

**BRUCE R. EWING**  
(212) 415-9206  
FAX (212) 953-7201  
ewing.bruce@dorsey.com

January 2, 2026

**VIA ELECTRONIC MAIL  
AND FEDERAL EXPRESS**

Supreme Court of New Jersey  
Attn: Honorable Michael J. Blee, J.A.D.  
Acting Administrator Director of the Courts  
Richard J. Hughes Justice Complex  
25 Market Street  
Trenton, New Jersey 08601

Re: Objection to Atlas Data Privacy Corp.'s Application for Multi-County Litigation Designation or Transfer to a Single Vicinage

Dear Judge Blee:

We represent Defendant onXmaps, Inc. ("onX") in the Bergen County action *Atlas Data Privacy Corp. et al. v. onXmaps, Inc.*, Docket No. BER-L-000813-24 (the "onX Action"). We write in opposition to the November 3, 2025 application of Atlas Data Privacy Corporation ("Atlas") either to: (i) consolidate 111 pending Daniel's Law actions in which Atlas is a plaintiff, including the onX Action, and classify the proceeding as a Multicounty Litigation; or (ii) transfer all 111 actions to a single Vicinage and assign a single judge to all proceedings (the "Application"). To the extent any consolidation or transfer is granted, the onX Action should be exempted because the case is very different from the other Daniel's Law cases subject to the Application, and because litigation has progressed much further in the onX Action than in the other Daniel's Law cases at issue.

It is important to note that, in March 2025, Judge O'Dwyer in Bergen County severed the onX Action from other Daniel's Law cases pending before him, for these same reasons. Nothing has occurred since that time that would warrant consolidation of the onX Action with even more Daniel's Law cases. To the contrary, the onX Action has progressed substantially since that time, and consolidation would only delay a resolution and prejudice onX, without making the case management process more efficient. Accordingly, as to the onX Action, we respectfully submit that the Court should deny the Application.

**I. onX Is Different From Other Daniel's Law Defendants.**

In its Application, Atlas describes each defendant in all 111 actions it seeks to consolidate as a "data broker," and it argues that the goal of each case is to "hold a data broker accountable for unlawfully disclosing the home addresses and unpublished telephone numbers

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of Covered Persons in violation of New Jersey's Daniel's Law." Application at 1. These allegations are untrue as to onX.

onX operates a business whose primary services are websites and digital applications enabling hunters, hikers, and other outdoor enthusiasts who subscribe to its services to identify places to hunt or hike without trespassing or violating the property rights of landowners. onX offers its subscribers interactive services, and access to a range of information to broaden and inform subscribers' outdoor experiences. One aspect of onX's apps is that they enable subscribers to identify the metes and bounds of property where they can hunt, hike or recreate. So, if a subscriber were to want to take a trip to Sussex County to hunt for deer, they could use the app to identify public land where hunting or hiking is permitted, or to identify the owners of private property where they could ask for permission to hunt or hike. In addition, through the apps, onX subscribers can track their locations in real time, relative to neighboring property lines, to avoid trespassing or violating other fish and game or property laws.

onX does not and has never enabled subscribers to access the home addresses or home telephone numbers of individuals. Rather, all onX subscribers can access through its apps is property ownership and tax address information for plots of land obtained through local tax records, most of which is supplied to onX through outside services that collect this data and provide it to onX (and many other customers) for a fee. So, for individuals who reside in apartment buildings or rental properties, or whose residences are held in the names of LLCs or other types of companies, onX subscribers would not be and have never been able to determine where such individuals reside. onX products also do not make telephone numbers or other electronic contact information (e.g., email addresses) available.

Put simply, onX is not a data broker, and the tax lot identification information it discloses is very different from what is at issue in other Daniel's Law cases. onX's business is not based around building profiles using consumer information or selling such profiles for targeted advertising. onX aims to enhance outdoor experiences and prevent its users from trespassing. It makes every effort to comply with Daniel's Law, and other federal, state, and local laws, when conducting its business.

Because it is not a data broker, onX does not fit within any of the categories of defendants Atlas describes in its Application. Atlas characterizes the Daniel's Law defendants as having "already categorized themselves as falling into a few groups based on the type of service they provide." Application at 8. Atlas describes these categories as "people search providers, reverse phone lookup providers, consumer reporting agencies [and] property information or real estate services." *Id.* onX has not categorized itself as falling within any of these groups, nor has it coordinated with any other defendant to discuss whether it would fall within these groups (or for any other reason). onX provides services that help hunters and hikers identify where they can hunt or hike on public land, and what land is privately owned. It uses tax address information for this purpose only and thus has little to nothing in common with a data broker. Because onX is fundamentally different from other Daniel's Law defendants,

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there is no sound basis to treat it as such, or to lump the onX Action with fundamentally different Daniel's Law disputes.

## **II. The onX Action Concerns Unique Factual and Legal Arguments**

Not only is onX substantially different from other Daniel's Law defendants, the onX Action is focused on factual and legal arguments that, to our knowledge, are unique to the onX Action. Pursuant to N.J. Court Rule 4:38-1, it is within the Court's discretion to consolidate actions that "involve[e] common questions of law or fact arising out of the same transaction or series of transactions." N.J. Court Rules, R. 4:38-1; see also *Union Cty. Improvement Auth. v. Artaki, LLC*, 392 N.J. Super. 141, 149, 920 A.2d 125, 130 (Super. Ct. App. Div. 2007). The onX Action does not share common questions of law or fact with the other Daniel's Law cases in the Application, nor does it involve the same transaction or series of transactions. Indeed, the onX Action is focused on a core question that, to our knowledge, is not at issue in other Daniel's Law cases: whether onX actually received Daniel's Law notices from Atlas, as opposed to whether onX properly acted in response to Daniel's Law notices transmitted by Atlas.

In the onX Action, Atlas asserts that onX failed to respond to approximately 15,000 individual Daniel's Law notices transmitted by Atlas in rapid succession between December 28, 2023 and January 2, 2024 that onX never received. Discovery, including in-person inspections of onX's IT systems, has focused on whether onX received the Daniel's Law notices at issue in the onX Action, or not.

onX is not aware of another Daniel's Law case where the receipt of Daniel's Law notices is the primary issue. Therefore, Atlas' assertion that all cases it seeks to consolidate "involve common questions regarding the defendants' receipt and processing of nondisclosure requests, the adequacy and reasonableness of the defendants' procedures and controls for compliance with Daniel's Law, and other factual questions that arise from the application of the statute to data brokers" is inaccurate as to onX. Application at 7. Because the onX Action has focused almost entirely on the threshold issue of receipt, and because onX is not a data broker, the onX Action does **not** share common questions of fact with other Daniel's Law cases, and the resolution of questions common to the other proceedings will not affect the outcome of the onX Action. See e.g., *Seidman & Pincus, LLC v. Abrahamsen*, No. A-1740-16T3, 2018 N.J. Super. Unpub. LEXIS 2197, at \*18 (Super. Ct. App. Div. Oct. 4, 2018) (motion to consolidate denied where "matters [did] not share the same transaction or series of transactions' warranting consolidation under Rule 4:38-1").<sup>1</sup>

Further, because the onX Action is factually distinct, onX is not relying on any of the same fact or expert witnesses as other defendants. Thus, Atlas's claim that "[c]entralization will also eliminate the need for duplicative deposition testimony for fact and expert witnesses" is untrue as to the onX Action. Application at 11. onX is also not part of the mediation referenced in footnote 11 of the Application, nor is it a member of any joint defense group – both because

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<sup>1</sup> Unpublished decisions cited in this submission are appended in Exhibit A.

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the onX Action is factually and legally distinct, and because the onX Action is at a different stage of litigation than other Daniel's Law cases. Coordinating witnesses, or anything else, with other defendants would not be beneficial in any way to onX because of these differences. In fact, onX's legal costs would be magnified significantly if it were to be required to litigate at the same pace and in the same manner as other defendants with materially different defenses, in cases involving materially different facts.

As to legal differences, Atlas describes in its Application how different judges within the same Vicinages have issued conflicting legal rulings regarding the application of Daniel's Law to "reverse lookup tools," and how consolidation will prevent further inconsistent rulings. Application at 12. As discussed above, onX does not fall within the "reverse phone lookup provider" category, or any of the other categories of data brokers Atlas describes. As such, there is no risk of inconsistent rulings about reverse lookup tools or any of the other categories Atlas describes with respect to the onX Action. See *Brennan v. Bay Head Planning Bd.*, No. A-3984-21, 2024 N.J. Super. Unpub. LEXIS 764, at \*39-40 (Super. Ct. App. Div. May 1, 2024) (denying motion to consolidate where two matters involved different questions of law).

Likewise, onX has not challenged the constitutionality of Daniel's Law at all, let alone argued that Daniel's Law is unconstitutional "as applied to data brokers under the First Amendment and Article I, ¶¶ 6 & 18, of the New Jersey Constitution", nor has it argued that Daniel's Law is preempted by the Fair Credit Reporting Act and Section 230 of the Communications Act of 1934. Application at 7. onX is also not involved in the facial constitutional challenge to Daniel's Law that is before the U.S. Court of Appeals for the Third Circuit, see Application at 10-11, and it has not contested personal jurisdiction. *Id.* at 7.

The onX Action is also distinguishable from the cases Atlas cites in support of the proposition that individualized factual issues may not be an impediment to centralized case administration. See Application at 7-8. The single New Jersey state case Atlas cites in support of this argument concerned allegations brought by multiple individuals against the State of New Jersey, asserting claims of emotional and physical abuse that occurred at various state-run facilities. *In re Allegations of Sexual Abuse in Juvenile Detention Facilities Operated by the State of New Jersey*, <https://www.njcourts.gov/sites/default/files/mcl/sexual-abuse-in-juvenile-detention-facilities-operated-by-the-state-of-new-jersey/application.pdf>, at 1-2. That case concerned only a single defendant and multiple plaintiffs, and the litigations that were consolidated were all "in their infancy." *Id.* at 3. That is not the case here, for as explained below, the onX Action has been pending for nearly two years and is nearing the end of discovery, while other Daniel's Law cases are in their early stages. *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017), also cited by Atlas, is distinguishable for the same reason: the cases there were also all in similar early litigation stages. *Id.* at 1378-79. The other federal cases Atlas cites either involved fewer defendants, such as *In re Acetaminophen - Asd/Adhd Prods. Liab. Litig.*, 637 F. Supp. 3d 1372 (J.P.M.L. 2022), where there were just nine defendants, not over 100, *id.* at 1376, or a common factual core, like *In re FTX Cryptocurrency Exch. Collapse Litig.*, 677 F. Supp. 3d 1379 (J.P.M.L. 2023), where multiple litigations arose from the fraud that led to FTX's collapse. *Id.* at 1380-81. See also *In re Soc. Media Adolescent*

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*Addiction/Personal Injury Prods. Liab. Litig.*, 637 F. Supp. 3d 1377, 1378 (J.P.M.L. 2022) (“All parties agree that the claims involving Meta share questions of fact”).

### **III. The onX Action Has Progressed Further Than Other Daniel’s Law Cases**

Unlike the cases Atlas cites in the Application, the onX Action is also *not* at an early stage. Indeed, as we understand it, the onX Action, which was filed in February 2024, has progressed further than any of the other Daniel’s Law cases with which Atlas seeks to consolidate it, making this yet another reason why the onX Action should remain an independent proceeding. See *Browne v. Moshe Englewood Llc*, 2020 N.J. Super. Unpub. LEXIS 3679, \*8-9 (N.J. Super. Ct. Bergen Cnty. June 12, 2020) (denying motion to consolidate where cases were in different procedural postures, one was recently filed, and the others were “well on their way toward final disposition”). Thus, Atlas’ contention that consolidating the onX Action with 110 other Daniel’s Law cases will “expedite the resolution” of that Action is plainly untrue. In fact, the opposite will occur.

In early 2025, the onX Action was consolidated with other Bergen County Daniel’s Law cases, before onX had an opportunity to object. onX therefore filed a motion to sever the onX Action from other Bergen County Daniel’s Law cases. See *Atlas Data Privacy Corp. et al. v. onXmaps, Inc.*, No. LCV2025946668 (N.J. Super. Ct. Bergen Cnty. Mar. 27, 2025), Motion to Sever. The court found that there was good cause for the onX Action to proceed independently from other Daniel’s Law cases brought by Atlas. *Id.* at No. LCV20251373176 (N.J. Super. Ct. Bergen Cnty. May 9, 2025), Order on onXmaps’ Motion to Sever. Since that time, onX and Atlas have engaged in substantial fact discovery, which is nearing completion. The parties also litigated a motion to compel in front of Judge O’Dwyer in the fall of 2025. To date, onX has produced nearly 40,000 pages of documents in the onX Action and has provided Atlas access to its IT systems so that Atlas may physically inspect its email servers, among other functions. Inspections of onX’s systems occurred on August 6 and October 30, 2025, and a subsequent inspection is scheduled for January 7, 2026. The parties are planning depositions for January and February 2026. onX and Atlas also recently agreed to extend the discovery end date in the onX Action from January 31, 2026 to March 2, 2026.

Even though discovery will likely be extended in the onX Action, the case is still much further along than the other Daniel’s Law cases Atlas seeks to consolidate in the Application. For example, default judgments are pending in many of the actions Atlas lists in Exhibit A to the Application. Many of the cases where defaults are not pending are either at the motion to dismiss stage and stayed pending resolution of the Third Circuit case mentioned above, e.g., *Atlas v. Lightbox Parent, L.P.*, No. LCV20252761976 (N.J. Super. Ct. Mercer Cnty. Oct. 10, 2025), Consent Order, or are not scheduled to complete discovery until much later than the onX Action, e.g., *Atlas v. Twilio, Inc.*, No. LCV20253063646 (N.J. Super. Ct. Morris Cnty. Nov. 12, 2025) (extending discovery until August 16, 2026).

Because of how much further along the onX Action is in terms of discovery, consolidated and coordinated discovery will not be more efficient. Indeed, because many of the cases Atlas

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lists in the Application are stayed pending the Third Circuit matter, consolidation of the onX Action with other Daniel's Law cases will unjustifiably delay the progress of the onX Action – which does not concern the same legal or factual issues as the cases that are currently stayed – and thereby prejudice onX.

As the onX Action is factually and legally distinct from the other Daniel's Law cases listed in the Application, and because of its different procedural posture, the onX Action should remain an independent proceeding. To the extent any Daniel's Law cases are consolidated or transferred pursuant to the Application, the onX action should remain a separate proceeding in front of Judge O'Dwyer in Bergen County.

We thank the Court for its consideration of this submission. To the extent the Court wishes to hear further from onX on this matter, we will make ourselves available at the Court's convenience.

Sincerely,



Bruce R. Ewing

Cc: Chief Justice Stuart Rabner (via overnight mail)

The Hon. John D. O'Dwyer (via eCourts)

All counsel of record in *Atlas Data Privacy Corp. et al. v. onXmaps, Inc.*, Docket No. BER-L-000813-24 (via eCourts)

# **EXHIBIT A**

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Neutral

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## Seidman & Pincus, LLC v. Abrahamsen

Superior Court of New Jersey, Appellate Division

September 13, 2018, Argued; October 4, 2018, Decided

DOCKET NO. A-1740-16T3

### Reporter

2018 N.J. Super. Unpub. LEXIS 2197 \*; 2018 WL 4780716

SEIDMAN & PINCUS, LLC, and MITCHELL B. SEIDMAN, Plaintiffs-Respondents, v. RICHARD J. ABRAHAMSEN, and ABRAHAMSEN LAW FIRM, LLC, Defendants/Third-Party Plaintiffs-Appellants, v. NICHOLAS G. SEKAS, Defendant/Third-Party Defendant, and SEKAS LAW GROUP, LLC, and SEKAS & ABRAHAMSEN, LLC, Defendants/Third-Party Defendants-Respondents.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY [RULE 1:36-3](#) FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** [\*1] On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2961-14.

[Purchase Partners, LLC v. Carver Fed. Sav. Bank, 914 F. Supp. 2d 480, 2012 U.S. Dist. LEXIS 181173 \(S.D.N.Y., Dec. 13, 2012\)](#)

### Core Terms

defamation action, memorandum, discovery, dissolution action, plaintiffs', frivolous, sanctions, orders, attorney's fees, indemnification, motions, defendants', subpoenas, counsel fees, legal services, matters, parties, dual representation, discovery request, protective order, reconsideration, handling, warning

**Counsel:** Richard J. Abrahamsen argued the cause for Pro se appellants.

Mitchell B. Seidman argued the cause for Pro se respondents Seidman & Pincus, LLC, and Mitchell B. Seidman (Mitchell B. Seidman and Andrew Pincus, on the brief).

Nicholas G. Sekas argued the cause for Pro se

respondents Sekas Law Group, LLC, and Sekas & Abrahamsen, LLC.

**Judges:** Before Judges Ostrer and Mayer.

### Opinion

PER CURIAM

Defendants/third-party plaintiffs Richard J. Abrahamsen and Abrahamsen Law Firm, LLC (Abrahamsen defendants) appeal from thirteen separate Law Division orders issued in connection with this litigation.<sup>1</sup> We affirm all of the orders appealed by the Abrahamsen defendants.

In August 2014, plaintiffs Seidman & Pincus, LLC (S&P) and Mitchell Seidman filed a complaint in Passaic County against Sekas Law Group, LLC and Sekas & Abrahamsen, LLC (Sekas defendants) and the Abrahamsen defendants, alleging defamation and tortious interference (defamation action). The law firm of Sekas & Abrahamsen, LLC (S&A), consisting of

<sup>1</sup> The orders that are the subject of this appeal are as follows: a May 4, 2015 order denying appointment of a custodian and compelling arbitration; a May 12, 2015 order denying disqualification of counsel and indemnification; a November 6, 2015 order denying a motion to strike co-defendants' answer for failure to provide discovery; a November 6, 2015 protective order; a January 8, 2016 order quashing subpoenas and granting attorney's fees; a February 5, 2016 order quashing subpoenas and granting attorney's fees; a February 5, 2016 order denying a motion to compel discovery; a February 17, 2016 order compelling payment of counsel fees; a February 26, 2016 order vacating the February 17, 2016 order and awarding counsel fees; a February 26, 2016 order awarding counsel fees; a December 5, 2016 order denying reconsideration; a December 5, 2016 order compelling reimbursement; and a December 5, 2016 order denying sanctions.

Nicholas G. Sekas and Richard J. Abrahamsen, dissolved in December 2013, prior to the filing of the defamation action. [\*2] Litigation related to the dissolution of S&A was filed in Monmouth County (dissolution action) two weeks after plaintiffs filed their defamation action.<sup>2</sup>

The underlying facts are not complex. However, the procedural history is convoluted based on the sheer number of motions filed by the Abrahamsen defendants. The procedural background related to the defamation action is further muddled due to the Abrahamsen defendants' repeated conflating of the issues in the defamation action and the dissolution action. Consequently, a more detailed recitation of the procedural background is required to provide context for this appeal.

Plaintiffs filed the defamation action against the Abrahamsen defendants and Sekas defendants on August 6, 2014, alleging all defendants caused S&P to lose a long-time client. One month later, the Abrahamsen defendants sent a notice to plaintiffs demanding withdrawal of the defamation action as frivolous. In response, plaintiffs requested a copy of a memorandum authored by Abrahamsen to assess the merits of their claim and determine whether the memorandum caused the loss of a long-term client. Instead of replying to plaintiffs' request for a copy of the memorandum, the [\*3] Abrahamsen defendants filed a motion to dismiss the complaint. Plaintiffs then filed a cross-motion to amend the complaint.

Leave to amend the complaint was granted and, in January 2015, plaintiffs filed an amended complaint, adding Sekas Law Group, LLC as a defendant and asserting a new claim based on fraudulent transfer. The Abrahamsen defendants filed an answer, cross-claim for indemnification against the Sekas defendants, and third-party complaint against the Sekas defendants and Nicholas G. Sekas.

In March 2015, the Abrahamsen defendants moved to consolidate the defamation action with the dissolution

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<sup>2</sup>In the dissolution action, Sekas sought to enforce the terms of S&A's partnership operating agreement and recover assets taken by Abrahamsen when he left S&A in December 2013. Sekas claimed Abrahamsen was responsible for his percentage share of debts and obligations of S&A, and for fees and costs on S&A cases that Abrahamsen took to his new law firm. Abrahamsen claimed the partnership's operating agreement required S&A to indemnify him against plaintiffs' defamation action.

action. The judge denied consolidation.

In May 2015, the judge dismissed the third-party claims against the Sekas defendants. The judge also issued an order on May 4, 2015 denying a motion by the Abrahamsen defendants to appoint a custodian and compel arbitration of the dispute between the Abrahamsen defendants and the Sekas defendants. A motion to compel the Sekas defendants to indemnify the Abrahamsen defendants in the defamation action was denied on May 12, 2015.

Failing to succeed in their earlier motions, the Abrahamsen defendants requested discovery from the Sekas defendants. In [\*4] the fall of 2015, the Abrahamsen defendants moved to strike the Sekas defendants' answer for failure to provide discovery. In response, the Sekas defendants sought a protective order related to the discovery requests. The judge denied the motion to strike and granted the motion for a protective order. These orders, dated November 6, 2015, granted attorney's fees to the Sekas defendants. The judge expressly warned the Abrahamsen defendants that additional sanctions would be imposed for their "continued contempt and violation of the intent and spirit of the prior [o]rders issued by the [c]ourt."

Notwithstanding the unequivocal warning issued by the judge in the defamation action, the Abrahamsen defendants served multiple subpoenas on individuals and companies associated with the Sekas defendants. The Sekas defendants demanded the Abrahamsen defendants withdraw the subpoenas, but the Abrahamsen defendants refused. The Sekas defendants then filed a motion to quash the subpoenas, a motion for a protective order, and sought to hold the Abrahamsen defendants in contempt of the court's prior orders in the defamation action.

On January 8, 2016, the judge quashed certain subpoenas and granted [\*5] the request for a protective order in favor of the Sekas defendants. The order also denied discovery sought by the Abrahamsen defendants; ordered the Abrahamsen defendants to stop demanding discovery from the Sekas defendants; barred the Abrahamsen defendants from requesting discovery without leave of the court; ordered Abrahamsen, individually, to show cause why he should not be held in contempt; found the Abrahamsen defendants to be in contempt; and ordered the Abrahamsen defendants to pay attorneys' fees to the Sekas defendants. One month later, the judge quashed additional subpoenas served by the Abrahamsen

defendants and reiterated his prior warning regarding the imposition of sanctions for continued service of improper discovery demands. On February 17, 2016, the judge awarded counsel fees to the Sekas defendants in the amount of \$6,310. On February 26, 2016, the judge vacated the February 17, 2016 award of counsel fees and, instead, awarded counsel fees to the Sekas defendants in the amount of \$5,740. The judge also awarded additional counsel fees to the Sekas defendants in the amount of \$11,410.

The Abrahamsen defendants sought reconsideration of the judge's orders issued in [\*6] January and February 2016. Because the Abrahamsen defendants claimed the judge who issued the January and February 2016 orders had a conflict based on his law clerk's employment with Sekas as of April 2016, a different judge heard argument on the motions for reconsideration, indemnification, and sanctions. These motions were denied by order dated December 5, 2016.

The factual history preceding the filing of the defamation action is relevant to understanding the issues on appeal. In 2003, Mariner's Bank retained plaintiffs to handle various legal matters, including litigation actions, bankruptcy matters, and foreclosure proceedings.

Around July 2009, Mariner's Bank retained plaintiffs to pursue an action against Carver Federal Savings Bank (Carver) for default of a loan.<sup>3</sup> Around the same time, Mariner's Bank decided to sell thirteen defaulted loans to Purchase Partners, LLC (Purchase Partners). Carver asserted counterclaims in the Carver action against Mariner's Bank before its loan was sold to Purchase Partners. Because the interests of Mariner's Bank and Purchase Partners were aligned, plaintiffs discussed whether they could represent both parties in the Carver action. Plaintiffs asked [\*7] Mariner's Bank and Purchase Partners to sign a conflict waiver letter before plaintiffs would undertake dual representation of the parties in the Carver action. Mariner's Bank and Purchase Partners signed the conflict waiver letters, and agreed to equally share payment of plaintiffs' legal fees in the Carver action.

Purchase Partners fell behind on its payments to plaintiffs for legal services. Plaintiffs requested payment in return for continued representation of Purchase Partners in the Carver action. Purchase Partners was

unable to pay plaintiffs' legal fees. Purchase Partners then sought a more economical arrangement with another law firm to represent it in the Carver action.

Thereafter, Purchase Partners retained S&A to represent its interest in the Carver action. Plaintiffs filed a motion in the Carver action to impose a charging lien against Purchase Partners for outstanding legal fees and for any recovery obtained by Purchase Partners in the Carver action. The federal judge handling the Carver action granted plaintiffs' motion.

Plaintiffs then filed a motion in federal court to establish the amount of the charging lien against Purchase [\*8] Partners. S&A advised Purchase Partners to oppose the motion, and dispute plaintiffs' outstanding fees based on an alleged conflict of interest arising from plaintiffs' dual representation of Mariner's Bank and Purchase Partners. Plaintiffs' motion to establish the amount of the charging lien was not decided by the federal judge handling the Carver action until early 2014.<sup>4</sup>

In August 2013, the parties settled the Carver action. At that time, Abrahamsen authored a confidential memorandum to Purchase Partners regarding the Carver action. The memorandum, entitled "Memo on Mariner[']s Bank and Purchase Partners and the Dual Representation of Seidman & Pincus," discussed the events that transpired after S&P undertook representation of both Mariner's Bank and Purchase Partners in the Carver action. The memorandum opined that "S&P turned on his client [Purchase Partners] and was [Mariner's Bank] against [Purchase Partners] on this point while still counsel of record for both parties."

Mariner's Bank received a copy of the Abrahamsen memorandum and stopped paying plaintiffs for legal services in the Carver action and other matters. After receipt of the Abrahamsen memorandum, Mariner's Bank did [\*9] not hire plaintiffs to represent it in any new matters. In early 2014, plaintiffs requested overdue payment for legal services from Mariner's Bank. A representative of Mariner's Bank told plaintiffs the bank was discontinuing S&P's legal services based on the Abrahamsen memorandum and Abrahamsen's advice that plaintiffs had a conflict of interest due to S&P's dual representation of Mariner's Bank and Purchase Partners in the Carver action.

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<sup>3</sup> The action, entitled *Mariner's Bank v. Carver Federal Savings Bank*, was filed in United States District Court for the Southern District of New York (Carver action).

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<sup>4</sup> On February 5, 2014, the federal judge in the Carver action determined plaintiffs had no conflict of interest and awarded the fees owed by Purchase Partners to plaintiffs for legal work related to the Carver action.

Believing the bank's decision to discontinue plaintiffs' legal services was due to the Abrahamsen memorandum, plaintiffs filed the defamation action seeking damages against defendants. Soon after commencing the defamation action, plaintiffs sought a copy of the Abrahamsen memorandum. Rather than provide a copy of the memorandum or explain why the memorandum could not be produced, the Abrahamsen defendants filed a series of motions for discovery and other relief unrelated to plaintiffs' defamation action as described earlier in this opinion. The defamation action then proceeded for nearly two years.

On March 28, 2016, plaintiffs served a subpoena on Mariner's Bank, seeking the Abrahamsen memorandum. Mariner's Bank provided the document to plaintiffs [\*10] on April 1, 2016. The Abrahamsen memorandum opined S&P had a conflict of interest based on the law firm's dual representation of Mariner's Bank and Purchase Partners in the Carver action.

Three months after receipt of the Abrahamsen memorandum, plaintiffs deposed several individuals affiliated with Mariner's Bank. Based on the deposition testimony, plaintiffs determined they would be unable to prove the Abrahamsen memorandum caused Mariner's Bank to terminate S&P's legal services. Therefore, on July 28, 2016, plaintiffs elected to discontinue the defamation action. Plaintiffs and the Sekas defendants promptly signed a stipulation dismissing the complaint. However, the Abrahamsen defendants did not sign the stipulation until January 2017.

While the defamation action was pending, in or around April 2016, the judge's law clerk accepted employment with Sekas and his new law firm. The judge handling the defamation action had not issued any orders in the defamation action subsequent to February 2016. The Abrahamsen defendants did not file a motion for reconsideration and other relief until around March 2016. Due to an alleged conflict based on the judge's law clerk's acceptance of a position [\*11] with the Sekas firm, the reconsideration motion and other motions filed by the Abrahamsen defendants were heard by the presiding judge of the Civil Division. The presiding judge denied those motions on December 5, 2016.

The parties filed a stipulation of dismissal in the defamation action on January 17, 2017, and the Abrahamsen defendants then appealed from thirteen separate orders issued in the defamation action. On

appeal, the Abrahamsen defendants argue four points.<sup>5</sup> First, they argue plaintiffs' complaint constituted frivolous litigation because it was without basis in law or in fact, and the judge erred in failing to impose sanctions against plaintiffs. Second, they argue entitlement to indemnification and counsel fees from the Sekas defendants pursuant to S&A's partnership operating agreement related to plaintiffs' claims in the defamation action. Third, they contend the judge handling the defamation action improperly denied discovery, quashed subpoenas, granted protective orders, and awarded counsel fees. Fourth, they claim all orders issued by the original judge assigned to the defamation action should be vacated because his law clerk was subsequently hired by Sekas' new law [\*12] firm.

We review the issues raised in this appeal for abuse of discretion. An abuse of discretion arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." [\*Flagg v. Essex County Prosecutor\*, 171 N.J. 561, 571, 796 A.2d 182 \(2002\)](#) (quoting [\*Achacoso-Sanchez v. Immigration and Naturalization Serv.\*, 779 F.2d 1260, 1265 \(7th Cir. 1985\)](#)).

Our review of a trial court's imposition of sanctions is similarly reviewed for abuse of discretion. [\*Masone v. Levine\*, 382 N.J. Super. 181, 193, 887 A.2d 1191 \(App. Div. 2005\)](#). We likewise review a judge's decision to impose discovery sanctions and award attorney's fees as a discovery sanction under an abuse of discretion standard. [\*Shore Orthopaedic Grp. v. Equitable Life Assurance Soc'y of U.S.\*, 397 N.J. Super. 614, 629-30, 938 A.2d 962 \(App. Div. 2008\)](#); [\*Innes v. Carrascosa\*, 391 N.J. Super. 453, 496, 918 A.2d 686 \(App. Div. 2007\)](#).

A judge, in his or her discretion, has the inherent authority to sanction a party for behavior that is vexatious, burdensome, and harassing. See [\*Brundage v. Estate of Carambio\*, 195 N.J. 575, 610, 951 A.2d 947 \(2008\)](#) (recognizing the inherent power of courts to sanction parties as means of enforcing ordinary rules of practice); [\*Abtrax Pharm. v. Elkins-Sinn\*, 139 N.J. 499,](#)

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<sup>5</sup>The Notice of Appeal lists the May 4, 2015 order, the February 5, 2016 order denying a motion to compel discovery; and the December 5, 2017 order denying reconsideration of prior orders. However, because the issues related to these orders were not briefed, the issues are deemed waived. [\*Gormley v. Wood-El\*, 218 N.J. 72, 95 n.8, 93 A.3d 344 \(2014\)](#).

[513, 655 A.2d 1368 \(1995\)](#) (recognizing the inherent power to punish for discovery violations); [Dziubek v. Schumann, 275 N.J. Super. 428, 439-40, 646 A.2d 492 \(App. Div. 1994\)](#) (reasoning a court's inherent power may include awarding attorney's fees in the form of a sanction). Although the power to sanction should be invoked sparingly, the circumstances presented in this case support the award of attorney's fees as the proper sanction for the Abrahamsen defendants' vexatious and harassing motion practice in the defamation [\*13] action.

We conclude there is sufficient, credible evidence in the record to support the judge's award of attorney's fees as a sanction against the Abrahamsen defendants. The Abrahamsen defendants repeatedly sought discovery and filed motions relating to the dissolution action in the defamation action. The judge's orders clearly and unambiguously instructed that issues and discovery requests related to the dissolution action had to be pursued in the dissolution action. The judge expressly warned that if the Abrahamsen defendants continued to file such applications in the defamation action, rather than in the dissolution action, he would impose sanctions. The Abrahamsen defendants failed to heed the judge's admonition to cease filing repetitive discovery motions and other motions unrelated to the defamation action.

Because the Abrahamsen defendants disregarded the judge's orders related to motion practice and discovery in the defamation action, the judge awarded attorney's fees as a sanction for the Abrahamsen defendants' improper use of the defamation action to gain discovery in the dissolution action. The judge found the Abrahamsen defendants were acting in bad faith, contrary to [N.J.S.A. 2A:15-59.1](#), by [\*14] attempting to use the defamation action to obtain information relevant to the dissolution action.

The judge also imposed further sanctions against the Abrahamsen defendants in accordance with [Rule 1:4-8\(c\)](#). When an attorney signs a pleading, motion, or other paper, the attorney certifies that the " paper is not being presented for any improper purpose, such as to harass or t o cause unnecessary delay or needless increase in the cost of litigation." [R. 1:4-8\(a\)\(1\)](#).

We discern no abuse of discretion in the trial court's decision to sanction the Abrahamsen defendants by imposing attorney's fees in favor of the Sekas defendants. The Sekas defendants were forced to oppose a barrage of motions filed by the Abrahamsen

defendants unrelated to the defamation action. The record does not reflect favorably on the Abrahamsen defendants ' litigation tactics, which lead the judge to impose sanctions in the form of attorney's fees to deter continued violations of the court's orders regarding discovery and motion practice in the defamation action. The filing of continued requests for discovery by the Abrahamsen defendants, after the judge's issuance of a warning not to seek such discovery, was contrary to [Rule 1:10-3](#), and the judge did not [\*15] abuse his discretion under the circumstances.

The Abrahamsen defendants also contend the judge should have sanctioned plaintiffs because the defamation action was frivolous. The frivolous litigation statute permits a court to award reasonable counsel fees and litigation costs to a prevailing party in a civil action if the court determines that the complaint, counterclaim, cross-claim, or defense is frivolous. [N.J.S.A. 2A:15-59.1](#).

A claim is considered frivolous when: "no rational argument can be advanced in its support"; "it is not supported by any credible evidence"; "a reasonable person could not have expected its success"; or "it is completely untenable." [Belfer v. Merling, 322 N.J. Super. 124, 144, 730 A.2d 434 \(App. Div. 1999\)](#). "[F]alse allegations of fact [will] not justify [an] award . . . unless they are made in bad faith, 'for the purpose of harassment, delay or malicious injury.'" [McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561, 626 A.2d 425 \(1993\)](#) (quoting [N.J.S.A. 2A:15-59.1\(b\)\(1\)](#)). An honest attempt to pursue a perceived, though ill-founded, claim is not considered to be frivolous. [Id. at 563](#). The burden of proving bad faith is on the party who seeks fees and costs. [Id. at 559](#).

[Rule 1:4-8](#) supplements [N.J.S.A. 2A:15-59.1](#), and governs the conduct of attorneys. A [Rule 1:4-8](#) sanction is "specifically designed to deter the filing or pursuit of frivolous litigation." [LoBiondo v. Schwartz, 199 N.J. 62, 98, 970 A.2d 1007 \(2009\)](#). "For purposes of imposing sanctions under [Rule 1:4-8](#), an assertion [\*16] is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" [United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389, 971 A.2d 434 \(App. Div. 2009\)](#) (quoting [First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432, 918 A.2d 666 \(App. Div. 2007\)](#)). "Where a party has [a] reasonable and good faith belief in the merit of the cause, attorney's fees will not be awarded." *Ibid*.

The Abrahamsen defendants sought counsel fees, claiming plaintiffs "persist[ed] in frivolous litigation" pursuant to [N.J.S.A. 2A:15-59.1](#) and [Rule 1:4-8](#). We reject this argument. When plaintiffs filed the complaint, they knew their long-term relationship with Mariner's Bank was abruptly terminated after the bank received the Abrahamsen memorandum. However, plaintiffs also knew as of the date they filed the defamation action that a federal judge determined S&P did not have a conflict of interest in the Carver action.

In deciding the Abrahamsen defendants' motion for sanctions against plaintiffs, the judge stated:

I do think it's a close call. I don't think its mere speculation. . . . I think there was some indicia that defamation could have occurred. It didn't. And I agree. But — but, you know, [plaintiffs] also ha[d] a problem with obtaining a memo which . . . is the smoking gun that, in fact, wasn't smoking. But the [\*17] only way to obtain it would have been to file litigation. And, obviously, through discovery or subpoena power [plaintiffs have] been able to obtain it through that method. He did. And then he dropped his complaint.

The judge found plaintiffs never conceded the defamation action was without merit. Plaintiffs voluntarily dismissed the defamation action after obtaining the Abrahamsen memorandum (sixteen months after requesting a copy of that document) and deposing several representatives of Mariner's Bank. Only after receipt of the Abrahamsen memorandum and completion of depositions in July 2016 did plaintiffs conclude they lacked direct or admissible evidence to prove their claims in the defamation action.

Plaintiffs' claims were not frivolous. Based on circumstantial evidence, plaintiffs believed the Abrahamsen memorandum resulted in the loss of Mariner's Bank as a client, facts sufficient to establish a claim for defamation and tortious interference against one or more defendants. Based on the refusal of the Abrahamsen defendants to provide the Abrahamsen memorandum, plaintiffs had a good faith basis as to the merits of their claims, and the complaint was not frivolous under [N.J.S.A. 2A:15-59.1](#) or [Rule 1:4-8](#).

We [\*18] next review the Abrahamsen defendants' argument related to the judge's denial of indemnification from the Sekas defendants. The judge determined the indemnification issue should be resolved in the dissolution action, not the defamation action. [Rule 4:38-2](#) "vest[s] [a] determination whether or not to sever

claims to the sound exercise of a trial court's discretion." [Rendine v. Pantzer, 141 N.J. 292, 310, 661 A.2d 1202 \(1995\)](#).

The judge denied the Abrahamsen defendants' motion to consolidate the defamation action with the dissolution action, finding the matters "do not share 'the same transaction or series of transactions' warranting consolidation under [Rule 4:38-1](#)." The judge then dismissed the Abrahamsen defendants' third-party complaint against the Sekas defendants seeking indemnification. The judge noted the Abrahamsen defendants could seek indemnification from S&A in the dissolution action as that court had "appropriate venue" to decide the issue and was the forum where the "matter properly belongs." The judge instructed that the indemnification issue be determined in the dissolution action, and denied the motion without prejudice to allow the filing of the indemnification claim in the dissolution action. We discern no abuse of discretion in the judge's decision [\*19] directing the Abrahamsen defendants to pursue their claim for indemnification in the dissolution action rather than the defamation action.

We turn to the claim by the Abrahamsen defendants that the judge abused his discretion in denying various discovery requests in the defamation action. The Abrahamsen defendants did not appeal from the order dismissing the defamation action. When a party fails to appeal from the dismissal of an action, that party is barred from appealing any prior adverse discovery orders. [Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 257, 581 A.2d 1372 \(App. Div. 1990\)](#). "Discovery is provided to prepare for trial. In light of plaintiff's dismissal of its complaint, there will be no trial. Thus, the discovery issues are moot." *Ibid.* As the claims against the Abrahamsen defendants were extinguished by the execution of a stipulation of dismissal, the Abrahamsen defendants have no reason to obtain discovery, and their appeal of any discovery orders is moot.<sup>6</sup>

Lastly, we address the argument that the judge's orders should be vacated based on his law clerk's subsequent employment with Sekas Law Group. "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such

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<sup>6</sup> Because we decline to address the Abrahamsen defendants' appeal of discovery orders as moot, we similarly decline to address the Abrahamsen defendants' appeal of the judge's orders related to the issuance of protective orders and the quashing of subpoenas.

a presentation is [\*20] available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public importance." [Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 \(1973\)](#) (internal citation omitted). The Abrahamsen defendants never raised the issue to the trial court despite the motion for reconsideration being heard several months after the law clerk began his employment with Sekas. Because the question does not relate to jurisdiction or constitute a matter of great public importance, we decline to reach this issue on appeal. Moreover, the judge who issued most of the orders in the defamation action did not issue any orders after February 2016. Therefore, there is no evidence in the record the judge was influenced by his law clerk's acceptance of a job with Sekas in or around April 2016.

Affirmed.

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## [Brennan v. Bay Head Plan. Bd.](#)

Superior Court of New Jersey, Appellate Division

March 11, 2024, Argued; May 1, 2024, Decided

DOCKET NO. A-3984-21

### Reporter

2024 N.J. Super. Unpub. LEXIS 764 \*; 2024 WL 1894570

PAUL G. BRENNAN, ESTHER KOAI, RONALD PUORRO, and KATHRYN PUORRO, Plaintiffs-Appellants, v. BAY HEAD PLANNING BOARD, KAITLYN TOOKER BURKE, and DONALD F. BURKE, JR., Defendants-Respondents.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY [RULE 1:36-3](#) FOR CITATION OF UNPUBLISHED OPINIONS.

**Subsequent History:** Related proceeding at [Burke v. Borough of Bay Head, 2024 U.S. Dist. LEXIS 190115 \(D.N.J., Oct. 17, 2024\)](#)

**Prior History:** [\*1] On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0340-21.

### Core Terms

variances, frontage, street, subdivision, conditions, zoning, hardship, trial court, feet, Ordinance, minutes, plaintiffs', map, default, garage, notice, discovery, redacted, merger, certification, conforming, Block, affordable housing, nonconforming, drainage, Borough, single-family, self-created, properties, parcel

**Counsel:** Michele R. Donato argued the cause for appellants (Michele R. Donato and Jeff Edward Thakker, attorneys; Jeff Edward Thakker, of counsel; Michele R. Donato, on the briefs).

Barry Avram Stieber argued the cause for respondent Bay Head Planning Board (Citta, Holzapfel & Zabarsky, attorneys; Barry Avram Stieber, on the brief).

Donald Francis Burke argued the cause for respondents Kaitlyn Tooker Burke and Donald F. Burke, Jr. (Law Office of Donald F. Burke, attorneys; Donald Francis Burke, on the brief).

**Judges:** Before Judges Gilson, DeAlmeida, and Berdote Byrne.

### Opinion

PER CURIAM

Plaintiffs, Paul Brennan (Brennan) and Esther Koai (Koai),<sup>1</sup> challenge the grant of variances by defendant Bay Head Planning Board (BHPB) to defendants Donald and Kaitlyn Burke (the Burkes) for the construction of a single-family house on a lot neighboring their homes. The Burkes' property, designated as Block 3, Lot 13 on the Borough of Bay Head's tax map (Lot 13), lacks sufficient frontage, and the street on which it fronts is insufficiently improved. The BHPB awarded relief from these bulk requirements. Plaintiffs filed an action in [\*2] lieu of prerogative writs seeking to invalidate the BHPB's decision.

On appeal, plaintiffs raise jurisdictional arguments concerning the BHPB's action, arguing: (1) the Burkes did not provide adequate notice of their variance application; (2) the BHPB was divested of jurisdiction to continue considering the application after the Burkes filed a lawsuit seeking default approval; and (3) Lot 13 merged with other nearby lots formerly in common ownership and should not have been sold without subdivision approval.

Plaintiffs also challenge the merits of the variances with a variety of arguments, primarily arguing: (1) the BHPB failed to address conditions found in a 2005 subdivision resolution concerning other lots in the same commonly owned group; and (2) relief pursuant to [N.J.S.A. 40:55D-70\(c\)\(1\)](#) and [-36](#) was unavailable because the

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<sup>1</sup> Plaintiffs Ronald Puorro and Kathryn Puorro did not join in the appeal.

Burkes created their own hardships.

Additionally, plaintiffs challenge the dismissal of two counts in their complaint alleging the Burkes exerted undue influence over the BHPB. They also contend the trial court erred by denying their motion to consolidate their litigation with the Burkes' default approval matter.

Finally, plaintiffs assert the court violated their First Amendment rights related to meeting [\*3] minutes they inadvertently received as part of a request to the Bay Head Borough Council (Council) pursuant to the [Open Public Records Act \(OPRA\), N.J.S.A. 47:1A-1 to -13](#). Plaintiffs argue the trial court erred by ordering no further dissemination of the minutes.

For the reasons that follow, we find no error in the trial court's orders and affirm all of them.

I.

We glean the following facts from the record. Lot 13 lies within the "R-100 Zone" for residential use on Bay Head's zoning map. Lot 13 conformed to lot size requirements set forth in Bay Head's zoning ordinance, being 47,700 square feet where 10,000 square feet are required.

Prior to 1991, Lot 13 had 300 feet of frontage on Twilight Road to its south, and over 100 feet of frontage on Warren Place to the west. Thus, it conformed to the local zoning ordinance requiring 100 feet of frontage. On May 7, 1991, Bay Head adopted Ordinance 1991-5, which vacated a large section of Twilight Road, including the entire border with Lot 13 and fifty feet of Warren Place. The ordinance stated the other 79.2 feet of Warren Place would remain, to "provid[e] egress- ingress to Lots 32 [and] 33 in Block 2, Lots 1 and 13 in Block 3, and Lot 1 in Block 4." As a result, Ordinance 1991-5 left Lot 13 in a nonconforming [\*4] condition, lacking the requisite frontage.

Additionally, Warren Place is not an "improved street," which is required for a building permit pursuant to [N.J.S.A. 40:55D-35](#). It has a paved section ten feet wide with the rest of its fifty-foot width being vegetated; those conditions do not conform to local Code § 147-2, which requires a roadway be at least forty-feet wide to be considered a "street." Nonetheless, a single-family home was built on Block 2, Lot 33, which fronts on Warren Place across from Lot 13.

Until his death in 2003, Clarence Voorhees owned Block 3, Lots 1, 2, 4, 5, 6, 7, 12, and 13 on the Bay Head tax

map (the Voorhees lots). Despite the common ownership, all the lots continued to be separately platted on the tax map.

In 2005, Clarence's executor applied to the BHPB for minor subdivision approval to divide Lots 2 and 4, which were each seventy-five feet wide, into three fifty-foot-wide lots. The new Lots 2.01, 3.01, and 4.01 front Osborne Avenue, with their backyards abutting Lot 13. Pursuant to Bay Head Code § 147-44(a)(5)(q), this subdivision application needed to include sketch plats showing, among other things, "[e]xisting wooded areas within the tract or immediately adjacent thereto . . . ." As a result, trees on Lot 13 were identified [\*5] on the subdivision map along with large, wooded areas encompassing most of the new proposed lots. Lot 13's dimensions were unaffected by the planned subdivision.

The BHPB adopted Resolution 2004-11 approving the subdivision. Relevant here, the resolution stated Lot 13 was owned by the Voorhees estate and described it as "a rather large lot to the rear of the subject property" accessible by Warren Place, a "50-foot right-of-way" that was "only paved approximately 10 feet in width." It said an "environmental study" showed "Lots 12 and 13 contain[ed] some wetlands," but there was "no environmental concern with regard to Lots 2 and 4 which [were] the subject of the application . . . ."

Resolution 2004-11 included a condition requiring the subdivision plan to show "all wooded areas within the tract or adjacent thereto on the survey map" and directed the Voorhees estate to submit a "proposal for preserving said wooded areas prior to issuance of building permits."

Following approval of the subdivision, the executor sold several of the Voorhees lots. All these lots are in the R-50 Zone and require only fifty-feet of frontage and other size requirements, which are smaller than the size requirements [\*6] to which Lot 13 is subject.

Lot 13 is also subject to a conservation easement, under which the New Jersey Department of Environmental Protection (DEP) designated a significant portion of Lot 13 as wetlands and wetlands transition areas not to be developed. The easement states the "Restricted Area" cannot be "included as part of the gross area [of Lot 13] for the purpose of density, lot coverage, or open space requirements . . . ." On December 19, 2014, the executor obtained wetlands development permits from DEP to clear 5,000 square feet in the northwest corner of Lot 13 to build a single-family house. The survey plan for the proposed home

stated the garage on the lot was to be removed.

The Burkes purchased Lot 13 on April 18, 2016. Thereafter, they submitted an appeal to the Ocean County Board of Taxation that resulted in Lot 13 being designated as "non buildable" and with a value of \$90,000 to match its purchase price.

On November 30, 2018, the Burkes received new development permits from DEP reducing the size of the Restricted Area and relocating the area where construction is allowed to the east of the property. That change created a flag-shaped buildable area. The "pole" for a driveway [\*7] fronting on Warren Place is 32.36 feet wide, and the "flag" for a house is 79.2 feet wide. The buildable area encompasses 19,989 square feet, nearly double the requirement of 10,000 square feet. The remainder of Lot 13 remains conservation-restricted.

In 2019, the Burkes applied for a zoning permit to build a single-family house and pool on the newly delineated, buildable portion of Lot 13 and refurbish the preexisting garage. Bay Head zoning officer Theodore A. Bianchi, Jr. denied the permit, finding Lot 13 had insufficient frontage.

On November 26, 2019, Donald Burke filed a development application with the BHPB, appealing Bianchi's decision pursuant to [N.J.S.A. 40:55D-70\(a\)](#) and, alternatively, requesting a bulk variance for lot frontage in accordance with [N.J.S.A. 40:55D-70\(c\)](#). He published notice of the application as required by [N.J.S.A. 40:55D-12](#).

The BHPB determined at its January 15, 2020 meeting it did not have jurisdiction to consider the appeal/application because the Burkes' public notice was deficient, failing to request relief pursuant to [N.J.S.A. 40:55D-36](#) or identify they were appealing Bianchi's decision. On February 24, 2020, the Burkes filed a new application and requested the [N.J.S.A. 40:55D-36](#) variance, along with the relief previously requested.

Prior to March [\*8] 18, 2020, all BHPB meetings were postponed due to the COVID-19 pandemic. The Burkes filed an action in Superior Court against the BHPB, seeking default approval of their application pursuant to [N.J.S.A. 40:55D-61](#) because the BHPB failed to approve or deny it within 120 days after it was deemed complete. However, proceedings before the BHPB on the merits of the Burkes' appeal and application

continued once meetings resumed in an online format.

On June 17, 2020, the Burkes published a new public notice stating they were appealing Bianchi's decision and seeking variances for frontage, lot width, garage height, garage setback, and construction on an unimproved street. The notice stated their application concerned "the premises located at 174 Twilight Road . . . and designated on the Bay Head Tax Map as Block 3, Lot 13." Although Twilight Road no longer existed in the vicinity of Lot 13, this address remained the address of record in tax documents at the time the notice was issued.

At a hearing on July 1, 2020, a licensed professional planner and engineer (Lindstrom) testified on behalf of the Burkes that Lot 13 had 79.2 feet of frontage on Warren Place and an additional twenty-five feet along the terminus [\*9] of that street, creating a total of 104.2 "continuous and unbroken" feet of frontage and obviating the need for a variance. The BHPB disagreed and voted to deny the Burkes' appeal and affirm Bianchi's decision.

On the application for variances, the Burkes presented testimony detailing the history of Lot 13 and asserting it was subject to "hardship" under [N.J.S.A. 40:55D-70\(c\)\(1\)](#) and [40:55D-36](#) that was created by the Borough through Ordinance 1991-5. Lindstrom testified that the requirements of [N.J.S.A. 40:55D-70\(c\)\(2\)](#) for the frontage variance were also met because there would be no detriment to the public good by the construction of the Burkes' house. He testified the Burkes' proposed dwelling would conform to the residential use requirement in the R-100 Zone and to all setback requirements. He also said the house was consistent with the Borough's master plan of constructing single-family homes, and it would not create any improper density of construction since the buildable portion of Lot 13 was twice the minimum size for the R-100 Zone. The house's architecture would be consistent with that of others in the neighborhood, promoting a "desirable visual environment . . . ."

Lindstrom also testified the Burkes now planned to remove the existing [\*10] garage on Lot 13 and replace it with a "fully conforming accessory structure," removing the need for the garage height and garage setback variances. The Burkes submitted a revised plan prior to the BHPB's July 30, 2020 meeting, showing the smaller "accessory structure."

Lindstrom further testified, although Warren Place did not meet the forty-foot width requirement, there were

several streets in Bay Head with substantial residential development that also did not meet that requirement. He stated the subdivision map for the Osborne Avenue properties adjacent to Lot 13 required "turnaround driveways," but that none of them met the requirement. He also said, although Resolution 2004-11 had directed the preservation of trees on Lots 2.01, 3.01, and 4.01 except those in the building footprint of any houses, the three lots were cleared of all but one mature tree.

Lindstrom also explained the Burkes' home would not cause flooding on neighboring properties, noting water from those properties currently drains south into the wetland area because Lot 13 is lower in elevation. He stated a local ordinance obligated the Osborne Avenue properties to have their drainage run onto the street and not onto [\*11] adjoining areas like Lot 13, but the lots were never graded properly to accomplish that drainage. He also testified the building plan submitted with the Burkes' application was already approved by DEP.

Gerard J. Naylis, an expert in fire safety, testified that in the event of a fire, trucks could utilize Warren Place and pull into the proposed driveway on Lot 13 to access the house. Bay Head Fire Chief Joseph Todisco (Todisco) confirmed that testimony, stating he drove the largest fire truck in the town onto Warren Place and backed it up onto Osborne Avenue to test whether Lot 13 had suitable access. He said he had "no problem" doing so. Todisco further stated he never had difficulty maneuvering trucks on other streets in Bay Head that were less than forty-feet wide, and explained the process for fighting a fire on such a street was no different than on a wider roadway. When asked specifically about a ten-foot-wide street, he remarked the department's trucks were driven into and backed out of its ten-foot garage doors "every single day."

As nearby property owners and "interested parties" pursuant to [N.J.S.A. 40:55D-4](#) and -12, plaintiffs objected to the Burkes' application for variances before the BHPB. [\*12] Their counsel first argued the Burkes' public notice remained deficient because it listed Lot 13's address as "174 Twilight Avenue" when that address no longer existed. The BHPB's counsel noted the address conformed to the tax map and all neighbors within 200 feet were informed.

Regarding the application's merits, plaintiffs testified to alleged harms that would result from the Burkes' proposed construction. The BHPB heard testimony that residents were told by realtors prior to purchasing their

own neighboring lots that Lot 13 was "unbuildable" and would remain wooded and vacant, and their property values might suffer from drainage issues and loss of the pleasing woodland views. The neighboring lot owners confirmed they removed all the trees, except one, from their own properties and that their lots lacked turnaround driveways.

Plaintiffs additionally argued Lot 13 "merged" with the rest of the Voorhees lots under Bay Head Code § 147-6P because it was a nonconforming lot. Plaintiffs asserted that because Lot 13 did not have the minimum frontage required after May 1991, it became part of an undivided parcel and should not have been sold to the Burkes without subdivision approval. Because of the merger, they [\*13] posited the lot-frontage deficiency for Lot 13 was a self-created hardship.

Plaintiffs also argued conditions in Resolution 2004-11 requiring the preservation of wooded areas and removal of the preexisting garage applied to Lot 13 because it was part of the greater group of Voorhees lots. The BHPB's engineer, however, testified there were no restrictions on Lot 13 based upon the resolution because it was not part of any larger tract. Lindstrom stated he "surveyed [Lot 13] and did some deed research, there was nothing recorded of any restriction to [the] property for tree sav[ing] or any kind of easements" for that purpose.

Plaintiffs presented the testimony of an expert engineer specializing in hydrology who prepared a report for submission to DEP dated July 2, 2020, describing potential issues with drainage on Lot 13 and neighboring lots. He testified the Burkes' proposed home would cause flooding on the Osborne Avenue neighbors' properties. He conceded, however, that DEP issued a letter rejecting his findings and opinions.

Following the close of all testimony and admission of exhibits on November 4, 2020, the BHPB approved the variances for lot frontage and to build on an unimproved [\*14] street by a vote of six to three. In its Resolution 2019-12, adopted December 16, 2020, the BHPB found the nonconforming frontage condition of Lot 13 was not self-created by the Burkes or their predecessors in title because the lot was conforming until Ordinance 1991-5 changed the compliance of the streets bordering it. The BHPB further found there were no other bulk variances required for Lot 13, and that a frontage variance would "not affect adjacent residential properties."

The BHPB found the building plan was consistent with

the aesthetics and architecture of the neighborhood. It further found there was "adequate access for firefighting equipment, ambulances and other emergency vehicles" and noted there was a home across the street from Lot 13 for several years, and there was no testimony that emergency vehicles could not access that house. It further found DEP's easement, which considerably reduced the buildable portion of Lot 13, would promote environmental preservation.

The BHPB imposed conditions upon the grant of the variances, requiring, among other things, the Burkes' building plan be updated to incorporate: (1) the Burkes' promised demolition of the preexisting garage; (2) **[\*15]** the widening of Warren Place to twenty feet using asphalt pavement; (3) a new drainage and stormwater plan; and (4) relocation of a generator, an air conditioning unit, and pool equipment to the side of the house not facing the Osborne Avenue lots. The BHPB also conditioned approval on the Burkes obtaining any necessary permits and approvals from DEP, the Ocean County Planning Board, the Ocean County Soil Conservation District, the Borough Sewer and Water Department, the New Jersey Department of Transportation, and local fire officials.

On February 9, 2021, plaintiffs filed a complaint in lieu of prerogative writs against the BHPB and the Burkes seeking the reversal of the BHPB's decision. Count One alleged the lot-frontage and unimproved street variances were granted in error. Count Two asserted the BHPB erred by not requiring compliance with Resolution 2004-11 concerning the 2005 Voorhees subdivision. Counts Three and Four argued the project failed to adequately address fire safety and DEP's drainage/stormwater requirements. Count Five alleged the Burkes exerted undue influence over BHPB members. Count Six asserted the BHPB did not comply with OPRA requests filed by Brennan. Finally, **[\*16]** Count Seven alleged the Burkes acted "in bad faith" by threatening to request Lot 13 be re-zoned for affordable housing units if the BHPB denied their application.

The Burkes moved to dismiss plaintiffs' complaint and BHPB joined the motion. Plaintiffs submitted certifications in opposition, alleging various acts of undue influence by the Burkes, including allegations that Board member Holly MacPherson told a third-party that Kaitlyn Burke asked her to influence other members to vote in favor of the application and the Burkes threatened to seek approval to build affordable housing on Lot 13.

In response to those certifications, the Burkes moved to strike portions from the record on grounds they were not based on firsthand knowledge. Plaintiffs then filed a motion to allow discovery as to the undue influence and conflict of interest claims, to consolidate their action with the Burkes' default approval matter, and to expand the record. The Burkes filed a cross-motion for a protective order precluding discovery.

By order dated August 4, 2021, the trial court denied plaintiffs' motions. It found the statements in support of the motion were based on inadmissible hearsay and were not part of **[\*17]** the record before the BHPB. It further found additional discovery was inappropriate because plaintiffs' claims were "based upon stringing together a series of rumors, allegations, and so forth" and were insufficient to warrant vacation of the BHPB's decision "as a matter of law . . . ." The trial court stated "the purpose of discovery is not to try to construct a cause of action" but to "discover reasonable admissible information or evidence in connection with" a cause of action.

The trial court dismissed Counts Two through Seven for failure to state a claim pursuant to [Rule 4:6-2\(e\)](#), leaving only Count One -- the merits of the variances. The court stated Count Six, the alleged OPRA violations, should have been filed before the Government Records Council (GRC), while Count Four, regarding the DEP permits, should be brought before that agency. The trial court found Counts Five and Seven, concerning undue influence and conflicts of interest, were not supported by sufficient evidence.

The trial court denied plaintiffs' motion for consolidation because of continuing confidential "negotiations that [were] going on a separate track as to [the variance] conditions" in the default approval litigation and **[\*18]** because, although both actions dealt with the same variance application, merging the two actions "may just complicate the review of this matter . . . ." The denial of the discovery motion rendered the Burkes' cross-motion for a protective order moot.

Plaintiffs then made a series of OPRA requests to the Council for copies of its executive session minutes between August 2020 and September 2021. On September 23, 2021, the Council provided electronic files containing the requested documents, some of which were redacted. Yet when Brennan used his cell phone to "copy and paste" the text of the files "from [his] e-mail inbox into the iPhone application 'Notes,'" the black redaction bars disappeared, allowing him to read

the minutes in their entirety. Brennan was unable to explain why this occurred, but certified he did not intentionally try to remove the redactions. He later discovered he could also remove the redactions on a desktop computer by using the "copy and paste [function] in any basic word processing program (e.g. Microsoft Word, Adobe Acrobat, Gmail)." Brennan shared information from the redacted portions of the minutes, including attorney-client privileged discussions between [\*19] the Council and its Special Counsel about the Borough's affordable housing obligations and settlement negotiations in the default approval litigation, with his fellow plaintiffs and "many residents of Bay Head, through e-mail or word of mouth."

The Burkes subsequently filed a motion, joined by the BHPB, for an order to show cause seeking to restrict plaintiffs from disseminating the unredacted minutes. They also demanded plaintiffs "effectuate the return" of the information. The same day, the court issued an order temporarily restraining plaintiffs from disseminating the disputed information pending a decision on defendants' motion.

Plaintiffs filed a certification by Brennan in opposition to the motion. Paragraph 24 of the certification described the content of the minutes that had been redacted. In response, the Burkes filed a motion to delete this certification, joined by the BHPB. Plaintiffs then filed a motion to dissolve the temporary restraints and vacate the October 12 order, arguing Brennan had not violated any confidentiality requirements.

At oral argument, on November 8, 2021, the parties acknowledged the redacted information had already been widely disseminated by plaintiffs. [\*20] Defendants argued the disclosure of the privileged information to Brennan was involuntary. The court found Brennan did not "have a right to view" the privileged portions of the minutes. It ruled the documents could be used in the litigation only in their redacted format. The court imposed permanent restraints on dissemination of the unredacted minutes' content. On November 19, 2021, following further discussion on the record, it entered orders restricting the use of the confidential information in the current litigation and placing the entire Brennan certification under seal.

Meanwhile, plaintiffs filed a motion to amend the complaint, seeking to add two new counts. One raised the issue of the merger of Lot 13 with the other Voorhees lots and, again, the applicability of the 2005 subdivision conditions, this time claiming the subdivision

meant any "hardship" to Lot 13 was self-created by the Burkes' predecessor in title. The other count alleged the Burkes attempted to use the default approval litigation and threats to use Lot 13 for affordable housing as a means to bypass the conditions set forth in Resolution 2019-12. The court denied this motion, finding the amendments were an attempt [\*21] to pursue claims previously dismissed.

After a trial, the court entered an order for final judgment affirming the BHPB's decision granting the variances. The court found Resolution 2004-11 did not prevent the BHPB from granting the variances and rejected plaintiffs' argument that Lot 13 merged into a "Voorhees Tract" with other lots and should not have been sold without subdivision approval. It found the Burkes' public notice concerning the application for variances was adequate, and the BHPB was not divested of jurisdiction over the application when the Burkes filed their default approval litigation.

The court also rejected plaintiffs' arguments that relief pursuant to [N.J.S.A. 40:55D-70\(c\)\(1\)](#) was unavailable because the Burkes' asserted hardships were self-created. Specifically, it found the lack of sufficient frontage for Lot 13 was a hardship under [\(c\)\(1\)](#) caused by the Borough when Twilight Road and part of Warren Place were vacated in Ordinance 1991-5. It also stated the variances were appropriate because the proposed home would meet all bulk requirements, would not shed water onto plaintiffs' properties, and would be accessible to emergency vehicles. Finally, the court rejected plaintiffs' revived argument [\*22] that they should be granted further discovery. The court concluded the BHPB's Resolution 2019-12 contained sufficient support for and the reasoning behind its findings of fact, and therefore dismissed the remainder of plaintiffs' complaint.

This appeal followed.

II.

When evaluating a trial court's review of a municipal planning board's action, we look for an abuse of discretion. [Cohen v. Bd. of Adjustment of Rumson, 396 N.J. Super. 608, 614-15, 935 A.2d 842 \(App. Div. 2007\)](#). A court should not disturb a decision of a local board that is "supported by substantial evidence in the record and reflect[s] a correct application of the relevant principles of land use law." [Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58-59, 733 A.2d 464 \(1999\)](#). Similarly, motions to consolidate, discovery orders, and evidentiary rulings are reviewed for an

abuse of discretion. [Morales v. Wesler](#), 439 N.J. Super. 375, 378, 109 A.3d 218 (App. Div. 2015); [State in the Int. of A.B.](#), 219 N.J. 542, 554, 99 A.3d 782 (2014).

A board's decision regarding a question of law, however, is subject to de novo review. [Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Franklin](#), 233 N.J. 546, 559, 187 A.3d 142 (2018). Whether the board has jurisdiction over a matter is also a legal question. [Pond Run Watershed Ass'n v. Twp. of Hamilton Zoning Bd. of Adjustment](#), 397 N.J. Super. 335, 350, 937 A.2d 334 (App. Div. 2008). Likewise, a trial court's decision on a [Rule 4:6-2\(e\)](#) motion is reviewed de novo, and an appellate court "owes no deference to the trial court's legal conclusions." [Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.](#), 237 N.J. 91, 108, 203 A.3d 133 (2019).

III.

#### A. BHPB's Jurisdiction.

BHPB's jurisdiction is a threshold issue. See [Northgate Condo. Ass'n v. Borough of Hillside Planning Bd.](#), 214 N.J. 120, 137-38, 68 A.3d 292 (2013); [Waste Mgmt., Inc. v. Admiral Ins. Co.](#), 138 N.J. 106, 119-21, 649 A.2d 379 (1994). Plaintiffs argue the Burkes' public notice of their application was deficient, depriving the BHPB of jurisdiction [\*23] to consider it. They assert the notice improperly stated Lot 13's address as "174 Twilight Road," when the lot no longer fronted on that street. Plaintiffs also argue the notice failed to alert the public the Burkes' construction plan would "vitiating the tree-preservation provision" in Resolution 2004-11.

To comply with the [Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163](#) (MLUL), "a notice must do more than simply recite the technical terms of a proposed development." [Northgate](#), 214 N.J. at 139. Instead, it must "inform the public of the nature of the application in a commonsense manner such that the ordinary layperson could intelligently determine whether to object or seek further information." [Perlmart of Lacey, Inc. v. Lacey Twp. Plan. Bd.](#), 295 N.J. Super. 234, 239, 684 A.2d 1005 (App. Div. 1996). The "critical element" is "an accurate description of what the property will be used for under the application." [Id.](#) at 238.

The notice must accurately identify the location of the property that is the subject of the application. [Northgate](#), 214 N.J. at 141. The statute "offers two alternatives, requiring use of either the street address or the lot and block numbers as shown on the current tax map." [Ibid.](#) Minor discrepancies, such as clerical errors in the listing

of either the address or tax map designation, do not render a notice fatally defective when interested parties are adequately apprised of [\*24] the proceedings. See [Northgate](#), 214 N.J. at 126, 142; see also [Pond Run](#), 397 N.J. Super. at 343-50.

Here, the alleged defect in the notice as to the identification of the application's subject property is not even a clerical error. "174 Twilight Road" remained the address of record for Lot 13 on the tax map and documents related to the Burkes' tax appeal. Importantly, [N.J.S.A. 40:55D-11](#) requires the notice to give either the street address or the block and lot numbers, and in this instance the block and lot numbers were correctly stated. There was no evidence presented that any interested parties were confused by the notice or did not come to the BHPB's meetings because they were confused. Proper notifications were sent to all neighbors in the 200-foot range, and many members of the public attended the virtual meetings and voiced their support and objections.

As to the alleged failure to fully describe the nature and impact of the application, that the notice did not mention the 2005 Voorhees subdivision and its conditions did not render it defective. A description of the proposed use of the subject property and a sufficiently detailed outline of the variances required are all that were required. Even if the conditions set forth in Resolution 2004-11 required the Burkes [\*25] to preserve trees on Lot 13, it was not necessary to include the fact that some trees would need to be cleared in the public notice. There is substantial credible evidence in the record that the public notice issued by the Burkes was sufficient pursuant to [N.J.S.A. 40:55D-11](#) and [-12](#).

#### B. Effect of Default Approval.

Plaintiffs next argue the BHPB was deprived of jurisdiction to continue considering the application on its merits after the Burkes filed their action in lieu of prerogative writs seeking default approval of their application. They rely on [Orloski v. Planning Board of Ship Bottom](#), 226 N.J. Super. 666, 670 n.1, 545 A.2d 261 (Law Div. 1988), *aff'd*, 234 N.J. Super. 1, 559 A.2d 1380 (App. Div. 1989), in which the trial court stated that "once an applicant has received a decision of the [planning] board and appealed in lieu of prerogative writs, the board is divested of jurisdiction absent a remand."

The BHPB addressed the Burkes' variance application in detail over the course of several hearings where plaintiffs and other residents had a full opportunity to

comment, testify, and argue its merits. Here, the Burkes did not receive a timely decision from the BHPB, and their action in Superior Court was not an appeal from any decision. Instead, the Burkes initiated a suit in accordance with [N.J.S.A. 40:55D-61](#), which provides a board must grant or deny an application within [\*26] 120 days of its being deemed completed, as an alternative means of relief. Because the BHPB had not reached a conclusion on the merits of the application, under the circumstances of this matter it was not divested of jurisdiction when the default lawsuit was filed.

### C. Alleged Merger of Lot 13.

Plaintiffs allege Lot 13 merged into the rest of the Voorhees lots pursuant to Bay Head Code § 147-6P. Plaintiffs claim Lot 13 could not have been sold legally to the Burkes without subdivision approval because of the merger. They assert, therefore, the BHPB lacked jurisdiction to consider any application for variances for Lot 13. Code § 147-6P provides, if two or more contiguous lots "are in single ownership and one or more of the lots is nonconforming in any aspect," they "shall be considered to be an undivided parcel for the purposes of" zoning and planning in the Borough. No portion of this "parcel" may be "conveyed or divided" unless subdivision is first approved.

Like statutes, the goal in interpreting municipal ordinances is the discovery and implementation of the local legislative intent. [DePetro v. Twp. of Wayne Plan. Bd.](#), 367 N.J. Super. 161, 174, 842 A.2d 266 (App. Div. 2004). Words in an ordinance "cannot be considered to exist in a vacuum without reference to relevant policies." [Terner v. Spyco., Inc.](#), 226 N.J. Super. 532, 539, 545 A.2d 192 (App. Div. 1988). Instead, a court should interpret [\*27] them in a manner "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand.'" [Jersey City Chapter of Prop. Owner's Protective Ass'n v. City Council of Jersey City](#), 55 N.J. 86, 101, 259 A.2d 698 (1969) (quoting [Dvorkin v. Dover Township](#), 29 N.J. 303, 315, 148 A.2d 793 (1959)). It is essential we focus on the ordinance's purpose. [White Castle Sys. v. Plan. Bd. of Clifton](#), 244 N.J. Super. 688, 691, 583 A.2d 406 (App. Div. 1990).

We "give deference to a municipality's informed interpretation of its ordinances, while nevertheless construing the ordinance de novo." [DePetro](#), 367 N.J. Super. at 174. This standard recognizes "the board's knowledge of local circumstances . . . ." [Fallone Props., LLC v. Bethlehem Twp. Plan. Bd.](#), 369 N.J. Super. 552, 562, 849 A.2d 1117 (App. Div. 2004). Code § 147-6P

codifies the doctrine of "merger" in land use law. "Merger" describes "the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation." [Jock v. Zoning Bd. of Adjustment of Wall](#), 184 N.J. 562, 578, 878 A.2d 785 (2005). It mandates subdivision approval before individual substandard parcels are developed if contiguous parcels have been in the same ownership and, if at the time of that ownership, the greater parcel was not substandard. *Ibid.* Merger does not preclude the treatment of the lots as separate for other purposes, such as designation on a town map or assessment of taxes. [Id. at 579](#). It is "simply the characterization of adjacent undersized lots in common ownership as part of a larger tract or parcel with an eye toward effectuating present day zoning laws." *Ibid.*

Merger [\*28] does not apply to "adjoining lots, owned by the same person, 'all of which are found and certified by the administrative officer to conform to the requirements of the municipal development regulations and are shown and designated as separate lots, tracts or parcels on the tax map or atlas of the municipality.'" [Id. at 582](#) (quoting [N.J.S.A. 40:55D-7](#)). It is also inapplicable where a party comes into possession of two "back-to-back" contiguous lots fronting different streets, even if one of them is nonconforming, because merger would create an oddly long and narrow plot. *Ibid.* Contiguous lots created pursuant to an approved subdivision also do not merge. [Id. at 583](#).

We agree with the trial court: Lot 13 did not merge with the other Voorhees Lots. Lot 13 has never been "undersized," [Dalton v. Ocean Twp. Zoning Bd. of Adjustment](#), 245 N.J. Super. 453, 460-61, 586 A.2d 262 (App. Div. 1991), and is not contiguous with any other "lots of substandard size," [Jock](#), 184 N.J. at 578, except the landlocked Lot 12. Merger with Lot 12 would not bring Lot 13 into compliance with the frontage requirement, which is the only bulk nonconformity it suffers. Lots 2.01, 3.01, and 4.01 were created through subdivision approval; they did not merge with any of the other Voorhees lots and were properly severed pursuant to the local ordinance.

Construing Code § 147-6P to require merger [\*29] in this instance would not serve the purpose of merger, as it would entail the formation of exceptionally long, narrow lots fronting on two different streets. There is sufficient credible evidence in the record to support the trial court's finding that Lot 13 did not merge with the other lots at the time of the subdivision.

#### D. Variances.

Plaintiffs also challenge the grant of variances. They argue the BHPB erred by approving the Burkes' requested variances without making any findings in its resolution addressing the conditions allegedly placed on Lot 13 through Resolution 2004-11. They assert the subdivision of Lots 2 and 4 required the protection of all the trees on Lot 13 and the removal of the garage. Plaintiffs assert a remand is necessary for the BHPB to make the necessary factual findings regarding the effect of the subdivision conditions, as well as other issues including drainage, DEP's conservation easement, and fire truck accessibility.

These arguments are without merit. Resolution 2004-11 addressed the minor subdivision of Block 3, Lots 2 and 4, into Lots 2.01, 3.01, and 4.01. Bay Head Code § 147-44(a)(5)(q) and Resolution 2004-11 required the Voorhees estate to submit plat maps showing, among other things, [\*30] wooded areas on and "immediately adjacent to" the subject lots. The estate did so and identified some wooded areas on Lot 13. Resolution 2004-11 did not limit Lot 13.

The resolution further directed the estate to submit a proposal for preserving wooded areas. This, however, was stated as a condition for (1) the grant of subdivision approval, and (2) the issuance of any building permits related to the newly created lots. The resolution did not preclude potential subsequent applications for variances for any other Voorhees lot. Indeed, seeking needed variances for a proposed development is a different process than seeking a building permit. [Ten Starry Dom P'ship v. Mauro, 216 N.J. 16, 37, 76 A.3d 1236 \(2013\)](#).

The Burkes' plan shows the building envelope for their driveway, house, accessory structure, and pool is in the northern part of Lot 13 and quite close to the property line with the other Osborne Avenue lots. This abides by DEP's conservation easement forbidding construction on any other part of the lot. As a result, even if the resolution condition had applied to Lot 13, clearing the vegetation closest to the lots created by the 2005 subdivision would not be prohibited. There is no need for remand to address the tree-related condition in Resolution [\*31] 2004-11; that condition does not apply to Lot 13.

With regard to the garage, the text of Resolution 2004-11 does not mention that structure or its removal. Regardless of whether Resolution 2004-11 did impose a condition requiring the garage's demolition, the Burkes agreed to replace it with a new, conforming structure,

and the BHPB conditioned approval of the variances on that action. As a result, no remand to the BHPB is necessary on this issue.

Plaintiffs' other concerns regarding the variances, unrelated to Resolution 2004-11, are similarly misplaced. "Site conditions, including access and drainage, are valid considerations of a board when the relief requested implicates those conditions." [Ten Starry Dom, 216 N.J. at 31-32](#). In [Ten Starry Dom](#) our Supreme Court specifically concluded "[a] deviation from prescribed lot frontage may have no impact on any valid zoning purpose other than the stated public interest in location of all lots on a public street." [Id. at 33](#). The BHPB was not required to consider and make findings concerning purported drainage issues when addressing the Burkes' application.

Similarly, there is no need to remand for the BHPB to make findings concerning compliance with DEP's conservation easement. Like the drainage issue, [\*32] compliance with the conservation easement was irrelevant to granting the requested variances. Those compliance concerns are within the control of DEP, pursuant to the enforcement provisions of its Freshwater Wetlands Protection Act Rules, [N.J.A.C. 7:7A-1.1 to -22.20](#). The BHPB conditioned approval upon the Burkes obtaining any necessary permits and approvals from DEP and other agencies.

Finally, as to fire truck accessibility, the BHPB specifically heard testimony and found Warren Place provided sufficient access for firefighting equipment and emergency vehicles. It noted there was no testimony those vehicles could not access the home opposite Lot 13 on Lot 33. The BHPB conditioned variance approval upon the Burkes widening the paved area of Warren Place to twenty feet, which would provide an even safer right of way for emergency vehicles.

In summation, remand to the BHPB is not necessary as it, and the trial court, addressed every issue that plaintiffs raised. We conclude the BHPB's decision is supported by sufficient findings in the record.

#### E. Alleged self-created hardship.

Plaintiffs further argue variance relief pursuant to [N.J.S.A. 40:55D-70\(c\)\(1\)](#) was unavailable to the Burkes because the hardships caused by the lot's substandard frontage [\*33] and location on an unimproved street were self-created. They contend the Voorhees estate created the hardship by "pursu[ing] a subdivision" in 2005 "that did not account for the 100 foot [sic] minimum

required frontage for Lot 13." They assert once more the Voorhees lots should have undergone a subdivision before any lots were sold. Because this was not done, plaintiffs claim the Burkes cannot now receive hardship variances.

"Provisions in a zoning ordinance that control the size and shape of a lot and the size and location of buildings or other structures on a parcel of property are known as bulk or dimensional requirements." [Ten Starry Dom, 216 N.J. at 28. N.J.S.A. 40:55D-70\(c\)\(1\)](#) provides a local board has the power to grant a variance from these requirements

[w]here: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to . . . this act would result in peculiar and exceptional [\*34] practical difficulties to, or exceptional and undue hardship upon, the developer of such property . . . [(footnote omitted).]

The hardship claimed must relate to a condition of or on the property in question and the property itself must be in some way atypical. [Lang, 160 N.J. at 56](#). Examples of exceptional conditions include the property's dimensions, topographic conditions, "or some other extraordinary or exceptional feature unique to the property." [Ten Starry Dom, 216 N.J. at 29](#). Hardship does not include the property owner's personal hardship. *Ibid*.

Generally, (c)(1) variances are granted because "without such relief the property will be zoned into inutility." [Davis Enters. v. Karpf, 105 N.J. 476, 481, 523 A.2d 137 \(1987\)](#). A variance may be granted where the strict enforcement of the zoning ordinance will, because of the property's unique characteristics, impede the extent to which the property can be used. [Lang, 160 N.J. at 55. N.J.S.A. 40:55D-35](#) provides that "[n]o permit for the erection of any building or structure shall be issued unless the lot abuts a street giving access to such proposed building or structure." The street must be "certified to be suitably improved to the satisfaction of the governing body" or suitable improvement must have been "assured by means of a performance guarantee . . ." *Ibid*. [N.J.S.A. 40:55D-36](#) provides that where

enforcement [\*35] of this requirement "would entail practical difficulty or unnecessary hardship," the planning board may grant a variance. The grant must be "subject to conditions that will provide adequate access for firefighting equipment, ambulances and other emergency vehicles necessary for the protection of health and safety . . ." *Ibid*.

The BHPB conditioned approval of the variances in this case on the widening of the paved area of Warren Place to provide emergency access, in compliance with this requirement. Lot 13 is landlocked on all sides except for 79.2 feet of frontage on Warren Place. Ultimately, Lot 13 would be zoned into inutility if the variances were not granted. It would be a "residential" lot where a residence is forbidden to be built. See [Ten Starry Dom, 216 N.J. at 35](#) (finding (c)(1) hardship where, without a lot frontage variance, a lot could not be "developed for residential use, the only permitted use in the zone"). The trial court properly found strict application of the requirements for lot frontage length and frontage on an improved street would create a hardship under [N.J.S.A. 40:55D-36](#) and [70\(c\)\(1\)](#).

Nor was this hardship self-created. [Ketcherick v. Borough of Mountain Lakes Bd. of Adjustment, 256 N.J. Super. 647, 654, 607 A.2d 1039 \(App. Div. 1992\)](#). A self-created hardship "requires an affirmative action by the landowner or a predecessor [\*36] in title that brings an otherwise conforming property into non-conformity." [Jock, 184 N.J. at 591](#). If a previously conforming lot becomes nonconforming due to a new zoning or other ordinance rather than any action by the owner, the right to variance relief passes to any successors in title regardless of whether they acquired the lot with knowledge of the nonconformity. [Ketcherick, 256 N.J. Super. at 655](#). The record amply supports the trial court's finding that the nonconformities as to the lot's frontage and its position on an unimproved street were created by Ordinance 1991-5 and the Borough, not the Burkes or any predecessor in title. Prior to that ordinance's enactment, Lot 13 had over three times the required frontage on Twilight Road, which was presumably sufficiently improved to meet the local definition of a "street."

In addition to demonstrating a hardship that is not self-created, an applicant for a (c)(1) variance must show that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." [N.J.S.A. 40:55D-70](#). To determine whether these "negative criteria," [Nash v. Bd. of](#)

Adjustment of Morris Twp., 96 N.J. 97, 102, 474 A.2d 241 (1984) are met, the local board must look at the impact of the proposed variance [\*37] on nearby properties and decide whether it will cause "substantial detriment to the public good" or will "substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55D-70.

The "substantial" modifier is key; any variance "may have some tendency to impair residential character, utility or value," Lang, 160 N.J. at 61 (emphasis omitted), and impair the zoning plan "at least to the extent that it impinges on the zoning minima," Chirichello v. Zoning Bd. of Adjustment of Monmouth Beach, 78 N.J. 544, 557, 397 A.2d 646 (1979). Where there is less of a difference between the required dimensions and that of the subject lot, it is "more likely the restriction is not that vital to valid public interests." Id. at 561. The negative criteria are satisfied where proposed development will not make much impact on surrounding property owners and their lots.

There is substantial evidence in the record demonstrating the negative criteria were met here. In Ten Starry Dom, our Supreme Court found all the criteria for a (c)(1) lot frontage variance were met and the variance would have "no impact on any valid zoning purpose," where the lot in question, also in Bay Head, had only 10.02 feet of frontage where fifty were required. 216 N.J. at 33. Given there is already one single-family home on Warren Place, building another should not have any [\*38] additional harmful consequences relating to the road's width.

There is also no evidence of substantial detriment to the public good, because the Burkes propose building a single-family residence in an area zoned for same, the house's architecture will match the rest of the neighborhood, and the conservation easement restricts the home and accessory structures to sizes in keeping with others in the area.

The BHPB did not act arbitrarily, capriciously, or unreasonably when granting the lot frontage and unimproved street variances to the Burkes under N.J.S.A. 40:55D-70(c)(1) and -35, because their application met both the positive and negative criteria under those statutes. Moreover, because we agree with the trial court that the BHPB did not err in granting (c)(1) variance approval, there is no need to discuss relief pursuant to (c)(2).

#### F. Consolidation.

Plaintiffs further maintain the trial court erred by denying their motion to consolidate their case with the Burkes' default approval litigation pursuant to Rule 4:38-1. They assert the two matters involved the same facts and common questions of law, and they could not succeed in their litigation if the Burkes also succeeded in their default litigation. Pursuant to Rule 4:38-1, "[w]hen actions [\*39] involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party's or its own motion may order the actions consolidated."

Here, although the two matters at issue concern the same "transaction" -- the Burkes' application for variances -- they involve different questions of law. The issue before the court in the Burkes' default approval litigation was whether the BHPB granted or denied their application within 120 days of its being deemed completed. N.J.S.A. 40:55D-61. In contrast, the issue in plaintiffs' action was whether the BHPB reached a proper conclusion on the merits of the application. One suit involved the BHPB's alleged failure to act; the other involved its chosen action. The former concerned questions of fact involving timing, the effect of the COVID-19 pandemic, and any "consent" by the Burkes to delays in the proceedings. The latter included a review of the BHPB's decisions regarding application of statutory criteria and interpretation of local ordinances, and factual issues such as the history of Lot 13, the character of the neighborhood, and the validity of plaintiffs' claims that the construction [\*40] would be detrimental. The issues were not intertwined. The trial court did not abuse its discretion in denying plaintiffs' motion to consolidate.

#### G. Undue Influence.

Plaintiffs assert the trial court erred by dismissing the count for undue influence for failure to state a claim pursuant to Rule 4:6-2(e). They contend there "was an alleged threat of affordable housing unless the Burkes received approval" for their single-family home. Plaintiffs also argue the court erred by denying their request for discovery related to these allegations. They assert they were entitled to discovery, including deposing BHPB members, to search for support for undue influence.

We apply a plenary standard of review from a trial court's decision to grant a motion to dismiss pursuant to Rule 4:6-2(e). Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114, 30 A.3d 1061 (App. Div. 2011) (citing Sickles v. Cabot Corp., 379 N.J.

[Super. 100, 106, 877 A.2d 267 \(App. Div. 2005\)](#)). No deference is owed to the trial court's conclusions. *Ibid.* Although our review is liberal, dismissal is "mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted," [Rieder v. State, 221 N.J. Super. 547, 554, 535 A.2d 512 \(App. Div. 1987\)](#), or if "discovery will not give rise to such a claim," [Dimitrakopoulos, 237 N.J. at 107](#). Indeed, dismissal "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [\*41] [the] . . . claim must be apparent from the complaint itself." [Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202, 814 A.2d 1115 \(App. Div. 2003\)](#).

Plaintiffs' complaint alleged the Burkes unduly influenced the BHPB by threatening to change their building plan to one for affordable housing if their single-family house was not approved. In opposition to defendants' motion to dismiss, plaintiffs submitted letters and e-mails from Burke, Sr., to Bay Head Mayor William Curtis dated December 21, 2020, January 11, 2021, and May 18, 2021, requesting a meeting to "discuss use of [Lot 13] to address Bay Head's constitutionally mandated affordable housing obligation." All these messages are dated after the BHPB voted to grant the variances at issue here on November 4, 2020, and adopted its memorializing Resolution 2019-12 on December 16, 2020. Nothing in the record suggests the Burkes mentioned affordable housing before the vote was taken.<sup>2</sup> Thus, even if the allegation in the complaint on this subject is presumed true, as required on a [Rule 4:6-2\(e\)](#) motion, plaintiffs did not state a valid cause of action. The trial court did not err in dismissing the count.

#### H. *First Amendment Claim.*

Plaintiffs argue the court violated their First Amendment rights by ordering them not to further disseminate the improperly unredacted Council [\*42] meeting minutes. They assert the content of the minutes was of interest to other Bay Head residents because there were discussions concerning the borough's affordable housing obligations and possible related "threats" by the Burkes. Plaintiffs further argue the trial court erred by placing Brennan's certification describing the contents of the improperly unredacted minutes under seal.

We find no error in the trial court's prohibition on the use of the improperly unredacted minutes and Brennan's full certification in this litigation. Again, the meetings did not occur until after the BHPB granted the variances. There is nothing in the record suggesting any of the Burkes discussed affordable housing until after that decision was made. Thus, the information in the minutes was not relevant to the issues in this matter. By the same token, placing Brennan's certification under seal because it described the redacted information did not have any negative impact on plaintiffs' presentation of their case. Brennan submitted multiple certifications during the pendency of the litigation, and the court had all the other statements and arguments he wished to make that were not based on privileged material. [\*43] Because prohibiting the use of the documents and placing them and Brennan's certification describing them under seal could not have impacted the result of the case, the trial court did not abuse its discretion by taking these actions.

On the dissemination the redacted minutes' contents, we note at the outset Brennan should never have had access to them. OPRA specifically exempts "any record within the attorney-client privilege" from the types of "government record[s]" that must be released by a public body upon request. [N.J.S.A. 47:1A-1.1](#). The [Open Public Meetings Act \(OPMA\), N.J.S.A. 10:4-1 to -21](#), also states the public may be excluded from portions of meetings where the government body discusses "matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise [the] ethical duties [of] a lawyer." [N.J.S.A. 10:4-12](#).

Attorney-client "privilege is fully applicable to communications between a public body and an attorney retained to represent it." [In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty., 241 N.J. Super. 18, 28, 574 A.2d 449 \(App. Div. 1989\)](#). "[A] governmental client has the same need as a corporation for assurance that legal advice provided by its attorneys will remain confidential," and maintaining that confidentiality is "in the public interest . . ." [Paff v. Div. of Law, 412 N.J. Super. 140, 152-53, 988 A.2d 1239 \(App. Div. 2010\)](#). As a result, if an exchange is covered [\*44] by the privilege, the public body may meet with its attorney in a closed session, and "[t]he minutes, part or all of which may constitute work-product, then may be appropriately suppressed or redacted." [Payton v. N.J. Tpk. Auth., 148 N.J. 524, 558 \(1997\), 691 A.2d 321](#).

<sup>2</sup> Even the redacted meeting minutes of the Council, in which the Council discussed Burke, Sr.'s affordable housing-related communications, were from sessions in 2021, after the BHPB's vote.

The redacted parts of the minutes consisted of discussions between the Council and its Special Counsel about pending litigation and the legal matters. They were not "public records" pursuant to OPRA, the public was appropriately excluded from those portions of the meetings under OPMA, and plaintiffs were not entitled to their disclosure.

Pursuant to OPRA, Brennan should never have had access to that material, as it was attorney-client privileged and the Council did not waive that privilege. Its disclosure of the privileged information was inadvertent and should have been returned by Brennan. The prohibition against the use of an inadvertent disclosure of attorney-client privileged information produced pursuant to OPRA furthers "an important or substantial governmental interest unrelated to the suppression of expression" and . . . 'is no greater than is necessary or essential to the protection of the particular governmental interest involved.'" [\*Seattle Times Co. v. Rhinehart\*, 467 U.S. 20, 32, 104 S. Ct. 2199, 81 L. Ed. 2d 17 \(1984\)](#) (brackets omitted) (quoting [\*Procurier v. Martinez\*, 416 U.S. 396, 413, 94 S. Ct. 1800, 40 L. Ed. 2d 224 \(1974\)](#)).

To the [\*45] extent we have not addressed plaintiffs remaining arguments, we find they are without sufficient merit to warrant discussion in a written opinion. [R. 2:11-3\(e\)\(1\)\(E\)](#).

Affirmed.

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## **Browne v. Moshe Englewood Llc**

Superior Court of New Jersey, Law Division, Bergen County

June 12, 2020, Decided

DOCKET NO.: BER-L-2177-20

### **Reporter**

2020 N.J. Super. Unpub. LEXIS 3679 \*

WENTWORTH C. BROWNE, Plaintiff, v. MOSHE ENGLEWOOD LLC; YAAKOB SEDEK A/K/A COBY SEDEK; BERNADINE HARRIGAN, Defendants.

ROBERT L. POLIFRONI, P.J.Cv.

### **THIS MOTION WAS:**

### **Core Terms**

consolidate, lease, landlord, tenant's action, argues, security deposit, matters, settlement

Opposed

Unopposed

Reply

**Counsel:** [\*1] For Plaintiff: ECKERT SEAMANS CHERIN & MELLOTT, LLC, Nicholas M. Gaunce, Esq. (Attorney ID No.# 01203-2007), Lawrenceville, NJ, Princeton, NJ, Wentworth C. Browne.

RIDER

BROWNE VS. MOSHE ENGLEWOOD, LLC, ET AL.

BER-L-2177-20

### **Opinion**

MOSHE ENGLEWOOD, LLC VS. BROWNE, ET AL.

Civil Action

BER-LT-2148-20

BROWNE VS. HARRIGAN

### **ORDER DENYING CONSOLIDATION PURSUANT TO R. 4:38-1**

BER-C-270-17

**THIS MATTER**, having been opened to the Court by Eckert Seamans Cherin & Mellott, LLC, attorneys for the plaintiff, Wentworth C. Browne ("Browne"), seeking an Order granting consolidation, and the Court having considered the moving [ILLEGIBLE TEXT] papers, and for good cause not appearing for the entry of this Order; and for [ILLEGIBLE TEXT]

### **MOTION TO BE CONSIDERED**

This matter comes before the court by way of Browne's motion to consolidate the above-captioned matters. Opposition and reply were received [\*2] by this court. Said motion was returnable June 5, 2020.

**IT IS HEREBY ORDERED** that, on this 12 day of June, 2020, Browne's Motion for Consolidation is **DENIED**.

### **BACKGROUND**

By way of brief background, this litigation arises out of a commercial lease agreement executed on December 1, 2015 between Browne as tenant, Harrigan as co-tenant, and Moshe Englewood, LLC ("Moshe") as landlord. Defendant Sedek was the principal owner and sole member of Moshe. The lease is for a term of five years ending on November 30, 2020.

**IT IS HEREBY FURTHER ORDERED** that a copy of this executed Order shall be served upon all parties of interest within five days of its posting on e-Courts.

In 2017, Browne instituted a Chancery Division action against Harrigan for breach of the lease agreement. The parties settled and the case was dismissed on

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, J.S.C.

November 17, 2017. Browne recently filed a motion to enforce settlement in that action. Judge DeLuca denied said motion without prejudice and ordered discovery on Browne's allegations underlying the motion in an effort to proceed to a plenary hearing on the motion. Subsequently, a landlord/tenant action was commenced by Moshe against Browne and Harrigan for failure to pay rent. Moshe seeks a judgment of possession in that action. Shortly thereafter, Browne instituted this Law Division action against Harrigan, Moshe and Sedek for return of the security deposit and a judgment of possession.

A verified complaint and order to show [\*3] cause were filed in this Law Division action on April 7, 2020. The order to show cause was entered by Judge Beukas on April 22, 2020. Oral argument was heard on May 22, 2020.

By way of his verified complaint, plaintiff sought the following preliminary relief: (1) a full accounting of the location and disposition of the security deposit, (2) to terminate the lease between Browne, Harrigan and Moshe, (3) to enjoin Moshe from further disposition/transfer of the security deposit, (4) to compel Moshe to turn over the security deposit, (5) a ruling that Moshe breached a fiduciary duty owed to Browne, (6) a ruling that Harrigan is in wrongful possession of the property, and finally, (7) to obtain a writ of possession to remove Harrigan from the property.

Judge Beukas granted Browne's request for an accounting and denied all other relief for the reasons set forth on the record on May 22, 2020.

Browne now moves to consolidate all three matters in the Law Division.

## **LEGAL ARGUMENTS**

### **Motion**

Browne argues all three actions involve common questions of law or fact and arise out of the same commercial lease agreement. Specifically, in the Law Division action, Browne alleges that Sedek converted Browne's [\*4] security deposit within the first few months of the lease, and that Sedek and Harrigan reached an agreement without Browne to cross-collateralize Browne's security deposit to lease a separate property. Because of these alleged breaches, Browne terminated the lease, vacated the property and demanded return of the security deposit. Browne seeks the alternative relief of a judgment of possession.

Browne makes similar allegations in the Chancery Division action. Although the case settled, the Chancery Division action is still pending as there are outstanding discovery issues between Browne and Moshe relating to a recently filed motion to enforce settlement. Counsel for Browne learned for the first time on May 11, 2020, when Moshe filed an answer in the Law Division action, that Moshe had commenced a landlord/tenant action against Browne and Harrigan seeking a judgment of possession. Browne argues these matters should be consolidated because they involve common questions of law or fact and arose out of the same commercial lease.

### **Opposition**

Defendants Moshe and Sedek oppose, arguing these matters do not involve common questions of law or fact even though they arise out of the same agreement. [\*5] Defendants point out that because they are not a party to the settlement between Browne and Harrigan in the Chancery Division action, enforcement of the settlement as Browne seeks would have no bearing on defendants. Likewise, if the co-tenants were found to have owed and continue to owe rent and thereby face eviction, the eviction ruling would have no bearing on the outcome of the Chancery Division or Law Division actions. Moreover, defendants argue that in light of the State's recent executive orders, the landlord/tenant action will not be heard until sixty days after the State lifts its emergency orders, and therefore may not be heard for a significant amount of time compared to the other actions. Defendants argue it would be unduly prejudicial to consolidate these actions and include them in the Chancery Division action in which they are not parties.

### **Reply**

Browne asserts that it is defendants' breaches of the lease agreement which led him to terminate the agreement and withhold rent. Browne argues one court should interpret the lease provisions which he alleges were breached leading him to terminate the lease. Further, Browne maintains the cases have overlapping facts. For example, [\*6] Browne contends that if Moshe obtained a judgment against Browne in the landlord/tenant action, this would trigger Harrigan's indemnification obligation under the settlement agreement in the Chancery Division action.

Next, Browne argues that the State executive orders do not apply to commercial evictions. Browne acknowledges, however, that the landlord/tenant action is at a standstill as the trial date was adjourned.

Nonetheless, Browne argues that cases are being actively litigated in the Law Division and therefore the judgment of possession issues can be determined together in the Law Division.

Further, Browne argues it would be unduly prejudicial to him if dispositive issues were adjudicated in landlord/tenant court. Browne seeks rescission of the lease agreement, which he argues is an issue that should be adjudicated by the Law Division.

Finally, Browne argues Moshe improperly filed the landlord/tenant action against him. Moshe previously filed a landlord/tenant action against Harrigan only under docket number BER-L-7254-19. Moshe later filed suit against Harrigan and Browne. Browne contends Moshe knows Browne is not a proper party to the landlord/tenant action.

### **DECISION**

[Rule 4:38-1 \(a\)](#), which governs [\*7] consolidation, provides in pertinent part:

When actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party's or its own motion may order the actions consolidated.

The decision to consolidate actions lies within the discretion of the trial court. [See \*Union County Imp Auth. v. Artaki\*, 392 N.J. Super. 141, 148-149 \(App. Div. 2007\)](#). In reviewing a motion to consolidate, the court should consider all relevant factors, [cf. \*Flagg v. Essex Co. Prosecutor\*, 171 N.J. 561 571 \(2002\)](#), including the complexity of the issues, the possibility of confusion, and the risk of inconsistent verdicts. [See \*Moraes v. Wesler\*, 439 N.J. Super. 375, 378-379 \(App. Div. 2015\)](#) (reversing the trial court's denial of a motion to consolidate separate tort actions involving the same plaintiff when the predominant issue was damages and failure to consolidate could result in inconsistent jury verdicts); [Tobia v. Cooper Hosp. Univ. Medical Or.](#), 136 NX 335, 345 (1994), ("[I]f all or most of a claimant's damages are due to one of several incidents, a jury may not be able to evaluate the relative liabilities in a vacuum without knowing the nature and extent of the injuries incurred.").

[Rule 6:3-4\(a\)](#) specifically restricts consolidation of summary disposition proceedings for public policy reasons. [See \*Fargo Realty, Inc. v. Harris\*, 173 N.J. Super. 262, 267 \(App. Div. 1980\)](#) Browne's complaint in

the Law Division alleging breach of contract is, in effect, the sort [\*8] of pleading rejected by the court in [Fargo Realty](#) as conflating the summary disposition matter. See *id.*

Further, although these matters arise out of the same commercial lease, they do not involve common questions of law or fact and are therefore not ripe for consolidation. Moshe and Sedek are not parties to the Chancery Division action, which was instituted by Browne against his co-tenant, Harrigan, for breach of the lease agreement. Any outcome in that matter would have no impact on the disposition of the landlord/tenant or Law Division matters and vice versa.

In addition, the procedural posture of each matter compels denial of the relief sought by Browne. This court is not inclined to delay the Law Division action, which was recently filed on April 7, 2020 and is anticipated by the court rules to consume at least 300 days of discovery, for the Chancery Division and landlord/tenant matters which are well on their way toward final disposition. Browne is correct that pursuant to the State's executive orders, there is no stay of [commercial](#) eviction proceedings. Thus, although the trial date in the landlord/tenant action was adjourned due to the current health crisis, the case is actively [\*9] proceeding toward trial and will reach trial well in advance of the Law Division action. Similarly, the Chancery Division action, which was settled and is now closed, is rearing a plenary hearing on Browne's motion to enforce settlement. In light of the different procedural posture of each case, judicial economy would best be served by each matter proceeding in their respective courts.

For the foregoing reasons, the motion is hereby DENIED.

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