ALBERTO CABRERA, Plaintiff-Respondent, v. TOWN OF GUTTENBERG, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001401-24 Civil Action ON APPEAL FROM SUPERIOR COURT, LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-L-786-23 Sat Below: HON. KALIMAH H. AHMAD

DEFENDANT-APPELLANT BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

This case involves the double-dipping former Municipal Clerk of the Town of Guttenberg, who is seeking to retain the benefits of a negotiated Separation Agreement and General Release ("the Agreement") which placed him on a paid leave of absence from Guttenberg while he simultaneously worked "full time" for the Town of Belleville.

Plaintiff Alberto Cabrera ("Cabrera") commenced his employment with Guttenberg on March 24, 2008. On or about August 18, 2022, in order to amicably terminate the employment relationship, the Town and Cabrera executed the Agreement (Pa36) with the sole understanding that the employment relationship would terminate by Cabrera's retirement on March 31, 2023. In exchange for Cabrera's irrevocable retirement on that date, the Town agreed to maintain Cabrera on its payroll as an employee on a paid leave of absence through March 31. The Agreement further provided, among other things, that in return for full compliance, Cabrera would be paid accrued leave time. It was clear and unambiguous to both parties that under the terms of the Agreement, Cabrera was obligated to remain as a paid Guttenberg employee on a leave of absence until March 31, 2023, in order to receive the full benefits of the Agreement.

However, rather than comply with his obligation to remain as a paid Guttenberg employee on a leave of absence until March 31, 2023, Cabrera instead took employment with a different municipality, the Town of Belleville, effective on January 1, 2023. Cabrera not only knew that accepting a position as Belleville's municipal clerk would be a material breach of the parties' Agreement, but he was also aware that such a decision would result in the forfeiture of any paid leave time for 2023 which he would have otherwise received. Despite being aware of these risks, Cabrera accepted employment with Bellville while simultaneously and unlawfully attempting to receive the benefits of both his Bellville salary and his Guttenberg 2023 paid leave, to which he was no longer entitled. In other words, Cabrera sought to maintain the benefits of the paid leave time that came along with his Belleville employment while also seeking to unlawfully extract those same benefits from Guttenberg.

When Guttenberg, having learned of Cabrera's duplicity, cut him off, Cabrera filed the instant breach of contract claim for damages without acknowledging that his new employer enrolled him in its payroll system, allocated paid leave time for 2023, and enrolled him in PERS – all of which would not have been possible but for Gutenberg's removal of Cabrera from the payroll. In other words, Cabera attempts to blame his prior employer for the loss of benefits that he himself caused while also seemingly attempting to use taxpayer dollars to unlawfully to double dip.

PROCEDURAL HISTORY

On March 3, 2023, Plaintiff filed a Complaint alleging a breach of contract claim against the Town of Guttenberg. Pa14. The Town filed its Answer and Affirmative Defenses to the Complaint on June 15, 2023. Pa21.

On July 30, 2024, the Town filed Motion for Summary Judgment. Pa26 – Pa73. Then, on August 20, 2024, Mr. Cabrera filed a Cross-Motion for Summary Judgment. Pa78 – Pa132. On August 26, 2024, the Town filed its opposition to the Cross-Motion.

On December 19, 2024, Judge Ahmad granted the Plaintiff's Motion for Summary Judgment, denied the Defendant's Motion, and denied Plaintiff's application for counsel fees. Pa1 – Pa5.

On January 16, 2025, the Town filed a Notice of Appeal, Pa6, and on January 29, 2025, Mr. Cabrera filed a Notice of Cross Appeal. Pa9.

STATEMENT OF FACTS

Alberto Cabrera commenced his employment with the Town on March 24, 2008, as an Acting Town Clerk. Pa33. Cabrera was appointed the Registered Municipal Clerk ("RMC") for the Town in October 2010, and reappointed on or about November 25, 2013, retroactive to October 13, 2013, at which time he received tenure. Pa33. Cabrera continued to serve as the Town's RMC until December 31, 2022, when he resigned and took employment with the Township of Belleville ("Belleville") as Belleville's Municipal Clerk effective January 1, 2023. Pa35.

Prior to his accepting employment with Belleville, Cabrera and the Town entered into a Separation Agreement for the purpose of resolving several employment issues and severing their employment relationship. Pa36. Cabrera executed the Agreement on August 18, 2022, and, thereafter, did not exercise his right of revocation. Id. Pursuant to the Agreement, on or about August 18, 2022, Cabrera both (1) requested a paid leave of absence from August 18, 2022, to March 31, 2023; and (2) signed an irrevocable letter retiring from all employment with the Town, to be effective at the close of business on March 31, 2023. Pa34. On or about August 22, 2022, during a regular meeting, the Mayor and Council of the Town accepted Cabrera's requested leave of absence, effective August 18, 2022, and Cabrera's retirement request, effective March 31, 2023. Pa34.

The Town issued salary payments to Cabrera, consistent with the terms of the Agreement and in accordance with the Town's usual and customary payroll cycle, beginning August 31, 2022. Pa47 – Pa59; Pa65 – Pa67. On or about December 20, 2022, Cabrera by way of email captioned "Amendment to Separation Agreement" to Jorge de Armas, the Town's attorney, sought to amend the Agreement as follows:

1. Change the retirement date from March 31, 2023, to December 31, 2022.
2. The payout as agreed in item number 1 – for full 53 days of vacation, sick time, and personal time.

3. My last official day on Town of Guttenberg payroll will be December 31, 2022, midnight. I agree to forego my salary payments from January 1, 2023 – March 31, 2023.

Pa69 – Pa75.

On or about December 21, 2022, Mark Tabakin, Esq., the Town's Labor Counsel, responded to Cabrera's email informing him that the Town was agreeable to amending the agreement, however, should he decide to resign on December 31, 2022, he would also be forfeiting all of his 2023 paid time off. Pa74. As of December 30, 2022, Cabrera had the following time remaining: six (6) vacation days, four (4) sick days, one (1) personal day and seven (7) compensatory days. However, according to the Town policy, an employee must be enrolled in the Town payroll at the beginning of the new year in order to accrue and vest the allotted leave time for the year. The leave time allotment for the year 2023 would have been as follows: fifteen (15) vacation days, twelve (12) sick days, three (3) personal days, and five (5) compensation days. Pa34.

On or about December 28, 2022, the Town was advised that Cabrera had accepted a Municipal Clerk position at Belleville, effective January 1, 2023. Pa35. As a result, the Town concluded that Cabrera had negated the terms of the Agreement and issued Cabrera's final salary payment on December 30, 2022.

On or about January 1, 2023, Cabrera effectively commenced employment with the Township of Belleville ("Belleville") as Belleville's Municipal Clerk. Although the Town's obligation to pay Cabrera's accrued time would not arise until March 2023, on or about February 15, 2023, the Town issued Cabrera a payroll check in the amount of $3,692.90 for Cabrera's remaining unused leave time for the year 2022. Pa35.

STANDARD OF REVIEW

The review of a trial court's grant or denial of a motion for summary judgment is *de novo*, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). The appellate court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The purpose of summary judgment is to avoid needless trials and afford deserving litigants immediate relief. See Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). It is well settled that a motion for summary judgment must be granted where, as here, there are no genuine issues of material fact in dispute and where the moving party is entitled to judgment as a matter of law. Id. New Jersey Court Rule 4:46-2 provides that, "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on a motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Although summary judgment should be granted with caution, such hesitancy should not deprive a party of the procedure when the moving party is rightfully entitled to it. N.J. Sports and Exposition Auth. v. McCrane, 119 N.J. Super. 457, 469 (Law Div. 1971), aff'd 61 N.J. 1,7 (1972).

Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995) dictates the standard by which summary judgment may be granted. Under Brill, the motion judge must determine "whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id., at 540. A non-moving party cannot defeat a motion for summary judgment by merely pointing to *any* fact in dispute. Id. Rather, the non-moving party must present evidence that creates a "genuine issue as to any material fact challenged." Id. (Emphasis added). The court's approach must be "essentially the same as that necessary to rule on a motion for a directed verdict," which requires a determination of whether the evidence is so "one-sided" that one party should prevail as a matter of law. Id., at 540.

LEGAL ARGUMENT

I.

THE SUMMARY JUDGMENT MOTION WAS WRONGFULLY DECIDED

(Opinion or Ruling at Pa1, Pa3)

New Jersey law imposes on a Plaintiff the burden to prove four elements in order to establish a claim for breach of contract: (1) "[t]he parties entered into a contract containing certain terms"; (2) the plaintiff "did what the contract required [them] to do"; (3) the "defendant[s] did not do what the contract required [them] to do," defined as a "breach of the contract"; and (4) the defendants' breach caused a loss to the plaintiff. Goldfarb v. Solimine, 245 N.J. 326, 338-39 (2021) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). Here, Plaintiff could not successfully have shown that he did what he was required to do under the Separation Agreement (or that Guttenberg failed to perform its obligations under the Separation Agreement), since Mr. Cabrera abandoned his employment with the Town of Guttenberg three months before his paid leave was to expire and while he was still employed by the Town.

A. Plaintiff Failed to Perform His Obligations as Required by the Agreement and Therefore His Breach of Contract Claim Cannot Survive Summary Judgment.

A settlement agreement is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of "fraud or other compelling circumstances," should honor and enforce as it does other contracts. See Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983) (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). Indeed, New Jersey's strong public policy of enforcing settlements is based upon "the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008) (citing Peskin v. Peskin v. Peskin, 271 N.J. Super. 261, 275 (App. Div. 1994)). New Jersey courts "strain to give effect to the terms of a settlement wherever possible." Brundage, 195 N.J. at 601 (citing Dep't of Pub. Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 538 (App. Div. 1985)).

Under New Jersey law, the terms of a contract must be "sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)); Friedman v Tappan Dev. Corp., 22 N.J. 523, 531 (1956). If parties agree on essential terms of and manifest an intent to be bound by those terms, they have created an enforceable contract. Weichert, supra., 128

N.J. at 435 (citations omitted). Simply put, the court must enforce a contract whose terms are clear and unambiguous. See Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 497 (App. Div.), certif. denied, 127 N.J. 548 (1991).

On August 18, 2022, Cabrera and the Town pursued New Jersey's favored avenue for dispute resolution and entered into a binding separation agreement as the mutually agreeable outcome of Cabrera's disciplinary proceedings. This Agreement was entered into with the understanding that it would settle the ongoing dispute regarding Cabrera's employment misconduct. The Agreement contained an integration clause wherein Cabrera agreed that the terms of the Agreement constituted the complete agreement of the parties. ("[t]his Agreement contains the complete understanding between the Town and Employee, and no other promises or agreements shall be binding unless signed by both Parties."). Cabrera, through his signature, certified that he understood the terms of the Agreement.

The material terms and obligations were clearly outlined as follows: Cabrera agreed to retire effective March 31, 2023, at which time he would no longer be an employee of the Town. In return, the Town agreed to maintain Cabrera on pay roll as an employee on a leave of absence (from August 18, 2022, through March 31, 2023) and pay any *accrued* paid leave.

Rather than comply with the unambiguous language and intent of the Agreement, Cabrera sought and commenced employment as the Municipal Clerk of

Belleville on or about January 3, 2023. Cabrera's purposeful failure to retire undoubtedly had the effect breaching the Agreement. As such, there is no genuine dispute of material fact that Cabrera failed to comply with the terms of the Agreement when he prematurely (and contrary to the Agreement) severed the employment relationship with the Town. Accordingly, Plaintiff cannot establish a *prima facie* cause of action for breach of contract and his complaint must be dismissed.

It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance. Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285–86 (App. Div. 1998) (citations omitted); Restatement (Second) of Contracts § 237 (1981). More specifically, if "during the course of performance one party fails to perform 'essential obligations under the contract,' he may be considered to have committed a material breach and the other party may elect to terminate it." Ingrassia v. Const. Co., Inc. v. Vernon Twp. Bd. of Educ., 345 N.J. Super. 130, 136-37 (App.Div. 2001). See also, 5907 Blvd. L.L.C. v. W. N.Y. Suites, L.L.C., 2013 WL 3762695, at *6 (N.J. Super. Ct. App. Div. July 19, 2013) (where the Appellate Division recently confirmed that a material breach will excuse the other party's performance.)

Further, "Material breach" has been described as follows:

> Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or

> consistent recurrences which tend to "defeat the purpose of the contract." In applying the test of materiality to such contracts a court should evaluate "the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated."

Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286 (App. Div. 1998) (citing Medivox Prod., Inc. v. Hoffmann-LaRoche, Inc., 107 N.J. Super. 47, 59 (Law. Div. 1969)).

Cabrera's Complaint is an attempt to have his cake and eat it too. While alleging that the Town did not fulfill its obligations (which it did), he himself did not hold up and could not hold up his end of the bargain. More specifically, Cabrera accepted employment with Bellville and simultaneously attempted to unlawfully receive the benefits of both his Bellville employment *and* his former Guttenberg employment. However, Cabrera failed to concede that in order for him to accept and be employed by Belleville as their municipal clerk, a public employment position, it was necessary for him to be off Guttenberg's payroll prior to commencing employment with Belleville. This is because, absent a shared services agreement (none exists between Guttenberg and Belleville), municipal clerks can only be appointed to and may only serve one municipality. See N.J.S.A. 40A:9-133(a).[1] Accordingly, when Belleville

[1] Under N.J.S.A. 40A:9-133(a), only municipalities in the participating counties – Atlantic, Camden, Monmouth, Morris, Ocean, Sussex, and Warren— are permitted to engage in shared services agreements for municipal clerks.

sought to appoint Cabrera, Cabrera was required to sever his employment relationship with the Town, by either accelerating his retirement date or by resigning. Cabrera was conscious that he could not serve two municipalities simultaneously. As such, he would be required to either amend (or willingly breach) the Agreement so that he could retire early or wait to retire in accordance with the terms of the Agreement on March 31, 2023. He did neither. Instead, by accepting full time public employment with Belleville, Cabrera resigned *de facto* and, as such, abandoned his rights under the Agreement.

It is well established that a full-time public employee cannot be employed full-time by multiple public entities at the same time. This is clearly evidenced by the New Jersey's Public Employment Retirement System set forth in N.J.S.A. 43:15A-57.2, which generally bars public employees from receiving pension benefits (once retired) while continuing public employment in the same position or in any other position requiring PERS membership. Stevens v. Bd. of Trs., Pub. Emps. Ret. Sys., 309 N.J. Super. 300, 303 (App. Div. 1998) (internal citations omitted). Therefore, any public employee seeking full time employment with a public entity cannot be awaiting retirement.

The parties reached the Agreement with the sole understanding that Cabrera would terminate the employment relationship by way of his retirement from the Town. At no point did the parties contemplate that Cabera could take employment elsewhere while he was still employed by Guttenberg and on a paid leave of absence pending his irrevocable retirement. Cabrera's retirement was an "essential obligation" under the Agreement and in return the Town would pay him "for his unused accrued vacation, sick, compensatory, and personal days for 2022 and 2023 [. . .] all less applicable state and federal taxes and other applicable withholdings," and a "Separation Payment, less applicable deductions." See Cirillo Cert. Cabrera breached the Agreement when he accepted full time employment with Bellville because statutorily, he would be required to withdraw his retirement application and no longer retire. Because he was an employee until December 31, 2022, before he took employment with Belleville, the Town rightfully was only obligated to pay him a salary through December 31, 2022, which it did and the accrued time for 2022, which it also did.

The Agreement's purported offer to pay Cabrera's unused *accrued* vacation, sick, compensatory, and personal days for 2023 was contingent on Cabrera's full compliance with the terms of the Agreement, which also required Cabrera being an active employee on January 1, 2023.[2] However, Cabrera's employment with Belleville severed his relationship with the Town (and breached the Agreement), and as a result the Town was justified in removing him from payroll and not paying him for unearned 2023 sick, vacation, and compensatory time.

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[2] It is Guttenberg's policy that an employee does not accrue paid time off unless he is on the Town's payroll as of January 1st of the fiscal year.

Cabrera's December 20, 2022, email further shows that he was cognizant that accepting employment in Belleville meant that he was no longer retiring on March 31, 2023, in accordance with the terms of the Agreement. In fact, his full-time employment from Belleville would bar him from retiring under PERS and as a result his pending retirement application would need to be withdrawn. He further understood that in order to take the Belleville municipal clerk position he was required to sever his employment relationship with Guttenberg – as evidenced by his request to be removed from payroll on December 31, 2023. However, he refused to accept the logical, and long-standing practice, that, as the Town clearly communicated on December 21, 2023, removal from payroll also meant that he would not be no longer be entitled to the following year's leave time. But instead of responding to the Town's attorney's explanation, Cabrera went silent for weeks, expecting that he would still receive the benefits of the Agreement despite his failure to perform his obligation under the Agreement. Therefore, there is no genuine issue of material fact that Cabrera's breach was material and Guttenberg was discharged from performing under the Agreement. It follows that Cabrera's Complaint should have been dismissed in its entirety as a matter of law.

New Jersey courts have held that a plaintiff's suffering damages is an essential element of a breach of contract action. Even if all the breach of contract elements have been met, a cause of action for breach of contract will not be sustained if a plaintiff cannot successfully show that he has sustained damages.

The recovery of damages in breach of contract actions is limited by the general principles that: (1) the damages are those arising naturally according to the usual course of things from the breach of the contract, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made, as a probable result of the breach; and (2) there must be reasonably certain and definite consequences of the breach as distinguished from the mere quantitative uncertainty. Vosough v. Kierce, 437 N.J. Super. 218, 243 (App. Div. 2014) (citing Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81, 88 (App. Div. 1989)).

Cabrera incorrectly alleges that he was damaged because Guttenberg discontinued salary payments from January 1 through March 31. Complaint, at ¶15. To the extent that Cabrera alleges that he was harmed by the Town's failure to issue a payment for his unaccrued paid time off, this argument must likewise fail. First, Cabrera was appointed as the Township of Belleville's Municipal Clerk on or about January 3, 2023. The Belleville Municipal Data Sheet clearly demonstrates that Bellville created its budget with an understanding that Cabrera would be on their payroll during the entire 2023 fiscal year. Accordingly, Belleville's 2023 budget expressly allocated $205,000 for Cabrera's salary. Also consistent with beginning his employment with Belleville on January 3, 2023, Cabrera accrued paid time off-including sick, personal, and compensatory time for the 2023 Belleville fiscal year.

As evidenced by his December 20, 2022, email, Cabrera knew that accepting employment in Belleville meant that he risked forgoing his salary payments from January 1, 2023 to March 31, 2023. It follows that once removed from payroll, and working for a different public entity, an employee who is no longer with the employer beginning the following year, does not accrue paid leave time. Instead, Cabrera fails to recognize that his alleged damages were superseded when his new employer registered him in its payroll system, allocated vacation time for 2023, and enrolled him PERS. None of which could have been possible but for Guttenberg's removal of Cabera from the payroll. Cabrera's instant Complaint is a clear attempt at double dipping which as a trusted public employee, is unacceptable.

Mr. Cabrera's argument, however, apparently agreed with by the trial court, is that the Separation Agreement and General Release did not expressly preclude his employment elsewhere during the period of time that, as the Plaintiff puts it, "he continued to draw a salary from the Town," although it is hard to understand why it would have to do so. He goes on to argue that he was in the "unique" position of being able to earn "two full-time salaries" for the three-month period from January 1, 2023, though March 31, 2023, because this was the "benefit of the bargain . . . ."

Unique indeed. What Plaintiff characterizes as the "benefit of the bargain," the Town looks at as double-dipping and gaming the system. First, Mr. Cabrera, at the moment he began his job as Belleville Municipal Clerk, was still an employee of the

Town of Guttenberg, on the Guttenberg payroll. As the Agreement reflects, he was on a leave of absence and had not separated from the Town. His resignation date was still three months away. Simply put, there is no rational basis for the belief that while on a leave of absence from one public employer, still being paid one's full salary from that public employer, it is permissible to also take a full-time job with another public employer and receive a second full salary.

For some municipal positions we might have to rely on common sense and common law principles to reach the conclusion that Mr. Cabrera was forbidden to do what he did. In the case of a Municipal Clerk, however, the prohibition is explicit. Absent a shared services agreement, which does not and may not exist between Guttenberg and Belleville, municipal clerks can only be appointed to and may only serve one municipality. See N.J.S.A. 40A:9-133(a). Plaintiff argues that whether or not accepting the Belleville position violates the statute is between Cabrera and Belleville and has nothing to do with Gutenberg, but that is far too cavalier a point of view for any responsible public official or any responsible public body, and Guttenberg is not willing to support and assist Mr. Cabrera's efforts to scam his way into two full time salaries simultaneously.

Put simply, the Town of Guttenberg was entirely justified in removing its employee, Mr. Cabrera from its payroll and in cutting off all of his entitlements when, while in the middle of a paid leave of absence with three months still remaining until his resignation would become effective, he accepted another full time public job, trying to maneuver himself into being paid by both municipalities at the same time and ignoring he pension implications of doing so.

The Town's Motion for Summary Judgment should have been granted, and the Plaintiff's Cross-Motion should have been denied.

CONCLUSION

The Decision of the trial court should be reversed.

Respectfully,

WEINER LAW GROUP LLP

By: ______________________
Stephen J. Edelstein

Dated: May 5, 2025

ALBERTO CABRERA, Plaintiff-Respondent-Cross-Appellant, vs. TOWN OF GUTTENBERG, Defendant-Appellant-Cross-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001401-24 Civil Action ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-786-23 Sat Below: Hon. Kalimah H. Ahmad

PLAINTIFF-RESPONDENT-CROSS APPELLANT'S AMENDED BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT-CROSS-RESPONDENT'S APPEAL AND IN SUPPORT OF HIS CROSS-APPEAL

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Dated: July 1, 2025

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PRELIMINARY STATEMENT

This is a garden variety breach of contract case in which one party fully performed its obligations under the contract while the other did not. Plaintiff-Respondent-Cross-Appellant, Alberto Cabrera ("Plaintiff" or "Cabrera"), a former tenured employee of Defendant-Appellant-Cross-Respondent, Town of Guttenberg ("Guttenberg" or "Defendant"), entered into a written separation agreement ("Agreement") with Guttenberg on August 18, 2022 to resolve a work-related dispute that had arisen between them earlier that year. The Agreement called for Cabrera to take a paid leave of absence from August 18, 2022 through March 31, 2023 from his position as Town Clerk and to retire at the conclusion of his leave. It also called for Plaintiff to release all his claims against Defendant, known or unknown, and to forfeit all his tenure rights to any position with Defendant. In exchange, the Agreement required that Guttenberg maintain Cabrera on its payroll through the end of his leave on March 31, 2023 and to pay him, within seven (7) days of the Agreement's effective date, a one-time separation payment equal to fifty-three (53) total days compensation for unused accrued vacation, sick, compensatory, and personal days. The Agreement contained no restriction on Cabrera's ability to work for another public or private employer during the period of his leave and, indeed, expressly relieved him of any professional responsibilities with Guttenberg during his leave and prohibited him from having any business contact with Guttenberg officials or employees.

Plaintiff complied with the Agreement in all respects, including by submitting his irrevocable letter of retirement and ceasing performance of his professional responsibilities for Guttenberg on August 18, 2022. For its part, Defendant only partially complied with the Agreement. While it continued to maintain Plaintiff on its payroll and pay him his regular salary from the commencement of his leave of absence on August 18, 2022, it failed to pay him the one-time separation payment and, beginning on January 1, 2023, after Cabrera accepted employment with the Township of Belleville ("Belleville"), it stopped paying his regular salary. In total, Defendant failed to pay Plaintiff the sum of $45,959.82, constituting his unpaid salary from January 1, 2023 through March 31, 2023 totaling $25,316.85, and $20,642.97 for the unpaid separation payment comprising 53 days of unused accrued vacation, sick, compensatory, and personal days.

After Defendant initially moved for summary judgment, Plaintiff cross-moved for summary judgment which included a request for his attorney's fees and costs. By order dated December 19, 2024, the trial court (Hon. Kalimah H. Ahmad) denied Defendant's motion, granted Plaintiff's cross-motion, but denied Plaintiff's application for attorney's fees and costs. The court's order entered judgment in favor of Plaintiff in the amount of $45,959.82 with prejudgment interest from March 23, 2023. In its written decision, the court found that Guttenberg breached that Agreement when it failed to pay Cabrera all amounts due under the Agreement. It rejected Defendant's argument that its obligations to continue paying Cabrera were discharged after he took a position at Belleville, finding that there was nothing in the Agreement that precluded him from doing so during his leave period "where he has essentially been relieved of his duties in the Town of Guttenberg." (Pa4) The court's decision contains no discussion of its denial of Cabrera's request for attorney's fees and costs.

The decision and order below denying Defendant's motion for summary judgment and granting summary judgment in favor Plaintiff should be affirmed as the court correctly rejected Defendant's attempt to write a restrictive covenant into the Agreement that does not exist. The aspect of the lower court order denying Plaintiff's application for attorney's fees and costs should be reversed, however, as the Agreement expressly provided that either party could seek for attorney's fees and costs in any action to enforce performance following a breach.

PROCEDURAL HISTORY

Plaintiff commenced this action with the filing of his one-count complaint against Defendant for breach of contract on March 3, 2023. Pa14 After initially defaulting following service of the Summons and Complaint, Defendant filed its Answer on June 15, 2023. Pa19, Pa21

On July 30, 2024, Defendant filed a motion for summary judgment dismissing the Complaint. Pa26 – Pa73. On August 20, 2024, Plaintiff filed opposition to Defendant's motion and cross-moved for summary judgment, which included a request for attorney's fees and costs. Pa76 – Pa187.

On December 19, 2024, the lower court entered an order denying Defendant's motion for summary judgment, granting Plaintiff's cross-motion for summary judgment but denying Plaintiff's application for counsel fees and costs, and entered judgment in favor of Plaintiff and against Defendant in the amount of $45,959.82, plus prejudgment interest from March 31, 2023. Pa1 – Pa5.

On January 16, 2025, Defendant filed a Notice of Appeal of the judgment below. Pa6. On January 29, 2025, Plaintiff filed a Notice of Cross-Appeal of only that portion of the court's order denying his application for attorney's fees and costs. Pa9.

STATEMENT OF FACTS

Defendant is a municipal corporation organized and existing under the laws of the State of New Jersey. Pa80, Pa190. Cabrera commenced employment with Guttenberg on March 24, 2008 as its Acting Town Clerk. Pa33 In October 2010, he was appointed its Registered Municipal Clerk. Pa33. On November 25, 2013, he was reappointed to that position and received tenure. Pa33. In early 2022, a dispute arose between Cabrera and Guttenberg concerning issues pertaining to his employment.[1] Pa80, Pa190. On or about August 18, 2022, the parties entered into a written "Separation Agreement and General Release" (the "Agreement") to resolve the dispute. Pa81, Pa190.

The Agreement provided, among other things, that Defendant would maintain Cabrera on its payroll and continue his medical benefits through March 31, 2023, as well as pay him a separation payment consisting of all his unused accrued vacation, sick, compensatory, and personal days for 2022 and 2023 totaling 53 days (the "Separation Payment"); in exchange, Plaintiff was required to: 1) execute a general release of all claims, known or unknown, against Guttenberg and its officers, agents, etc.; 2) submit a written request for a paid personal leave of absence from his employment at Guttenberg from August 18, 2022 through March 31, 2023, during which he "shall not have any professional responsibilities as a Town employee"; 3) sign an irrevocable letter of retirement from all employment with Guttenberg, to be effective at the close of business on March 31, 2023; and 4) forfeit all tenure rights that he has to any position with

[1] In its brief, Guttenberg improperly characterizes the Agreement as a settlement of a dispute regarding Cabrera's "employment misconduct." Db10. This statement should be disregarded because it is not supported by admissible evidence of record and not relevant to the issues in this case.

Guttenberg up until the date of the Agreement. Pa101 – Pa110. The Agreement further provided, at paragraph 23, that Plaintiff had the right to consider the Agreement for twenty-one (21) days before signing it (called the "Revocation Period") and, if signed at any time within the Revocation Period, Plaintiff then had an additional seven (7) days thereafter to revoke his consent to it. Pa107. The Agreement further provided, at paragraph 1, that "[i]f this Agreement is timely signed and returned to the Town, the Separation Payment will be on the first payroll date, which is at least seven (7) days immediately following the expiration of the Revocation Period, as set forth in Paragraph 23, below." Pa101.

Plaintiff executed the Agreement on August 18, 2022 and, thereafter, did not exercise his right of revocation. Pa82, Pa190. The Agreement was subsequently countersigned by Defendant and approved and ratified by a public resolution. Pa82, Pa190. On August 18, 2022, as required by paragraphs 2 and 7 of the Agreement, Cabrera delivered to Guttenberg's attorney, Mark Tabakin, Esq., handwritten letters addressed to Defendant's Mayor and Council requesting "a paid leave of absence from August 18, 2022 to March 31, 2023" and the acceptance of his "official retirement as of March 31, 2023". Pa82, Pa111, Pa113, Pa191.

Following Guttenberg's ratification of the Agreement, it maintained Cabrera on its payroll and continued to pay him his regular salary bi-weekly through December 31, 2023. Pa82, Pa191. However, Defendant failed to pay Cabrera the

Separation Payment, which, under paragraph 1 of the Separation Agreement, was due "on the first payroll date, which is at least seven (7) days immediately following the expiration of the Revocation Period." Pa97 On or about January 1, 2023, Cabrera commenced employment with Belleville as its Town Clerk. Pa82, Pa191. Upon discovering that Cabrera accepted employment with Belleville, beginning on and after January 1, 2023, Guttenberg stopped paying Cabrera his bi-weekly salary. Pa82, Pa191.

Approximately one year later, in or about late December 2023 or early January 2024, Cabera received in the mail a payroll check from Guttenberg back-dated to February 15, 2023 in the gross amount of $5,452.60 and net amount of $3,692.90. There was no letter or explanation accompanying the check, although in the deductions section of the pay stub there was a notation that the amounts were for "Vacation", "Adjustmnt", and "Comp Pay." Pa83, Pa115, Pa191. Cabrera did not deposit the February 15, 2023 payroll check because it was nearly a year old at the time he received it and because it was far short of what he was owed by Defendant under the Agreement. Pa97.

As of January 1, 2023, Cabrera's annual salary at Guttenberg was **$101,267.33 per year**. Pa83, Pa191. An annual salary of $101,267.33 amounts to a weekly salary of **$1,947.45 per week** ($101,267.33 divided by 52 weeks = $1,947.45 per week). Pa83, Pa191. Based on the five-day work week that Cabrera worked for Guttenberg, his daily pay amounted to **$389.49 per day** ($1,947.45 per week divided by 5 days = $349.49). Pa83, Pa191. Accordingly, the amount due for the Separation Payment, which amounted to a total of 53 days, was **$20,642.97** (53 days multiplied by $389.49 per day = $20,642.97). Pa83.

For the period from January 1, 2023 through March 31, 2023, there were a total of 65 days, excluding weekend days. Pa83, Pa191. Thus, for the period from January 1, 2023 through March 31, 2023, based on Cabrera's 5-day work week and daily pay rate of $389.49 per day, had Defendant continued to pay him his regular salary he would have received **$25,316.85** (65 days multiplied by $389.49 per day = $25,316.85). Pa83 – Pa84.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Under *R*. 4:46-2, a motion for summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment as a matter of law." "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Id*. The judge's function is not to weigh the credibility or preponderance of the evidence and determine the truth of the matter but, rather, to determine whether there is a genuine issue for trial in viewing the facts in the light most favorable to the non-moving party. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 329 (2010); Tomeo v. Thomas Whitesell Const. Co., 176 N.J. 366, 370 (2003).

An appellate court's review of a trial court's grant of summary judgment motion is de novo, applying the same standards as the lower court. Barila v. Board of Educ. Of Cliffside Park, 241 N.J. 595, 611 (2020). In the absence of a factual dispute, the interpretation of a contract is also reviewed de novo. *Id*. at 612; Serico v. Rothberg, 234 N.J. 168, 178 (2018).

As shown below, and as found by the trial court, Plaintiff is entitled to summary judgment on his breach of contract claim because the facts are undisputed that Defendant failed to comply with its payment obligations to Cabrera under the Agreement. For that reason, the judgment below should be affirmed. However, the trial court erred in not granting Cabrera's application for counsel fees and costs to which he is entitled as a prevailing party under the terms of the Agreement. The lower court's order denying his counsel fee application should therefore be reversed and the matter should be remanded to the trial court for further proceedings on Plaintiff's fee application.

POINT II

THE TRIAL COURT'S ORDER AND JUDGMENT GRANTING PLAINTIFF SUMMARY JUDGMENT ON HIS BREACH OF CONTRACT CLAIM SHOULD BE AFFIRMED

(Order and Opinion at Pa1, Pa3)

Under New Jersey law, "[a] party violates the terms of a contract by failing to fulfill a requirement enumerated in the agreement." Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019). The plaintiff must prove four elements to prevail on a claim that the terms of a contract were violated: (1) that the parties entered into a contract containing certain terms; (2) that the plaintiff did what the contract required the plaintiff to do; (3) that the defendant did not do what the contract required the defendant to do, defined as a breach of contract; and (4) that the defendant's breach caused a loss to the plaintiff. Id., citing Globe Motor Co. v. Igdaley, 225 N.J. 469, 482 (2016).

Here, the facts are undisputed. Plaintiff and Defendant entered into the Agreement on or about August 18, 2022. Under the Agreement, Plaintiff was required to do the following things: (1) submit a letter of retirement from all employment with Guttenberg by no later than August 22, 2018, to be effective at the close of business on March 31, 2023; (2) submit to Guttenberg by no later than August 18, 2022 a written request for a paid leave of absence from August 18, 2022 through the close of business on March 31, 2023; (3) refrain from performing any professional responsibilities as a Guttenberg town employee during his paid leave of absence; (4) have no business contact with any Guttenberg town officials or employees and not communicate with them regarding the subject matter of the agreement; (5) refrain from making any defamatory or derogatory statements concerning Guttenberg, its officials or employees; and (6) release all claims known or unknown that he had or may have against Guttenberg and its agents including, but not limited to, any and all claims arising from his employment or the termination thereof. For its part, Defendant's obligations to Cabrera under the Agreement included the following: (1) pay him the Separation Payment equal to 53 days of pay by no later than the first payroll date after the seven-day revocation period of the Agreement expired; and (2) maintain him on its payroll and continue to pay him his regular salary through March 31, 2023.

Plaintiff fully complied with his obligations under the Agreement. He executed the Agreement which under paragraph 5 included a general release of all claims known and unknown against Defendant. He submitted a letter of retirement and written request for a leave of absence on August 18, 2022. He refrained from performing any further professional responsibilities pertaining to his employment with Guttenberg and refrained from having business contact with Guttenberg officials and employees. As for Defendant, it did not comply with its obligations under the Agreement, namely, its obligation to pay Cabrera the Separation Payment and its obligation to continue to pay his salary through March 31, 2023, having ceased paying him his salary as of December 31, 2022. Accordingly, Cabrera has been damaged in the amount of the unpaid Separation Payment totaling $20,642.97, and the three months of unpaid salary for the period of January 1, 2023 through March 31, 2023 totaling $25,316.85. Thus, total damages amount to $45,959.82.

Guttenberg contends that it was relieved of its obligations to continue paying Cabrera's salary and the Separation Payment because Cabrera materially breached the Agreement when he took the position with Belleville. Since Defendant can point to no term or provision within the four corners of the Agreement that restricts Plaintiff's ability to work for another employer during his leave of absence, it argues that the Agreement contains an implied restriction on his ability to accept outside employment while still on its payroll and that New Jersey law prohibits municipal clerks from working for more than one municipality at the same time. Defendant argues that Cabrera's email to the Town's attorney in late 2022 proposing to amend the Agreement demonstrates that he knew that he could not work for Belleville during his leave. Defendant further argues that even if Plaintiff can demonstrate that it breached the Agreement, he still cannot not prevail because his damages were fully mitigated by the salary and benefits he earned from Belleville. As demonstrated below, these arguments are without merit.

It is well settled that "when the terms of a contract are clear and unambiguous, there is no room for construction and the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447 (2003); Barr v. Barr, 418 N.J. Super. 18, 32 (App. Div. 2011). A settlement agreement is, moreover, like any other contract and courts are not to engage in the practice of rewriting it in order to provide a better bargain than contained in their writing. Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008).

Here, Defendant would have the court rewrite the Agreement to include a restriction on outside employment that is absent from its text. This is contrary to the basic principles of contract interpretation as well as the terms of the Agreement itself, namely, the integration clause at paragraph 18:

> 18. This Agreement contains the complete understanding between the Town and Employee, and no other promises or agreements shall be binding unless signed by both Parties. ***In signing this Agreement, the Parties are not relying on any fact, statement, or assumption not set forth in this Agreement***. (emphasis added)

Pa41. (Agreement, ¶ 18) See Harker v. McKissock, 12 N.J. 310, 321-22 (1953) ("The essence of voluntary integration is the intentional reduction of the act to a single memorial; and where such is the case the law deems the writing to be the sole and indisputable repository of the intention of the parties.")

Likewise, Cabrera's email to the Town's attorney in late 2022 which Defendant contends shows recognition that he was not permitted to accept outside employment is irrelevant[2] and barred by the parol evidence rule which prohibits extrinsic evidence of a party's alleged contractual intent to alter or contradict the terms of an integrated contract whose language is clear and unambiguous. Saul v. Midlantic Bank/South, 240 N.J. Super. 62, 77 (App. Div. 1990); see also YA Global Investments, L.P. v. Cliff, 419 N.J. Super. 1, 12 (App. Div. 2011) ("there is a distinction between the use of evidence of extrinsic circumstances to illuminate the meaning of a written contract, which is proper, and the forbidden use of parol evidence to vary or contradict the acknowledged terms of an integrated contract.").

There is also no merit to the contention that working for another municipality during this period would be incompatible with his responsibilities as a Guttenberg employee. The express terms of the Agreement relieved Plaintiff from any responsibilities with Defendant and expressly prohibited him from having any business-related contact with its officials or employees. See Agreement, ¶¶ 7-8; Pa39 – Pa40. Plaintiff's employment at Belleville could not possibly then have interfered with his obligations under the Agreement.

There is also no merit to the contention that Cabrera's acceptance of the position in Belleville while on paid leave from Guttenberg is prohibited by New

[2] The fact that Cabrera sought to amend the agreement in December 2022 to change his retirement date to December 31, 2022 is irrelevant parol evidence, as the record shows that Cabrera's proposal to amend was rejected by the Town. Pa74.

Jersey law. Defendant cites N.J.S.A. 40A:9-133(a) for the proposition that municipal clerks can only work for one municipality at a time absent a shared services agreement. Db12. That statute says nothing of the sort. It simply provides that "in every municipality there shall be a municipal clerk" . . . which "may be fulfilled by the sharing of a municipal clerk with another municipality or municipalities pursuant to a shared services agreement…" In other words, the statute gives a municipality the option to fulfill its statutory mandate to have a municipal clerk by sharing the clerk through a co-employment arrangement with another municipality. It does not, however, prohibit a municipality from having two clerks on its payroll (which Guttenberg invariably did during Cabrera's leave since he was no longer actively working there) nor does it prohibit a clerk from being on the payroll of more than one municipality in the absence of a shared services agreement.[3] More to the point, there is nothing in that statute that prohibits a clerk on paid leave from one municipality from taking a position with another. In any event, Guttenberg and Belleville were not "sharing" the services of Cabrera, as he was precluded under the Agreement from performing any services for Defendant during his leave. This was also not paid leave in the traditional sense. It was severance pay in consideration of a separation agreement that included a

[3] While N.J.S.A. 19:3-5 and N.J.S.A. 19:3-5.2 prohibit a person from holding at the same time more than one of certain public offices, the office of Municipal Clerk is not one of them.

resignation from employment and a general release. Guttenberg chose to pay the severance over the course of several months through its normal payroll practices but there was no expectation that Plaintiff would ever return to work. In fact, he was disqualified under the Agreement from employment or reemployment and forbidden from reapplying for any position with Defendant. Pa41; Agreement, ¶13.

Guttenberg also argues that the Agreement's requirement that Cabrera "retire" from his position on March 31, 2023 is incompatible with his decision to accept employment with Belleville on January 1, 2023 because, it maintains, Cabrera is prevented under N.J.S.A. 43:15A-57.2 from collecting public employment retirement benefits through the Public Employee Retirement System ("PERS") while continuing public employment in the same or other capacity requiring PERS membership. This is a red herring. Whether or not Cabrera's acceptance of employment with Belleville put on hold his ability to collect retirement benefits under PERS after March 31, 2023 is a matter between Cabrera and PERS and has nothing to do with the parties' obligations to each other under the Agreement. The Agreement is in fact altogether silent on the issue of retirement benefits or enrollment in PERS. Moreover, should Cabrera be ineligible from collecting retirement benefits following his retirement from Guttenberg as a result of his employment with Belleville, it would be to the detriment of Cabrera, not Defendant, and his eligibility to collect benefits through PERS based on his employment at

Guttenberg would ultimately resume, in any event, upon his subsequent retirement from Belleville, together with any additional retirement benefits he accumulates from his Belleville service. See N.J.S.A. 43:15A-57.2(a) ("Upon subsequent retirement of such member, his former retirement allowance shall be reinstated together with any optional selection, based on his former membership. In addition, he shall receive an additional retirement allowance based on his subsequent service…").

There is also no merit to Defendant's contention that Cabrera suffered no damages from its breach because they were mitigated by his earnings from Belleville. Mitigation principles are not applicable here. The parties settled an employment dispute in which Cabrera gave up important rights in exchange for the payments that he was promised. Those rights included the relinquishment of a coveted tenured position and a general release of all claims, known and unknown, including those that gave rise to the dispute. This is no different than any other employment settlement agreement in which an employee agrees to resign and provide a general release of claims against his employer in exchange for the payment of a sum of money. Unless the agreement states otherwise, the employer's obligation to make the payment is not discharged or reduced if the employee takes other employment after the agreement is signed. The employer's obligation to make the settlement payment is independent of what the employee may earn from subsequent employment, and as here, the consideration is the release of claims by the employee and not his continued labor for the employer. Pa37 – Pa44 (Agreement, ¶¶ 2, 5, 15, and "Notice of Rights" provision at p.8). Moreover, because the Agreement expressly required that Cabrera not perform any services for Defendant and did not preclude his employment elsewhere during the period of his leave, it afforded him the opportunity to earn income from other sources because his workday was otherwise freed up. This was, in essence, the benefit of the bargain that Cabrera struck in the settlement. Thus, in the same way that earnings from the stock market would not mitigate damages, his earnings from Belleville cannot serve to offset the damages that he sustained from Guttenberg's breach because his capacity to earn an income from other sources while on leave was never restricted.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S APPLICATION FOR COUNSEL FEES AND COSTS

(Order and Opinion at Pa1, Pa3)

As noted above, the trial court denied Plaintiff's application for attorney's fees and costs but did so without explaining its reasons. Plaintiff contends that the court's decision denying his request for attorney's fees and costs was in error as the Agreement contains a fee-shifting provision entitling a party to seek legal fees and costs in the event of a default in performance by the other party.

Paragraph 19 of the Agreement provides as follows:

> 19. This Agreement is the compromise of disputed claims. All parties shall bear their own attorney's fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement, except that nothing in this Agreement or the documents referenced herein shall preclude either Party from seeking attorneys' fees and costs in an action to enforce performance of any term of this Agreement should there be a default in performance.

Pa41 – Pa42.

Although New Jersey adheres to the "American rule" under which the prevailing party is not entitled to collect a reasonable attorney's fee from the losing party, Van Horn v. Trenton, 80 N.J. 528, 538 (1979), attorneys fees may be awarded to the prevailing litigant "if they are expressly provided for by statute, court rule, or contract. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009). Where there is such express authorization, a court's decision granting or denying attorney's fees will not be disturbed absent a clear abuse of discretion. First Atlantic Federal Credit Union v. Perez, 391 N.J. Super. 419, 426 (App. Div. 2007); Desai v. Board of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586, 598 (App. Div. 2003). An abuse of discretion is established if the "decision was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." United States v. Scurry, 193 N.J. 492, 504 (2008), quoting Flagg v. Essex County Prosecutor, 171 N.J. 561, 571

(2002).

Here, the lower court abused its discretion in denying Plaintiff's application for counsel fees because it provided no explanation for its decision and because it appears to have ignored the fee-shifting provision in the Agreement that expressly permits either party to seek fees "in an action to enforce performance of any term of this Agreement should there be a default in performance." Pa42; Agreement, ¶19. See Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951) (stating that all parts of a contract and every word of it will, if possible, be given effect). As demonstrated above, and as found by the trial court, Guttenberg defaulted in its performance under the Agreement by failing to pay Cabrera his salary for the period from January 1, 2023 through March 31, 2023 and failing to pay him the Separation Payment equivalent to 53 days compensation. Accordingly, under Paragraph 19 of the Agreement, Plaintiff is entitled to his attorney's fees and costs in bringing this action because he was indisputably the prevailing party in an action in which the court found that the Defendant defaulted in its performance.

CONCLUSION

For the reasons outlined above, and based on the record as a whole, Plaintiff Alberto Cabrera respectfully requests that the order and judgment below denying Defendant's motion for summary judgment and granting Plaintiff's cross-motion for summary judgment be affirmed, except for that portion of the order and judgment that denied Plaintiff's application for counsel fees and costs which should be reversed, and the matter remanded to the trial court for further proceedings on the fee application.

Dated: July 1, 2025

Respectfully submitted,

REPPERT KELLY & VYTELL, LLC
Attorneys for Plaintiff-Respondent-Cross-Appellant

By: *s/ Christopher P. Kelly*
Christopher P. Kelly

ALBERTO CABRERA, Plaintiff-Respondent- Cross-Appellant, v. TOWN OF GUTTENBERG, Defendant-Appellant- Cross-Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001401-24 Civil Action ON APPEAL FROM SUPERIOR COURT, LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-L-786-23 Sat Below: HON. KALIMAH H. AHMAD

REPLY BRIEF OF DEFENDANT-APPELLANT AND ANSWERING BRIEF OF CROSS-RESPONDENT TOWN OF GUTTENBERG

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Dated: August 7, 2025

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STATEMENT OF FACTS

As set forth in the Town of Guttenberg's ("the Town") opening Brief, the Plaintiff Alberto Cabrera ("Cabrera") has asked the Court to sanction his receiving a full-time salary from each of two municipalities, while on the payroll of both. The Town relies upon its initial Procedural History, Statement of Facts, and Legal Argument without repeating them at length.

In short, pursuant to the separation agreement between the parties, on or about August 18, 2022, Cabrera both (1) requested a paid leave of absence from August 18, 2022, to March 31, 2023; and (2) signed an irrevocable letter retiring from all employment with the Town, to be effective at the close of business on March 31, 2023 – not earlier. Pa34.

When Cabrera subsequently tried to change the Agreement to an earlier date, December 31, 2022, but still be paid for the full 53 days of vacation, sick time, and personal time, the Town indicated that it was acceptable to advance the termination date but that Cabrera would also be forfeiting all of his 2023 paid time off. Pa74.

As of December 30, 2022, Cabrera had the following time remaining: six (6) vacation days, four (4) sick days, one (1) personal day and seven (7) compensatory days. However, according to the Town policy, an employee must be enrolled in the Town payroll at the beginning of the new year in order to accrue and vest the allotted leave time for the year. The leave time allotment for the year 2023 would have been as follows: fifteen (15) vacation days, twelve (12) sick days, three (3) personal days, and five (5) compensation days. Pa34.

On or about December 28, 2022, the Town was advised that Cabrera had accepted a Municipal Clerk position at Belleville, effective January 1, 2023. Pa35. As a result, the Town concluded that Cabrera had negated the terms of the Agreement and issued Cabrera's final salary payment on December 30, 2022.

STANDARD OF REVIEW

The parties to this appeal have now agreed that the review of a trial court's grant or denial of a motion for summary judgment is *de novo*, applying the same standard used by the trial court. See, e.g. Samolyk v. Berthe, 251 N.J. 73 (2022)

LEGAL ARGUMENT

I.

THE SUMMARY JUDGMENT MOTION WAS WRONGFULLY DECIDED

Despite Cabrera's arguments to the contrary, he did not do what his Agreement required of him. New Jersey law imposes on a Plaintiff the burden to prove four elements in order to establish a claim for breach of contract: (1) "[t]he parties entered into a contract containing certain terms"; (2) the plaintiff "did what the contract required [them] to do"; (3) the "defendant[s] did not do what the contract required [them] to do," defined as a "breach of the contract"; and (4) the defendants' breach caused a loss to the plaintiff. Goldfarb v. Solimine, 245 N.J. 326, 338-39 (2021) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). Plainly, having left the employment of the Town as of December 31, 2022, rather than March 31, 2023, he did not do so.

The material terms and obligations were clearly outlined as follows: Cabrera agreed to retire effective March 31, 2023, at which time he would no longer be an employee of the Town. In return, the Town agreed to maintain Cabrera on pay roll as an employee on a leave of absence (from August 18, 2022, through March 31, 2023) and pay any *accrued* paid leave.

Both the trial court and Cabrera ignore the prevailing law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance, as happened here. Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285–86 (App. Div. 1998); Restatement (Second) of Contracts § 237 (1981).

What happened here was, on Cabrera's part, a "material breach," which defeated the purpose of the contract – namely, that Cabrera had to be on the payroll from January 1, 2023, through March 31, 2023, in order to receive the 2023 benefits. As set forth in the Town's initial Brief, Cabrera has now been permitted to have his cake and eat it too, it is Cabrera, and not the Town, who undermined the Agreement.

The Town remains firm in its position that a New Jersy public employee cannot receive full-time pay on two public payrolls at once. clearly evidenced by Rules of the New Jersey's Public Employment Retirement System. See, N.J.S.A. 43:15A-57.2

Mr. Cabrera's argument, however, agreed with by the trial court, is that the Separation Agreement and General Release did not expressly preclude his employment elsewhere during the period of time that, as the Plaintiff puts it, "he continued to draw a salary from the Town," although it is hard to understand why it would have to do so. He goes on to argue that he was in the "unique" position of being able to earn "two full-time salaries" for the three-month period from January 1, 2023, though March 31, 2023, because this was the "benefit of the bargain . . . ."

What Plaintiff characterizes as the "benefit of the bargain," the Town looks at as double-dipping and gaming the system.

Put simply, the Town of Guttenberg was entirely justified in removing its employee, Mr. Cabrera from its payroll and in cutting off all of his entitlements when, while in the middle of a paid leave of absence with three months still remaining until his resignation would become effective, he accepted another full time public job, trying to maneuver himself into being paid by both municipalities at the same time and ignoring he pension implications of doing so.

The Town's Motion for Summary Judgment should have been granted, the Plaintiff's Cross-Motion should have been denied, and the Cross-Appeal should likewise be denied.

II.

THE TRIAL COURT DID NOT ERR IN DENYING CABRERA'S REQUEST FOR COUNSEL FEES

To reiterate, Paragraph 19 of the Agreement provides:

> This Agreement is the compromise of disputed claims. All parties shall bear their own attorney's fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement, except that nothing in this Agreement or the documents referenced herein shall preclude either Party from

> seeking attorneys' fees and costs in an action to enforce performance of any term of this Agreement should there be a default in performance.

Pa41-42.

This is not a fee-shifting provision, as Cabrera characterizes. Rather, it is a clause which allows a prevailing party to ask for counsel fees. It is, for example, a far cry from a fee shifting clause which might typically state: "In the event of litigation or arbitration concerning the subject matter of this Agreement, the prevailing party shall be entitled to recover all costs incurred by it, including such party's reasonable attorneys' fees . . . ." The clause at issue says nothing of the kind.

Consequently, the case law cited by Cabrera is inapplicable. The clause ni the Agreement does not express any absolute entitlement to counsel fees for a prevailing party. However, even when a contract does provide for fee shifting, the applicable provision "should be strictly construed in light of [New Jersey's] general policy disfavoring the award of attorneys' fees." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009). And even if a Court does decide to award fees, it must first determine reasonableness, as required by N.J. Rule of Professional Conduct 1.5(a).

The denial of counsel fees should be upheld. If it is not upheld, it then would have to be remanded to the trial court for further analysis.

CONCLUSION

The Decision of the trial court should be reversed on liability and upheld on the denial of counsel fees.

Respectfully,

WEINER LAW GROUP LLP

By: ________________________

Stephen J. Edelstein

Dated: August 7, 2025