

**MEMORANDUM DECISION**

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AMIT SHAH, Individually and derivatively on behalf of JAI SWAMINARAYAN MOUNT LAUREL, LLC	:	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY LAW DIVISION
Plaintiff(s),	:	
vs.	:	DOCKET NO. CAM-L-2934-20
	:	
VIJAY SHROFF, et al.	:	<i>CBLP Case</i>
	:	
Defendant(s).	:	<i>Civil Action</i>

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**Decided:** January 21, 2025

Attorneys for Plaintiffs – Justin E. Proper, Esquire (pro hac vice) and Natalie B. Molz, Esquire, White and Williams LLP

Attorney for Defendants Vijay Shroff, Hema Shroff and 603 Fellowship, LLC – Michael Lauricella, Esquire, Archer & Greiner, P.C.

Attorney for Defendant Mehul Khatiwala – Thomas J. Gossé, Esquire

**STEVEN J. POLANSKY, P.J.Cv.**

**I. BACKGROUND**

Plaintiff files the current motion seeking a new trial in this matter. Trial in this case commenced on October 21, 2024 and concluded November 21, 2024 with a verdict in favor of Defendants<sup>1</sup>.

~~Plaintiffs seek a new trial focused upon the Court’s ruling that the jury would not be advised that Defendant Mehul Khatiwala and a non-party witness Jennifer Watkins chose to exercise their fifth amendment right against self-incrimination. The Court further denied a request for an adverse inference charge with respect to each of these individuals’ assertion of their fifth amendment rights.~~

Plaintiff further seeks a new trial on the basis that the Court refused to permit Plaintiff to introduce evidence that Defendant Khatiwala had a prior criminal conviction. The Court also denied Plaintiff’s request to be permitted to present evidence or explore with Khatiwala the circumstances of his current criminal indictment in the United States District Court for the District of Maryland.

This litigation arises out of the purchase of a Red Roof Inn in Mount Laurel, New Jersey. In or about August of 2014, plaintiff Amit Shah made an offer for the purchase of the Red Roof Inn in

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<sup>1</sup> Defendants on the legal malpractice portion of this suit settled before trial.

Mount Laurel, New Jersey. The purchase offer for the sum of \$4.5 million dollars required a \$100,000 non-refundable deposit. The initial deposit was paid for the purchase of the Red Roof Inn by an entity formed for that purpose, Jai Swaminarayan Mount Laurel, LLC (JSML).

The initial investor in the purchase with Shah was to be Peter Bhi, Shah's brother-in-law who is not a party to this litigation. Bhi brought settling defendant Anthony Foschi, Esq. in as the attorney for structuring the deal and completing the transaction. By October of 2014, Bhi had decided not to participate in the Red Roof purchase.

The Red Roof property was involved in litigation related to a proposed Walmart on an adjacent tract of land. Foschi as counsel raised serious concerns about the impact that litigation would have on the value and viability of the Red Roof Inn property.

In September 2014, shortly after Bhi had withdrawn from the transaction, Vijay Shroff expressed an interest in participating in the purchase of the Red Roof Inn. Ultimately, an undated Operating Agreement for JSML was executed in February 2015 between Amit Shah and Hema Shroff. A separate Power of Attorney Agreement was executed giving Vijay Shroff the power to act on behalf of Hema Shroff with respect to the Red Roof Inn property and the operation of JSML. While undated, there is no dispute that the agreement was signed in February 2015.

Sometime in February 2015 a dispute arose between Shah and Vijay Shroff during a telephone call. The dispute purportedly involved a request by Shah that Shroff contribute money towards a counsel fee bill. Plaintiff asserted that Vijay Shroff backed out of the deal during the exchange. Shroff asserted that it was plaintiff who backed out of the deal during this exchange. The jury concluded that Plaintiff failed to prove that Shroff backed out of the deal.

Thereafter Plaintiff Shah requested the return from Red Roof Inn of the \$100,000 non-refundable deposit made by JSML without the consent of co-shareholder Shroff. That refund was obtained. The deal to purchase the Red Roof Inn subsequently was completed by a new entity, 603 Fellowship LLC. Defendant Hema Shroff remained a fifty percent participant in the new LLC which ultimately purchased the property. Defendant Khatiwala was not a participant in the purchase, although Plaintiff asserts that Khatiwala, Plaintiff's nephew, was in actuality a silent partner in the subsequent purchase. Khatiwala's wife was a 10% owner of the new LLC. Khatiwala operated a separate entity identified as Delaware Hotel Group, LLC.

Prior to trial Khatiwala, Watkins and others were indicted in the United States District Court for the District of Maryland on charges involving bank fraud, conspiracy to commit bank fraud and other related charges on November 2, 2023<sup>2</sup>. The indictment involves loan applications related to the purchase of hotel properties but does not involve the Red Roof Inn property involved in this litigation. Those charges remain pending against Khatiwala and Watkins.

During trial, Jennifer Watkins was called to the witness stand outside of the presence of the jury. She testified that she was asserting her fifth amendment right against self-incrimination on the advice of her counsel in the criminal action, and further indicated that her answer would be the same to all questions posed. Counsel for Defendant Khatiwala represented outside the presence of

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<sup>2</sup> U.S.D.C. Md., Case 1:23-cr-00390.

the jury that Khatiwala would likewise assert his fifth amendment right against self-incrimination and refuse to answer any questions posed at trial should he be called to the stand.

Plaintiff further asserts that he is entitled to a new trial because he should have been permitted to introduce into evidence Khatiwala's prior criminal conviction for bank fraud despite the fact that no testimony or evidence was presented by Khatiwala at trial. Finally, Plaintiff complains that they were not permitted to reference the November 2023 indictment of Khatiwala and Watkins to the jury.

## II. ANALYSIS

Plaintiff files the present motion pursuant to R. 4:49-1 seeking a new trial. This motion was timely filed.

Pursuant to Rule 4:49-1(a), a court may grant a party's motion for a new trial if "having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." The court must not "substitute [its] judgment for that of the jury merely because [the court] would have reached the opposite conclusion . . . ." Dolson v. Anastasia, 55 N.J. 2, 6 (1969); Inness v. Marzano-Lesnevich, 435 N.J. Super. 198, 224 (App. Div. 2014). Instead, the court must "determine whether reasonable minds might accept the evidence as adequate to support the jury verdict." *Ibid.* (quoting Kulbacki v. Sobchinsky, 38 N.J. 435, 445 (1962)).

The verdict of the jury is entitled to considerable deference and should not be disturbed unless after reviewing the record and weighing the evidence, the continued viability of the judgment would constitute a manifest denial of justice. Risko v. Thompson Muller Automotive Group, Inc., 206 N.J. 506, 521 (2011); Baxter v. Fairmont Food Co., 74 N.J. 588, 597-598 (1977).

### A. Khatiwala's Exercise of his Fifth Amendment Right against Self-Incrimination

A Defendant in a civil case, particularly one who has not asserted an affirmative counterclaim, has involuntarily been brought into Court and has no choice but to be present for the opponent's benefit. The privilege can be waived by a Defendant who voluntarily testifies in the action on the merits. State v. Kobrin Securities, Inc., 213 N.J. Super. 161, 169 (App. Div. 1986), reversed on other grounds 111 N.J. 307 (1988). Khatiwala here did not voluntarily present testimony or evidence at trial. Plaintiff opposed any stay of the trial pending the conclusion of the criminal proceedings.

In this case the Court found there was a valid exercise of the privilege against self-incrimination. There was no reason except to permit surmise and innuendo to have the exercise of the privilege against self-incrimination exercised in front of the jury. As Plaintiff points out at page 11 of its brief, the purpose for having Khatiwala invoke his fifth amendment right was to suggest to the jury that all Defendants were involved in criminal activity with respect to this particular hotel deal.

Plaintiff fails to explain how Khatiwala's exercise of his fifth amendment right against self-incrimination would have impacted Defendant Vijay Shroff's credibility.

The first unpublished decision relied upon by Plaintiff involves a question whether a matter was properly stayed pending resolution of criminal charges. There, the Court citing National Freight, Inc. v. Ostroff, 133 N.J. Super. 554, 558-59 (Law Div. 1975) noted that the status of the pending criminal indictment is a significant factor in evaluating the issue. The significance is highlighted in this case by Plaintiff's stated desire to inquire into circumstances of the pending indictment. The Court had ruled in limine that Plaintiff could not pursue such a line of questioning since the indictment did not involve the transaction at issue at trial, but rather involved financing for different hotel purchases. Financing of this hotel deal was not involved in the primary operative facts in this case.

The law does not mandate that an adverse inference be drawn from the assertion of a fifth amendment right against self-incrimination. See Building Materials Corp. of America v. Allstate Insurance Company, 424 N.J. Super. 448, 474 (App. Div.), cert. denied 212 N.J. 198 (2012). Further, where the potential penalty is so severe as to effectively destroy the privilege, no adverse inference should be drawn. Duratron Corp. v. Republic Stuyvesant Corp., 95 N.J. Super. 527, 532 (App. Div. 1967); State Department of Law and Public Safety, Division of Gambling Enforcement v. Merlino, 216 N.J. Super. 579, 587-588 (App. Div. 1987). Adverse inferences may only be drawn if there is other evidence supporting an adverse finding. It cannot alone constitute evidence of guilty conduct. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); State Department of Law and Public Safety, Division of Gambling Enforcement v. Merlino, 216 N.J. Super. 579, 587-88 (App. Div. 1987), affirmed 109 N.J. 134 (1988).

Plaintiff failed to present any basis for such an adverse inference. See State Department of Law and Public Safety, Division of Gaming Enforcement v. Merlino, supra. There must be some basis presented for the adverse inference, and the Court determined none was shown.

In State v. Fournier, 91 N.J. Super. 477, 480-81 (App. Div. 1966), the Court held that where there is knowledge that a witness intends in advance to assert their right against self-incrimination, this should be done outside the presence of the jury to avoid unnecessary prejudice. See also State v. Karlein, 197 N.J. Super. 451 (1984)(finding Court properly refused to permit Defendant to call a separately indicted Defendant to the stand so that the witness could invoke the self-incrimination privilege before the jury because of the risk of undue prejudice); State v. Cullen, 103 N.J. Super. 360 (App. Div. 1968)(holding that "the prosecution is prevented from calling a co-defendant as a witness, or any other witness, when the prosecution has knowledge that the witness will claim his privilege against self-incrimination because such a practice operates the prejudice the defendant in the eyes of the jury").

Plaintiff's theory with respect to Khatiwala, Plaintiff's nephew, was that Khatiwala convinced Vijay Shroff to terminate the purchase agreement of the hotel by JSML. Khatiwala was not a party to the short telephone call between Vijay Shroff and Shah during which it was alleged the parties terminated the deal. It was further undisputed that following this telephone conversation it was Plaintiff who sought a refund of the \$100,000 deposit for purchase of the Red Roof Inn.

It was never suggested that Khatiwala's testimony could address the specifics of the telephone conversation between Vijay Shroff and Shah. Rather, the claim asserted by Plaintiff and developed through other evidence was that Khatiwala's desire to purchase the hotel was the motivation for Vijay Shroff to cancel the deal with Jai Swaminarayan. Ultimately any proposed testimony would have had no bearing on the jury's determination of this specific question which concluded deliberations.

Where a witness or party does not testify in a case, their credibility as a witness is not at issue. Prior criminal convictions are not admissible to attack the witness' credibility under these circumstances. Gonzalez v. Safe and Sound Security Corp., 368 N.J. Super. 203, 210 (App. Div. 2004); State v. Farquharson, 321 N.J. Super. 117, 121 (App. Div. 1999). The Court in Gonzalez explained that where a party does not testify but the other party uses their deposition or other testimony as part of its claim, such conduct does not open the door for an attack on the non-testifying party's credibility, and their credibility is not at issue. Gonzalez v. Safe and Sound Security Corp., N.J. Super. at 210.

Here, Defendant Khatiwala did not testify nor offer affirmative proof with respect to any prior statements he may have made. His credibility therefore was not at issue. While the Court had ruled his prior criminal conviction would be admissible to attack his credibility, since his credibility was not at issue, the Court properly precluded use of the prior criminal conviction.

#### **B. Jennifer Watkins' Exercise of her Fifth Amendment Right against Self-Incrimination**

Witness Jennifer Watkins was subpoenaed to testify at trial by Plaintiff. Ms. Watkins had been an employee of Delaware Hotel Group, LLC. The sole or primary shareholder of the LLC is Khatiwala.

Ms. Watkins was called to the stand outside the presence of the jury and asserted her fifth amendment right against self-incrimination. She further testified that on the advice of counsel she would exercise her fifth amendment right and refuse to answer in response to any questions posed during trial. The sole purpose of Plaintiff's request to have the exercise of the fifth amendment right against self-incrimination occur before the jury would have served no purpose other than surmise and innuendo. Watkins is currently under indictment in the United States District Court for the District of Maryland for the same bank fraud allegations that have been made against Khatiwala.

Watkins was not a party to the litigation and presented no affirmative evidence. She was not deposed by Plaintiff during discovery. Even if such a suggestion of relevance could be made by Plaintiff, the Court concluded under New Jersey Rule of Evidence 403 that the probative value of such an exercise of the fifth amendment privilege before the jury would be substantially outweighed by the risk of undue prejudice or misleading the jury.

Further, the Court notes that Plaintiff represented that the primary reason for which they wished to call Watkins as a witness involved an explanation of the services provided by Delaware Hotel

Group LLC to the subsequent purchaser of the Red Roof Inn, 603 Fellowship LLC. Plaintiff's argument was that expenses reducing profits earned by the purchasing entity should not be reduced by payments made to Delaware Hotel Group. Since the jury never reached the issue of damages, such testimony or lack thereof had no bearing on nor impact on the jury's decision in this case.

### III. CONCLUSION

Plaintiff's entire theory of the case revolved around a short telephone conversation between Vijay Shroff and Plaintiff Shah. Shah claimed that during the telephone conversation Shroff backed out of the Jai Swaminarayan deal. Shroff claimed that it was Shah who backed out of the deal during that telephone discussion.

The verdict sheet in this case consisted of forty-four separate questions. The jury answered 'No' to the first question which read:

Did Plaintiff prove by a preponderance of the evidence that Vijay Shroff backed out of the purchase of the Red Roof Inn through Jai Swaminarayan Mount Laurel, LLC ("JSML")?

All parties agreed that should the jury answer no to this first question, this concluded the case and deliberations would cease.

There was no factual dispute that immediately after this telephone conversation, Shah instructed counsel for Jai Swaminarayan to seek a refund of the \$100,000 non-refundable deposit which had been funded by Shah. The attorney was successful in obtaining that repayment. There further was no dispute that Shah was copied on numerous emails subsequent thereto which sought to put the Red Roof purchase deal back in place, and sought Shah's participation in the deal. Shah denied reading any of the emails with the exception of an email from Khatiwala regarding the deal, but Shah admitted he never responded to Khatiwala.

Given the jury's findings, issues regarding the testimony or lack thereof from Khatiwala and Watkins had no bearing on the jury determining what occurred during a telephone conversation in which only Shah and Shroff participated. Plaintiff therefore is unable to show that it clearly and convincingly appears that there was a miscarriage of justice under the law.

Further, the Court concludes that both Khatiwala and Watkins were entitled to assert their fifth amendment right against self-incrimination due to their being under indictment and awaiting trial on criminal charges for bank fraud and conspiracy to commit bank fraud, among other charges. No evidence was presented which would warrant an adverse inference charge with respect to the assertion of that privilege. Further, other than surmise and innuendo, there is no basis upon which Khatiwala and witness Watkins should have been required to exercise their fifth amendment rights in front of the jury. Rather, it may have been reversible error to permit the exercise of the privilege against self-incrimination to occur before the jury. State v. Nunez, 209 N.J. Super. 127, 132 (App. Div. 1986).

For these reasons, the motion for a new trial is denied.