alone fraud on the court, when it was their disclosures in the initial round of discovery that provided defendant with the means of gathering the evidence she needed to prove her case.

Finally, because defendant did not demonstrate a valid reason for the court to grant her relief from the judgment, she was not entitled to either sanctions or counsel fees. To the extent we have not addressed an argument raised on appeal, it is because it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION