In the Matter of the Estate of FRANK P. LAGANO a/k/a FRANK P. LAGANO, SR. Deceased.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001316-22 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART BERGEN COUNTY DOCKET NO.: P-022-21 SAT BELOW: Hon. Edward A. Jerejian, P.J.Ch.

DEFENDANTS / APPELLANTS BRIEF

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[1] No memorializing written order was entered. *See* Geoffrey D. Mueller, Esq., Cert. n.2 dated February 14, 2023. (Da1161, n. 2.)

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[2] *See* "CERTIFICATION OF TRANSCRIPT COMPLETION AND DELIVERY" FILED, Clerk of the Appellate Division, April 04, 2023, A-001316-22 at Da1452.

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PRELIMINARY STATEMENT

Decedent, Frank P. Lagano, Sr. ("Decedent"), was murdered on April 12, 2007. This appeal arises out of two alleged loans made to Decedent by Anthony Trobiano, as trustee of the Anthony Trobiano Trust and assignee on behalf of his daughter, Tracy Trobiano ("Plaintiff" or "Trobiano"). The "loan" consisted of two checks, one from a trust account and one from Trobiano's daughter's personal account, totaling $187,500. Defendant, Frank Lagano, Jr. ("Defendant"), Decedent's son (and substitute administrator of Decedent's Estate) appeals from the default judgment – the amount of the "loans," plus attorney's fees.

The alleged loans were made in 2006. The only documentary evidence of the loans are the fronts of the two checks. There are no other writings, no repayment terms or interest rate. Plaintiff claims that Decedent borrowed to buy stock in a privately held waste management business. Plaintiff alleges that Decedent orally agreed to repay the loans in six months, when the stock value increased. Plaintiff purportedly modified the loan terms one week before Decedent's murder. Plaintiff cannot say how much the stock had to increase before Decedent was to repay Plaintiff. And suspiciously, while Decedent indeed bought shares of stock, the amount does not correspond to the amount of the loan. Even more suspiciously, Plaintiff contemporaneously acquired $187,500 worth of stock in the same company.

Plaintiff's claims against all parties should have been barred by the statute of limitations and Statute of Frauds, the Uniform Commercial Code ("UCC") and Probate Code. Indeed, the federal court had initially dismissed Counts 1-5 of the Complaint against Defendant and expressly found Plaintiff's claims meritless. Plaintiff then filed a new complaint in state court and sought relief against the Estate thru Defendant individually and as the substitute administrator, and from Defendant's sisters, who were beneficiaries of their mother's estate.

However, the Probate Part never addressed the *bona fides* of Plaintiff's claims. Instead, because Defendant did not sit for his deposition, the trial court entered default judgment. In so doing, the trial court ignored prevailing law. Just what Defendant's testimony could supply is unclear. Defendant has no personal knowledge of the alleged loan. Moreover, while the Court Rules specify many lesser sanctions for violating a discovery order, the court imposed the ultimate sanction without considering any lesser sanction or the lack of prejudice to Plaintiff.

The trial court's decision caused a manifest denial of justice. Defendant had valid reasons for requesting accommodations for his deposition and meritorious defenses to Plaintiff's claims. Without any consideration of due process, the court ordered a Proof Hearing and entered judgment against all individual defendants, without specific findings of fact, law or jurisdiction to each individual defendant's culpability. The trial court's decision should be reversed.

PROCEDURAL HISTORY

The procedural history is complex. On August 15, 2018, counsel for Plaintiff issued a letter demanding repayment of the "loan." Da92.[1] Decedent's Estate ("Estate"), responded, denying the claims. On October 11, 2018, Plaintiff filed a Complaint in the Law Division, against Defendant, individually and as Substitute Administrator of Decedent's Estate[2] and Liberty Mutual Insurance Company. Da444. This Complaint alleged that Decedent failed to repay loans in the total amount of $187,500 and that no portion of the Loans has been repaid. *Id.* ¶¶15–20.

This Complaint sought judgment against Defendant individually and as Substitute Administrator. *Id.* at ¶¶21-42. It asserted six causes of action, including a claim pursuant to N.J.S.A. 3B:22-40, *Heirs and Devisees Liable for Debt of*

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[1] Pursuant to *R.* 2:6-8, the following references will be used:
"Da" for the appendix to Defendant's principal Appellate Division brief and, regarding transcripts "0T" for the conference on 6/3/21; "1T" for argument on motion to dismiss/motion for summary judgment, 7/30/21; "2T" for conference on 9/23/21; "3T" for conference on 12/7/21; "4T" for conference on 1/31/22; "5T" for conference on 2/23/22; "6T" for conference on 4/7/22; "7T" for conference on 4/20/22; "8T" for conference held on 5/10/22; "9T" for conference on 6/8/22; "10T" for conference on 8/19/22; "11T" for motion on 8/31/22; "12T" for conference on 10/24/22; "13T" for 11/1/22 proof hearing; and "14T" for post-judgment motion.

[2] On May 21, 2007, Decedent's surviving spouse, Frances Lagano was appointed as the Estate's administrator. Da219-220. On March 26, 2012, Defendant was appointed substitute administrator to the Estate following Frances Lagano's death on July 29, 2011. Da224-225. The Estate is still open only because of two pending lawsuits, *Estate of Frank P. Lagano v. Bergen County Prosecutor's Office, et al.*, Civil Action No. 12–cv–05441, and a civil forfeiture action. Da1374; Da95; Da1156.

Decedent (Count Six). *Id.*

On February 6, 2019, Defendant removed the case to federal court, invoking diversity jurisdiction. Plaintiff moved to remand. Magistrate Judge Mannion issued a Report and Recommendation ("R&R"), recommending that the remand motion be denied, Da949, because Plaintiff's failure to perfect service upon Defendant in his individual capacity rendered removal timely, Da958-Da959, and there was complete diversity of citizenship. Da961. Judge Arleo affirmed and adopted the R&R.

On December 17, 2019, Defendant moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On June 23, 2020, Judge Arleo granted the motion and dismissed Counts I-V of the Complaint against Defendant as Substitute Administrator without prejudice, and with prejudice against Defendant individually. Count VI against Defendant, individually, was dismissed without prejudice to refile. Da318-322. The court found the claims to be barred by the statute of frauds, because Defendant's alleged assumption of the loans was never reduced to writing. Moreover, Plaintiff failed to comply with N.J.S.A. 3B:22-4. *Ibid*.

On July 9, 2020, Plaintiff filed a formal notice of a belated creditor claim with the Surrogate pursuant to N.J.S.A. 3B:22-10. Da327. The next day, he filed the (first) Verified Complaint and Order to Show Cause ("OTSC") in the Probate Part, Docket No. P-293-20, Da1-5; Da6-41, asserting the same causes of action that Judge Arleo had dismissed. Da1182-1219; Da444-454. It also identifies Decedent's surviving children — Defendant, Anne and Corrine Lagano - as "Interested Persons" with "an interest in this proceeding." Da9. Counts I-V demand judgment against the Estate by naming Defendant as substitute administrator, Da10-Da16; Count VI demands judgment against the Interested Persons jointly and severally. Da15-Da16.

The OTSC directed the parties to appear on August 28, 2020 and noted that Plaintiff sought judgment against the Estate for $187,500.00, along with a determination of whether Decedent's assets "descended to" the Interested Parties. Da2. Defendant timely removed this Verified Complaint to federal court, invoking diversity jurisdiction and Plaintiff moved to remand. On November 25, 2020, Magistrate Judge Kiel's R&R recommended that the probate exception to diversity jurisdiction applied and defeated federal jurisdiction. Da383-Da403. Defendant timely objected to the R&R. Before the District Judge ruled, Plaintiff filed the current Verified Complaint and OTSC in the Probate Part, Docket No. P-022-21. Da47-60; Da42-46. Defendant removed this Complaint to federal court. On March 8, 2021, Judge Jerejian dismissed the action without prejudice, allowing it to be refiled if Judge Arleo approved the R&R. Da61. On April 9, 2021, Judge Arleo adopted the R&R and remanded the action to state court. Da62; Da401-403. On April 20, 2021, Judge Jerejian reinstated Docket No. P-022-21 (rather than Docket No. P-293-20). Da384.

On May 28, 2021, Defendant moved to dismiss, or in the alternative, for summary judgment. Da64. Plaintiff opposed and Defendant replied. After argument, 1T, the court denied the motion without prejudice on July 30, 2021. Da498. The court then issued a Case Management Order ("CMO") and instructed Defendant to file a Verified Answer. Da494. On August 23, 2021, Defendant answered Counts 1 through Count 5, but only in his capacity as substitute administrator. Da499-508. Since Defendant individually disputed service and jurisdiction, Da507, he appeared for the Estate only, both as its attorney and administrator. Written discovery was exchanged. On February 23, 2022, the court entered an Order concerning a dispute over documents subject to privilege. Da510. The documents were submitted for the courts *in camera* review and inspection. Da511-Da562.

On May 10, 2022, the court ordered Defendant to appear for a deposition on May 23, 2022, (Da569), for which Defendant was to obtain counsel. 8T, 34-20 to 23. Defendant retained counsel, who attempted to file a Substitution of Attorney. Da572-574; Da1001-02. Plaintiff objected and the Surrogate clerk rejected the substitution. Da1007-10; Da1014. Counsel then entered a Notice of Appearance and asked to adjourn the deposition pending the court's approval of the substitution and ruling on the privilege issues. Da571. The court ruled on June 7, 2022. Da575. Defendant objected to the court's ruling the same day. Da577. By Order dated June 9, 2022, following an off the record conference, the court ordered Defendant to appear for his deposition on June 24, 2022, at Plaintiff's counsel's office, noting:

> This is a court ordered deposition. There will be no adjournments granted. If Frank Lagano, Esq. does not appear, his pleadings will be stricken and judgment will be entered against him. [Da578.]

Defendant appeared for his deposition at Plaintiff's counsel's office. Da741-Da744; Da726-Da727. Defendant had not known that Plaintiff was attending in person and felt threatened by Plaintiff's presence (Decedent had testified against Plaintiff and his close associates in a criminal matter) *e.g.*, Da726; 8T, 28:17-25.[3] Additionally, Defendant had been exposed to COVID-19, was feeling ill and had concerns he could pass the virus to others. *Ibid*. Plaintiff's presence caused Defendant considerable duress; he was concerned he would not be able to provide reliable testimony. *Ibid*. Ultimately, the deposition did not occur.

On June 27, the court held another off the record conference. Da1452. Defendant requested accommodations, *e.g.*, appearing remotely or having Plaintiff attend remotely, holding the deposition at the courthouse or in the presence of security, at Plaintiff's counsel's office. Da726-27; Da1359. Defendant requested leave to cross-move for a protective order, in accord with the CMO. Da725 ¶1; Da495 ¶7. Defendant offered to pay for all fees associated with the missed deposition and offered to provide *in camera* medical records from June 24 and 26 to support his position. Da726-27. The court denied all these requests. Da754.

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[3] *See also* Da513, ¶13, Da738, ¶15, Da747 at 4:19, Da748 at 145:17-25, 146-148, 170; Da162, Da164, ¶1; Da973, Da989-990; Da1376; Da995, ¶2.

On June 30, 2022, Plaintiff moved to enter judgment against Defendant, Anne and Corinne Lagano. Da579. Defendant opposed and sought leave to cross-move for a protective order. Da718; Da725. Plaintiff replied. Da735. On July 29 and August 19 "off the record" conferences took place. Da1452; 10T:3. The parties argued Plaintiff's motion to enter judgment on August 31, 2022. 11T. Defendant again offered to be deposed on that day; his counsel reiterated why the deposition had not happened. 11T13 to 14; Da939-40. The court incongruously stated that it was hearing Defendant's offer to submit medical documentation in support thereof for the first time, 11T18, and then rendered its oral decision. 11T20-28.

On October 24, Defendant again appeared before the court ready and willing to be deposed. 12T4:11-19. The court again declined to review medical treatment records, *in camera*. 12T5:6-12; Da1027. Defendant appeared for the proof hearing on November 1. Defense counsel again offered to cure and be deposed, but the court declined. 13T4:9-14. On November 3, 2022, Plaintiff's counsel submitted an Affidavit of Services and proposed Judgment. Da822; Da851-56; Da1033-39. On November 18, 2022, Plaintiff submitted an amended proposed Judgment. Da857; Da104551; Da1041; Da1043. Over Defendant's objection, the court entered judgment against the Estate, Defendant, as substitute administrator, and Defendant, Corinne Lagano and Anne Lagano, individually. Da863; Da868-73.

Defendant filed a Notice of Appeal on January 3, 2023. Da876. On

January 10, 2023, in derogation of *R*. 2:9-1, Plaintiff's counsel moved to amend the Judgment to include attorney's fees, costs and interest. Da881-882. Defendant timely opposed. Da923; Da919-20; Da1054. Plaintiff replied. Da1028. The court held oral argument on the application on February 2, 2023. 14T. Plaintiff submitted a form of Order on February 7, 2023; Defendant opposed on February 14, 2023. Da1160; Da1054. On March 10, 2023, the court granted the fee application, awarding fees and costs and denying pre-judgment interest. Da1259.

Defendant amended the Notice of Appeal on April 21, 2023. Da1345. By Order dated August 1, 2023, the court ordered Defendant to post a supersedeas bond. Da1324. Defendant filed an amended Notice of Appeal on August 2, 2023. Da1365.

On August 29, 2023, Plaintiff moved to dismiss the appeal, based in part, on the failure to post a *supersedeas* bond. Da1327. Defendant opposed the motion on October 2, 2023. On October 12, 2023, this Court dismissed the appeal without prejudice subject to appellant's compliance with Rule 2:9-6. Defendant secured a *supersedeas* bond in the amount of $274,659.89 to cover both judgments of $187,500 and $87,159.89 for attorney's fees and trial costs. Da1357. After further procedural wrangling, which involved the posting of an additional $40,000 in security, Lagano moved to reinstate the appeal. *Id.* Plaintiff opposed; the appeal was reinstated by Order dated December 2, 2024.

STATEMENT OF FACTS

Plaintiff avers that on April 25, 2006, he issued a check from the Anthony Trobiano Trust, which had a South Hackensack office address, to Decedent in the amount of $125,000. Da10; 36. Plaintiff's daughter, Tracy Trobiano, issued Decedent a second check on April 27, 2006, in the amount of $62,500. Da38. The checks, totaling $187,500, were drawn on different accounts, but bore the same address. Each memo line states "Loan." Da36; 38. Plaintiff produced only the front of the checks. Who endorsed the checks is not known. *Ibid.*; *see also* Da763; 765.

Nothing documents the terms of the loan, its purpose, interest rate, term or repayment trigger. Da112-113 at 68:4-71:1; 13T40:13-25; 13T18:8-12. The alleged purpose and terms of the loans are Plaintiff's uncorroborated oral representations. Initially, Decedent was to repay Plaintiff within six months from the May 25, 2006 purchase of the stock. Da114 at 75:9-10. But ten days before his death, Decedent allegedly agreed to repay the loans upon the sale of the stock. Da79, ¶8; 13T19:12; 41:9-14; 45-46.

Plaintiff's relationship with Decedent **"**was business related**"** and involved a **"**prior loan in or around 1995**"** and these loans in April 2006. Da97 at 7:20-24; Da98 at 11:6-7; 13T5-6. The Anthony Trobiano Trust is a business trust that in part: lends money for a profit to individuals and/or businesses as a mortgagee, holds and/or invests in various real estate properties and invests in stock securities in privately held companies. Da137, 167:15-23; Da112 at 69:5-12; Da168; Da174; 13T45:21 to 46:1-4; 46:23-25. According to Plaintiff, the checks prove an oral "handshake" agreement. Da113 at 70:2-21. Tracy Trobiano's only involvement was to issue the second ($62,500) check to Decedent at Plaintiff's direction. Da10; Da38; Da113 at 73:10-25; Da114 at 74:1-3; 13T41:4-8.

Given the lack of any paper trail and the passage of nearly 20 years, there is no way to determine if a valid loan and/or contract exists; whether Decedent endorsed or deposited the two checks or repaid any monies to either Tracy Trobiano or the Anthony Trobiano Trust between May 2, 2006, and Decedent's murder.

Plaintiff alleges that the purpose of issuing the checks was for both he and Decedent to purchase shares of stock in a privately held California company, World Waste Technologies Inc. ("WDWT"). Da12 ¶30; Da112 at 69:5-12. There is no proof that Decedent used either of the two checks to purchase WDWT stock as Trobiano alleges, or if they were used to purchase shares for Trobiano. In fact, Trobiano's counsel spent 6.3 hours trying to determine if the checks could have been cashed without Decedent's knowledge. Da835-36. SEC filings in May 2006 show that both Plaintiff and Decedent became WDWT shareholders. Da202. The statement from Decedent's brokerage shows Decedent purchased $237,500 worth of WDWT Series B Preferred Stock. Da206-207. SEC filings also show that Plaintiff purchased $187,500 worth of the same stock – the exact amount allegedly loaned *to*

Decedent for *him* to buy WDWT stock. Da202; 769; 980.

Decedent died intestate and his surviving spouse, Frances Lagano, was appointed administratrix on May 21, 2007. Da220. Decedent was survived by his children, Corinne, Anne and Defendant. On May 10, 2007, Defendant filed an affidavit with the Surrogate outlining Decedent's assets "discovered to date." Da19. The affiant stated all known debts as of that date in time and that neither he nor his mother knew of any creditors, debts and/or claims against the Decedent other than those listed. Da19-Da20. Trobiano testified that "maybe six or eight months after," Decedent's death was the first time he ever spoke about the $187,500 allegedly owed to him. Da116 at 82:17-21.

The Estate retained Emery Duell, Esq. to administer Decedent's estate. Da216. The Estate waited more than nine (9) months from Decedent's death for any alleged creditor to issue formal written notice of claim in accordance with N.J.S.A. 3B:22-4. Having received no such notice, in July 2008, Frances Lagano and Duell filed a Federal Estate Tax Return and New Jersey Estate Tax Return. Da177; Da229. Apart from the alleged debt owed by the Decedent to only the Trobiano Trust, a *draft* Federal Estate Tax Return indicates that all 2,375 shares of the WDWT stock passes to the surviving spouse heir, with a date of death estimated value of $237,500.00. Da245; Da235; Da206; Da352 at ¶42, Da368 at ¶ 42 and Da355 at ¶47; Da368 at ¶47). Frances Lagano and Decedent owned a home in Tenafly as tenants by the entirety. Da280. Frances Lagano, as surviving spouse, inherited the real property.

Tax records do not show any of Decedent's children having an ownership interest, through 2015. Da295-Da300. Attorney Duell sought six New Jersey tax waivers to permit the transfer of certain assets to Frances Lagano the surviving spouse heir. The assets included: i) Decedent's interest in the Tenafly home; ii) the entire Montauk Financial Group brokerage account which included the WDWT Stock; and iii) other financial accounts she held individually and/or jointly with Decedent. Da179; Da302. October 9, 2008 correspondence from the New Jersey Estate Tax Division noted completion of their audit and stated "all necessary waivers are attached," *i.e.* the six tax waivers including the WDWT stock held at Montauk Financial. Da302; Da179; Da177. On January 28, 2009, Mr. Duell received the Federal Estate Tax closing letter from the Internal Revenue Service. Da304. Frances Lagano as the surviving spouse heir inherited the entirety of the WDWT stock. Da355 at ¶47, Da368 at ¶47. Except with regard to pending and prospective litigation, the Decedent's Estate was closed both as to the tax authorities and the Surrogate. Da304; 302; 1156; 314; 1368; 95.

On April 16, 2009, Vertex Energy, Inc. ("VTNR" or "Vertex") acquired WDWT, which then ceased to exist. All WDWT preferred stock was cancelled and exchanged for 11.651 shares of Vertex Series A preferred stock. Da250-Da253. SEC filings show that all WDWT shareholders, including Plaintiff and Frances Lagano, were asked to approve the acquisition and merger. Da311-312; Da355 at ¶47, Da368 at ¶47. Plaintiff converted his WDWT stock into Vertex common stock. Da1158.

Sometime between April 2009 and her July 29, 2011 death, Frances Lagano apparently disposed of the Vertex stock. Da1064-1065. Before dying, Frances Lagano never transferred the Tenafly property to any of her children. Da353-Da355; Da361; Da70-71; Da1072. Solely to continue the prosecution and defense of the then-pending lawsuits involving the Estate, Defendant applied to become the substitute administrator of the Estate. Da314; Da1156.

Following Frances Lagano's funeral in July 2011, Plaintiff did not speak to Defendant until April 2014. Da119 at 94:20-22; Da119 at 96:10; Da115 at 80:19-25. Plaintiff testified that he had dinner with Defendant in April 2014 where Defendant allegedly said that he sold his Vertex shares at "$10.50 per share." Da121 at 105:1-7. Plaintiff also testified Defendant had advised him of this via telephone. Da122, 106-5 to 7. Plaintiff admits that he never spoke with Defendant about the amount of money that Decedent owed to him from 2006. According to Plaintiff, all that Defendant allegedly said to him was "I'm going to pay you." Da122 at 107:1-108:23. Much like his exchanges with Decedent, this was unwitnessed. Plaintiff alleges that a week later, Defendant disappeared and refused to take Plaintiff's calls. Da122 at 109:15 to Da123 at 110:18. In late 2015, Plaintiff alleges that he sent Defendant a letter, apparently to the diner previously owned by Decedent. Da123 at 111:1-113:7;

13T34-6 to 15; Da99, 17:11-20. On August 1, 2018, Tracy Trobiano assigned her claim to Plaintiff. Da40. On August 15, 2018, more than four years after Plaintiff alleges Defendant sold the Vertex stock, Plaintiff made "written demand" for repayment of the two alleged loans. Da820. Thus, Plaintiff did not pursue this claim until August 15, 2018, more than 4 years after the 2014 dinner, Da123 at 111:1-113:7, 7 years after Frances Lagano's death, and 12 years after issuing the checks.

Plaintiff's testimony at the proof hearing held on November 1, 2022 establishes that Plaintiff does not know either a maturity date, default date or date on which pre-judgment interest would begin to run on the loans.13T, 41:12-14. Plaintiff cannot establish the time period during which Decedent held the alleged monies improperly. Plaintiff testified:

> Q. Okay. Well, tell me, please, what – when you lent this money to Frank Lagano, when was it that the money was to be repaid to you?
> A. When we sold the stock.
>
> * * *
>
> Q. Was the repayment at all contingent upon the value of the stock rising?
> A. No. [13T, 19:9-12; 19:24-25 & 20:1-2.]

Plaintiff failed to provide the trial court with any basis upon which the court could conclude that there was a maturity date for the alleged loans.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT STRUCK DEFENDANT'S ANSWER (11T20-28; Da721-22; Da 1161 n.2)

The court erred when it entered judgment based upon Defendant's failure to appear at deposition. *R*. 4:23-4 addresses a party's failure to attend a deposition:

> If a party or an officer, director, or managing agent of a party or a person designated under *R*. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1), (2) and (3) of *R*. 4:23-2(b)….

The remedies available under *R*. 4:23-2(b) are:

> (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;
>
> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;

However, in addressing these remedies, our Supreme Court has been clear that imposing the "death penalty" on a litigant because of discovery violations is a remedy of last resort. *Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499 (1995), reserved this sanction for the most egregious cases. The Court noted:

> The scarcity of cases ordering dismissal demonstrates that trial courts have heeded *our admonition to impose sparingly the ultimate sanction of dismissal*. [*Id*. at 515 (emphasis added).]

And imposition of the ultimate sanction is to "be ordered only when no lesser sanction will suffice to *erase the prejudice suffered* by the non-delinquent party" *Id*. at 514 (emphasis added). This necessarily means that before imposing that sanction, the court must evaluate the prejudice that inured to Plaintiff by Defendant's violation of the order. No such analysis was done here of the alleged "prejudice suffered" by Plaintiff, much less why a lesser sanction was inappropriate. Indeed, in derogation of the Supreme Court's admonition to impose sparingly the ultimate sanction of dismissal, the court's June 9, 2022 Order specifically stated that Defendant's pleadings would be stricken if he failed to appear for deposition. Da578. In fact, the August 31, 2022 transcript shows the court was more concerned with showing its disdain for Defendant and the age of the case than with substance. That is ironic. After all, Plaintiff waited 12 years before bringing this action.

In Abtrax, the discovery misconduct consisted of the willful concealment of relevant documents and perjured deposition testimony. *Id.* at 502. Throughout discovery, Abtrax took the position that relevant documents were lost in a flood or otherwise were destroyed or unavailable. Its principal testified at deposition, and its counsel repeatedly asserted that all relevant documents in Abtrax's possession had been produced. *Id.* at 506, 507. At trial, the principal let slip that there were in fact other records that had not been produced. *Id.* at 507-08. At Abtrax's place of business, 50 to 60 boxes of responsive, but non-produced, documents were located. In the principal's attic, another 14 boxes were located. *Id*. at 508-09. The court found that the disobedience of court orders and false testimony constituted contempt of court punishable by summary dismissal of the complaint. *Id*. at 510.

> In support of its ruling, the trial court made the following findings: Rahner had denied having received advance notice that Elkins would cease production of Gecolate powder despite proof that Rahner had negotiated with other potential producers of Gecolate; Rahner had testified falsely at his August 24, 1988, deposition that purchase orders for Gecolate powder had been "dumped" after one year; Rahner had never referred specifically to Canadian sales of Gecolate powder, which had resulted in the preparation of expert reports without reference to Canadian sales; and Rahner had never reviewed all the billing receipts for Gecolate powder to determine if the sample receipts produced were "representative." In addition, the court observed that although "some misunderstanding [might have occurred] early in the discovery process regarding what documents were destroyed or lost in a flood in 1984, * * * there could be no misunderstanding" that Rahner had failed to satisfy the November 4, 1988, request for answers to interrogatories, the March 23, 1989 Rider, the March 28, 1989, notice to produce documents requested in the Rider, and the September 5, 1989, Order from the trial court requiring Abtrax to produce the documents requested in the Rider and in the March 28, 1989, notice. The court therefore concluded that
>
>> notwithstanding many conferences at which complete discovery was urged by this court, and particularly, despite the September 5, 1989 order, Charles Rahner knowingly and on behalf of [Abtrax], failed to produce documents relevant to this litigation and misled [Elkins]. I find further that Charles Rahner testified falsely and misleadingly, as set forth above[,] and that his conduct was clearly contumacious. [*Id*. at 510-11 (elision and alterations in original).]

The court in *Abtrax* specifically found prejudice to the defendant, in that expert reports would have to be redone, it would have to retain a new damages expert, and it had revealed its theory of the case. *Id*. at 511.

The lack of prejudice here is patent. Defendant's counsel pointed out to the court that if the case was as simple as Plaintiff then asserted, there would be no need to depose Defendant. 11T, 19:19-22 to 20-1. Neither the court nor Plaintiff addressed this, much less denied it. 11T, 20:21-25 to 21:1; 12T, 10:24-25 The record is bereft of any prejudice to Plaintiff because there was and is none. Similarly, the record does not reveal any thought process by the court to impose a lesser sanction.

In fact, Defendant has no personal knowledge of the alleged transaction between his late father and Plaintiff. Da113, 73:21-25, 74:1-6 Defendant only became aware of the alleged loan after his father died. *Id.*; 13T, 7:15-17. Plaintiff himself acknowledges there were no terms to the loan – so Defendant is in no position to deny that. 13T, 18:9-12. Defendant could, perhaps, deny Plaintiff's testimony regarding family dinners and an alleged statement that Defendant would pay Plaintiff. But the court did not even consider whether a sanction, such as deeming Plaintiff's testimony in this regard admitted, would suffice. Instead, the court was wed to its June 9, 2022 Order.

The striking of Defendant's Answer with Prejudice was not warranted by the facts or law in this matter. Defendant was ready and willing to be deposed, but not able, because of the conditions extant. Defendant asked that the court permit him to appear remotely for his deposition, or that Plaintiff attend the deposition remotely. In June 2022, remote depositions were the rule, rather than the exception. The court erred when it rejected Defendant's requested accommodations without explanation.

While not routine (or proper), it is not uncommon for parties to fail to appear for depositions, even court-ordered ones. A common remedy is an order precluding that party from testifying at trial. *See, e.g., Costanza v. Costanza*, 66 N.J. 63 (1974); *Cunningham v. Rummel*, 223 N.J. Super 15, 17 n.1 (App. Div. 1988); *cf. R.* 4:23-2(b)(2). Suppression of one's pleadings, without any analysis of prejudice to the non-defaulting party, is improper.

Generally speaking, a court's discovery rulings are reviewed for abuse of discretion. But where the court makes a discretionary decision, but acts under a misconception of the applicable law or misapplies it, the discretion lacks foundation and it becomes an arbitrary act, not subject to the usual deference. *Summit Plaza Assocs. v. Kolta*, 462 N.J. Super. 401, 409 (App. Div. 2020); *Alves v. Rosenberg*, 400 N.J. Super. 553, 563 (App. Div. 2008). In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law. *State v. Lyons*, 417 N.J. Super. 251, 258 (App. Div. 2010); *State v. Steele*, 92 N.J. Super. 498, 507 (App. Div. 1966); *Kavanaugh v. Quigley*, 63 N.J. Super. 153, 158 (App. Div. 1960). Here, the court misapplied the law, imposed the ultimate sanction and proceeded to a proof hearing, manifestly denying justice. The decision should be reversed.

II. THE DEFENDANT HAS MERITORIOUS DEFENSES TO THIS ACTION (13T, 79:6-11, 67, 69-70, Da863-867; 1T, 42:5-8, 41:1-3, 40:2-23, 39:13-16, 45:17-19, 46, Da498)

In addition to denying due process by applying the ultimate sanction, the court compounded its error by abandoning its obligation to ensure that plaintiff had in fact established liability and damages. *R* 4:43-2 provides the court with the opportunity, if not the obligation, to put a plaintiff to its proofs, both on liability and damages. *See, e.g.*, Pressler & Verniero, Current N.J. Court Rules (Gann), comment 2.2.2 to *R*. 4:43-2: (a court may refuse to enter judgment for the plaintiff even where defendant has defaulted, if the complaint on its face, fails to state a cause of action on which relief can be granted). *See also Douglas v. Harris*, 35 N.J. 270 (1961); *Morales v. Santiago*, 217 N.J. Super. 496 (App. Div. 1987). This includes a situation such as here, where the Complaint itself revealed the collection effort to be woefully past the expiration of the statute of limitations. *See Prickett v. Allard*, 126 N.J. Super. 438 (App. Div.), *aff'd o.b.*, 66 N.J. 6 (1974) (default judgment denied when complaint showed that statute of limitations had run). *Jugan v. Pollen*, 253 N.J. Super. 123 (App. Div. 1992), stands for the proposition that where a party's default has thwarted the adversarial nature of the proceedings, it may be appropriate to "strip away that party's rights to participate one by one so as not to prejudice the [party] and punish the contumacious party," noting that "even a proof hearing is a search for truth." *Id*. at 134. Judges are not expected to operate as ministerial functionaries; they are required to conduct proceedings in a fair and impartial manner and with the paramount goal that justice be done. *Ibid*.

Even though a defendant's answer is stricken for failure to make discovery, the plaintiff may be, as here, precluded from recovery where the proof which he offers in support of his own case reveals a legal defense to his claim. *Johnson v. Johnson*, 92 N.J. Super 457, 465 (App. Div. 1966). The court's entry of Judgment against Defendant ignored meritorious defenses that it was bound to consider. The manifest injustice should be remedied by this court.

A. The Statute of Limitations Bars the Claims (1T39-42; 13T79)

Determining whether a cause of action is barred by a statute of limitations is a question of law subject to *de novo* review. *Save Camden Pub. Schs. v. Camden City Bd. of Educ.*, 454 N.J. Super 478, 487 (App. Div. 2018). The date upon which a statute of limitations begins to run is also subject to plenary review. *Town of Kearny v. Brandt*, 214 N.J. 76, 91 (2013).

By penalizing unreasonable delay, statutes of limitations encourage potential litigants not to sit on their rights but to pursue their claims diligently so that answering parties will have a fair opportunity to defend. *Troum v. Newark Beth Israel Med. Ctr.*, 338 N.J. Super. 1, 22 (App. Div. 2001). They also assure that courts do not have to adjudicate "stale claims," deal with fading memories, unavailable witnesses, loss of evidence, and separating valid claims from frivolous ones. *Mitzner v. W. Ridgelawn Cemetery, Inc.*, 311 N.J. Super. 233 (App. Div. 1998); *Kaczmarek v. N.J. Tp. Auth.*, 77 N.J. 329, 338 (1978).

This is particularly so in the probate context; one goal of the Probate Code is to secure "the speedy settlement" of the estate. *Fazilat v. Feldstein*, 180 N.J. 74, 82 (2004). They "bar belated creditors from participating in the orderly settlement of the estate," *Robinson v. Hodge*, 4 N.J. 397, 405 (1950), and facilitate the estate's representative's ability to "make an orderly determination of [the] estate's liabilities and assets." *Pitale v. Leroy Holding Co.*, 65 N.J. Super. 361, 365-66 (Ch. Div. 1961).

1. Money Lent

Plaintiff's Complaint does not state timely claims against Decedent, his Estate, representatives and heirs. An action involving a negotiable instrument accrues at the time the check is negotiated; that is, the statute of limitations begins to run when the check amount is debited from the maker's account. *See New Jersey Lawyers' Fund for Client Prot. v. Pace*, 374 N.J. Super. 57 (App. Div. 2005), *aff'd*, 186 N.J. 123 (2006). The discovery rule cannot toll the statute of limitations in actions involving negotiable instruments. In *Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat. Bank*, 390 N.J. Super. 199 (App. Div. 2007), the court determined that an "action involving a negotiable instrument accrues at the time the check is negotiated; that is, the statute of limitations begins to run at the time the check amount is debited from the maker's account." *Id*. at 204. The court rejected plaintiffs' attempt to invoke the discovery rule, noting its previous decision in *Pace*.

In *Pace*, the Court concluded that the discovery rule did not apply under the UCC. "The application of the discovery rule to negotiable instruments would be inimical to UCC policies of finality and negotiability." 186 N.J. at 125. The UCC provides a comprehensive framework for allocating and apportioning the risk of handling checks; the free flow of commerce demands commercial certainty. *City Check Cashing v. Manufacturers Hanover Trust*, 166 N.J. 49, 57, 64 (2001). Indeed, the UCC displaces the common law where reliance on the common law would thwart the purposes of the UCC. *Sebastian v. D&S Express, Inc.*, 61 F. Supp. 2d 386, 391 (D. N.J. 1999) (applying Pennsylvania law which is identical to New Jersey).

> An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or within six years after the date of the acceptance if the obligation of the acceptor is payable on demand. [N.J.S.A. 12A:3-118(f).]

Plaintiff alleges two claims for "Money Lent" to Decedent on behalf of the Anthony Trobiano Trust and as assignee for Tracy Trobiano. The Complaint asserts that the checks were presented on April 28, 2006 and May 1, 2006 respectively and debited or drawn from each maker's account. The latest date that Plaintiff could have filed his claims would be April 28, 2012 and May 1, 2012 respectively, six years from the date the checks were presented and cashed. Plaintiff's August 15, 2018 written demand for payment, made more than 6 years after the statute of limitations had already expired, is too late to revive the time-barred claims.

2. Money Had and Received

Plaintiff also alleges a claim for "Money Had and Received." The UCC provides for a three-year statute of limitations from the date of accrual. N.J.S.A. 12A:3-118(g). The statute expired no later than April 28, 2009 for the Anthony Trobiano Trust $125,000 check and May 1, 2009 for the $62,500 Tracy Trobiano check. This claim is also time barred. Indeed, Plaintiff testified that other than the issuance of the check, his daughter, Tracy Trobiano, had no dealings with the Decedent. 13T, 45:18-20, 46:10-13. The alleged debt to Tracy Trobiano is a time-barred UCC claim for recovery by way of a negotiable instrument.

Even if not time-barred, given the dispute over whether in fact, the loan was made and its terms, the absence of Tracy Trobiano's testimony is fatal to Counts Three and Four. *Monte v. Monte*, 212 N.J. Super. 557, 568 (App. Div. 1986) held that absent a finding as to whether the debts to a party's relatives existed, those relatives should establish the basis and amount of the debts.

3. Breach of Contract, Implied Breach of Contract, and Unjust Enrichment

Count Three alleges a breach of contract claim with a six-year statute of limitations. *See* N.J.S.A. 2A:14-1. Where there is no time stated between a debtor and creditor as to when the payment of a money obligation shall be due, it is deemed payable on demand. *Denville Amusement Co. v. Fogelson*, 84 N.J. Super. 164, 169 (App. Div. 1964). "A cause of action based upon a money obligation which is payable on demand is deemed to accrue at the time of the loan." *Id*. Thus, the statute ran on April 28, 2012 and May 1, 2012 respectively.

Plaintiff alleges Decedent orally agreed to repay the loans when he sold the WDWT stock. Da114 at 75:9-10; Da79; 13T19, 41, 45-46. Decedent died on April 12, 2007. Any breach of the alleged agreement to sell the WDWT stock and repay the two alleged loans would have accrued on the date of his death because Decedent could no longer sell the stock. Accordingly, it was stale six years after death, April 12, 2013.

Plaintiff's claims for implied breach of contract and unjust enrichment also have a six-year statute of limitations period. *See Kopin v. Orange Products, Inc.*, 297 N.J. Super. 353, 374 (App. Div.), *certif. denied*, 149 N.J. 409 (1997). These claims should have been presented by April 28, 2012 and May 1, 2012 respectively. If the accrual date is Decedent's death on April 12, 2007, then Plaintiff's deadline was April 12, 2013. If the accrual date is when the WDWT stock was to be sold, the April 19, 2009 acquisition of WDWT rendered impossible the sale of WDWT stock, the time to sue would have expired on April 19, 2015.

More basically, one cannot employ the legal fiction of quasi-contract, *i.e.*, implied Breach of Contract or Unjust Enrichment, to substitute one promisor or debtor for another. *See Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super 105, 110 (App. Div. 1966); *State v. Cherry Hill Mitsubishi*, 439 N.J. Super 462, 471 (App. Div. 2015). An unjust enrichment claim accrues when the plaintiff last renders the services that form the basis of the plaintiff's claim. *Rabinowitz v. Mass. Bonding & Insurance Co.*, 119 N.J.L. 552 (E. & A. 1938). The benefit was conferred upon Decedent in 2006.

4. The Trial Court Never Determined the Loans' Accrual Date

The court never determined the accrual date(s) of the loan. At the first hearing, on July 30, 2021. Specifically, the Court stated:

> But I think at this juncture an Appellate Court wouldn't view this record to say that it is unequivocal that the statute ran, therefore we are not going to allow any discovery. [1T42:5-8.]

The court incorrectly concluded that discovery was necessary to determine the date of accrual of the alleged loan, but this is a legal determination. Even at the Proof Hearing, Plaintiff did no provide information regarding any modification of the loan:

> Q. Okay. Did the decedent provide you any additional funds when you delayed repayment of the loan?
> A. No. [13T, 49:8-11.]

Plaintiff had no recall of any modifications of the loan and confirmed that there was no consideration for any alleged modification of the loan. Thus, the statute of limitations accrued when the checks were cashed, and this suit is untimely. *Denville Amusement*, 84 N.J. Super. at 166; N.J.S.A. 12A:3-118. The court again erred at the proof hearing by failing to determine the loan's proper accrual date. As such, the court failed to properly apply the statute of limitations.

B. The Dead Man's Act Bars the Claims (13T18)

Plaintiff's attempts to delay the accrual date violate the Dead Man's Act, N.J.S.A. 2A:81-2, which requires clear and convincing proof of a creditor's claim. *See De Blanco v. Dooley*, 164 N.J. Super. 155 (App. Div. 1978). There was no signed writing or clear and convincing proof of the alleged agreement to repay the alleged loans upon the sale of the WDWT stock. The court overruled objections based on the Dead Man's Act at the Proof Hearing. Thus, the court erred in entering judgment for Plaintiff. Specifically, Plaintiff testified at the Proof Hearing that:

> Q. At the time you made the loans to Frank Lagano, Senior, what terms of repayment did he agree to?
> A. We never really discussed that. [13T18:9-12.]
>
> * * *
>
> Q. Okay. Well, tell me, please, what – when you lent this money to Frank Lagano, when was it that the money was to repaid to you?
> A. When **we** sold the stock. [13T19-9 to 12 (emphasis added).]

Indeed, Plaintiff admitted:

> Q. Okay. And are you aware of any note or any writing from the decedent that says, hey, I am going to pay you back when – in six months, or anything like that? Any note?
> A. No.
> Q. No writing. What was the interest rate on the either one of those loans, sir?
> A. We never discussed interest.
> Q. And when was the maturity date on either one of those loans? In other words, when was it due?

A. We never discussed that either. [13T, 41:4-14.]

Plaintiff failed to adduce clear and convincing proof of his claim under the Dead Man's Act. Plaintiff admitted that there were no repayment terms and could not state when repayment was expected. Plaintiff's testimony regarding the terms of the loan violated the Dead Man's Act. Thus, the court should have found the accrual dates of the checks to be the dates of negotiation, barring the claims under the statute of limitations, as set forth above. Clearly, Plaintiff cannot articulate the terms of the agreement between the parties and has failed to meet the evidentiary burden necessary to enter Judgment against Defendant.

C. **Plaintiff's Claims are Barred by Statute of Frauds** (1T41-46; 13T79)

New Jersey's Statute of Frauds, N.J.S.A. 25:1-5(f) provides, in pertinent part:

> No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:
>
> * * *
>
> f. A contract, promise, undertaking or **commitment to loan money** or to grant, extend or renew credit, **in an amount greater than $100,000, not primarily for personal, family or household purposes, made by a person engaged in the business of lending** or arranging for the lending of money or extending credit…. [Emphasis added.]

Decedent's alleged agreement to repay the loans when the WDWT stock was sold violates the Statute of Frauds. Plaintiff admits that there is no writing to evidence the alleged oral agreement or changes to it. Plaintiff testified:

> Q. Did the decedent ever execute a note evidencing a loan of $125,000?
> A. No.
> Q. Was there ever a text message or an email or something like that? Anything written, sir?
> A. No. Other than what I mentioned earlier in my notebook. [13T:40-13 to 19.]

The Statute of Frauds also applies to loan modifications. *See Nat'l. Cmty. Bank of N.J. v. G.L.T. Indus., Inc.*, 276 N.J. Super. 1, 4 (App. Div. 1994); N.J.S.A. 25:1-5(g). The Anthony Trobiano Trust is a business trust that acts as a mortgagee and lends money for a profit in the form interest to various individuals and/or businesses. The Trust also invests in purchasing and selling securities in privately held companies (*e.g.*, WDWT) for a profit, as alleged in the Complaint. The check exceeds $100,000 and lists a business office address. Plaintiff concedes he had a business relationship with the Decedent since 1995. The alleged loan to the Decedent was "not primarily for personal, family or household purposes," *see* N.J.S.A. 25:1-5(f), but instead was business-related.

Specifically, Plaintiff testified regarding the alleged loan modification:

> Q. Okay. Any my understanding, is, you then would have modified the maturity date, correct? When they were due?
> A. Yes.

> Q. Okay. Did the decedent provide you any additional funds when you delayed repayment of the loan?
> A. No. [13T, 49:4-11.]

Moreover, there is no clear due date on the loan, even after the alleged agreement to modify the terms of the loan. Plaintiff testified:

> Q. Is it your understanding that when the stock would appreciate, the loan would be repaid?
> A. Yes.
> Q. Okay. Now, did you discuss with the decedent the amount that the stock would have to appreciate before the loans could become payable?
> A. It would become payable when we sold our stock. [13T, 49:24-25 to 50:1, 50:6-9.]

Plaintiff did not identify any concrete terms of the alleged loan modification. He has no right to collect on alleged modified terms or extend the statute of limitations.

Plaintiff testified that other than the issuance of the check, his daughter, Tracy Trobiano, had no dealings with the Decedent. Tracy Trobiano's assignment of her claims in 2018 to her father does not resurrect a claim that had already been time barred by the statute of limitations, nor does it create a new breach of contract claim. "The rights of an assignee can rise no higher than those of the assignor." *Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med.*, 210 N.J. 597, 607 (2012). Clearly, Tracy Trobiano's claim consists of time-barred UCC claims for recovery by way of a negotiable instrument only.

D. Plaintiff's Claims against the Estate Administrators and this Summary Proceeding, Probate Action, are Barred (Da498, 1T13-14, 32; Da863)

The Estate and its administrators owed no duty to Trobiano until he issued formal written notice of the alleged debts pursuant to N.J.S.A. 3B:22-4 or -10. An executor only owes a fiduciary duty to beneficiaries of the estate, not creditors, and the executor only pays the debts of the estate when he or she is legally obligated to do so. *Semler v. Core States Bank*, 301 N.J. Super. 164, 177 (App. Div.), *certif. denied*, 151 N.J. 467 (1997). *See also,* N.J.S.A. 3B:22-14 Estate creditors and beneficiaries compete for the same dollars, and the executor's goals are to protect the estate and the beneficiaries, not the creditors. *N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc.*, 319 N.J. Super. 435, 446 (App. Div. 1998). Here, Plaintiff admits that he never issued formal written notice of his alleged claims to the administratrix. Thus, she had no duty to Plaintiff since he did not properly present his claim.

Plaintiff has contended that Frances Lagano's January 10, 2008 Real Property Disclaimer was improper, given that he is alleged to be a creditor claimant. Plaintiff knew or should have known of this as well as other public filings as demonstrated from the exhibits attached to his pleadings.[4] In addition, N.J.S.A. 3B:1-9 establishes a two-year limitations period for any fraud or evasion in connection with the administration of an estate. As such, any claim against Frances Lagano would have lapsed on or before January 10, 2010.

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[4] *See Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 424-25 (2010) ("[P]arties are presumed to know the law and are obliged to follow it.").

Plaintiff has relied on a July 2008 draft Federal Estate tax return (Da778). The return was filed fifteen months after death, after no statutory notice had been made by any creditor. The draft return contains reference to the alleged debt, albeit in an incorrect amount, and owed only to Plaintiff. But this reference was made only to the IRS and not to Plaintiff. Regardless of whether the Estate contested the debt with the IRS, it does not constitute a writing to Plaintiff. Nor does it amount to an acknowledgment of a promise to pay on demand or extend the payment terms when the alleged WDWT stock was to be sold. That would require a signed writing, or it would violate the Statute of Frauds. *See, e.g.*, N.J.S.A. 25:1-15: "A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing signed by the person assuming the liability or by that person's agent…" Neither Frances Lagano nor Plaintiff executed any such writing. 1T, 11:17-22; 13T, 55-56; Da778.[5]

Denville Amusement Co., *supra*, held that the statute of limitations applied and the decedent's estate was not required to repay an alleged loan even though corporate filings referred to it. The decedent's preparation of corporate documents listing loans did not lift the bar because he did not promise to pay the loans on

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[5] *See also* N.J.S.A. 3B:22-7 (writing requirement to accept or reject a creditor's claim that replaced and repealed N.J.S.A. 25:1-5(a) writing requirement between estate administrator/executor with a creditor); Da1438 ft. 13.

demand. 84 N.J. Super. at 166. The Court held that the corporate report did not constitute a sufficient acknowledgement because defendant had an obligation to the stockholders to disclose the debt. Relatedly, the new promise alleged by Plaintiff to pay the outstanding amounts only tolls the statute of limitations period if it is in writing signed by the party chargeable thereby. Specifically, N.J.S.A. 2A:14-24 states:

> In actions at law grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, so as to take any case out of the operation of this chapter, or to deprive any person of the benefit thereof, **unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby**. [Emphasis added.]

Id. at 170. Here, there is no executed writing in which Frances Lagano made a new promise of any kind to Trobiano because no such agreement occurred. The draft Estate tax return (Da778) between the IRS and Frances Lagano is insufficient to satisfy the writing requirement of N.J.S.A. 2A:14-24 because it is not "signed by the party chargeable thereby" (*i.e.*, Frances) and it was not sent or issued to either Plaintiff or Tracy Trobiano. Mere disclosure does not qualify as a "promise to pay the debt on demand." *Id*. at 171. Moreover, Tracy Trobiano did not assign her claim to Plaintiff until 2018. Thus, the draft return is incorrect and is not a substitute for compliance with N.J.S.A. 3B:22-4 and -10.

Frances Lagano issued no writing to Plaintiff accepting or promising to pay the debt on behalf of the Estate. Da357, ¶57, Da369 ¶57. There was no written agreement to repay Plaintiff. Accord *Rickenbach v. Noecker Shipbuilding Co.*, 66 N.J. Super. 580 (Ch. Div. 1961) (the inclusion of a debt upon a corporate income tax return is not an acknowledgment of the debt sufficient to remove the debt from the statute of limitations.) The July 2008 purported Federal Estate tax return Plaintiff relies upon was a draft return used in a deposition in a federal lawsuit. But even if it was final, the return was issued only to the IRS. It is not a written promise to repay the debt by the Estate to Plaintiff. It is not a waiver of the Statute of Limitations, Statute of Frauds, and Probate Code requirements that must be in writing.

Additionally, if a valid contract did exist between Plaintiff and Frances Lagano as administratrix, the claim is time barred. Having died on July 29, 2011, the statute ran on or before July 29, 2017. Plaintiff filed his first Complaint on October 11, 2018; the Complaint here was filed on July 10, 2020 and January 12, 2021. Count Three is time barred and should be dismissed. Given the fact that Frances Lagano has no liability, no such liability may be imputed to Defendant.

The Probate Code does not allow the doctrine of equitable tolling. But even if that were to apply, it requires plaintiffs to "diligently pursue their claims" because the doctrine "does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." *Villalobos v. Fava*, 342 N.J. Super. 38, 52 (App. Div.), *certif. denied*, 170 N.J. 210 (2001). Here, the accrual date appears on the face of the pleadings and attached exhibits. Da6-41; 47-60. Plaintiff fails to state an enforceable contract against Defendant, as Substitute Administrator. Judge Arleo found that Exhibits A-D of the Complaint "indicate that neither the Loans nor the VTNR stock were included in the Estate's Disclaimers." Da322. It is undisputed that Frances Lagano, the surviving spouse heir, inherited the stock from Decedent. Da355 at ¶47, Da368 at ¶47. She did not disclaim the stock. Da245; Da235; Da206; Da352; Da368; Da355.

Defendant was not the administrator for the Estate when, in 2007-2011, these distributions were made by and to Frances Lagano. N.J.S.A. 3B:1-9 bars this type of summary action. Plaintiff filed his claim in July 2020, twelve years, after these publicly filed disclaimers and distributions took place. Da811. Judge Arleo properly applied the Statute of Frauds between Plaintiff and Defendant individually. Da321 Thus, given the amount and purpose of the loan, and the relationship between Decedent and Plaintiff, the Statute of Frauds equally applies with Plaintiff trustee and both administrators of the Estate. *See* N.J.S.A. 25:1-5(f), (g) and 25:1-15; *See also* N.J.S.A. 3B:22-4 and -7 (writing requirements).

Judge Arleo ruled, and it is uncontroverted that Plaintiff did not file his claim within the 9-month window prescribed by statute. Plaintiff's failure means there could be no breach of duty, and thus, no basis to impose personal liability upon the representative who distributes estate assets before the claim was filed. The court misapplied N.J.S.A. 3B:22-4. Defendant was not administrator during the period in question (2007-11). Moreover, he could be liable only after July 2020, when Plaintiff filed his claim. It was simply improper to allow Plaintiff to proceed by way of this summary proceeding in violation of N.J.S.A 3B:1-9 and its 2- and 5-year time bar to pursue this probate part action.

Further, any contract claim between Plaintiff and Defendant fails as a matter of law. The material terms of the alleged contract between Decedent and Plaintiff in 2006 were unknown. *See Heim v. Shore*, 56 N.J. Super. 62 (App. Div. 1959) (agreement unenforceable because parties did not agree on terms of payment, principal amount of mortgage, due date, and interest rate). Trobiano admits in April 2014, he did not discuss what the Decedent allegedly owed Plaintiff. Defendant allegedly said in 2014, "I'm going to pay you." Da122 at 108:15-16. That does not pass muster. "An agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract, and clearly is not an enforceable one." *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463 (App. Div. 1978). In *Malaker*, the Appellate Division upheld the trial court, which had refused to enforce an alleged contract, because it also lacked too many terms:

> Although the total amount of the obligation was clear, the failure to specify rates of interest, terms of repayment, necessity for collateral or the extent thereof required, or the very duration of the agreement, rendered it too vague for enforcement. [*Id*. at 472.]

A contract, therefore, is unenforceable for vagueness when its essential terms are too indefinite to allow a court to determine with reasonable certainty what each party has promised to do, again, pointing to the need for a writing.

III. DOCTRINES OF ISSUE PRECLUSION BARRED RELIEF ON COUNTS I-V OF THE COMPLAINT AND JUDGMENT ENTERED ON THOSE COUNTS WAS IMPROPER (1T, 45; Da498; 13T75-76)

By Letter Order dated June 23, 2020, Judge Arleo dismissed Plaintiff's initial Complaint. Da318-Da322. This Order provided:

> For the reasons stated above, Defendant's Motion to Dismiss, ECF No. 13, is **GRANTED.** Counts I-V against Defendant as Estate Administrator are **DISMISSED WITHOUT PREJUDICE** to refile in the Surrogate's Court. Counts I-V against Defendant in his individual capacity are **DISMISSED WITH PREJUDICE** as barred by the Statute of Frauds. Count VI, asserted against Defendant in his individual capacity as an heir or devisee of the Estate, is **DISMISSED WITHOUT PREJUDICE.**

Da322 (emphasis in original). The federal court ruled, on the merits, that, as against Defendant individually, Plaintiff could not satisfy the Statute of Frauds as to Counts I through V of the Complaint, dismissing the Counts with prejudice. *See* N.J.S.A. 3B:22-12 Plaintiff then refiled a duplicative Complaint in the Surrogate's Court.

Collateral estoppel forecloses the re-litigation of an issue where: (1) the issue to be precluded is identical to the issue in the prior proceeding; (2) it was actually litigated in the prior proceeding; (3) the prior court issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against who the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. *Olivieri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 521 (2006). The *Olivieri* elements are present in the case at bar. Plaintiff is collaterally estopped from entry of judgment against Lagano, individually, as to Counts I through V.

The issues presented in the case at bar are identical to the issues determined in federal court. The first prong of the *Olivieri* test is satisfied. The issues were actually litigated in federal court. This adjudication on the merits satisfies the second prong of *Olivieri*. A final judgment was entered in federal court, which satisfies the third prong of the *Olivieri* test. The court's determination was essential to the prior judgment, so the fourth prong of *Olivieri* is satisfied. The plaintiff in each matter is the same. The fifth prong of *Olivieri* is satisfied. Thus, Plaintiff is estopped from obtaining entry of judgment against Defendant, individually, for Counts I through V. The court improperly ignored the prior judgment and should be reversed.[6]

The Statute of Frauds applies to Defendant as administrator just as it did to Defendant individually. As above, the alleged assumption or guaranty, by the Estate, of the loans had to be in writing to be effective. So must be Plaintiff's alleged

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[6] Res judicata also applies. A Fed. R. Civ. P. 12(b)(6) "dismissal with prejudice constitutes adjudication on the merits as fully and completely as if an order had been entered after trial." *Velasquez v. Franz*, 123 N.J. 498, 507 (1991). The misapplication of res judicata and collateral estoppel is a question of law and is reviewed de novo. *Selective Ins. Co. v. McAlliste*r, 327 N.J. Super. 168, 173 (App. Div. 2000).

forbearance. N.J.S.A. 25:1-5(f) & (g). Forbearance must be in writing, but like everything else in this case, it was not. Judgment was improperly entered.

IV. THE PROBATE PART LACKED JURISDICTION AND TO ENTER JUDGMENT AGAINST OUT OF STATE HEIRS (Da498, 1T:43; 11T:26; 13T:70-81, Da863)

The court implicitly denied the challenges raised by Defendant, as an individual and sister heirs, regarding jurisdiction.[7] The determination of whether a court has personal jurisdiction is subject to *de novo* review. *YA Glob. Invs., LP v. Cliff*, 419 N.J. Super. 1, 8 (App. Div. 2011). Defendant answered only in his capacity as administrator for the Estate. Da499; 1T43-2 to 7.

N.J.S.A. 3B:22-41 specifically states, “the action shall be brought against all of the heirs and devisees of the deceased debtor who can be found within the State.” N.J.S.A. 3B:22-40 -43. Anne Lagano lives in Florida (Da9; Da50); Frank Lagano, in New York. (*Id.*; Da71 ¶7, Da960-961). “[A] trial judge’s statutory interpretation is reviewed de novo.” *In re Estate of Fisher*, 443 N.J. Super. 180, 190 (App. Div. 2015). Neither were found or personally served within New Jersey. Accordingly, the court improperly asserted its jurisdiction as to both heirs when it entered judgment.

Actions in the Probate Part are brought “in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67.” *R.* 4:83-1.

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[7] Raised in briefing filed on May 27, 2021, and July 13, 2021, the trial court did not rule. Da1447 and Da1451.

"Service shall be made and the action shall proceed thereafter in accordance with that rule." *Ibid.*

R. 4:67-3, prescribes the manner of service required in summary actions in the Probate Part, but specifically states "provided the nature of the action is such that the court may thereby acquire jurisdiction." (*emphasis added*) Count Six, N.J.S.A. 3B:22-41, a statutory cause of action, only permits jurisdiction over heirs found in this State, particularly when issuing a general *in personam* money judgment. The Probate Part, court along with "[i]ts jurisdiction in such matters is purely statutory and hence a court has no inherent power to expand it." *In re Schiller*, 148 N.J. Super. 168, 180 n.4 (Ch. Div. 1977).[8]

Plaintiff made no effort at personal service or moved for alternative service for either of the two Probate Part Complaints against any of the heirs that must be found in this State. *See* Da693-697; Da681-688. *See U.S. Bank N.A. v. Curcio*, 444 N.J. Super. 94, 105-07 (App. Div. 2016); *City of Passaic v. Shennett*, 390 N.J. Super. 475, 483-484 (App. Div. 2007); and *R.* 4:4-3, 4:4-4 and -7.

Plaintiff never entered default as to Defendant, individually. Da702-05. Plaintiff did not demonstrate, and the court did not determine its jurisdiction and

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[8] *See also Goldfarb v. Solimine*, 245 N.J. 326, 245 A.3d 570, 584 (2021) (holding "[t]hat a court's equitable powers must bow to a legislative enactment" (quoting *Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n*, 215 N.J. 522, 523-24 (2013))).

service at the proof hearing before entering judgment against the heirs as to Count Six. 13T:1-69, 13T:70-80; Da762-820 (exs. P-1 to P-13), Da1253 (ex. P-17). Indeed, no written order was issued by the court after striking Defendant's Answer and its oral decision does not specify its rulings as to jurisdiction, service, entry of default and default judgment, against any of the three heirs for Count Six. 11T, 20-28; *See* Da1161, n. 2. Moreover, entry of default filed by Plaintiff was out of time per *R.* 1:13-7, which requires a motion to be filed and did not occur. Da940 at ¶48-49 *See*, Pressler & Verniero, Current N.J. Court Rules (Gann), comment 1.1 to *R*. 1:13-7 and, comment 4 to *R.* 4:43-2(d). *See also Estate of Semprevivo v. Lahham*, 468 N.J. Super. 1 (App. Div. 2021).[9]

While the court may have *in rem* jurisdiction over assets held by the BCPO to render judgment in Plaintiff's favor against the decedent's Estate, it could not acquire or assert a general money judgment against alleged heirs outside the State. *See* N.J.S.A 3B:22-15 and *R.* 4:4-5. (Da1228-31, Da1232-37; Da1243-44, Da1249; Da954-959).

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[9] "A default judgment is void if 'taken in the face of defective personal service,' if the defect is so significant that it 'cast[s] reasonable doubt on proper notice.'" *BV001 REO Blocker, LLC v. 53 West Somerset*, 467 N.J. Super. 117, 125 (App. Div. 2021).

V. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF COUNSEL FEES AND COSTS (T14; 13T70-81; Da866; Raised in Briefing Not ruled on by Court Da871-872; 14T, 27-39, Raised in Briefing Not ruled on by Court, Da919-920, Da933-942, Da1160-1163, Da1054-1062, Da1259)

Despite the significant discretion a court has in awarding attorneys' fees, its determinations are not entitled to any special deference if the judge misconceives the applicable law or misapplies it to the factual complex. *Porreca v. City of Millville*, 419 N.J. Super. 212, 224 (App. Div. 2011). An Appellate Court undertakes a *de novo* review when analyzing questions of law raised in an application to approve a fee request. *Brunt v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 455 N.J. Super. 357, 363 (App. Div. 2018). In the case at bar, the court erred in approving Plaintiff's fee request, and as such the determination is subject to *de novo* review.

A. The Trial Court Lacked Jurisdiction to Award Fees, as the Matter was on Appeal (14T, 30:5-6; Da866, ¶4; Da1259)

R. 2:9-1(a) provides:

> Supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed, . . . The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to *R.* 1:10 and as otherwise provided.

Thus, except as otherwise expressly provided, filing the notice of appeal deprives the court below of jurisdiction to act further. *See* Pressler & Verniero, Current N.J. Court Rules, comment 1 on *R.* 2:9-1(a) (Gann); *see also Manalapan Realty v. Township Committee*, 140 N.J. 366, 376 (1995). This includes ruling on motions for: a new trial, *Dinter v. Sears, Roebuck & Co.*, 278 N.J. Super. 521, 527 (App. Div.

1995); reconsideration, *Kiernan v. Kiernan*, 355 N.J. Super. 89, 94 (App. Div. 2002); or dismissal, *State v. Kosch*, 458 N.J. Super. 344, 349 (App. Div. 2019). The trial court's jurisdiction is limited to enforcement of judgments and orders pursuant to *R*. 2:9-1(a)(7), and correcting clerical errors in the judgment under *R.* 1:13-1.

The award of fees does not fall within the limited exceptions to exclusive appellate jurisdiction. Defendant's notice of appeal was filed before Plaintiff moved for fees and well before the entry of the Order awarding fees. Da1259-Da1260; Da876. *R*. 2:9-1(a) deprived the trial court of jurisdiction to hear, much less grant, Plaintiff's motion. Da919-920.

B. Plaintiff's Motion for Fees was Untimely

Just as Plaintiff waited too long to bring this action, he waited too long to seek fees and pre-judgment interest. *R*. 4:42-9 serves as a bar on the Trial Court's making piecemeal rulings. *R*. 4:42-9(d) specifically provides:

> Prohibiting Separate Orders for Allowances of Fees. An allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination.

R. 4:42-9(d) requires the application to be made either before entry of final judgment or within 20 days, as prescribed by *R*. 4:49-2. *Czura v. Siegal*, 296 N.J. Super. 187 (App. Div. 1997); *Franklin Med. v. Newark Pub. Sch.*, 362 N.J. Super. 494, 516-517 (App. Div. 2003). *Czura* addressed frivolous litigation sanctions and held:

> The necessary implication of *R*. 4:42-9(d) is that an application for the allowance of attorneys' fees in a case governed by that rule has to be

> presented before the entry of the final judgment or, possibly, at the latest, within 10 days thereafter by a motion to alter or amend the judgment; since the defendants did not make their application for the award of attorneys' fees within the prescribed time period, their application was properly denied. [296 N.J. Super. at 190.]

See also Ramirez v. County of Hudson, 169 N.J. Super. 455, 458 (Ch. Div. 1979) (allowance of fees shall be included in the judgment stating that determination.)

Here, Plaintiff's executed order of Judgment instead purported to allow Plaintiff to move for relief "upon post-judgment application." Da866 Plaintiff did not move for pre-judgment interest or counsel fees within 20 days, which would be December 8, 2022. Indeed, Defendants waited 45 days before filing the Notice of Appeal, which was after the deadline for moving for fees and interest. Plaintiff was obliged to move for dismissal of the appeal or a temporary remand, pursuant to Rule 2:9-1(a). *Shimm v. Toys From The Attic, Inc.*, 375 N.J. Super. 300, 304 (App. Div. 2005). Plaintiff did neither and instead blithely filed an untimely motion for an award of attorneys' fees and pre-judgment interest, before a receptive judge. Da882.

C. Counsel Fees are not Warranted (14T27-39)

Ignoring the procedural irregularity and lack of jurisdiction, the trial court substantively erred in granting counsel fees. New Jersey disfavors the shifting of attorneys' fees. *In re Estate of Stockdale*, 196 N.J. 275, 307 (2008). This is to: foster unrestricted access to the courts; not penalize persons for exercising their right to litigate a dispute, even if they lose; and administrative convenience. *In re Niles Trust*, 176 N.J. 282 (2003). Instead, a prevailing party can recover those fees only if they are provided for by statute, court rule, or contract. *Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427, 440 (2001). Here, there are no statutory provisions or contractual terms.[10] Thus, we are left with court rules, which do not allow for fee shifting for any of the causes of action alleged in the Complaint. At the proof hearing, 13T, Plaintiff did not cite any court rule which would allow attorneys' fees. The trial court did not cite any basis at the proof hearing for the imposition of fees. Had Plaintiff sued in the Law Division, no judge would have awarded counsel fees. The mere fact that this suit was brought in the Probate Part should not allow Plaintiff to collect attorney's fees on a collection case.

D. The Court Improperly Found an Exception to the American Rule to Impose Counsel Fees (14T; Da1259; 13T; Da863-67)

While there are other exceptions to the American Rule that are not otherwise reflected in the text of Rule 4:42-9, this category of common law fee-shifting arises out of fiduciary breaches in certain settings. *See In re Estate of Folcher*, 224 N.J. 496, 507 (2016); *In re Estate of Vayda*, 184 N.J. 115, 120-21 (2005). The court

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[10] There was no contractual agreement between Plaintiff and Decedent to award attorneys' fees in the event of a default:

Q -- for those loans. And in the event of default, did you discuss with the decedent that he could be liable for costs of collection, attorney's fees, and things of that nature?

A No. [13T, 49-18 to 22.]

erroneously determined that *In re Niles Trust*, *supra*, and *In re Estate of Lash*, 169 N.J. 20 (2001) applied. 14T:35.

The American Rule does not preclude an allowance of reasonable counsel fees where there is a breach of fiduciary duty; such fees may be recoverable as an element of damages. *Niles Trust*, 176 N.J. at 294; *Lash*, 169 N.J. at 27. But the court misapplied these cases. Breach of fiduciary duty was not alleged among Plaintiff's myriad causes of action. No fiduciary relationship or breach was found with the Plaintiff by the court. 13T:70-81. Thus, imposition of attorneys' fees against the fiduciary was a legal error. The court's fee determination is subject to *de novo* review. *Moreland v. Parks*, 456 N.J. Super. 71 (App. Div. 2018).

The determination that Defendant had breached a fiduciary duty misapplies *Lash and Niles* to claims not asserted. 14T17:19-25; 19-23. It also runs afoul of *R.* 4:43-2(c), in that the final judgment is different from that sought in the Complaint.

E. Plaintiff is not Entitled to Fees Under *R.* 4:42-9(a)(2) or (3)

This was a collection case. Plaintiff did not advance the interests of the heirs of the Estate or otherwise create, preserve, or protect the assets of the estate. Even if successful, the litigation would have benefitted Plaintiff alone. Fee awards are usually denied if the party seeking the award was advancing only personal interests. *Estate of Silverman*, 94 N.J. Super. 189, 195 (App. Div. 1967); *Bush v. Riker*, 77 N.J. Super. 243, 247 (App. Div. 1962). Thus, Plaintiff did not qualify for an award of attorney's fees pursuant to Rule 4:42-9(a)(2) since his litigation efforts, if successful, would have redounded only to his own benefit. *See Henderson v. Camden Cty. Mun. Util. Auth.*, 176 N.J. 554, 564 (2003). The legal services rendered by Trobiano's attorney benefited only Plaintiff, not the heirs of the Estate. The fund in court exception "does not apply when a party litigates a private dispute for its own personal gain." *Ibid*. (*citing Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 169-70 (1960); *Janovsky v. Am. Motorists Ins. Co.*, 11 N.J. 1, 7-8 (1952)).

Rule 4:42-9(a)(3) permits a court, in its discretion, to make an allowance for attorneys' fees in certain probate actions, providing in pertinent part:

> In a probate action, if probate is refused, the court may make an allowance to be paid out of the estate…. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.

Here, Trobiano was not contesting the validity of a will or codicil. He was litigating his collection claim, for entitlement to a distribution as a belated creditor over that of intestate heirs. Trobiano's success, and the legal services performed by his attorney benefit only him, not the Estate. Trobiano did not qualify for an award of attorney's fees. *See In re Trust Agreement Dated Dec. 20, 1961*, 399 N.J. Super. 237, 260-62 (App. Div. 2006) (claimant who succeeded only in being added to a class of beneficiaries who may receive a distribution benefitted only himself and is not entitled to an award of attorney's fees), *aff'd*, 194 N.J. 276 (2008); *Silverman*, 94 N.J. Super. at 194-95 (disallowing fees for that portion of case prosecuted by plaintiff to advance his own interests); *Estate of Balgar*, 399 N.J. Super. 426 (Law Div. 2007) (holding services benefitting only the litigant and not the estate do not qualify for an attorney's fee award). There was no basis for granting Trobiano's application for an award of attorney's fees and costs.

F. The Fees were Unreasonable (14T27-38; Da1259; 13T; Da872)

Determining whether fees are reasonable requires meticulous analysis by the court. *Hansen v. Rite Aid Corp.*, 253 N.J. 191, 221 (2023). That analysis was sorely lacking. Thus, the lack of findings as to the reasonableness of the Plaintiff's attorneys' fees are entitled to *de novo*, as opposed to an abuse of discretion review. *Moreland*, 456 N.J. Super at 83. Defendant provided detailed objections. By way of example, roughly $25,500 of Plaintiff's fees were carried out in prior filed actions, in which Defendant partially prevailed. There was also excessive, duplicative and paralegal work as opposed to attorney work in the amount of $31,000. Da1179-80; 14T17-19. Plaintiff filed a duplicative Probate Part action (P-022-21). Da59, Da62. But just as it ignored Defendant's efforts to cure the default, the court ignored, or at best did not address, these major flaws. Again, the court's analysis was anything but meticulous. In fact, the judge did not engage in any "analysis" of the application at all. It did not address defense objections and reasonableness of the fee, but simply requested a fee certification and awarded the exact amount Plaintiff was seeking.

The court erroneously awarded fees for work not reasonably devoted to or required. It abdicated its duty.

Finally, even assuming the propriety of the fee award, those fees can only be imposed against the Estate. *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*, 172 NJ 60 (2002) (counsel fees should be recoverable only from the estate.) Thus, imposition of personal liability against the residuary beneficiaries and fiduciary of the Estate is improper. *See* N.J.S.A. 3B:22-4, specifying that the personal representative shall not be liable to a late-arriving creditor with respect to assets which the personal representative may have delivered or paid in satisfaction of any lawful claims, devises or distributive shares, before the presentation of the claim. *See also* Da320 (§3A).

CONCLUSION

Based upon the foregoing, Defendant Lagano requests that this Court reverse the judgment(s) below and enter judgment in favor of defendants.

LAW OFFICES OF GEOFFREY D. MUELLER, LLC

Attorneys for Defendant/Appellant,
Frank Lagano, as Substitute Administrator of the
Estate of Frank P. Lagano a/k/a Frank P. Lagano, Sr,
Deceased and Frank Lagano, Individually

By: */s/ Geoffrey D. Mueller*
Geoffrey D. Mueller, Esq.

Dated: February 18, 2025

Superior Court of New Jersey

Appellate Division
Docket No. A-001316-22

In the Matter of the Estate of

Frank P. Lagano, a/k/a
Frank P. Lagano, Sr.,

Deceased.

CIVIL ACTION
ON APPEAL FROM:

Superior Court of New Jersey,
Bergen County, Chancery Division
Probate Part, Docket No. P-022-21

SAT BELOW:

Hon. Edward A. Jerejian, P.J. Ch.

AMENDED BRIEF IN OPPOSITION ON BEHALF OF PLAINTIFF-RESPONDENT

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Preliminary Statement

This matter comes before the Appellate Division after a long, sordid and unnecessary protracted procedural history. Plaintiff, Anthony Trobiano, individually, as Assignee and Trustee of his self-settled Anthony Trobiano Trust ("Plaintiff") maintained a long friendship with Frank P. Lagano, a/k/a Frank P. Lagano, Sr. ("Decedent"). Their friendship permitted Plaintiff to lend to the Decedent, and the Decedent to borrow $187,500, the purpose of which to enable the Decedent to purchase stock in World Waste Technologies. The funds were transferred to Decedent who purchased the shares. Plaintiff and Decedent agreed that Decedent would repay the loan when the stock price increased. Shortly after the loan was made, the Decedent died. Plaintiff and Decedent's family were close, and Plaintiff and his daughter attended not only the public services for the Decedent but the private services limited to family only.

Plaintiff and Decedent's son, Frank Lagano, Jr., a/k/a Frank Lagano ("Defendant"), maintained a cordial relationship, and saw the price of the World Waste Technologies stock fluctuate over the years following Decedent's death. Defendant offered to repay the loan by selling the Decedent's residence or borrowing the money from a bank to satisfy the acknowledged debt. Though appreciated, Plaintiff declined these efforts in view of the close relationship. When the stock price increased to the value they had hoped for, Defendant invited Plaintiff to a dinner to celebrate the event. Subsequent to the dinner, however, Plaintiff's efforts to contact the Defendant were unsuccessful, leaving the Plaintiff no option other than to pursue his claim through the Courts. Defendant has turned what should have been a routine proceeding into a "scorch the earth" defense.

Defendant three (3) times removed the matter to federal court, each time having the matter remanded to the state court. Once finally in the Probate Division, Defendant advanced every possible excuse for not providing paper discovery, and provided incomplete, evasive and non-responsive answers in response to interrogatories and document requests. Yet, Defendant saved his most vociferous efforts to avoid being deposed. Defendant first avoided two (2) notices to take his deposition, requiring the intervention by the Trial Court. The Trial Court twice ordered Defendant to attend and give a deposition, only to see the Defendant cancel the first one the night before. When he arrived for the second occasion, claimed he could not proceed because he was fearful when he saw the Plaintiff.

The Trial Court provided the Defendant with every benefit of the doubt, over objections by the Plaintiff. However, Defendant's actions provoked the Trial Court to impose the ultimate sanction for the only time in which the Trial Court's sixteen (16) years on the bench.

This Court should affirm the Trial Court in all respects.

Procedural History

On January 12, 2021, the Verified Complaint *(Da47)* and Order to Show Cause *(Da42)* was filed in the Probate Part of Bergen County Superior Court. Defendant removed this Complaint to federal court and it was remanded to the Superior Court. Defendant filed a Verified Answer on August 23, 2021. *(Da499)*.

On August 12, 2021, Plaintiff noticed Defendant to appear for his deposition on October 5, 2021 *(Pa1)* and on March 30, 2022, re-noticed Defendant to appear for his deposition on April 12, 2022. *(Pa2)*. On each occasion, Defendant failed to appear offering excuses each time. Depositions were also scheduled during the April 7, 2022 hearing *(6T16,2 – 6T17,7) for April 21, 2022,* and during the April 20, 2022 hearing *(7T18,25 – 7T19,3)* for April 28, 2022. Defendant did not appear on either of these dates.

After two (2) notices to take Defendant's deposition *(Pa1, Pa2)* and the depositions scheduled during two (2) court conferences *(6T16,2 – 6T17,7; 7T18,25 – 7T19,3)* were ignored, the Plaintiff wrote to advise the Court on April 25, 2022 and again on May 23, 2022 regarding Defendant's continued noncompliance of his discovery obligations and his continued refusal to attend his deposition. *(Pa3; Pa4-Pa11)*.

On May 10, 2022, the Trial Court held a hearing on the various discovery issues, during which the Court expressed frustration of Defendant's continued failure to comply with orders, and continued refusal to appear for a deposition. *(8T6,24 – 8T7,10; 8T8,23 – 8T10,7; 8T17,7 -8T19,21; 8T21,11-25; 8T23,8-11; 8T24,7-12; 8T29,20-24)*. As a result of this hearing, the Trial Court ordered Defendant to appear on May 23, 2022 for a deposition. *(Da1259)*. On May 23, 2022, the Defendant then failed to appear, claiming outstanding privilege issues on certain documents, matters which had been previously resolved by the Court, and further asserting issues with a filed Substitution of Attorney. *(Db6).*

On June 9, 2022, the Trial Court held another conference at which the Court ordered Defendant again to appear for a deposition on June 24, 2022. The Trial Court's Order specifically provided, "If Frank Lagano, Esq. does not appear, his pleadings will be stricken and judgment will be entered against him." *(Da578).*

On June 24, 2022, Defendant was late in appearing for his court-ordered deposition, then suddenly refused to actually sit for the deposition, claiming "fear and panic" from being in the same room as the Plaintiff. Defendant also claimed recent COVID exposure and while he tested negative that morning, feigned concern for possibly jeopardizing Plaintiff's health. Before counsel for Plaintiff could contact the Court, counsel for Defendant advised that Defendant had already left the building. *(Da585, ¶28)*. Plaintiff then filed a Motion to strike the Defendant's Answer and to enter Judgment against the Defendant on June 30, 2022. *(Da579).* On August 31, 2022, the Trial Court granted the Plaintiff's Motion, entered default and directed that the matter would be later set for a Proof Hearing. *(11T26, 10-15; 11T27, 14-16)*.

The Trial Court held a Proof Hearing in this matter on November 1, 2022 with both parties participating, including counsel for Defendant. Defendant was not restricted in his cross examination, and did not confront the Plaintiff with any documents beyond those offered by the Plaintiff. Following testimony and cross examination, and review of the evidence, the Trial Court heard closing arguments from counsel for both parties. The Trial Court rendered its oral opinion in favor of the Plaintiff on all six (6) counts of the Complaint. The Trial Court found the Plaintiff's testimony to be extremely credible and further found the evidence to be overwhelmingly in favor of the Plaintiff. Thereafter, an Order for Judgment was entered in favor of the Plaintiff and against the Defendants on all six (6) counts of the Plaintiff's Complaint on November 18, 2022 against the Defendants in the amount of $187,500.00. *(Da863).*

In response to Plaintiff's request for counsel fees and costs, the Trial Court directed Plaintiff to file a separate fee application and certification of services following the entry of the Court's Order for Judgment. *(13T79, 24-25; 13T80, 1-11).* The November 18, 2022 Order *(Da863)* further contains the following language with respect to counsel fees: "ORDERED that the Plaintiff's request for pre-judgment interest, attorneys fees and costs shall be decided by the Court upon post-judgment application." By the terms of the November 18, 2022 Order *(Da863)*, the Trial Court retained jurisdiction over this matter for purposes of the Plaintiff's impending fee application and prior to finalizing the judgment entered in this matter. The Trial Court did not set a deadline for submission of this application.

On January 3, 2023, before Plaintiff submitted his application for counsel fees, Defendant filed a Notice of Appeal of the November 18, 2022 Order for Judgment. *(Da876)*. Shortly thereafter, on January 10, 2023, Plaintiff filed its Motion for Counsel Fees, Interest and Costs to the Trial Court. *(Da881).*

At the February 2, 2023 hearing, the Trial Court determined that it had jurisdiction to hear the application based on the specific reservation of jurisdiction it made in the November 18, 2022 Order. The Trial Court further determined that the Plaintiff was entitled to counsel fees as authorized pursuant to R. *4:23-2(b)* under which the Defendant's Answer was stricken and based upon the egregious discovery violations of the Defendant, including his repeated failure to appear for a deposition. *(14T28, 20-25; 14T29, 1-22; 14T30, 1-6)*. The Trial Court also found that pursuant to its findings relative to *N.J.S.A. 3B:22-40* and the Defendant's breach of fiduciary duty and misappropriation of funds of the Estate, imposition of counsel fees was further warranted based upon governing case law. *(14T35,3-25; 14T36,1-22)*. Finally, the Trial Court analyzed the reasonableness of the counsel fees requested based upon a review of the factors set forth in *R.P.C. 1.5(a)*. *(14T31,20-25; 14T32;*

14T33; 14T34; 14T36,23-25; 14T37,1-10). The Trial Court's decision was memorialized in an Order dated March 10, 2023 granting fees and costs to the Plaintiff in the amount of $87,159.89. *(Da1259)*. Thereafter, Defendant amended the Notice of Appeal to include the Trial Court's March 10, 2023 Order granting counsel fees and costs. *(Da1345)*.

On April 10, 2023, in an effort to collect the November 18, 2022 and March 10, 2023 Judgments, Plaintiff served an information subpoena upon the Defendant which he refused to answer. *(Da1347)*. This required the Plaintiff to file a Motion to Enforce Litigant's Rights seeking Defendant's responses to the information subpoena. In response, the Defendant filed a cross-motion to stay the execution on the judgments while an appeal was taken. *(Da1261)*.

On June 26, 2023, the Trial Court once again obliged the Defendant by carrying the Motions until July 14, 2023, giving him an additional fourteen (14) days to answer the information subpoena or to post a supersedeas bond pursuant to *R. 2:9-6*, which was necessary in order to stay the execution of the November 18, 2022 and March 10, 2023 Judgments. *(Da1323)*. The June 26, 2023 Order *(Da1323)* specifically required Defendant to either post the supersedeas bond, or to furnish responsive answers to the subpoena by July 14, 2023.

As was becoming routine in this matter, Defendant failed to comply with the Trial Court's June 26, 2023 Order. *(Da1323)*. On July 27, 2023, the Trial Court heard oral argument on the Plaintiff's Motion to Enforce litigant's rights and the Defendant's cross-motion to stay the execution of judgments. Despite the Defendant's continued contumacious conduct, the Trial Court gave the Defendant an additional fourteen (14) days to either post the supersedeas bond or furnish answers to the information subpoena. The Order further provided that upon Defendant's failure to comply, the Trial Court would grant leave for Plaintiff to move in the Appellate Court to dismiss the Defendant's Appeal on the basis of failure to comply with the Trial Court's orders. *(16T11).*

Post Judgment motion practice continued while Defendant refused to answer the Information Subpoena and continues to waste time and Plaintiff's money by delaying this appeal. It was not until October 2024, a year after this Appeal was dismissed for the Defendant's failure to comply with the Trial Court's Order requiring Defendant to post a supersedeas bond, that the Defendant presented and posted a proper supersedeas bond that was satisfactory to the Trial Court. *(Da1357).* On November 12, 2024, Defendant filed a Motion to Reinstate the Appeal, and on December 2, 2024, this Court granted that Motion and this Appeal was reinstated.

Counterstatement of Facts

On April 25, 2006, Plaintiff, individually, as Assignee and as Trustee of the Anthony Trobiano Trust, loaned the sum of one hundred and twenty-five thousand dollars ($125,000) to the Decedent. *(Da36)*. This check was negotiated by Decedent on April 28, 2006. This transfer was documented as a loan on the check itself. *(Da36)*. On April 27, 2006, Plaintiff's daughter, Tracy Trobiano, loaned the sum of sixty-two thousand five hundred dollars ($62,500.00) to the Decedent. *(Da85)*. This check was negotiated by the Decedent on May 1, 2006. This transfer was documented as a loan on the check itself. *(Da85)*. On August 1, 2018, Tracy Trobiano assigned all right, title and interest in her loan to the Plaintiff. *(Da661)*. On April 12, 2007, Decedent died intestate a domiciliary of Tenafly, Bergen County, New Jersey. Decedent was survived by his spouse, Frances Lagano ("Mrs. Lagano"), and their three (3) children, son, Frank, Jr., and daughters, Anne and Corinne. *(Da6)*. Together, the April 25, 2006 loan and the April 27· 2006 loan represent a total debt that Decedent owed to Plaintiff in the amount of $187,500 (collectively referred to as the "Loan.")

The purpose of this Loan was to enable the Decedent to purchase shares in a company called World Waste Technologies. *(13T9,18-25; 13T10,1-8)*. Decedent did in fact utilize this Loan to purchase shares of World Waste Technologies. As of the Decedent's date of death, statements in his name from the Montauk Financial Group indicate Decedent's ownership of 2,375 shares of World Waste Technologies, valued based upon management assets at $237,500.00. *(Da799)*.

While the April 25, 2006 Loan to the Decedent was written from a revocable trust in Plaintiff's name, Plaintiff testified that the source of funds were personal funds, and that he set up the account of which he is the grantor, the trustee and the beneficiary. The Plaintiff testified he used the account in his ordinary everyday life as his personal account. *(13T12,23-25; 13T13; 13T14,1-3)*. Plaintiff testified that the Loan in question was a personal loan made to his longtime friend, and it was not a business loan. *(13T9,18-25; 13T10,1-8)*. Plaintiff and the Decedent had been friends for many years prior to the Decedent's death, and on at least one prior occasion, Plaintiff loaned the Decedent money in the same manner which was previously paid back in full. *(13T5,4-25)*.

With respect to the terms of repayment of this Loan, Plaintiff testified he and the Decedent agreed that Plaintiff would be repaid when the stock was sold. Repayment was not contingent on the value of the stock. *(13T19,9-25; 13T20,1)*. In the year following the Loan to the Decedent, the parties had several discussions about the repayment of the Loan, as they expected the value to increase within six (6) months and to then sell, but when that did not happen, the Decedent asked Plaintiff for additional time to repay the Loan, to which Plaintiff agreed. *(13T20,2-18)*. Before Decedent could repay the Loan to Plaintiff, the Decedent died. The total amount of the Loan owed to Plaintiff at the time of Decedent's death was $187,500. *(13T21,1-3)*.

On May 21, 2007, the Surrogate of Bergen County granted Mrs. Lagano administration and Letters of Administration were issued to Mrs. Lagano. *(Da770)*.

On January 3, 2008, Mrs. Lagano disclaimed 12,500 shares of SIGA Technologies, Inc., stock with a date of death value of $67,000, and an ownership interest in Seville Food, LLC, a New Jersey Limited Liability company, having a date of death value of $276,000.00, estimated to be a 24% ownership interest. *(Da6).* In addition, on January 3, 2008, Mrs. Lagano disclaimed $1,500,000 (but not more than 50%) in value of the survivorship interest in the real property known as 147 Buckingham Road, Tenafly, that had been owned by the Decedent and Mrs. Lagano as tenants by the entireties. *(Da6).*

The combined amount disclaimed as listed is $1,804,125.00. The consequence of the disclaimers is that each of the three (3) individual Defendants, Frank, Jr., Anne and Corinne, received the value of $601,375. *(Da6; Da610, part 4, item 5).*

On July 9, 2008, Emery C. Duell, Esq., executed a Federal Estate Tax Return Form 706 ("Estate Tax Return") detailing the assets, debts, and liabilities of the Decedent. *(Da610).* By letters dated July 11, 2008, Mrs. Lagano filed the Decedent's Estate Tax Return with the Internal Revenue Service and the New Jersey Division of Taxation. *(Da626).* The Estate Tax Return was received by the IRS on July 15, 2008, and by the New Jersey Division of Taxation on July 14, 2008. The Estate Tax Return listed the Debts of the Decedent, Schedule K, Item 16 as a debt of the Decedent to "Anthony Trobiano Trust" and reflects an amount unpaid to date as "$237,500.00" with "$0" listed as being "amount in contest." *(Da610).* The Estate

Tax Return further confirmed that as a result of the disclaimer, the value of $601,375.00 was received by each of the three (3) Defendants in this matter. *(Da610, p. 2, part 4, item 5).*

After the Estate Tax Closing Letter was received from the Internal Revenue Service, by letter to Mrs. Lagano dated February 3, 2009, attorney Duell confirmed that because of the disclaimers, the SIGA Technologies, Inc. warrants and the $1,500,000.00 value of the tenant in common interest should be transferred to Frank, Jr., Anne, and Corinne. *(Da708).*

On July 29, 2011, Mrs. Lagano died, and Defendant applied for Letters of Substitutionary Administration. By Judgment dated March 26, 2012, substitutionary administration was issued to Defendant. *(Da629).* On August 18, 2015, Defendants sold the real property at 147 Buckingham Road, Tenafly, for a gross sale price of $2,950,000. *(Da711).* When the Decedent died, Plaintiff attended the funeral, including a separate and private viewing portion thereof that was reserved just for family, due to his long-standing friendship with the Decedent. *(13T8,2-25; 13T9,1-7).* While Plaintiff had some social interaction with Defendant prior to Frank Sr.'s death, there was an increase in those interactions after Decedent's death.

Plaintiff testified that he had several discussions with Defendant after Decedent's death about the repayment of the Loan. Plaintiff testified that on several occasions, Defendant offered to sell his family's Tenafly home to repay the Loan to

Plaintiff, and on others, Defendant proposed taking out another mortgage on the Tenafly home to repay the Loan. Plaintiff testified that he told Defendant that it was not necessary, particularly where Mrs. Lagano was still living in the Tenafly home, and he suggested waiting until the stock price rose and then Defendant could repay the Loan. *(13T29; 13T30; 13T31,1-5).*

When the stock price rose in 2015, Defendant called Plaintiff and invited him out to dinner in New York City to celebrate. Plaintiff testified that they discussed how the stock had risen and even turned a profit. At that time, Defendant offered to repay not only the principal Loan amount, but also the profit from a rise in stock prices. *(13T31; 13T32,1-8).* Plaintiff told Defendant that it was only necessary to repay the principal amount of the debt, and he suggested that Defendant split the profit between him and his sisters, Anne and Corinne. *(13T32,9-20).*

Thereafter, Defendant did not repay the Loan to Plaintiff, nor did he contact Plaintiff to discuss the terms of repayment at any time thereafter. In the several months following that 2015 dinner, Plaintiff attempted to contact Defendant regarding repayment, but Defendant ignored Plaintiff and failed to repay the Loan. *(13T32,21-25; 13T33,1-23).*

On August 15, 2018, when it became clear to Plaintiff that Defendant had no intention of repaying the Loan, Plaintiff wrote a letter to Defendant, Anne and Corrine making formal demand for repayment. *(Da647).* Plaintiff also filed a formal notice of a creditor claim against the Estate of Frank P. Lagano, Sr., with the Bergen County Surrogate on July 9, 2020. *(Da658).* Shortly after making the demand for repayment, Plaintiff instituted formal legal proceedings on October 11, 2018 by filing a Complaint against Defendant seeking repayment of the Loan. *(Da444).*

Legal Argument

Standard of Review

"The general rule is that findings by a Trial Court are binding on appeal when supported by adequate, substantial, credible evidence." *Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). See also, State v. Camey, 239 N.J. 282, 306 (2019)* ("we will not disturb the Trial Court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the Trial Court"); *Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017)* ("we review the Trial Court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); *Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016)* (findings by the Trial Court are binding on appeal when supported by adequate, substantial, credible evidence).

Discretionary matters determined by the Trial Court are reviewed by the appellate court under the "abuse of discretion" standard. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Flagg v.*

Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002). "A functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." *State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).* "When examining a Trial Court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)).*

Likewise, discovery rulings are reviewed by the appellate court under the abuse of discretion standard. *Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017).* "Appellate courts 'generally defer to a Trial Court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" *State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).*

Here, Defendant appeals a judgment entered by the Trial Court on November 18, 2022 *(Da863)*, which was entered after a Proof Hearing in which Defendant participated, and which followed an order striking Defendant's Answer for his repeated failure to comply with numerous discovery obligations, including failure to appear for two (2) court ordered depositions despite otherwise being required to do so over a period of approximately nine (9) months. The November 18, 2022 Order *(Da863)* is reviewed under the "abuse of discretion" standard. Therefore, this Court should defer to the Trial Court's disposition on the discovery issues leading to the November 18, 2022 Judgment, as Defendant has not been presented with evidence that the Trial Court abused this discretion or it made its decision on a mistaken understanding of the applicable law.

I. The Trial Court Properly Struck Defendant's Answer Pursuant to *R. 4:23-4* Where Defendant Willfully Disregarded Discovery Obligations, Failed to Attend Court-Ordered Depositions and Otherwise Demonstrated a Pattern of Deliberate Noncompliance and Purposeful Manipulation of Procedural Tactics in an Effort to Delay, Frustrate and Interfere with the Plaintiff's Pursuit of Legal Action to Secure Repayment of the Loan

Defendant asserts that the Trial Court improperly struck Defendant's Answer in response to his failure to appear at Court-ordered depositions because the Trial Court did not evaluate the prejudice to the Plaintiff in light of the severity of the sanction of dismissal. Defendant further alleges that during the period of non-compliance, he attempted to make himself available for deposition on several occasions and those efforts were rebuffed by the Trial Court. Not only was the Trial Court well within its authority to strike Defendants' Answer after several months of the Defendant's willful noncompliance with discovery obligations and Court orders pursuant to the remedies listed in *R. 4:23-4,* but the Trial Court gave the Defendant every opportunity to comply, accommodated every reasonable request and routinely granted extensions of time for Defendant's compliance, even cautioning the Defendant as to the Court's authority to impose sanctions, ultimately giving the Trial Court no other choice but to issue the sanction of dismissal.

R. *4:23-4* provides as follows:

> If a party or an officer, director, or managing agent of a party or a person designated under *R. 4:14-2(c) or 4:15-1* to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs *(1), (2) and (3) of R. 4:23 - 2(b).*

When confronted with a party's failure to comply with discovery orders or obligations, the remedies available to the Trial Court are set forth in R. *4:23-2(b)* which provides as follows:

> (b) Other Matters. If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;
>
> (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Based on the foregoing, the Trial Court is undoubtedly well within its powers and authority set forth in the rules of discovery to strike a pleading, or parts thereof, to stay proceedings until an order is obeyed, to dismiss the action or any part thereof with or without prejudice or to enter default judgment against a party who fails to comply with its discovery obligations. A determination as to whether the imposition of the sanction of dismissal was reasonable will depend on the conduct of the defaulting party and the facts and circumstances leading up to the order in question. A casual review of the transcripts demonstrates the Trial Court's extraordinary patience and leniency to the Defendant, repeatedly granting Defendant's requests to adjourn his deposition over Plaintiff's objections, and when ordered to attend his deposition, refusal to testify offering excuse after excuse. A review of the case law regarding sanctions for discovery violations will demonstrate that the Trial Court's imposition of the dismissal was appropriate.

Discovery rules are designed "to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." *Zaccardi v. Becker, 88 N.J. 245, 252 (1982)*. "The discovery rules were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." *Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 387 (App. Div. 1990)*. If the discovery rules are to be effective, courts must be prepared to impose appropriate sanctions for violations of the rules. *See*, *Cunningham v. Rummel, 223 N.J. Super. 15, 18 (App. Div. 1988)* stating "[I]f discovery rules are to have any meaningful effect upon calendar control and early disposition of litigation, they must be adhered to unless, for good cause shown, they are relaxed under *R. 1:1-2*.".

In *Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 513 (N.J. 1995)*, the Court synthesized the case law and discussed the necessary balance the Trial Court must strike between the appropriateness of sanctions and the specific discovery violations as follows:

> Chief Justice Vanderbilt observed over thirty years ago, 'As with all rules it is necessary that there be adequate provisions for the enforcement of the rules [regarding] discovery against those who fail or refuse to comply. Sanctions are peculiarly necessary in matters of discovery and the power to invoke them is inherent in our courts.' *Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338 (1951) (construing predecessor to Rule 4:23-2(b))*. 'A Trial Court has inherent discretionary power to impose sanctions for failure to make discovery,

> subject only to the requirement that they be just and reasonable in the circumstances.' *Calabrese v. Trenton State College, 162 N.J. Super. 145, 151-52 (App. Div. 1978); see also Lang, supra, 6 N.J. at 339 (same); cf. Allegro v. AftonVillage Corp., 9 N.J. 156, 161 (1952)* ('It is peculiarly within the sound discretion of the Trial Court to deal with [the question whether an adjournment should be granted or a complaint should be stricken].')

The *Abtrax* court further recognized that competing policies are involved in disputes over procedural issues. "The defendant's right to have the plaintiff comply with procedural rules conflicts with the plaintiff's right to an adjudication of the controversy on the merits." *Zaccardi, supra, 88 N.J. at 252*. "Because of these competing policies, and because of the varying levels of culpability of delinquent parties, a range of sanctions is available to the Trial Court when a party violates a court rule." *Id. at 252-53*.

With respect to the ultimate sanction of dismissal, the courts must strike a balance by imposing that sanction only sparingly. In *Lang, supra*, the Court held that "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious." *6 N.J. at 339 (1951)*. Further, "since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault." *Zaccardi, supra, 88 N.J. at 253.*

Moreover, the "imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others who [might] be tempted to violate the rules absent such a deterrent." *Id. at 332*.

With respect to the type of conduct that properly gives rise to the ultimate sanction of dismissal, the *Abtrax* Court held that a party invites this extreme sanction by deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts. The *Abtrax* Court specifically referenced the Appellate Division's holding in *Interchemical Corp. v. Uncas Printing Finishing Co., 39 N.J. Super. 318, (App. Div. 1956)*, where the plaintiff brought suit for unpaid royalties, alleging that the defendant had failed to submit quarterly reports and had refused to permit the plaintiff to inspect and audit the defendant's records. In that case, during pretrial discovery proceedings, the court entered three orders directing the defendant to produce named records and books for inspection. *Id. at 321-23*. The defendant's failure to produce the requested books and records led to the plaintiff's propounding and serving interrogatories in an effort to secure the information contained in the documents that had not been produced. *Id. at 323*. After waiting more than four (4) months for answers to the interrogatories, the plaintiff obtained an order directing that the defendant provide answers within thirty (30) days or a default judgment would be entered. *Ibid.* No answer having been provided, the court suppressed the defendant's answer and ordered the plaintiff to proceed to default judgment, after proof of damages. Ibid. Under those circumstances, the Appellate Division observed that the court had authority to strike the defense and enter default judgment, reasoning that the defendant had "invited the extreme sanction by the course [that] it chose to pursue in the face of plaintiff's persistent efforts to get at necessary facts." *Id. at 326*. The Appellate Division in *Interchemical Corp.* further found that the "order was a just one, for the discovery proceedings went to the very foundation of plaintiff's cause of action, and defendant's refusal to comply was deliberate and contumacious." *Ibid.*

Finally, it is well-settled that that imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrants it, but to deter others who may be tempted to violate the rules absent such a deterrent. *Abtrax, supra, 139 N.J. 499, 517-18. See also*, *Zaccardi, supra, 162 N.J. Super. at 332* (stating that "imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others who [might] be tempted to violate the rules absent such a deterrent"); *National Hockey League v Metropolitan Hockey Club. Inc., 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 747, 751 (1976)* (stating that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent").

With respect to the type of conduct displayed by the defaulting party that warrants the sanction of dismissal, the facts of this case are aligned with those in Interchemical Corp., *supra*. Here, Defendant has deliberately pursued a course that thwarts persistent efforts to obtain the necessary facts in Plaintiff's pursuit of repayment of the 2006 loans.

As set forth in the torturous procedural history in this matter, Plaintiff initially sought a legal remedy for repayment of the 2006 loans in 2018, and for a period of over three (3) years, Defendant took every opportunity to delay, hinder, and frustrate Plaintiff's efforts to seek legal recourse, including several attempts to remove the case to federal court despite the clear probate exception warranting jurisdiction in the Superior Court, Bergen County, Chancery Division, Probate Part, requests for extensions of time on filings, and otherwise manipulating the court rules and process in a manner designed to stall Plaintiff's right to seek repayment of the 2006 loans. *(13T75,2-25; 13T76; 13T77,1-4)* Three (3) years after the filing of the first Complaint, in August 2021, Defendant filed an Answer in this matter. With discovery commencing, Plaintiff was finally able to begin his arduous, largely unsuccessful effort to obtain documents and completely unsuccessful effort to depose the Defendant.

Defendant continued to display willful noncompliance with discovery demands, including his refusal to attend his deposition scheduled by the Court for May 23, 2022. *(Da569)*. Plaintiff was once again forced to make additional requests, and eventually to seek intervention from the Trial Court to secure responses to the discovery requests made, resulting in further delay and frustration of Plaintiff's efforts to obtain necessary information vital to Plaintiff's claims in this matter. *(Pa3; Pa4-Pa11)*. On at least four (4) separate occasions between February 2022 and the Trial Court's Order striking Defendant's Answer in August 2022, the Trial Court specifically issued orders requiring Defendant to provide informational discovery or to appear at a deposition on a specific date and time, or both, all of which were issued as a result of motions Plaintiff was forced to file in light of Defendant's willful noncompliance with discovery obligations. *(Da510; Da569; Da578, Da579; 11T)*. After three (3) years of Defendant's abusive procedural tactics utilized with the intent to defeat Plaintiff's ability to secure repayment of the loan, and nearly a year of Defendant's deliberate disregard for discovery obligations and orders of court, a distinct pattern of Defendant's contumacious conduct began to emerge. In his effort to excuse his failure to give testimony, Defendant offered to obtain medical records to substantiate that he possessed a genuine fear of the Plaintiff, to which Judge Jerejian stated "Which is the first I'm hearing of that. We just keep hearing new things as we go." *(11T14, 21-25; 11T18, 16-21)*.

When the Defendant sensed the Trial Court's growing frustration with his persistent failure to comply with discovery obligations, Defendant would feign an "attempt" to cooperate, such as appearing (albeit late) to a court-ordered deposition in June 2022, then refusing to actually be deposed, claiming extreme fear and panic at being deposed with Plaintiff in the same room, and further indicating a possible COVID exposure feigning concern over Plaintiff's health if he stayed for the deposition. *(Da585, ¶s 20-28).*

Notwithstanding the fact that the Defendant, a licensed and experienced practicing attorney in New Jersey, would certainly have been prepared for Plaintiff's presence at his deposition, and regardless of the likely fabricated health concerns, the Trial Court, over strenuous objection from the Plaintiff, allowed the Defendant additional opportunities to comply with the discovery requests on at least four (4) occasions prior to striking Defendant's Answer, each time refusing to impose stricter sanctions authorized under the court rules and certainly applicable in this instance. Each of these instances of leniency by the Trial Court was met with Defendant's willful disobedience of, and complete disregard for, the Trial Court's orders. *(Da585, ¶s 20-28; 13T75,5-25; 13T76; 13T77,1-18)*. Nonetheless, the matter had been delayed and progress impeded by these new requests, just as Defendant likely intended.

The above-described conduct displayed by the Defendant does not include the numerous conferences between the parties held during this time in which Defendant's persistent noncompliance was discussed and where the Trial Court urged compliance, set specific dates for compliance, granted extensions of time and other accommodations to Defendant for personal and other reasons. *(Da585, ¶s 20-28).* Finally, in August 2022, it became clear to the Trial Court that lesser sanctions available for discovery violations and similar remedies were ineffective to secure Defendant's compliance, and the prejudice to the Plaintiff in unnecessary delays and incurring additional counsel fees and other expenses was clear. *(Da579; 11T).*

It was at this time in August 2022 that the Trial Court granted Plaintiff's Motion to Strike Defendant's Answer and the matter proceeded to a Proof Hearing.

In the Defendant's Brief, reference is made to an unrelated comment by counsel for Plaintiff at the November 1, 2022, Proof Hearing about this matter being "simple" in response to Defendant's request for post-trial submissions, and Defendant suggests that if this were true, there should be no need to depose Defendant. Defendant's Brief states that Defendant has no personal knowledge as to the 2006 loans, so, he argues, it is not necessary to depose Defendant. *(Db19).* However, a party's discovery obligations are not satisfied just because he says so. And in any case, this argument is not remotely relevant or appropriate for consideration by this Court as a valid basis for Appeal.

With respect to the issue of the prejudice to the Plaintiff, even a cursory review of the record, including several discovery orders, hearings on motions to enforce litigant's rights with respect to discovery, and several court conferences held for the specific purpose of discussing Defendant's discovery-related conduct, is sufficient to establish the numerous attempts by the Trial Court to balance the prejudice to the Plaintiff in permitting delays and granting extensions for compliance to the Defendant, with the severity of impact of a sanction or default judgment against the Defendant for discovery violations. *(Da569; Da578; Da585; 13T75,5-25; 13T76; 13T77,1-18).* In fact, at the November 1, 2022 Proof Hearing, the Trial Court commented on how this was the first time in his seven (7) years sitting in Chancery that he had a case go to a Proof Hearing based on a defaulting party's failure to comply with discovery, and how this outcome was both surprising and avoidable. *(13T75,5-25; 13T76,1-19).*

The Defendant's continuous refusal to comply with discovery obligations and court-ordered depositions resulted in significant delays, prevented Plaintiff from obtaining necessary information relative to his pursuit of this matter, and effectively halted any progress, all of which resulted in significant prejudice to the Plaintiff. These concerns were all noted by the Trial Court at the numerous conferences held in this matter on discovery issues prior to October 2022. *(Da510; 8T8,23-25; 8T9;*

8T10,1-13; 8T17,12-25; 8T18; 8T19; 8T20; 8T21; Da569; Da578; Da585; 13T75,5-25; 13T76; 13T77,1-18).

Furthermore, Defendant's persistent and willful noncompliance with at least (2) notices to take deposition *(Pa1, Pa2),* depositions scheduled during two (2) court conferences *(6T16,2 – 6T17,7; 7T18,25 – 7T19,3)* and two (2) court-ordered depositions, or to appear for a deposition in light of the Trial Court routinely granting Defendant extensions of time for compliance with orders, and reminding Defendant of the Trial Court's authority to impose sanctions is proof that a lesser sanction would not have been effective to secure Defendant's compliance with court orders. It is further proof that the Trial Court's actions were reasonable and justified under the Rules.

Plaintiff has established, and Defendant does not dispute, that the Trial Court was authorized to strike Defendant's Answer for failure to comply with discovery pursuant to R. *4:23-4 and -2*. Defendant also does not dispute that he did not comply with his discovery obligations, including his failure to appear for at least two (2) court-ordered depositions. The record is replete with instances where the Court urges Defendant to comply with discovery, oftentimes giving Defendant additional time to comply and considering Defendant's increasing number of requests for accommodations prior to compliance. *(Da510; 8T; Da569; Da578; Da585)*. Despite the urgings of the Trial Court, and knowing the Trial Court had the authority to strike his pleading because he had ongoing and flagrant discovery violations, Defendant willfully refused to fulfill his discovery obligations and deliberately violated court orders.

Defendant further argues that it was "manifestly unjust" that the Trial Court did not impose a "more common remedy" to the refusal to be deposed which is to preclude the Defendant's testimony at trial, and that the Trial Court erred in imposing the sanction of striking Defendant's Answer because of the alleged failure to evaluate the prejudice to the Plaintiff as a result of Defendant's violations, asserting that the Trial Court's decision was rendered with a "misconception of applicable law." Notwithstanding the fact that a statement of "the court could have decided differently in my favor" is not a legally cognizable argument in any forum but particularly not in this forum, Defendant appears to misunderstand the applicable law with respect to sanctions a Trial Court is permitted to issue for discovery violations.

Moreover, none of the remaining remedies available under R. *4:23-2(b)* provide an adequate remedy. *Part (b)(1)* permits taking the facts as established. The refusal to attend his deposition prevents counsel from obtaining facts such as admitting he attended the meeting at the restaurant in New York where both the increase in the stock price was discussed and after which Plaintiff sent a letter to the Defendant. *(13T37; Da809).* Additionally, a deposition would permit Plaintiff to explore additional evidence regarding the estate tax return, the disclaimers, the use of the funds received, and Defendant's role in handling the estate administration for his elderly mother. Plaintiff would have had an opportunity to obtain documents otherwise unknown to the Plaintiff that would avoid surprise testimony and allow for rigorous cross-examination. Similarly, *Part (b)(2)* offers no assistance to Plaintiff. In fact, Defendant was permitted to cross-examine the Plaintiff and confront the Plaintiff with documents. The Trial Court did not constrain Defendant's ability to cross-examine the Plaintiff. Finally, *Part (b)(3)* offers no remedy. Striking his pleadings leads only to further delay unless the Court authorizes as it did a Proof Hearing. Staying the proceeding until he complies would only benefit Defendant. Indeed, the ONLY viable remedy in this matter was to strike the Defendant's Answer and conduct a Proof Hearing.

In arguing that the Trial Court acted under a misconception of the applicable law, Defendant conflates a reference to the prejudice to the non-defaulting party in the Court's decision in *Abtrax* in consideration of the sanction of dismissal with the imposition of a specific requirement that the Trial Court analyze the prejudice to the non-defaulting party as a necessary precursor to imposing the sanction of dismissal. Defendant's position has absolutely no basis in law or fact. The New Jersey Court rules do not include such a requirement, nor is there a statute, local rule or holding in the applicable case law which imposes such a requirement on the Trial Court.

The Court's decision in *Abtrax* similarly does not require or even suggest that a Trial Court engage in such an analysis at any time, let alone as a necessary precursor to imposing the sanction of dismissal for discovery violations. Likewise, the *Abtrax* Court's reference to the prejudice to the non-defaulting party is found in another Court decision, *Zaccardi v. Becker, 88 N.J. 245 (1982)*, and no such requirement is included in this holding either.

Thus, where the Trial Court did not act under a misconception of the applicable law of sanctions for discovery violations, nor did it misapply the law in using its discretionary authority to strike Defendant's Answer after several months of the Defendant's continuous and deliberate refusal to comply with discovery obligations, and willful disregard for court orders despite being given every opportunity to comply. In the absence of evidence that the Trial Court's decision to strike Defendant's Answer was manifestly unjust, and where Defendant failed to produce any evidence indicating that the Trial Court's order striking Defendant's Answer was an abuse of discretion, this Court should defer to the Trial Court's August 31, 2022 Order Striking Defendant's Answer and the November 18, 2022 and March 10, 2023 Judgments, and deny the Defendant's appeal.

Based upon the foregoing, the Trial Court properly struck Defendant's Answer pursuant to *R. 4:23-2* because of the Defendant's willful noncompliance with court orders and deliberate refusal to comply with discovery obligations, warranting the sanction of dismissal.

II. The Defenses to this Action Asserted by the Defendant Lack Both Legal and Factual Merit, and Should be Rejected by the Court in Consideration of this Appeal

In support of this appeal, Defendant asserts that the Trial Court should not have struck Defendant's pleading because there are meritorious defenses to the Plaintiff's claims, namely, (1) that the claims are barred by the Statute of Limitation; (2) that the claims are barred by the Dead Man's Act; (3) that the claims are barred by the Statute of Frauds; and (4) that the claims against the Estate and Lagano are barred and there was no breach of fiduciary duty pursuant to *N.J.S.A. 3B:22-40*. At the Proof Hearing, the Trial Court heard arguments on all these defenses, and after review of the evidence, determined that none of these defenses had merit. Defendant fails to present any evidence that the Trial Court abused its discretion in making these findings, the absence of which is fatal to Defendant's Appeal.

Statute of Limitations

Pursuant to *N.J.S.A. 2A:14-1*, any claim "for recovery upon a contractual claim or liability . . . shall be commenced within six (6) years next after the cause of any such action shall have accrued." The six (6) year statute of limitations begins to run when a claim accrues, which is governed by the "discovery rule." *See*, *Grunwald v. Bronkesh, 131 N.J. 483, 494-495 (1993).* The "discovery rule" operates to "postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." *Id. at 494-498*. The "discovery rule" focuses on "an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person. Such knowledge involves two elements, injury and fault." *Lynch v. Rubacky, 85 N.J. 65, 70 (1981); Grunwald, 131 N.J. at 492-93*.

Here, the Trial Court determined that the nature of the loan was one personal in nature between the Decedent and the Plaintiff, based upon the testimony of the Plaintiff relative to the parties longstanding friendship, upon a determination that the testimony of the Plaintiff was credible, and that the evidence was overwhelmingly in favor of concluding that this was a personal loan, and not a business loan, as alleged by the Defendant. *(13T70, 18-25; 13T71, 1-20; 13T72, 9-11.)* Furthermore, Plaintiff testified that while the account from which the loan was written is that of a revocable trust, the source of funds of the account are Plaintiff's personal funds, that he is the creator of the trust, the grantor of the trust, the trustee of the trust and the beneficiary of the trust, and used the bank account for personal and everyday transactions. *(13T12, 23-25; 13T13, 1-25; 13T14, 1-3)*. Based upon the evidence and the testimony presented, the Trial Court determined that the applicable statute of limitations is set forth in *N.J.S.A. 2A:14-1* which provides for a 6-year statute of limitations for contractual claims, including oral contracts.

With respect to the date of accrual of the claim, Plaintiff argued, and the Trial Court concurred, that the earliest date of accrual of the claim was at the time of the dinner in 2015 where Defendant invited Plaintiff to dinner in New York City because the stock had finally increased and a profit made, and Defendant indicated he wanted to repay the loan and the profit to the Plaintiff. *(13T31, 6-25; 13T32, 1-11)*. After this dinner, and over the course of the next several months, the Plaintiff attempted to contact the Defendant regarding payment, and the Defendant failed to respond, and failed to repay the loan. *(13T32, 21-25; 13T33, 1-23)*. At that time, Plaintiff wrote to the Defendant and his sister, Corrine, regarding the failure to repay the loan, eventually making formal demand for payment in August 2018, the first complaint for repayment was also filed in 2018, and the proof of claim against the Estate was filed in July 2020. *(13T33, 8-25; 13T34, 1-21; 13T35, 1-22).*

The Trial Court reviewed the evidence and testimony and determined 2015 to be the earliest possible accrual date, therefore concluding that the causes of action asserted against Defendant were filed well within the 6-year statute of limitations. *(13T73, 5-9; 13T74; 13T75, 1-16; 13T79, 1-11.)*

Based upon the foregoing, the Defendant's assertion that the claims are barred by the statute of limitations is without merit and should be disregarded by the Court.

Statute of Frauds N.J.S.A. 25:1-5(f)

Similarly, the Trial Court held that the Defendant's assertion that the claims are barred by the *Statute of Frauds N.J.S.A. 25:1-5(f)* and required a writing in order to be enforceable to be without merit, primarily because the Trial Court's review of the evidence and testimony presented was overwhelmingly that the nature of the loan was a personal one between friends who had previously engaged in such conduct. *(13T73,5-9; 13T74; 13T75,1-16; 13T79,1-11)*. It therefore fell outside the scope of the Statute of Frauds, and did not require a writing to be enforceable.

Based upon the foregoing, the Court should reject the Defendant's claim that it had a meritorious defense to the action in asserting that the Statute of Frauds applied and barred Plaintiff from recovery in this matter as it was properly reviewed by the Trial Court and determined to be without merit.

Dead Man's Act N.J.S.A. 2A:81-2

Defendant also argues that with respect to the accrual date of any claims relative to the loans it is a violation of the *Dead Man's Act, N.J.S.A. 2A:81-2* which requires clear and convincing proof of a creditor's claim. The Trial Court heard Defendant's arguments relative to this issue, and after reviewing the evidence and evaluating the testimony of the Plaintiff, the Trial Court found an overwhelming amount of proof had been presented as to the payment of the loan to the Decedent, receipt of the loan by Decedent and the purchase of stock with that money, all of which was sufficient evidence to establish the existence of a credible claim. *(13T18,9-25; 13T19,1-7; 13T78,18-25; 13T79,1-5, 12-17)*. Indeed, the Trial Court stated, "…or really any standard …" *(13T77, 11-18)*.

Further, the Trial Court noted the numerous discussions between Defendant and Plaintiff after Decedent's death wherein the parties discussed the repayment, different methods by which repayment could occur, analysis of the stock prices at various points in time, providing additional corroborative evidence as to the Trial Court's determination of the existence of a credible claim. (*13T71,16-24; 13T72,1-16; 13T73,5-9, 17-24; 13T74,1-19; 13T76,23-25; 13T77,1-6)*. Lastly, the Trial Court referenced the 2008 Estate Tax Return which listed the loan as a debt of the Estate of Decedent, and the Trial Court determined that this was additional evidentiary proof of the existence of the Loan and acknowledgement by the Defendant of same. *(13T64,15-25; 13T65,1-23; 13T78,18-25)*.

Breach of Fiduciary Duty N.J.S.A. 3B:22-40

N.J.S.A. 3B:22-40 provides as follows:

> Every creditor, whether by simple contract or specialty, and whether or not the heirs or devisees are mentioned therein, shall have and may maintain by virtue of this article an action against the heirs and devisees of his deceased debtor dying seized or possessed of any real or personal property. The heirs or devisees shall be liable to pay the debt by reason of the descent or devise of the real or personal property to them in the manner provided in this article. In all actions creditors shall be preferred as in actions against personal representatives.

At the Proof Hearing in this matter, the Trial Court found that the evidence was overwhelming that the Estate owed this debt to the Plaintiff, that it was acknowledged by the Estate, and that it was acknowledged by the Defendant in his capacity as substitute administrator in many conversations that he had with Plaintiff regarding repayment of the debt. *(13T73; 13T74,1-13; 13T75,16-24; 13T77,7-18; 13T78,8-17,22-25; 13T79,1-5).* The Trial Court further found that the debt was never repaid, and that instead, the Defendant and his sisters split the profit that was made from the sale of the stock that was purchased with the money lent from the Plaintiff to Frank Sr., ultimately deeming this to be a breach of fiduciary duty. *(13T77,7-18; 13T78,8-17, 22-25; 13T79,1-5).*

The Defendant's claim that the estate tax return ultimately filed with the IRS did not include, or may not have included, a reference to the debt owed to the Plaintiff is a red herring. The Trial Court relied primarily on the documents presented, the credibility of the testimony of the Plaintiff in determining the existence of the debt and the acknowledgement of this debt by Defendant to the Plaintiff throughout the relevant time and in his capacity as Substitute Administrator of the Estate. The Trial Court correctly concluded that the evidence of the debt on the estate tax return signed by the estate's counsel *(Da610; Da611)* and the mailing under the signature of Mrs. Lagano, the Administrator *(Da626; Da627)* of a final estate tax return within a few days thereafter, was reasonable to rely upon as evidence of what was an admission of the existence of the debt. The mere appearance of the loan on the Estate's tax return as a debt owing to Plaintiff and that the amount was not in contest, whether it was included on the return that was filed with the IRS, is corroborative evidence of the Estate and Defendant's knowledge of the loan and the Estate's obligation to pay this debt.

The Defendant's claim on this appeal that he has meritorious defenses to Plaintiff's claims is yet another tactic employed by the Defendant in order to abuse the process, incur delay, create confusion, and otherwise thwart Plaintiff's efforts to collect on the November 18, 2022 and March 10, 2023 Judgments. Accordingly, the Court should reject the Defendant's assertion of the existence of any meritorious defenses to this action and dismiss the Appeal in its entirety.

III. Collateral Estoppel Does Not Apply to Bar Plaintiff's Claims in this Matter

The Defendant next argues that the doctrine of collateral estoppel applies to bar Counts I-V of the Complaint as against Defendant individually based upon a previous complaint filed, removed to federal district court and then remanded back to the Superior Court. In support of this claim, Defendant offers only the District Court's Letter Order dated June 23, 2020, which remanded the matter back to Superior Court.

The Defendant does not provide any corroborative evidence supporting the claims that each of the elements required for collateral estoppel to apply actually do apply in this matter, nor does the Defendant compare the claims brought in any prior complaint with those in this matter. For these reasons alone, the Court should disregard this claim and deny the Defendant's appeal.

The doctrine of collateral estoppel is an equitable doctrine designed to "promote efficient justice by avoiding the re-litigation of matters which have been fully and fairly litigated and fully and fairly disposed of." *Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002)*. New Jersey follows Section 27 of the Restatement (Second) of Judgments (1982) respecting collateral estoppel, and thus for the doctrine to apply to foreclose the re-litigation of an issue, the party asserting the bar must show that:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
>
> (2) the issue was actually litigated in the prior proceeding;
>
> (3) the court in the prior proceeding issued a final judgment on the merits;
>
> (4) the determination of the issue was essential to the prior judgment; and
>
> (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. *Sacharow v. Sacharow, 177 N.J. 62 (2003); In re Estate of Dawson, 136 N.J. 1, 20-21 (1994).*

Even if all these stated elements of collateral estoppel are met, a court can decide not to apply the doctrine where there are sufficient countervailing interests, or if it would not be fair to do so. *In re Coruzzi, 95 N.J. 557, 568 (1984); see also Panniel v. Diaz, 376 N.J. Super. 597, 608 (Law Div. 2004).*

Here, Defendant presents virtually no evidence as to any of the elements required to assert the claim that collateral estoppel applies to bar Plaintiff's claim. Defendant merely states that each of these elements are met, with no documentation, no corroboration whatsoever. It is the Defendant's burden to prove that collateral estoppel applies to bar these claims, and Defendant has woefully failed to do so. Further, the complaint that the Defendant refers to and which was ultimately remanded by the federal district court is a completely different complaint than the one before the Trial Court in this matter.

Based upon the foregoing, the Defendant's argument that collateral estoppel applies to bar the claims against Defendant individually must be denied where Defendant failed to present any evidence to support the elements required for asserting a claim of collateral estoppel.

IV. Defendant's Claim that the Court Lacked Jurisdiction is without Merit, and Defendant has No Standing to Assert Defenses on Behalf of the Other Sister Heirs

The next argument made by the Defendant is that the Probate Court lacked jurisdiction to enter judgment against the Defendant, individually and his sister heirs, Anne and Corrine, because they live out of state. Not only does the Defendant lack standing to appeal judgments entered against the sister heirs whom he does not represent, he also fails to present evidence to support a finding that the Probate Court lacked jurisdiction to enter judgment against him.

R. 4:4-4(b)(1)(C)(1) provides that a court will have in personam jurisdiction over an out of state individual by service of process via registered, certified, or regular mail, and same will be effective for personal service in this manner for purposes of in personam jurisdiction where the party answers the complaint or otherwise appears in response to the complaint.

Here, the Defendant was properly served by certified and regular mail at his business address of record, and the certified mail was signed for and received, and therefore effective and proper service under the court rules. *(Da1228 – Da1237).* In any case, Defendant clearly filed an Answer in this matter and actively participated in his capacity both individually and as substitute administrator of the Estate, clearly establishing both effective service of process and in personam jurisdiction was properly asserted. *R. 4:4-4(b)(1)(C)(1).* Defendant has denied the claims against him individually and as Substitute Administrator, which effectively gives the Trial Court in personam jurisdiction to determine the claims asserted against him in both capacities, which is exactly what the Trial Court did in this matter. Jurisdiction and service were therefore proper.

N.J.S.A. 3B:22-41 authorizes a party to serve "…heirs and devisees who can be found within the State." The statute does not require an heir or devisee to be a resident of New Jersey but merely "found" in New Jersey. Defendant maintained an office for the practice of law in Newark, New Jersey. He was served there by regular and certified mail. *(Da1228 – Da1231).* As to Anne, she may now live in Florida. However, she too was "found" in New Jersey. The regular mail was not returned undelivered. However, she refused the certified mail. Jurisdiction and service were proper. Judgment was properly rendered against Frank Lagano and Anne Lagano. The Defendant does not dispute that Corinne Lagano was properly served. *(Da1228 – Da1237).*

Additionally, Defendant has no standing to appeal a default judgment entered against his sisters, Anne and Corrine, where he does not represent them or their interests in this matter. The Court should not consider this argument in any capacity. For the foregoing reasons, the Court should deny the Defendant's claim as to improper service and jurisdiction.

V. Trial Court Specifically Reserved Jurisdiction to Determine a Forthcoming Application by Plaintiff for Counsel Fees Following Entry of the November 18, 2022 Judgment, and the Trial Court's March 10, 2023 Order Granting Counsel Fees and Costs was Authorized Pursuant to the Court Rules and the Applicable Case Law

Lastly, Defendant appeals the Trial Court's March 10, 2023 Order *(Da1259)* granting counsel fees and costs to the Plaintiff in the amount of $87,159.89 on the basis of alleged untimeliness and the alleged inapplicability of R. *4:42-9(a)(2) and (3)*. Not only was Plaintiff's motion for counsel fees timely where the Trial Court did not impose a deadline for filing such application and it was filed within a reasonable time of approximately six (6) weeks following the November 18, 2022 Judgment, but the Trial Court specifically reserved jurisdiction in the November 18, 2022 Order to decide on Plaintiff's forthcoming application for counsel fees. *(Da863).* Furthermore, the Trial Court properly awarded fees and costs pursuant to applicable law and based on the Trial Court's findings of fact relative to the Defendant's failure to repay a debt owed to the Plaintiff, and Defendant's extraordinary and egregious conduct during litigation which resulted in years of unnecessary expense and delay for the Plaintiff. For these reasons, the Court should deny the Defendant's appeal of the Trial Court's order granting counsel fees and costs.

R. *2:9-1(a)(7)* provides that supervision and control of proceedings on appeal shall be in the appellate court from the time the appeal is taken with the exception of the Trial Court maintaining continuing jurisdiction to enforce judgments and orders pursuant to R. *1:10* "and as otherwise provided." Courts have analyzed this rule and the meaning of "and otherwise provided" in the context of determining what types of issues the Trial Court can consider while a matter is on appeal.

In *Morrison v. Morrison, 93 N.J. Super. 96 (1996)*, the Court determined that in a matrimonial and custody action on appeal, the Trial Court properly awarded counsel fees and costs where it found counsel fees and costs to be collateral and supplemental to, and independent of, the matter on appeal and would in no way impair it. The Court further noted "the award of such fees and costs may be made the subject of the pending appeal so that the appellate court may review the entire matter before it at one time. Thus, action by this court on the issue at this time would avoid fractionalizing this litigation and the appeal." *Id. at 104*. Additionally, the Trial Court order being appealed made specific reference to the plaintiff's right to make an application for fees and costs, and the Court found this to be properly construed as reserving the Trial Court's jurisdiction to make such a determination. *Id.*

Here, too, the issue of Plaintiff's right and intention to make an application for counsel fees and costs was discussed by the parties and the Trial Court during the Proof Hearing on November 1, 2022, and was specifically referenced in the November 18, 2022 Order as being a forthcoming application upon which the Trial Court would enter judgment at a later date. *(Da863; 13T79,24 – 13T80,11)*. Thus, just as in *Morrison*, *supra*, the Trial Court retained jurisdiction to decide on Plaintiff's Motion for Fees and Costs. Furthermore, the Defendant amended this Appeal to include this issue of counsel fees and costs, and it has become part of the matters reviewed by this Court, so the timeliness has no bearing on the substantive appeal before this Court.

Plaintiff's Motion for Counsel Fees and costs was filed on January 10, 2023, approximately 5-6 weeks after the entry of the November 18, 2022 Judgment (and during which time fell several major holidays including Thanksgiving, Christmas/Hannukah, and New Year), well within a "reasonable" timeframe considering the circumstances and the Trial Court's decision not to impose a deadline for filing of same. *(Da881).*

For reasons that can only be understood to intentionally create confusion and attempt to generate additional issues for appeal, Defendant filed a Notice for Leave to Appeal on January 3, 2023, just a few days prior to the filing of the Plaintiff's Motion for Fees. *(Da876)*. On January 10, 2023, upon receipt of the Defendant's Appeal, the Clerk of the Superior Court wrote to Defendant's counsel questioning the timeliness and validity of the appeal, indicating that the pending Motion for Counsel Fees and Costs called into question whether the determination was "final" such that an appeal could even be filed. *(Da921).*

In reaffirming the Court's decision in *Morrison*, the Court in *Carlucci v. Carlucci, 265 N.J. Super. 333 (1993)* stated that if the issue raised in the application to the Trial Court does not have the capacity to "render moot" the pending appeal, it does not preclude the Trial Court from deciding the application before it. It further noted that in the case of an application for fees and costs, a court could grant such an application even if the matter on appeal was not successful or only partially successful for the party to whom fees and costs were awarded, echoing the Court's holding in *Morrison*. *Id. at 340.*

Here, the Trial Court's decision to award counsel fees and costs to the Plaintiff is indeed collateral to, independent of, and supplementary to the November 18, 2022 Order for Judgment *(Da863)*, and the Trial Court's determination as to an award of fees and costs does not have the capacity to render moot any issues in this Appeal. And in fact, it is part of this Appeal, further discrediting Defendant's timeliness argument. In any event, the Trial Court specifically reserved jurisdiction on the determination of an application to award counsel fees and costs, and thus, this application was properly heard by the Trial Court. *(Da863)*. Defendant's arguments regarding timeliness and jurisdiction of the Motion for Counsel Fees and Costs should therefore be rejected by this Court.

With respect to the substantive nature of the Trial Court's award of counsel fees and costs, Defendant argues that the Trial Court erred in granting counsel fees and costs by way of Order dated March 10, 2023 *(Da1259)*, after written submissions and oral argument heard by the Court on February 2, 2023. This argument is without merit where attorneys' fees are specifically permitted by the Court rules where a party is in default of discovery obligations. *R. 4:23-2(b)* as was the case here. Furthermore, Plaintiff is entitled to fees based on the Court's findings pursuant to *N.J.S.A. 3B:22-40* where Defendant breached his fiduciary duty to the Plaintiff in failing to repay a debt of the Estate and in fact profiting from that breach warranting counsel fees as held in *In the Matter of the Niles Trust,* *176 N.J. 282 (2003)*.

R. 4:42-9(a)(7) provides that attorneys' fees are allowed in certain circumstances, including "as expressly provided by these rules with respect to any action, whether or not there is a fund in court." *R. 4:23-2(b)* specifically permits a Trial Court to order a defaulting party to pay counsel fees and costs upon entry of a judgment finding that party in violation of discovery obligations, court-ordered and otherwise.

Here, the Court's November 1, 2022 Proof Hearing and November 18, 2022 Order *(Da863)* for Judgment were the result of the Defendant's continuous and persistent failure to comply with various discovery obligations, namely, court-ordered depositions of Defendant. In entering judgment against the Defendant, the Trial Court struck the Defendant's Answer pursuant to *R. 4:23-2(b)*. *(11T26,10-15).*

The parties further discussed the Plaintiff's intention to make a Motion for counsel fees based upon this Order and the Defendant's failure to comply with discovery, which the Trial Court required as a separate Motion. *(13T79, 24-25; 13T80, 1-9).* On January 10, 2023, the Plaintiff filed its Motion for fees *(Da881)*, the Trial Court heard arguments from both parties both in writing and in oral argument before the Court on February 2, 2023, and the Trial Court ultimately determined that Defendant's failure to comply with discovery over a lengthy period of time warranted counsel fees and costs pursuant to the Court's authority under the court rules for sanctions permitted where there are discovery violations. *(14T28, 20-25; 14T29, 1-22; 14T30, 1-6).*

The Trial Court further found that counsel fees and costs were warranted pursuant to its findings under *N.J.S.A. 3B:22-40* during the Proof Hearing whereby Plaintiff proved that the debt was owed, was acknowledged by the Estate, and that when Lagano became substitute administrator of the Estate, though he acknowledged the debt to Plaintiff, he refused to pay, and instead benefitted from the stock increase, ultimately splitting the principal of the debt along with the profit among himself and his sisters. *(13T73; 13T74,1-13; 13T75,16-24; 13T77,7-18; 13T78,8-17, 22-25; 13T79,1-5).* The Trial Court found that pursuant to the holdings in *In the Matter of the Niles Trust, 176 N.J. 282 (2003)* and *In re Estate of Lash, 169 N.J. 20 (2001),* that Lagano profited from improper behavior, breach of fiduciary duty and otherwise misappropriated funds in his capacity as substitute administrator which finding warrants imposition of counsel fees. *(14T35,3-25; 14T36,1-22).*

In terms of the reasonableness of the fee awarded, the Trial Court methodically went through each of the factors set forth in *R.P.C. 1.5(a)* and was further guided by the lodestar method outlined in *Rendine v. Pantzer, 141 N.J. 292 (1995)* to confirm the reasonableness of the fee imposed. *(14T31,20-25; 14T32; 14T33; 14T34; 14T36,23-25; 14T37,1-10).* The Trial Court also mentioned the numerous delays and other factual circumstances including the Defendant's failure to produce discovery and submit to a deposition, all of which required additional attention from counsel in order to address, ultimately leading to the work being done, which the Court found was modest considering the amount of work done and the nature of the delays. *(14T35,24-25; 14T36,1-13).*

Ultimately, the Trial Court properly determined jurisdiction to hear the fee application as it had reserved jurisdiction at the November 1, 2022 Proof Hearing, as set forth in the November 18, 2022 Order for Judgment. The Trial Court further determined counsel fees and costs were warranted pursuant to the Court's authority under *R. 4:23-2(b)* and pursuant to its findings under *N.J.S.A. 3B:22-40* and the case law permitting a court to award fees where there is a breach of fiduciary duty, and where there is a misappropriation of estate assets and funds warranting imposition of counsel fees, as was the case here with Defendant and the refusal to repay Plaintiff's debt. The Trial Court's decision to award counsel fees should be upheld, and Defendant's appeal should be denied.

Conclusion

For the reasons set forth herein, the Trial Court's November 18, 2022 Order for Judgment *(Da863)* and its March 10, 2023 Order for Counsel Fees and Costs *(Da1259)* should be upheld. The Defendant's Appeal should be denied in its entirety.

Respectfully Submitted,
WALSH & WALSH, ESQS., LLC

Dated: April 3, 2025

JOHN K. WALSH, JR.

In the Matter of the Estate of FRANK P. LAGANO a/k/a FRANK P. LAGANO, SR. Deceased.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001316-22 <u>ON APPEAL FROM:</u> SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART BERGEN COUNTY DOCKET NO.: P-022-21 <u>SAT BELOW:</u> Hon. Edward A. Jerejian, P.J.Ch.

DEFENDANT / APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The opposition filed by plaintiff/respondent, Anthony Trobiano, individually and as Assignee and as Trustee of the Anthony Trobiano Trust ("plaintiff" or "Trobiano") misses several points pertinent to this appeal, whether intentionally or not. First and foremost, Trobiano misses the point that the first reversible abuse of discretion is the trial court's entry of the order prospectively entering default judgment against defendant/appellant Frank Lagano ("defendant" or "Lagano"), individually and as the substitute administrator of the Estate of Frank P. Lagano, Sr. ("Decedent"), if he failed to attend his deposition. Defendant's merits brief exhaustively digests the cases in which the "ultimate sanction" was imposed for a discovery violation. The conduct in those cases was far worse, by orders of magnitude than defendant's conduct here. Not surprisingly, plaintiff does not document the analysis the trial court undertook to support the suppression of defendant's pleadings with prejudice. In fact, plaintiff cannot – because the trial court never made, much less expressed, any such analysis. The judgment below should be reversed on this ground alone. *See* Point I.

Similarly, plaintiff seeks to toll the statute of limitations, citing the "discovery rule," an argument never raised below (and not identified as such). But this is not a medical or legal malpractice case, it is a collections case. A surgeon didn't leave a sponge in plaintiff that took years to discover. This alleged loan was made in

2006. Plaintiff was well aware that Decedent died in 2007, but he waited 12 years to make a claim against the Estate and to file suit. Plaintiff cites no case that tolls the statute of limitations until a creditor subjectively believes he may not be paid. Plaintiff fails to address the statute(s) applicable to the causes of action that he pled, which again, are discussed at length in defendant's merits brief. Instead, he cites a legal and a medical malpractice case, which shows the patent lack of merit in plaintiff's position. *See* Point II.

The Statute of Frauds also bars the relief plaintiff seeks, for two reasons. If in fact, the trial court tacitly adopted the unpled "discovery rule," there was no legal basis to fix the accrual date to be the New York City dinner defendant allegedly invited plaintiff to in 2015. Defendant's alleged statement, "I'm going to pay you," created no obligation on defendant, as it was not in writing. The Statute of Frauds, which plaintiff also fails to address in this context, requires an agreement to assume the debt of another to be in writing and supported by consideration. Given that this alleged discussion occurred 9 years after the alleged loan, the statute of limitations already barred the claim. And illustrative of the trial court's failure to properly determine when the causes of action accrued is plaintiff's motion for counsel fees and prejudgment interest. There, plaintiff asserted that prejudgment interest began to run on April 15, 2014. Moreover, this was not a "personal loan," exempt from the Statute of Frauds. For that matter, the first loan between plaintiff and Decedent

– financing construction of a house by Decedent – is similarly a business loan. Decedent was not remodeling his kitchen or financing a family vacation. He was investing in a waste management business. Thus, the Statute of Frauds indeed applies; the trial court's contrary finding cannot be supported. *See* Point III.

Doctrines of issue preclusion apply to plaintiff. The federal court decision dismissing the matter specifically listed the causes of action. And they are the same causes of action plaintiff reasserted in state court. *See* Point IV.

While asserting that the trial court properly had jurisdiction over defendant personally, plaintiff points to no pleading in which defendant appeared personally. Moreover, he does not point to any certified mail receipt signed by defendant. Service was ineffective. *See* Point V.

Finally, the award of counsel fees came too late. A trial court's authority to do anything after the filing of a Notice of Appeal is limited. While accusing defendant of inordinate delay, it is plaintiff who waited too long to bring his fee application. Nor is plaintiff substantively entitled to a fee award. *See* Point VI.

LEGAL ARGUMENT

I. THE COURT IMPROPERLY IMPOSED THE "ULTIMATE SANCTION" WITHOUT CONSIDERING THE LACK OF PREJUDICE TO PLAINTIFF

New Jersey law is quite clear: "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only **when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party**…" *Zaccardi v. Becker*, 88 N.J. 245, 253 (1982) (citations omitted; emphasis added); *see also Abtrax Pharmaceuticals v. Elkins-Sinn*, 139 N.J. 499 (1995).

Zaccardi, a medical malpractice case, dealt with the plaintiff's failure to answer interrogatories, the dismissal of the case and a 17-month delay in moving to reinstate. When the Appellate Division reversed the order restoring the case, plaintiff filed a second identical action. The Supreme Court found that while a court could dismiss the second Complaint, that would be:

> appropriate only when the second complaint was filed merely to harass the defendant, when the delay has so prejudiced the defendant that his ability to defend his case is seriously impaired, or when other substantial equitable considerations suggest dismissal. It should be remembered that dismissal of the second complaint will deprive a plaintiff of an adjudication on the merits. [*Id*. at 253-54.][1]

Unlike the plaintiff in *Zaccardi,* here, defendant had nothing to do with the making of the loan. Defendant had no firsthand personal (*i.e.,* admissible) knowledge of the terms of the loan, or if in fact it was a loan. The trial court relied on an unauthenticated draft tax return to "prove" the loan. But it failed to recognize that the amount of the loan, and the amount of the stock purportedly purchased with

[1] It should be noted that the Court elected not to impose the ultimate sanction despite the "inordinate delay," "highly improper" conduct, that "warrant[ed] appropriately severe sanctions." *Id*. at 254.

the loan proceeds, were $50,000 apart. But again, this is not something that defendant would know or explain – defendant was not the administrator of the Estate when that return was prepared (assuming it was filed).

So what prejudice was there to plaintiff? Plaintiff alleges "unnecessary delays and incurring additional counsel fees and other expenses..." Pb26.[2] "[P]ermitting delays and granting extensions for compliance," Pb27, is not the type of prejudice contemplated by *Abtrax*.

Defendant allegedly frustrated "Plaintiff's efforts to obtain necessary information vital to Plaintiff's claims in this matter." *See* Pb24; s*ee also* Pb27 asserting – but providing no factual basis for the claim that "delays prevented Plaintiff from obtaining necessary information relative to his pursuit of the matter." Anyone expecting a list of such "necessary information" is still waiting. The closest plaintiff comes is to allege that defendant prevented plaintiff

> from obtaining facts such as admitting he [defendant] attended the meeting at the restaurant in New York where both the increase in stock price was discussed... [Pb29.]

But plaintiff knew the answer. Defendant's interrogatory responses show that he became aware of the alleged debt to plaintiff in 2018, not 2015. Da1103 (no. 19). Deeming such "facts" admitted – a remedy set forth in *R*. 4:23-2(b)(1) – is far less

[2] Defendant uses the same abbreviations as used in his merits brief. "Pb" refers to the Amended Brief in Opposition on behalf of Plaintiff-Respondent. "Db" refers to defendant's merits brief.

draconian than the entry of judgment. It is also largely irrelevant, given the Statute of Frauds. *See* Point III. Plaintiff also expresses curiosity regarding the "estate tax return, the disclaimers…" Pb30. But defendant was not the administrator of the Estate at the time, his mother was. The "use of the funds received" has no nexus to the alleged debt. (Plaintiff would hardly take a dismissal if the legacy had been used to fund a child cancer center.) Simply put, defendant produced voluminous paper discovery. Without an analysis of what defendant's deposition could have added to the case, the ultimate sanction was inappropriate.[3]

Plaintiff's discussion of *Abtrax* makes it appear that his copy of New Jersey Reports must be missing some pages. Dismissal with prejudice is a drastic remedy that should be invoked when the discovery "goes to the very foundation of the cause of action" and "will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." 139 N.J. at 514, citing (among others) *Zaccardi*¸88 N.J. at 253. In *Abtrax*, the trial court specifically found

[3] Plaintiff's citation to *Interchemical Corp. v. Uncas Printing Finishing Co.*, 39 N.J. Super (App. Div. 1956) is similarly off the mark. There, the adverse party refused to respond to proper document demands that went to the foundation of the cause of action, just as in *Abtrax*. In addition, here, defendant filed a 19-page statement of facts in support of summary judgment, showing his contentions. Da344-62. Just as plaintiff has not identified a single deposition topic that is material to his cause of action, the fact is that defendant produced thousands of documents – plaintiff cannot point to a single one that was withheld improperly. *See* Da1091-92 (998 documents, 10 lbs. produced 4.9.22); Da1078-90; Da1094-1104 (interrogatory responses); Da1112-13 (10 lbs. additional documents produced 4.17.22). Notably, plaintiff himself was not deposed, despite notices. Da1148-54.

that the perjured testimony, withheld documents and other conduct was "significantly prejudicial," 139 N.J. at 511, and the Supreme Court agreed. *Id*. at 520-21. The Court specifically noted:

> We agree that the extent of the prejudice caused by discovery violations and the ability to redress that prejudice are significant factors to be weighed by a trial court in imposing sanctions for discovery violations. [*Id*. at 521.]

Abtrax specifically noted that – despite plaintiff's allegation here that the court rules do not require prejudice, Pb30, "The scarcity of cases ordering dismissal demonstrates that trial courts have heeded our admonition to impose sparingly the ultimate sanction of dismissal." 139 N.J. at 515. Defendant's merits brief outlines the conduct at issue in *Abtrax*, which clearly went to the foundation of the matter and was clearly prejudicial. Db17-19. Nothing of the same ilk appears in this case. The trial court mistakenly exercised its discretion and should be reversed.

II. STATUTES OF LIMITATION BAR PLAINTIFF'S CLAIMS

Plaintiff's assertion that his claims are somehow tolled by the discovery rule, Pb32-33, is newly minted and would turn precedent on its head. *See New Jersey Lawyers' Fund for Client Prot. v. Pace*, 374 N.J. Super. 57, 67 (App. Div. 2005), *aff'd*, 186 N.J. 123 (2006); *Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat. Bank*, 390 N.J. Super. 199, 208 (App. Div. 2007). Both reject the discovery rule. Plaintiff distinguishes neither case, and cites none holding to the contrary.

The trial court's application of the statute of limitations is subject to plenary and *de novo* review. *Psak*, 399 N.J. Super. at 203 (citation omitted). This includes the trial court's erroneous assumption that all claims are governed by N.J.S.A. 2A:14-1's six-year statute of limitations. That statute is not applicable to all causes of action; more importantly, for most of those causes of action, the statute begins to run upon the negotiation of the check(s).

The statute of limitations for "money lent" accrues when the instrument is negotiated. Applying N.J.S.A. 2A:14-1, those claims expired in 2012. "Money had and received" is subject to a three-year statute under N.J.S.A. 12A:3-118(g), rendering that cause of action untimely. Plaintiff cites nothing to rebut defendant's assertion, Db25-26, that the cause of action accrues at the time of the loan.

Plaintiff appears to argue that the statute did not begin to run until plaintiff came to the realization he was not going to be repaid. *See, e.g.,* Pb34 (claim accrued after the alleged 2015 New York dinner). At the same time, plaintiff claimed that prejudgment interest should begin to run as of April 15, 2014. Da826. No law supports either contention. This Complaint was filed in 2021. It was untimely. Indeed, it is ironic for plaintiff, who delayed filing suit for all these years, to complain that defendant delayed things. Plaintiff filed suit too late. This court should enter judgment in defendant's favor.

III. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF FRAUDS

There are two aspects of the Statute of Frauds to address: whether the loan transactions were personal or business loans, and the alleged assumption of the debt by defendant in April 2015. *Moynihan v. Lynch*, 250 N.J. 60, 79 (2022), addresses the former:

> The Statute of Frauds generally requires that certain agreements "be in writing, and signed by the party to be charged therewith" -- that is, signed by the party against whom enforcement is sought. N.J.S.A. 25:1-5. The underlying concern of the Statute of Frauds is "that certain [oral] agreements may be 'susceptible to fraudulent and unreliable methods of proof,'" and for that reason the Statute mandates "that those agreements be reduced to writing and signed." *Maeker v. Ross*, 219 N.J. 565, 578 (2014) (quoting *Lahue v. Pio Costa*, 263 N.J. Super. 575, 599, *certif. denied*,134 N.J. 477 (1993)).

The Statute of Frauds recognizes that certain agreements may be "susceptible to fraudulent and unreliable methods of proof" and therefore insists that those agreements be reduced to writing and signed. *Lahue*, 263 N.J. Super. at 599. The need for a writing in this case is patent. Plaintiff asserts that although he is in the business of lending money (*see, e.g.,* Da168-74), the $187,500 loan(s) to Decedent, with no terms whatsoever, were purportedly turned into $237,500 worth of stock.

A. N.J.S.A. 25-1(f) Bars Enforcement

To avoid the Statute of Frauds, the trial court found that, despite the fact that the checks were issued on behalf of a trust from a business account at a business address, plaintiff's loan was a personal one. The court also ignored the fact that the one prior transaction between the men, in 1995, was "a business deal." Decedent was in the process of building a house and needed money to complete the job. 13T5-

9 to 23. In 2006, two other loans were made, totaling $187,500, allegedly to buy stock in a Nevada waste management company. That is "not primarily for personal, family or household purposes," so a writing is required. Moreover, plaintiff himself has testified that he is in the business of lending money for mortgages and such. 13T13-9 to 12. *See also* Da168-74.

The need for a writing is confirmed by the divergent facts here. Decedent did not buy $187,500 worth of stock, he bought $237,500 worth. But somehow, the latter number was listed on an unauthenticated draft tax return. There was no independent corroboration of the terms of the loans. In fact, these inconsistencies militate against acceptance of plaintiff's position, since it is not the clear and convincing evidence mandated by the Dead Man's Act, N.J.S.A. 2A:81-2.

B. The Alleged Assumption of Debt is Barred by Both the Statute of Frauds and N.J.S.A. 2A:14-24

N.J.S.A. 25:1-15 provides that a promise to be liable for the obligation of another must be in writing in order to be enforceable. The record in this case is bereft of any such writing signed by defendant. The same is true with respect to Frances Lagano. Finally, plaintiff cites no case to show that the holding of *Denville Amusement Co. v. Fogelson*, 84 N.J. Super. 164 (App. Div. 1964) does not apply here, so any parol extension of the statute of limitations is also ineffective under N.J.S.A. 2A:14-24.

That statute, the Statute of Frauds and the Dead Man's Act are clearly implicated in this case. The *Denville Amusement* court noted, that the "primary (and perhaps exclusive) thrust" of the Dead Man's Act "is to diminish the likelihood of feigned claims or defenses based upon transactions with a decedent where the decedent can no longer contradict them." 84 N.J. Super. at 168. The trial court overruled the defense objection based on the Act, without explanation. 13T18-15 to 19-7. There are no writings that extended the statute of limitations or satisfied the Statute of Frauds. Judgment should be entered for defendant.

IV. DOCTRINES OF ISSUE PRECLUSION BAR PLAINTIFF FROM RECOVERY

Although he does not append the operative pleadings, plaintiff avers that *res judicata* and collateral estoppel do not apply, even though the federal court entered judgment against him. Despite plaintiff's (and the trial court's) innuendo regarding defendant exercising the right of removal under 28 U.S.C. §1441, the fact is that some of the same claims here were decided on the merits adversely to plaintiff.[4] Judge Arleo's Letter Order notes that the initial Complaint (like the one currently under review) was in six counts: Money Lent (Count I); Money had and Received

[4] Plaintiff claims that removal was effected "despite the clear probate exception…" Pb23. But that alleged clarity was not then apparent to plaintiff, "[b]ecause the parties have not raised the probate exception…". Da320-21 n. 8. Were it so obvious, surely plaintiff would have alleged a violation of Fed. R. Civ. P. 11. He did not raise that "clear" exception, which again raises the question of what is rhetoric and what is fact.

(Count II); Breach of Contract (Count III) ; Implied Breach of Contract (Count IV); Unjust Enrichment (Count V); and a claim under N.J.S.A. 3B:22-40 (Count VI). Da319. Counts I-V were brought against defendant in both as an individual and as Estate Administrator; Count VI, as an individual. *Id*. at n.6.

Due to plaintiff's failure to timely present a claim against the Estate pursuant to N.J.S.A. 3B:22-4, Judge Arleo held the claims against defendant, as administrator, were barred. *Id.* The district court did not address the separate statute of limitations issue. Da321 n.9.

With respect to defendant's individual liability, Judge Arleo found that Counts I-V were barred by the Statute of Frauds, because defendant had not agreed, in writing, to assume Decedent's debts. Da321. Judge Arleo held:

> Plaintiff neither alleges that Defendant was a party to the original transaction nor that Defendant explicitly assumed Decedent's debt under the loans. Instead, Plaintiff merely claims that Defendant "informed [Plaintiff] of the sale of [VTNR stock] and he would repay the Loans" and that Defendant has since refused to pay… Plaintiff provides no factual basis for finding that this oral promise was "outside of the agreement" between Plaintiff and Decedent or "founded on new consideration…." **Counts I-V are therefore barred by New Jersey's statute of frauds because** "[i]t is undisputed that **[Defendant's assumption of the Loans] was never reduced to a signed writing**. [Da321 (alterations in original; emphasis added).]

The trial court gave no deference to this holding. And plaintiff now seems to hide from these findings, by claiming that his later Complaints are "different." But even if that is so, the bases for plaintiff's claims are the same, regardless of how they are wrapped. And, if in fact, plaintiff had more, better, or better-pled claims than those before Judge Arleo, he was bound to assert them or lose them under the Entire Controversy Doctrine. *R.* 4:21A-1. Finally, it is disingenuous for plaintiff to claim that defendant should have done more. Defendant sought to flesh out the issue following the proof hearing, but at plaintiff's urging, the trial court refused to allow post-hearing submissions. 13T59-25 to 60-19; *see also* 12T5-1 to 20; 12T8-3 to 9; Da1162, ¶18.

V. THERE WAS NO EFFECTIVE SERVICE OR JURISDICTION

Defendant relies on his merits brief. Defendant never appeared personally, but only as Substitute Administrator. Plaintiff points to no pleading proving otherwise or attempted personal service upon defendant or his sisters. *See, e.g., City of Passaic v. Shennett*, 390 N.J. Super. 475, 483-484 (App. Div. 2007); *N.J. Turnpike Auth. v. Tootle*, 59 N.J. 308 (1971). As such, the trial court lacked jurisdiction.

VI. THE AWARD OF COUNSEL FEES WAS IMPROPER

Plaintiff attempts to justify the award of counsel fees – after the trial court had no jurisdiction – by claiming that a trial court can reserve unto itself jurisdiction, notwithstanding court rules to the contrary. Plaintiff's incessant complaints of delay and prejudice ring hollow given that plaintiff waited *months* to file his fee application.[5] 13T81.

Plaintiff cites two Family Part cases, *Morrison v. Morrison*, 93 N.J. Super. 96 (Ch. Div. 1966) and *Carluccci v. Carlucci*, 265 N.J. Super. 333 (Ch. Div. 1993). The Appellate Division has expressly disapproved of *both* cases, "which skirted the jurisdictional rule." *See Kiernan v. Kiernan*, 355 N.J. Super. 89, 93 (App. Div. 2002). *D'Atria v. D'Atria*, 242 N.J. Super. 392, 402 (Ch. Div. 1990) is instructive:

> For those requests which do not fit neatly into *R.* 1:10, the Court believes that the appropriate course of action is to decline jurisdiction. Any doubts concerning the relief sought should be resolved in favor of deferral to the Appellate Division.

The attempt to justify the fee award by citing *R.* 4:23-2(b), Pb46, is clearly window dressing. At most, that could justify the award of fees on a discovery motion, not the entire case. Moreover, N.J.S.A. 3B:22-40 has no application to defendant as administrator and does not permit attorney's fees. Frances Lagano, not defendant, made distributions from the Estate – long before plaintiff filed his non-compliant claim in 2018 and the belated creditor claim against the Estate in

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[5] Plaintiff inexplicably asserts that defendant filed its Notice of Appeal on January 3, 2023 to "intentionally create confusion…" Pb45. Given the time constraints of *R*. 2:4-1(a), and plaintiff's dilatory conduct, defendant had no choice but to file the Notice of Appeal on that day. That plaintiff never moved to dismiss the appeal as interlocutory shows that his delay was intended to lull defendant into forfeiting his right to appeal. Plaintiff labeled the pleading appealed from as a judgment, rather than an order. Ironic, plaintiff is now accusing defendant of acting too quickly.

2020 pursuant to N.J.S.A. 3B:22-10. Indeed, that late filing was one basis for Judge Arleo's dismissal of Counts I-V against defendant in both capacities, with prejudice.

Finally, the trial court made no findings that would justify a fee that is nearly 44% of the amount recovered – again this was a collections case. Plaintiff filed no dispositive motions and there was no trial. Even if plaintiff was entitled to fees, which he was not, the amount was excessive.

CONCLUSION

For the above reasons, and those set forth in defendant's merits brief, this court is respectfully requested to reverse the judgment of the trial court, and either enter judgment in defendant's favor, due to plaintiff's failure to satisfy the Statute of Frauds, to bring suit within the statute(s) of limitations (or both), or in the alternative, remand the matter to the trial court for a disposition on the merits.

Respectfully submitted,

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By: */s Geoffrey D. Mueller*

Dated: April 17, 2025