

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4009-09T1

JAMES STABILE, individually and
in the alternative on behalf of
WESTERN WORLD, INC., CHEYENNE
CORP., and PINK ELEPHANT, INC.,

Plaintiff-Respondent,

v.

MARY STABILE BENSON, MICHAEL
STABILE, EDWARD STABILE, SHARON
ADELMAN, CAROL STABILE, WESTERN
WORLD, INC., CHEYENNE CORP.,
PINK ELEPHANT, INC., CAYUSE,
LLC,

Defendants-Respondents,

and

SCOTT HARRIS, by his Guardian Ad
Prosequendum, BETTY HARRIS,

Intervenor-Appellant.

Submitted: March 14, 2011 - Decided: September 29, 2011

Before Judges A.A. Rodriguez, C.L. Miniman
and LeWinn

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Docket No. L-
484-05.

Laddey, Clark & Ryan, LLP, attorneys for appellant (Andrew A. Fraser, of counsel; Mr. Fraser and Lawrence J. Supp, on the brief).

Mandelbaum, Salsburg, Gold, Lazris & Discenza, P.C., attorneys for respondents Western World, Inc., Cheyenne Corporation, and Pink Elephant, Inc. (David A. Ward, on the brief).

OlenderFeldman LLP, attorneys for respondent James Stabile (Joseph S. Pecora, Jr. and Michael J. Feldman, on the brief).

Mary Stabile Benson and Michael Stabile, respondents pro se.

PER CURIAM

Intervenor Scott Harris, by his guardian ad prosequendum, Betty Harris (Harris), appeals from the denial of his application to modify or vacate a judgment approving the settlement of this action, instituted by plaintiff James Stabile against defendants Mary Stabile Benson (Mary), Michael Stabile (Michael), Edward Stabile (Edward), Sharon Adelman (Sharon), Carol Stabile (Carol) (collectively, the Stabile defendants), Western World, Inc. (Western), Cheyenne Corp. (Cheyenne), Pink Elephant, Inc. (Pink Elephant), and Cayuse, LLC (Cayuse) (collectively, the corporate defendants).¹ Harris also appeals the denial of his subsequent motion for reconsideration. We now reverse and remand.

¹ Edward, Sharon, Carol, and Cayuse, LLC, did not participate in this appeal.

I.

Plaintiff and his five siblings, the Stabile defendants, are all equal shareholders as well as directors of Western, Cheyenne, and Pink Elephant. Cheyenne is a land-holding company which owned two parcels of real estate in Byram Township commonly known as Block 34, Lot 16, containing ten acres,² and Lot 17, containing ninety-two acres.³ The two lots are separated by Route 206. Western operates a business on Lot 17 known as Wild West City and owns a lot that is contiguous to Lot 17. Pink Elephant owns the liquor license that permits Western to serve alcohol to its customers. Cayuse is the lessee of Lot 17 and pays the carrying charges for it.

On September 2, 2005, plaintiff filed a complaint against the Stabile defendants alone alleging various breaches of their directors' duties to shareholders, minority-shareholder oppression, corporate waste, negligent misrepresentation, fraud, breach of fiduciary duty, and conversion. On June 23, 2006, plaintiff secured an order providing in pertinent part that the Stabile defendants were to purchase plaintiff's "interests at a price and [in a] manner to be determined." The corporate

² On September 28, 2006, Blau Appraisal Company (Blau) opined that Lot 16 had a market value of \$1,010,000.

³ At the same time, Blau opined that Lot 17 had a market value of \$10,335,223.

defendants were added to the action by order entered on July 10, 2006.

Three days earlier, on July 7, Harris had been employed as an actor by Western and was participating in the reenactment of a gunfight at Wild West City. A fellow employee actor used a gun that did not contain blanks but rather live ammunition that had been brought to work by another employee sometime prior to the gunfight skit. Harris was shot in the head during the skit, suffered a catastrophic brain injury, and was severely and permanently disabled as a result.

Harris instituted a personal injury action in 2008 that assert strict-liability claims.⁴ The defendants at that time were Cheyenne, Western, Pink Elephant, Cayuse, Michael, Mary, and various fellow employees. Harris sought to intervene in this action and was permitted to do so by order of September 5, 2008. His participation was limited to receipt of notice of all proceedings and orders entered in the action, notice to his counsel of the sale of any real property, and inclusion of his counsel on the counsel list. His request for the appointment of a fiscal agent was denied as premature and he was not permitted

⁴ There is apparently a workers' compensation lien in excess of \$1 million on any recovery obtained by Harris in his personal injury action.

to participate in depositions. Both actions proceeded in tandem for some period of time, although they were not consolidated.

Trial commenced in the shareholders' action in 2009 and on October 30 the parties reported to the trial judge that the matter had settled. It was not until January 18, 2010, that Harris was apprised of the settlement by copy of a letter from counsel for Western, Cheyenne, and Pink Elephant to the judge submitting a proposed form of consent judgment approving the attached settlement and dismissing the action.

The settlement provided for the transfer to Cheyenne of plaintiff's shares in Cheyenne in exchange for title to Lot 16 and some additional property. The settlement agreement also provided that, in the event the proposed conveyance was void or voidable, all parties would return to the status quo prior to the settlement. The judge entered the consent judgment on January 21, 2010.

Harris objected to the judgment by letter dated January 26, 2010, and three days later filed an application pursuant to Rule 4:50 to modify or vacate it. He asserted that the judgment did not protect his rights; he had not consented to it; and Cheyenne received no value in exchange for its land, diminishing the value of Cheyenne's assets. He argued that he was a creditor with an interest in the assets of the Stabile companies under

the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 to -33 (UFTA), and that the assets were being dissipated in derogation of his rights under the UFTA. He sought an order restoring his rights to execute against the real estate in the event he obtained a personal-injury judgment enforceable against Cheyenne.

Western, Cheyenne, and Pink Elephant opposed Harris's application on February 23, 2010. Plaintiff also opposed Harris's application. The Stabile defendants and Cayuse apparently did not file any opposition.

The judge concluded that there were no grounds justifying relief under Rule 4:50 because the intervention was limited in scope; was only intended to give Harris notice of the sale of assets to a third party; the law did not prohibit the shareholders from settling this litigation without notice to Harris; Harris's claim had not been reduced to judgment; and the workers' compensation bar⁵ was "at play." He found no violation of the intervention order; the corporations were not insolvent; and nothing in the record implicated a fraudulent transfer because everything was "done above board." Finally, the judge found "that there was no intent to hinder, delay, or defraud . . . Harris." As such, the public policy favoring settlements pre-

⁵ N.J.S.A. 34:15-8.

cluded any relief from the judgment. In denying Harris's motion, the judge did not make any fact-findings regarding the value of Lots 16 and 17. An order giving effect to this decision was entered on March 5, 2010.

Harris sought reconsideration of the March 5 order pursuant to Rule 4:49-2. He attached a valuation analysis of Lots 16 and 17 prepared by Integra Realty Resources⁶ (IRR) opining that the property had a highest-and-best-use value of \$1,060,000 as of August 1, 2006, because much of the land could not be developed due to wetlands and because it was in the Highlands Preservation Area.⁷ Harris argued that the total of \$11 million estimated by Blau was based on development rights that did not exist and the Blau appraisals were bogus. He also submitted a February 8, 2010, life-care plan and a March 29, 2010, economic report opining that the present value of the cost of medical care for the remainder of his life could be as high as \$23 million. As a result, it was likely that any judgment in his personal-injury action would exceed the value of Cheyenne's assets.

Plaintiff urged that Harris's evidence was not newly discovered, despite the fact that the life-care plan and economic report were both dated after Harris's initial motion.

⁶ This appraisal was submitted by one of the Stabile defendants while this action was pending.

⁷ N.J.S.A. 13:20-7 or N.J.A.C. 7:38-2.2(a).

Michael and Mary also opposed reconsideration, arguing that Harris was not a judgment creditor and his claims were tenuous at best.

The judge determined that there was nothing of significance before him that would warrant reconsideration. He noted that defendants "wanted to end the litigation, stop the hemorrhage of money, and control the fate of the business." He concluded that he was "satisfied that the original settlement was in the best interest of all parties, and that the claims by [Harris], viewed against the backdrop of the worker's compensation bar that applies to him, are tenuous at best, and all things being considered, [he] is not entitled to the relief sought." In denying Harris's motion for reconsideration, the judge again declined to make specific fact-findings as to Cheyenne's possible insolvency. The judge entered an order denying reconsideration on April 16, 2010. This appeal followed on May 6, 2010.

II.

Harris contends that the judge erred in upholding the settlement because it was a fraudulent transfer as defined in N.J.S.A. 25:2-25(b) because he is a creditor, the transfer was without equivalent value, and the remaining assets are insufficient to pay his claim. Additionally, he argues that under

N.J.S.A. 25:2-27(a) the settlement is fraudulent because his claim arose prior to the transfer, there was not equivalent value for the transfer, and the transfer left Cheyenne without sufficient assets. Alternatively, he asserts that the settlement is fraudulent under N.J.S.A. 25:2-27(b) because his claim arose before the transfer and the transfer was to an insider for an antecedent debt but Cheyenne was insolvent at the time of the transfer and plaintiff had reasonable cause to believe it was insolvent. Finally, he urges that the judgment should have been vacated on procedural grounds because he did not consent to the judgment, it was submitted without complying with the five-day provision of Rule 4:42-1(c), and the Stabile defendants did not comply with the notice provisions in the order allowing intervention.

Plaintiff responds that the transfer is not fraudulent because the proofs submitted at trial warranted relief in the form of a buy-out; fair value will be transferred, and Cheyenne will retain a substantial asset and continue its business. Additionally, the transfer is not fraudulent because Cheyenne is not insolvent and will not become insolvent, it is not a debtor under the UFTA and Harris thus has no standing to void the transfer. Finally, he contends that the procedural objections are irrelevant since Harris had notice of the trial and chose

not to attend and had an opportunity to object to the judgment and litigate these motions as well as a separate lawsuit.

Western, Cheyenne and Pink Elephant argue that there was no violation of the UFTA because plaintiff's shares provide adequate consideration for the transfer of Lot 16 and the order for intervention did not require the approval or consent of Harris prior to a settlement or judgment.

Because this matter comes to us as an appeal from orders denying motions for relief from judgment and for reconsideration, we review those orders for a mistaken exercise of discretion. See Housing Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994) ("A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles in determining whether relief should be granted or denied."); Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (reconsideration is committed to the sound discretion of the trial judge).

The exercise of judicial discretion "is not unbounded and it is not the personal predilection of the particular judge." State v. Madan, 366 N.J. Super. 98, 109 (App. Div. 2004). Moreover, the exercise of judicial discretion must have a factual underpinning and legal basis. Id. at 110. Applying these principles, we have explained:

Judicial discretion, sound discretion guided by law so as to accomplish substantial justice and equity, is a magisterial, not a personal discretion. It is legal discretion, in which the judge must take account of the applicable law and be governed accordingly. If the judge misconceives or misapplies the law, his discretion lacks a foundation and becomes an arbitrary act. When that occurs, the reviewing court should adjudicate the matter in light of applicable law to avoid a manifest denial of justice.

[Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 202 (App. Div. 1997), certif. denied, 156 N.J. 381 (1998).]

A trial judge's decision will constitute a mistaken exercise of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" United States v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002)). In such a case, "it is the duty of the reviewing court to adjudicate the controversy in light of the applicable law in order that a manifest denial of justice be avoided." State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966).

III.

The purpose of the UFTA "is to prevent a debtor from placing his or her property beyond a creditor's reach." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 475 (1999). "Underlying the [UFTA] is the notion that a debtor cannot delib-

erately cheat a creditor by removing his property from 'the jaws of execution.'" Ibid.

The UFTA clearly applies here because Cheyenne is a "debtor" and Harris is a "creditor" as defined by the UFTA. This is so because a "creditor" is "a person who has a claim" and a "debtor" is "a person who is liable on a claim." N.J.S.A. 25:2-21. A "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Ibid.

It has long been held that a person asserting a personal injury action qualifies as a creditor. In Lange v. Semanske, 108 N.J. Eq. 538 (Ch. 1931), the court determined, under the language of the then-controlling Fraudulent Conveyance Act of 1919 (UFCA), that the widow and children of a decedent, who was killed after being struck by the defendant, were potential beneficiaries of a Death-Act claim and thus "'creditors' as to whom a conveyance [by that defendant] is or may be fraudulent." Id. at 541; see also Chorpennig v. Yellow Cab Co. of Camden, 113 N.J. Eq. 389, 390 (Ch. 1933) (finding that an infant, who was injured by the defendant's taxicab, and her father became creditors under the UFCA on "the date of the commission of the tort"), aff'd o.b., 115 N.J. Eq. 170 (E. & A. 1934). The UFCA

defined a creditor as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Lange, supra, 108 N.J. Eq. at 541 (internal quotation marks omitted). The court concluded that "a conveyance, if without fair consideration and rendering grantor insolvent, is fraudulent as to [the widow and children] if made after the death or injury resulting in death, notwithstanding the claim under the Death [A]ct has not then been reduced to judgment or even put in suit." Ibid.

More recently, the Chancery Division found that "[t]he UFTA does not prevent a present or future 'creditor' from seeking a remedy prior to judgment." Intili v. DiGiorgio, 300 N.J. Super. 652, 659 (Ch. Div. 1997); see also Flood v. Caro Corp., 272 N.J. Super. 398, 405 (App. Div. 1994). Thus, "a defendant need not be a 'debtor' before plaintiff asserts a UFTA cause of action." Intili, supra, 300 N.J. Super. at 659 (footnote omitted). In reaching this conclusion, the Chancery Division quoted our opinion in Deerhurst Estates Corp. v. Meadow, 70 N.J. Super. 404, 409 (App. Div. 1961), where we determined prior to the enactment of the UFTA, that:

[w]hile the wisdom of the policy might be debated, we must obey the mandate of superior authority and allow the procedure. This new procedure does not mean that conveyances will be set aside as fraudulent before the creditor's claim has been reduced

to judgment or other lien, but it does permit the filing of a complaint for that purpose, so that judgments subsequently obtained may have a better chance of being satisfied.

Similarly, citing N.J.S.A. 25:2-29(a), we found in Flood that under the UFTA;

[a]ny creditor, with or without a judgment, may prosecute a suit (1) to avoid the transfer to the extent necessary to satisfy the claim, (2) to attach or otherwise provisionally secure the asset transferred, (3)(a) to enjoin further disposition of the asset transferred or other property, or (3)(b) to appoint a receiver.

[Flood, supra, 272 N.J. Super. at 405 (emphasis added).]

Based on the foregoing, Harris is clearly a creditor with standing under the UFTA to seek relief during the time his personal injury lawsuit is pending. This is so because he may very well have a viable cause of action against Cheyenne. For example, if Cheyenne was a landlord vis-à-vis Western World and Wild West City, then as a landlord, Cheyenne would have

a responsibility to take reasonable steps to curtail the dangerous activities of tenants of which he should be aware and that pose a hazard to the life and property of other tenants. The landlord's duty arises when the harm is foreseeable and the landlord has sufficient control to prevent it.

[Scully v. Fitzgerald, 179 N.J. 114, 122 (2004) (citation omitted).]

Sharing common directors and shareholders with Western, Cheyenne had sufficient knowledge to prevent the arguably foreseeable harm that occurred here from Western's dangerous activities. Of course, as Harris concedes, until he obtains a judgment, he is limited to the provisional remedies of N.J.S.A. 25:2-29(a).⁸ Flood, supra, 272 N.J. Super. at 405.

Although Harris relies on N.J.S.A. 25:2-25(b) and -27(a), we are persuaded, as he also argues, that N.J.S.A. 25:2-27(b) is

⁸ N.J.S.A. 25:2-29(a) provides as follows:

In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in [N.J.S.A.] 25:2-30, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Chapter 26 of Title 2A of the New Jersey Statutes and by Rule 4:60 et seq. of the Rules Governing the Courts of the State of New Jersey;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(a) An injunction against further disposition by the debtor or transferee, or both, of the asset transferred or of other property;

(b) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(c) Any other relief the circumstances may require.

most applicable to the facts of this case.⁹ That section of the UFTA requires no proof of fraudulent intent, Sec. & Exch. Comm. v. Antar, 120 F. Supp. 2d 431 (D.N.J. 2000), affirmed, 44 F. App'x 548 (2002), and provides as follows:

A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time,^[10] and the insider had reasonable cause to believe that the debtor was insolvent.

[N.J.S.A. 25:2-27(b).]

"The premise of § 27b is that an insolvent debtor should pay debts owed to unrelated creditors before paying debts owed to corporate insiders." Flood, supra, 272 N.J. Super. at 404-05. "Insiders" include officers and directors of debtor corpo-

⁹ In reaching this conclusion, we do not suggest that N.J.S.A. 25:2-25(b) and -27(a) are inapplicable but rather that we need not consider them in deciding the issues before us.

¹⁰ In Flood, we noted the difference in language between N.J.S.A. 25:2-27(a) and (b):

Section 27a applies if "the debtor was insolvent at that time or the debtor became insolvent as a result. . . ." Section 27b applies if "the debtor was insolvent at that time. . . ." Insolvency in the Act is a balance sheet concept. [See 25:2-23(a)]. It is unnecessary for this case to determine if there is an operative difference in the application of §§ 27a and 27b that is produced by the omission from 27b of the words, "became insolvent as a result." [Flood, supra, 272 N.J. Super. at 404-05 n.4.]

rations and their relatives. Id. at 407; accord N.J.S.A. 25:2-22(b)(1), (2), (6). "'Relative' means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree." N.J.S.A. 25:2-22. "The unifying theme among the enumerated persons is that they stand in such close relation to the debtor as to give rise to the inference that they have the ability to influence or control the debtor's actions." Gilchinsky, supra, 159 N.J. at 478.

It is clear that plaintiff is an "insider" pursuant to N.J.S.A. 25:2-22(b)(1), (2), (6), as he and his siblings are the sole shareholders of Cheyenne. However, citing Gilchinsky, supra, 159 N.J. at 478, plaintiff urges that an equitable reading of the statute would lead to a contrary conclusion because he is an oppressed minority shareholder without control. We are not persuaded by this argument because there has been no judicial determination that plaintiff had been oppressed. Even if he was, he is nonetheless a relative within the first degree of the officers and directors of Cheyenne and thus remains an "insider." We also note that the parties to the settlement elected to resolve plaintiff's claims by having one of the cor-

porations rather than the Stabile defendants fund the settlement, apparently contrary to the order for buyout entered when only the Stabile defendants were party to this litigation.

It is equally clear that Harris's "claim arose before the transfer was made" and the transfer was to "an insider for an antecedent debt." N.J.S.A. 25:2-27(b) (emphasis added). Harris was injured on July 7, 2006, and the settlement to resolve plaintiff's September 2, 2005, claim of oppression occurred on October 30, 2009. Thus, the first element of this statutory provision was satisfied.

The second element requires proof that the debtor was insolvent at the time of the transfer. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." N.J.S.A. 25:2-23(a). The challenger bears the burden of proof of insolvency. Johnson v. Lentini, 66 N.J. Super. 398, 404 (Ch. Div. 1961). However, "an insolvency analysis . . . include[s] the value of 'claims' against the debtor," including the contingent liability associated with pending litigation. Advanced Telecomm. Network, Inc. v. Allen, 490 F.3d 1325, 1335 (11th Cir. 2007) (applying New Jersey law), cert. denied, 552 U.S. 1188, 128 S. Ct. 1326, 170 L. Ed. 2d 73 (2008). "The 'fair value' of a contingent liability, of course, should be discounted according to the possibil-

ity of its ever becoming real." Ibid. Further, any liability "must be reduced to its present, or expected, value before a determination can be made whether [a debtor's] assets exceed its liabilities." Ibid. (internal quotation marks omitted).

In seeking reconsideration, Harris submitted prima facie evidence that Cheyenne was insolvent and would remain so at the time Lot 16 would be transferred to plaintiff. The value of Harris's future medical expenses alone dwarfs the value of Cheyenne's apparent assets, thus rendering it insolvent. The parties to this litigation did not suggest that Cheyenne's assets exceeded \$11 million, making those assets less than the total of Harris's claims. Of course, that is not the end of the inquiry because in assessing insolvency, the judge is required to determine the fair value of Harris's contingent claim, discounted by the possibility that it might not be successful, and further discounted to its present value. Advanced Telecom, supra, 490 F.3d at 1335. That was not done here because the judge concluded, without any legal analysis, that Cheyenne was entitled to the bar of the Workers' Compensation Act despite the absence of any proof that it was Harris's employer. Cf. Blessing v. T. Shriver & Co., 94 N.J. Super. 426, 429-30 (App. Div. 1967) ("[A]n employee, for the purposes of workmen's compensation, may have two employers, both of whom may be liable to him in compen-

sation, and a recovery against one bars the employee from maintaining a common law tort action against either for the same injury."); Scott v. Public Serv. Interstate Transp. Co., 6 N.J. Super. 226, 229 (App. Div. 1950) ("Where the employee is entitled to compensation benefits from both employers, he is barred from maintaining a common law negligence action against either of them."). Cheyenne offers no case law to support the proposition that a related company is entitled to the workers' compensation bar even though it is not a co-employer. This was a legally erroneous approach to the issue of the fair value of Harris's claim and the judge's determination is not entitled to our deference.

Last, Harris had the burden to prove, Johnson, supra, 66 N.J. Super. at 404, that plaintiff "had reasonable cause to believe that Cheyenne was insolvent," N.J.S.A. 25:2-27(b). Harris met this burden by proving that the parties to this litigation were aware of the devastating injury he sustained and were aware of the claim he made against Cheyenne, Western, Pink Elephant, Cayuse, Michael, Mary, and various employees of Western as his personal injury action was instituted in 2008 and Harris was permitted to intervene in this action that same year and more than a year before the settlement of this litigation was effectuated. Indeed, one of the earlier judges assigned to the

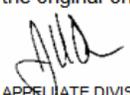
case observed on June 30, 2008, that "there is the tragic shooting that took place at Wild West City on July 7, 2006 which may have significant consequences (financial and otherwise) for the corporations, directors and shareholders."

The judge here should have (1) considered the newly obtained evidence respecting the value of Harris's cause of action, (2) given fair consideration to the applicability of N.J.S.A. 25:2-27(b) to the facts before him, and (3) granted the motion for reconsideration. Accordingly, we remand this matter for further proceedings consistent with this opinion. If plaintiff or defendants dispute the issue of insolvency or Cheyenne disputes the issue of its liability to Harris, a plenary hearing will be required unless the personal-injury action has been resolved. Absent such a dispute, Harris is entitled to one of the provisional remedies set forth in N.J.S.A. 25:2-29(a).

In light of our disposition of the issues raised under N.J.S.A. 25:2-27(b), we need not address the procedural issues raised by Harris.

Reversed and remanded for further proceedings consistent with this opinion.

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


CLERK OF THE APPELLATE DIVISION