Superior Court of New Jersey
Appellate Division
Docket No. A-002100-24

PARADIGM HEDGE, LLC, AND
PARADIGM DEVIATION, LLC,

PLAINTIFFS-APPELLANTS

V. CIVIL ACTION

MARY ANN FOLCHETTI, Individually
and as EXECUTRIX OF THE ESTATE
OF MARIE CERLIONE, MICHAEL
FOLCHETTI, ASHLEY L. FOLCHETTI
and JAMES FOLCHETTI,

DEFENDANTS-RESPONDENTS

On appeal from a final order
entered in the Superior Court
of New Jersey, Law Division,
Civil Part, Monmouth County
Docket No. MON-L-2934-18
Hon. Joseph W. Oxley, J.S.C.

BRIEF OF APPELLANTS

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BRIEF FILED ON JUNE 4, 2025

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Procedural History[1]

Plaintiffs sued defendants for breach of contract (count one), breach of the duty of good faith and fair dealing (count two), fraud in the inducement (count three), violation of the Consumer Fraud Act (count four), specific performance (count five), and secondary recourse (count six), arising from a contract for the purchase of defendants' real property. A1. Defendants denied plaintiffs' claims and filed a Counterclaim seeking payment of the remaining balance from plaintiffs. A22.

A bench trial was held before Joseph Oxley, J.S.C., in July 2021, following which the court entered a November 22, 2021 judgment dismissing plaintiffs' claims and granting judgment for defendants for the $200,000 remaining balance. A38.

Plaintiffs appealed; defendants cross-appealed. This Court denied the plaintiffs' appeal but remanded to the Law Division "for a statement of reasons on the issue of attorney's fees, in conformity with Rule 1:7-4." A37.

After remand, the defendants' counsel submitted a certification of services to support his fee application; the plaintiffs opposed this. A104, A132. Judge Oxley heard oral arguments on January 29 and then issued an oral decision that same day, awarding "Reasonable Attorney Fees in the amount of $62,090.05

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[1] References to transcripts are as follows:

1T 1/29/25 (argument and decision on attorney's fees)
2T 10/22/21 (underlying bench trial decision on merits)

together with costs of $9,156.92 for a total of $71,246.97" to the defendants. A150; 1T. Plaintiffs now appeal the trial court's attorney fees award. A151.

Statement of Facts

A. Plaintiffs' lawsuit in this case

The plaintiffs sued the defendants in this case for breach of contract and related causes of action stemming from their failure to pay the plaintiffs for the property's environmental remediation costs (appellants incorporate by reference the facts summarized in the Court's opinion in the prior appeal). A37. This lawsuit centered on a 2014 contract (later amended and supplemented) in which the plaintiffs agreed to purchase the defendants' 11-acre property for residential and retail development. While the defendants acknowledged certain environmental hazards on the property, the plaintiffs later discovered additional hazards that the defendants were aware of but did not disclose to the plaintiffs during the parties' negotiations or in their contract. After this was discovered, the parties agreed to proceed with the sale on condition that the plaintiffs would handle the necessary remediation and that the defendants would cover the remediation costs. A37.

Defendants denied the plaintiffs' claim that they had breached a contractual obligation and filed a counterclaim against the plaintiffs, asserting that they were owed the $200,000 balance remaining under the Mortgage Note that the parties had executed. A22.

Significantly, the plaintiffs never denied that they owed the defendants the remaining balance of $200,000 from the purchase price which, per the parties' closing agreement and amended note, was not due to be paid until the remediation was completed. Instead, the plaintiffs claimed that the defendants owed them the unpaid remediation costs, which exceeded the $200,000 they owed under the Note (the balance of the purchase price). A132. Due to these competing claims, neither party made any further payments to the other as the lawsuit progressed toward conclusion. A132.

At trial's conclusion, Judge Oxley denied the plaintiffs' claim that the defendants had breached the parties' contract or any obligation to pay for the remediation costs. As a result of this ruling, the defendants were not required to pay any additional amounts to the plaintiffs. Judge Oxley thus ruled, "defendants have proven that they are entitled to repayment of the mortgage in the amount of [$200,000], together with simple interest at the annual rate of four percent for March 20th, 2017"--a direct result of the judge's denial of the plaintiffs' breach of contract claim against the defendants. A132. As a result of this ruling, and per the trial court's order maintaining the status quo pending the plaintiffs' appeal to this Court, the plaintiffs deposited $228,712.33 into a New Jersey Superior Court Trust Fund interest-bearing account, which comprised the $200,000 balance owed to the defendants under the parties' Note plus the contractual interest that had accrued.

A88. Upon the conclusion of the plaintiffs' appeal, an additional sum of $20,448.89 in interest was added, for a total sum of $249,161.22 payable to the defendants under the Note. A132-49.

B. This Court's prior appeal decision

The trial court had denied the defendants' applications for attorney's fees after trial, stating," defendants have proven that they are entitled to repayment of the mortgage," and, "I am denying both of the applications for attorneys' fees," A37. This Court remanded for an explanation from the trial court as to why it did not award attorney's fees to the defendants, stating, "We agree with defendants that a limited remand is warranted for purposes of issuing a statement of reasons on the issue of attorney's fees, in conformity with Rule 1:7-4. Here, defendants brought a counterclaim seeking to collect the balance due on the note and to foreclosure on the mortgaged premise, plus attorney's fees. Pursuant to the terms of the mortgage, in the event of default, '[plaintiffs] must immediately pay the full amount of the unpaid principal, interest, other amounts due on the Note and this Mortgage and the [defendants'] cost of collection and reasonable attorney fees.'" A37-57.

C. The remand proceedings below

Defendants' counsel submitted a certification of services and arguments in support of his demand for $82,517.42 in attorney's fees and $9,802.73 in costs. A104.

In opposition, the plaintiffs argued that the defendants had no right to recover attorney's fees under the Mortgage Note. The Note was the only possible source of a right to recover fees as an exception to the presumptive American Rule. However, the Note only provided for attorney's fees incurred in "collection" efforts against the plaintiffs for their "default" under the Note. This litigation did not concern any claimed "default." The defendants did not sue the plaintiffs for "default" or initiate collection efforts against them. The trial court did not try a "default" claim by the defendants and never ruled that there was a default by the plaintiffs under the Note. A132. Rather, as noted above and as the plaintiffs stressed below, this litigation involved the plaintiffs' claim against the defendants that they had breached the parties' agreement by refusing to pay for the remediation costs. A132; 2T.

Indeed, the trial court specifically denied the defendants' motion for permission to pursue a foreclosure action against the plaintiffs based on any "default." After this case was filed, the defendants moved to dismiss the plaintiffs' Complaint and sought to proceed with a foreclosure action against the plaintiffs for default under the mortgage and note. On December 7, 2018, the trial court denied the motion and did not permit the defendants to proceed with a foreclosure claim. A61. The defendants did not appeal the trial court's decision in the prior appeal and did not pursue any foreclosure claim in the subsequent trial court litigation. A61.

In addition, as the plaintiffs emphasized below, the trial court did not rule on any of the three counts of the defendants' Counterclaims, which included their allegation that the plaintiffs had "defaulted" under the Note and Mortgage (2T). As noted, Judge Oxley ruled only that the plaintiffs had not proved their breach of contract claim against the defendants. As a result, Judge Oxley stated, "Plaintiffs concedes and defendants have proven that they are entitled to repayment of the mortgage in the amount of $20,000, together with simple interest at the annual rate of four percent for March 20th, 2017. And that is what I am going to order." 2T23. For these reasons, the plaintiffs argued that the defendants had no legal right to recover attorney's fees from the plaintiffs, and the American Rule thus applied. A132.

Furthermore, even if the defendants had a right to recover attorney's fees from the plaintiffs, they had not proven their entitlement to the substantial $82,517.42 in fees, plus $9,802.73 in costs that they demanded. The defendants had not demonstrated that any of these fees and costs were incurred in "collection" efforts against the plaintiffs for their "default."

None of the invoices presented by the defendants' counsel to Judge Oxley were contemporaneous legal fee invoices or proof of payments for any work related to collection efforts for a default claim. On the contrary, the invoices (list of charges) and other submissions from the defendants' counsel related to legal work opposing

the plaintiffs' breach of contract claim, not for "collection" efforts or proving a "default" under the Note and Mortgage—which was the only type of legal work from which the defendants had any potential right to recover fees and costs incurred. The plaintiffs emphasized that the defendants could not recover attorney's fees and expenses incurred in defending against the plaintiffs' breach of contract claim, as nothing in the parties' agreements granted this contractual right to the defendants (and thus the presumptive American Rule applied). A132.

In reviewing the submissions from the defendants' counsel, the plaintiffs emphasized that the invoices even covered unrelated legal matters. No entries indicated attorney work aimed at pursuing collection on a default claim. A158. These were not even contemporaneous invoices or proof of payments. The defendants' attorney created an invoice (No. 1115), dated September 24, 2024, addressed to Marie Cerlione (who passed away in July 2021, before the trial of this case), which included a spreadsheet of allegedly billed activities. (A146). The spreadsheet contained the following:

- 203 Entries dated from August 2018 to October 2021 (start of case to end of trial)
- 22 Entries dated from December 2021 to November 2023 (Appeal)
- 28 Entries dated from November 2023 to September 2024 (Post Appeal)

- 65 Entries dated from August 2018 to July 2024 (Expenses) [A132]

Opposing counsel's "Description" for many legal fees and expense entries on the spreadsheet includes items for matters unrelated to this case, such as a child support matter and closing fees and expenses for another property. A132. None of the entries detailed fees or expenses for tasks or work performed to pursue collection against the plaintiffs for default. The entries indicated attorney work in defending the plaintiffs' breach of contract claim. A132-49.

D. Judge Oxley's decision on the attorney's fee issue

Judge Oxley heard oral arguments on January 29, 2025. 1T. The plaintiffs reiterated that the attorneys' fee provision in the contract was not triggered because this lawsuit was not a collection effort by the defendants due to an alleged default. Even if attorneys' fees were recoverable, they would be recoverable only for fees and costs incurred in collection efforts related to a default under the parties' Note and Mortgage, not for fees and costs incurred in defending against the plaintiffs' breach of contract claim. 1T3, 11. "[T]he attorneys' fee provision would only be clicked in if there was actually a default, and our main position under that part of the case is that this litigation before the Court was about the plaintiffs' claim (Indiscernible) my clients claim about whether the defense breached a contract in terms of the agreement (Indiscernible) mediation issue." 1T4.

> It was never about a default. There was no finding of a default by the Court. There was no trial on the default, and, in fact, there was a point

> in the case which pointed out in our latest submission from November where I believe that the defendant moved to kind of amend their counterclaim essentially to alleged a foreclosure type default claim, and I believe the Court denied that. So, for all those reasons we would argue that the default provision of the part of the contract that provides for attorneys' fees was never even triggered. And my secondary argument really would be that even if there was a (Indiscernible) legally under the contract for attorneys' fees the only attorneys' fees that could be of worthy to the defendant would be those flowed from the attempt to recover the amount he wanted a Note, and that really is the language of the Note. When you look at it it talks about, you know, the Lender' s cause for collection. So, my argument would be as a secondary argument that even if the Court finds there's a right to attorneys' fees the fees can only be those that were incurred by collection of that amount. And if Your Honor looks at the actual trial litigation, which I know you're familiar with, the entire litigation was really about, did they breach the contract of the remediation parts of the case. It wasn't about that there was a default under the Note, terms of the amount. In fact, I don't think there was any point in the case where the defendants even said, you owe the $200, 000 which should be placed in escrow. You know that part was never really at issue. It was more of a question of what were the damages if, in fact, breach of contract. Once that claim was denied obviously the $200,000 was due. 1T4-5

Plaintiffs' counsel continued, "if you look at opposing counsel's certification it doesn't really sufficiently prove what were the reasonable amount of attorneys' fees that flowed out of any collection. There's really no contemporaneous invoices and there's really no proof of payment by the actual party showing that those fees were incurred. There also seems to be, and I don't know if this is kind of a separate issue, I'll (Indiscernible). It looked like from Mr. Granata's submission that there may also be a Court Rule that talks about fees in a mortgage foreclosure action which

we don't think this was that case anyway, but even if it was it seems to put a $7,500 cap on even that category." 1T6.

Despite that, Judge Oxley issued an oral decision and order awarding "Reasonable Attorney Fees in the amount of $62,090.05 together with costs of $9,156.92 for a total of $71,246.97" to the defendants. (A150). The court determined that the contract allowed for attorneys' fees in the event of a default and that the defendants were entitled to reasonable attorneys' fees and costs under that default provision. The court granted attorneys' fees from the filing of the plaintiff's Complaint until the conclusion of the trial, deducting only a few pre-litigation charges. The final award totaled $62,090.05 in attorney's fees and $9,156.92 in costs payable to the defendants. A150.

ARGUMENT

The trial court erred in awarding $71,246.97 in attorney's fees and costs to the defendants (A150).

A. The defendants have no legal right to recover attorney's fees and costs from the plaintiffs because this case was a breach of contract claim that the plaintiffs brought against the defendants, not a "collection" action the defendants initiated against the plaintiffs based on an alleged "default" under the Note and Mortgage between the parties.

The American Rule states that each party is responsible for its own fees and costs. Our Supreme Court has characterized the policies supporting the American Rule as "strong." N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., a Div. of Keller Sys., 158 N.J. 561, 569 (1999); In re Estate of Vayda, 184 N.J. 115, 123 (2005). New

Jersey courts only deviate from this rule when there is "express authorization by statute, court rule or contract," State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983), or when equity demands it, Red Devil Tools v. Tip Top Brush Co., 50 N.J. 563, 575–76 (1967).

In this case, the defendants claim that the Note and Mortgage between the parties provide an exception to the presumptive American Rule. The provision on which the defendants rely provides the following: "Default. If Borrower fails to make any payment required by this Note within thirty days after the due date the Lender may declare Borrower in default on the Mortgage and this Note. Upon default, Borrower must immediately pay the full amount of all unpaid principal and any other amounts due on the Mortgage and this Note, the Lender's costs of collection and reasonable attorney fee." A156.

That provision does not apply because the defendants did not "declare" the plaintiffs "in default on the Mortgage and this Note." No issue of "default" was litigated in this case, and the trial court never determined that the plaintiffs were in default. A156. Moreover, the defendants collected the interest earned on the $200,000 principal.

This was not a collection case brought by the defendants but a breach of contract case brought by the plaintiffs. As outlined in the Statement of Facts above (incorporated by reference), the defendants did not sue the plaintiffs for "default" or

initiate "collection" against them. The trial court did not adjudicate a "default" claim made by the defendants and never ruled that there was a "default" by the plaintiffs under the Note and Mortgage. A132. A132; 2T.

The court specifically denied the defendants' motion for permission to pursue a foreclosure action against the plaintiffs based on any "default." A61. The court did not rule on any of the three counts of the defendants' Counterclaims, which included their allegation that the plaintiffs had "defaulted" under the Note and Mortgage (2T). Judge Oxley ruled only that the plaintiffs had not proven their breach of contract claim against the defendants and, as a result, "defendants have proven that they are entitled to repayment of the mortgage" (2T).

Moreover, as noted above, the plaintiffs never denied owing the unpaid $200,000 of the property's purchase price. Instead, they argued that the defendants had a contractual duty to pay for the remediation of the property first, and this obligation was significantly greater than the $200,000.00 the plaintiffs owed the defendants under the note. Moreover, both the Closing Agreement and the Amended Mortgage Note made the repayment of the Note contingent on the defendant's payment to the plaintiff of the remediation costs incurred. Previously, the plaintiffs had advanced $20,000.00 to the defendants when they paid $300,000.00 toward the principal of that note at the defendants' request, anticipating future interest if the remediation costs ultimately did not exceed the remaining

$200,000.00 of the purchase price. The defendants never requested or demanded that the plaintiffs deposit $200,000, the balance of the purchase price, either to be held until the remediation work was completed or otherwise.

Plaintiffs had the right to seek a court ruling on their claim that the defendants breached their obligation to pay for the remediation costs. Their failure to succeed on their claim does not make them liable for the attorney's fees and costs that the defendants incurred in opposing the claim. The parties' Note and Mortgage do not grant such rights to either party (the defendants cited R. 4:42-9(a)(4) as another ground for recovery of fees, but that Rule applies only in "an action for the foreclosure of a mortgage," which this case was not; as noted above, the trial court specifically denied the defendants a right to pursue such a claim).

B. The defendants' only right to fees and costs under the Note and Mortgage is recovery of "costs of collection and reasonable attorney's fees" based on a declaration of "default" against the plaintiff buyers.

The Defendants have no legal right to recover fees and costs incurred for work other than that. Yet, the trial court essentially awarded the defendants their attorney's fees and costs incurred in this entire lawsuit, all or certainly nearly all of which were for opposing the plaintiffs' breach of contract claim, not for "collection" efforts based on any claim of "default" by the plaintiffs.

The party claiming the right to recover fees and costs must demonstrate that the fees and costs demanded are causally related to securing the relief for which

the contract allows recovery—here, the "costs of collection" based on a "declaration of default" against the plaintiffs. The fees awarded must be based on a record showing that the party's efforts, for which it seeks recovery of the fees, were a necessary and important factor in obtaining the relief, and the fees must be reasonable for the work that was required, Kellam Associates, Inc. v. Angel Projects, LLC, 357 N.J. Super. 132 (App. Div. 2003); Gruber & Colabella, P.A. v. Erickson, 345 N.J. Super. 248 (Law. Div. 2001) (noting fee provision must be rooted in actual collection costs incurred); Hrycak v. Kiernan, 367 N.J. Super. 237 (App. Div. 2004) (fees must be reasonable and directly related to the collection effort); Mayer v. Mayer, 180 N.J. Super. 164 (App. Div. 1981).

The submissions from the defendants' counsel did not demonstrate that they incurred any fees or costs for "collection" efforts based on a "declaration of default" against the plaintiff buyers under the Note and Mortgage. As noted above, none of the invoices presented by the defendants' counsel to Judge Oxley were contemporaneous legal fee invoices or proof of payments for any work related to collection efforts on a declaration of default claim. On the contrary, the invoices and other submissions from the defendants' counsel pertained to legal work opposing the plaintiffs' breach of contract claim, which the contractual provision does not cover. A132. No entries indicate attorney work for pursuing collection on a default declaration A158.

These are not even contemporaneous invoices. The defendants' attorney created an invoice (No. 1115), dated September 24, 2024, addressed to Marie Cerlione (who passed away in July 2021, before the trial of this case), which included a spreadsheet of allegedly billed activities. (A146). The spreadsheet contained the following:

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- 28 Entries dated from November 2023 to September 2024 (Post Appeal)
- 65 Entries dated from August 2018 to July 2024 (Expenses) [A132]

The "Description" for many entries on the spreadsheet includes matters unrelated to this case (such as a child support matter, closing fees, and expenses for another property). A132. None of the entries show fees or expenses for tasks or work performed for collection efforts based on a declaration of default. A132-49.

The defendant's submission also lacks proof of payment for any claimed collection work. Plaintiffs requested, and the Defendants failed to produce, contemporaneous legal fees invoices and payments made towards the invoices. The defendants' inability or refusal to produce evidence of their alleged payments for

legal fees in pursuing collection for an alleged default is fatal to their claim for fees and costs under the narrow "default" provision in the parties' agreement.

The defendants' submissions confirm that the fees and costs incurred were related to defending against the plaintiffs' breach of contract claim, rather than any collection effort. A132-49. This rationale is logical because this lawsuit solely concerned whether the plaintiffs proved their breach of contract claim against the defendants for failing to pay the remediation costs. Indeed, as noted above, the plaintiffs never denied that they owed the defendants the remaining $200,000 balance of the purchase price. Rather, the plaintiffs asserted that the defendants owed the plaintiffs the remediation costs they'd failed to pay, and this amount the defendants owed was greater than the $200,000 the plaintiffs owed under the Note (the balance of the purchase price). A132. At trial's conclusion, Judge Oxley denied the plaintiffs' claim and ruled that the defendants did not owe any breach of contract damages. This resulted in Judge Oxley stating, "defendants have proven that they are entitled to repayment of the mortgage in the amount of [$200,000], together with simple interest at the annual rate of four percent for March 20th, 2017"--a direct result of the judge's denial of the plaintiffs' breach of contract claim against the defendants. A132. The plaintiffs then deposited $228,712.33 into a New Jersey Superior Court Trust Fund interest-bearing account, which was comprised of the $200,000 balance owed to the defendants under the Note plus contractual interest

that had accrued. A88. Upon the conclusion of the plaintiffs' appeal, an additional sum of $20,448.89 in interest was added, for a total sum of $249,161.22 payable to the defendants under the Note. A132-49.

Since the defendants failed to show that they incurred any fees for the "costs of collection" based on a "declaration of default" by the plaintiffs, the Court should vacate the entire award entered by the trial court.

The Court should at least significantly reduce the award because the $62,090.05 in fees and $9,156.92 in costs that the trial court awarded improperly allowed the defendants to recover fees and costs incurred in defending the plaintiffs' breach of contract claim, which the parties' contract does not permit. The trial court erred by failing to strictly limit the defendants to recovering the fees and costs they incurred in "collection" against the plaintiffs for their alleged "default" under the Note and Mortgage. A150; 1T. The excessive award by the trial court reflects nearly the entire amount of fees and costs that the defendants claimed, without sufficient proof, they incurred in the litigation, which exceeds the contractual right to fees provided by the parties' Note and Mortgage.

The record shows that some part of the legal fees and costs incurred were premised on the claimed "frivolous nature" of the plaintiff's complaint. Defendants' counsel stated to Judge Oxley, "We asked for counsel fees because of the frivolous nature of the Complaint and also under the Mortgage provision." 1T9:1-20. Counsel

stated, "So, the Appellate Division was aware as the Court is aware and as counsel unfortunately is not aware because it was not part of that litigation that the application is for reasonable attorneys' fees under the contract, frivolous litigation, and also for the Mortgage foreclosure." 1T9:15-25. There were no fees permitted for frivolous litigation because no court – neither this Court nor Judge Oxley, found that the plaintiff's Complaint or this litigation was frivolous in any way; Judge Oxley specifically did not find this in the remand below (1T20).

In addition to the absence of any adjudicated default or foreclosure proceedings on the Note and Mortgage, the Defendants waived any right or claim they might have had to reasonable legal fees and expenses for collection by refusing to produce, before Judge Oxley on the remand below, contemporaneous invoices and receipts for any claimed fees and expenses, as well as proof of payments, which the plaintiffs requested and were required to demonstrate the defendants' claimed right to recover the fees and expenses. And the submission the defendants' counsel did ultimately make failed to prove that any legal fees and expenses were incurred for a collection action based on an alleged default on the Note and Mortgage.

All this demonstrates that the Court should reduce the award to just the reasonable attorney's fees and costs incurred by the defendants in their collection efforts against the plaintiffs, premised on sufficient evidence so demonstrating,

deducting any fees and costs the defendants incurred for opposing the plaintiffs' breach of contract claim.

Conclusion

The defendants were required to prove their legal right to any fees and costs claimed to have been incurred in collection efforts against the plaintiffs due to an alleged "default" under the parties' Note and Mortgage. However, the defendants did not prove this because their submissions to the trial court did not demonstrate that they incurred fees or costs for any such collection efforts. All entries and descriptions of legal work on the spreadsheet submitted by the defendants' counsel indicate that the work performed was to defend against the plaintiffs' breach of contract claim, not in pursuit of a "collection" action based on the alleged "default" by the plaintiffs under the parties' Note and Mortgage. Because the defendants failed to establish a contractual right to recover fees and costs, the presumptive American Rule applies. At the very least, the trial court erred in awarding the defendants fees and costs for defending the plaintiffs' claim, rather than limiting the award to only those fees and costs incurred in pursuit of collection for an alleged default, as the contractual provision allows. The court erred by awarding the defendants fees and costs that far exceeded reasonable fees and costs for pursuing any collection action, effectively granting fees and costs to the defendants for work performed in defending

the plaintiffs' breach of contract claim, of which nothing in the parties' agreements allows.

For all these reasons, the Court should vacate the trial court's order from February 3, 2025, or, at the very least, remand with directions that the trial court limit the attorney fee award to only those fees or costs incurred directly by the defendants in "collection" efforts against the plaintiffs for their declared default.

Respectfully submitted,

/s/ Michael Confusione
Hegge & Confusione, LLC
Counsel for Appellants

Dated: June 4, 2025

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August 1, 2025

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Re: **Superior Court of New Jersey, Appellate Division**
Docket No. A-002100-24

PARADIGM HEDGE, LLC and PARADIGM DEVIATION, LLC
Plaintiff-Appellants

v.

MARIE CERLIONE, MARY ANN FOLCHETTI, MICHAEL J. FOLCHETTE, ASHLEY FOLCHETTI and JAMES FOLCHETTI
Defendant-Respondents

On appeal from a final order entered in the
Superior Court of New Jersey, Law Division,
Civil Part, Monmouth County
Docket # MON-L-2934-18
Hon. Joseph W. Oxley

Dear Mr. Orlando;

Please accept this Letter Brief (Rule 2:6-2b) in lieu of a more formal brief on behalf of the Defendant-Respondents in opposition to the Plaintiff-Appellants Brief dated June 4, 2025, amended June 17, 2025.

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Preliminary Statement:

The Appellant/Plaintiffs ("Plaintiffs") purchased an eleven-acre farm from Appellee/Defendants ("Defendants") for $1,600,000.00. $500,000.00 of the purchase price was paid by a Mortgage Note (A156), providing for a Default:

> "**Default.** If the Borrower fails to make any payment required by this Note within (30) thirty days after the due date, the Lender may declare Borrower in Default on the Mortgage and this Note. Upon fault, Borrower must immediately pay the full amount of all unpaid principal and any other amounts due on the Mortgage and this Note, the Lender's costs of collection and reasonable attorney fees. Lender does not give up his

> rights to declare a default due to any previous delay or *failure to declare a default.*" (Emphasis added)

Before the mortgage was due, the parties agreed to a payment of $300,000.00 and signed an Amendment to Mortgage Note (A100) requiring payment "within thirty (30) days of the completion of the Remediation Work at the Property or March 21, 2018, whichever is sooner."

Plaintiffs did not remediate or make the payment due on March 21, 2018. On July 25, 2018, Plaintiffs were notified of the Default and told if not paid within thirty days, Defendants would "proceed to enforce [their] rights under the Note and Mortgage, and seek attorney fees and costs." (Da 1)

Prior to expiration of thirty days, Plaintiffs filed their twenty-one-page Complaint, alleging Breach of Contract, Duty of Good Faith and Fair Dealing, Fraud in the Inducement, Violation of the Consumer Fraud Act, and Specific Performance. A1.

Before filing a responsive pleading, Defendants requested copies of the documents referred to in the Complaint, pursuant to Rule 4:18-2. (Da 2). Plaintiffs' attorney responded on August 24, 2028 enclosing, among other things, a copy of the Amendment to Mortgage Note. (Da 3)

Defendants filed their Answer and Two Count Counterclaim (A22) seeking payment of the balance due, together with attorney fees and costs and served a Notice of Frivolous Claim pursuant to Rule 1:4-8 (Da 4)

Plaintiffs denied they owed the balance on the note, and sought dismissal of the claim. A32-33. They also denied they were in default of the Note and Mortgage. A33

At the conclusion of a three-day Bench Trial, Plaintiffs rested and Stipulated the Mortgage Note was not paid when due. (Trial 7/22/21 T46:10-15). Judgment for the Defendants was entered for the balance of the Mortgage Note, plus interest, and the Court denied Defendants' counsel fees.

Plaintiffs appealed, Defendants cross-appealed. The Judgment was affirmed and the matter remanded to the Trial Court for a "statement of reasons on the issue of attorney's fees, in conformity with Rule 1:7-4." A37.

After remand, the Trial Judge issued an oral decision (1T) and awarded Defendants attorney fees of $62,090.05 together with costs of $9,156.92. A151.

Plaintiffs file this Appeal from the award and argue Defendants have no legal right to recover attorney fees and costs "because this was a breach of contract claim" not a "collection action;" and there was no "Default." (Pb10). They do not argue the fees are unreasonable or unnecessary.

ARGUMENT

The Plaintiffs were declared in Default under the terms of the Mortgage and Note on July 18, 2018, and Defendants proved, at the Trial they were in default and owed the balance of the Mortgage Note

On November 28, 2023, Appellants filed a letter memorandum with the Trial Court to support their opposition to an award of attorney fees (A58) arguing they "did not have a claim against Defendant's Note, and did not deny that they owed the remaining $200,000.00 of the purchase price of the Property." A58. They alleged the "litigation was about Plaintiff's charge that the Defendants' breached the parties' contract by *refusing to pay for the remediation costs of the property.* A59, (emphasis added).

Defendants demonstrated to the Trial Court, there was no indication in the record, they "refused to pay for the remediation costs." A81-82. The Trial Court

held, and this Court affirmed the Defendants paid for the remediation, but Plaintiffs' delay in the responsibility to remediate exacerbated the condition. (A37, @15).

As to the claim Plaintiffs "did not deny that they owe the remaining $200,000.00," they denied the claim in answer to the Counterclaim A32. Not only did they deny owing the balance, they claimed they never signed the Amended Note during the trial, a denial they abandoned when filing the original Appeal.

Plaintiffs' Counsel conceded in his oral argument on Remand, the attorney fee provision of the Mortgage Note "would only click in if there was actually a default." He went on to argue the litigation was not about "default" under the note and mortgage, but rather a "claim about whether the (Defendants) breached a contract." (T4:5-11). The trial "was never about a default. There was no finding of a default by the Court. There was no trial on default." (T4:12-14). Therefore, he argues the "default provision of the contract was never triggered. T4:21-22

This argument fails because the Plaintiffs were on notice of Default on July 25, 2018 and if the balance was not paid within thirty (30) days, the Defendants would seek recovery under the Mortgage and Note for their Default. (Da 1). Before the 30 days lapsed, Plaintiffs filed their Complaint.

On Remand, Plaintiffs submitted a letter to Court Dated November 28, 2023 claiming the litigation was not about default and therefore attorney fees should not be considered. (A58). Defendants addressed each argument, point by point in their response to the Court. (A80-86).

Plaintiffs denied Defendants' allegations in the Counterclaim and specifically denied the existence of the Amended Mortgage (A32, ¶5) and continued denial throughout the discovery period and trial. Finally conceding the validity of the Amended Note when filing the Appeal.

Plaintiffs' litigation Counsel, Mark T. Zawisny, Esq. was placed on Notice of the Frivolous claims and defenses (Da 4), and for next three years proceeded with extensive discovery, frivolous pleadings and motions (A106-119) denying the authenticity of the Amended Mortgage Note.

Plaintiffs then designated John North, of Greenbaum, Rowe, Smith and Davis, LLP as Trial Counsel A119. The Trial Court held, and this Court affirmed the dismissal of the Plaintiffs' complaint and affirmed the Judgment for Defendants, based on the Stipulation by Plaintiffs, acknowledging they did not pay the Mortgage Note when it became due.

Defendants argued the Frivolous issue at the Remand Hearing and Judge Oxley addressed it as follows:

> "I am not going to go into the question of whether or not the litigation was frivolous. I agree with counsel that was not something that we spent time on.
>
> I, so, that in terms of the trial, the litigation and Motions and things that led up to that as is said I couldn't ask for more professional presentations. It was professional throughout the trial was orderly. The trial counsel were cordial with one another. I think we made a good record, and I think, throughout counsel were arguing points that they thought were valid. They were forceful with those arguments and I did not see anything that would lead me to conclude that they were frivolous in nature.
>
> There's no question that counsel gets hired and sometimes *they have clients that are asking for things that may—may not be as reasonable as counsel would want them to be,* but through the representation and that's what I believe had happened in this case. To that representation, counsel were arguing on behalf of their clients. (Emphasis added)
>
> There's no question in my mind that this was a valid contract. I made that finding. There's no question that there was no fraud on the defendants' behalf with regards to that contract and the modification as I put in my original decision.

> So, I'm satisfied at this point I'm not going to go into the allegations that this was frivolous.
>
> I think the findings from the Appellate Division and the direction that they gave me was to take a look at those counsel fees and I have done that, and I'm comfortable awarding the amount that I've placed on this record deducting things that were previous to the filing of the Complaint and I'm only awarding them up to and through the conclusion of our trial and our litigation." T20:19-22:3.

In the Defendants' brief to the Plaintiffs original appeal, they argued *Litton Industries, Inc. v. IMO Industries*, 200 *N.J.* 372 (2009), holding that an award of fees is to be based on a contractual agreement. The contractual agreement, here, is the mortgage prepared by Plaintiffs' attorney providing, "Borrower must immediately pay the full amount of the unpaid principal, interest and other amounts due on the Note and this Mortgage and the Lender's costs of collection and reasonable attorney fees."

Conclusion:

Plaintiffs signed a Mortgage and Note prepared by their attorney, agreeing to pay "the costs of collection and reasonable attorney fees" if they did not pay the balance within (30) thirty days after the due date. A156. Plaintiffs were on notice of their Default on July 25, 2018. Defendants are entitled to payment of the "reasonable attorney fees" found to be due by Judge Oxley on the Remand hearing.

Respectfully submitted,

Louis E. Granata, Esq.

cc: Attorney
Clients

Superior Court of New Jersey
Appellate Division
Docket No. A-002100-24

PARADIGM HEDGE, LLC AND
PARADIGM DEVIATION, LLC,

PLAINTIFFS-APPELLANTS

V. CIVIL ACTION

MARIE CERLIONE, MARY ANN
FOLCHETTI, MICHAEL J.
FOLCHETTI, ASHLEY L.
FOLCHETTI AND JAMES FOLCHETTI,

DEFENDANTS-RESPONDENTS

On appeal from a final order
entered in the Superior Court
of New Jersey, Law Division,
Civil Part, Monmouth County
Docket No. MON-L-2934-18
Hon. Joseph W. Oxley, J.S.C.

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BRIEF FILED ON AUGUST 14, 2025

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ARGUMENT

The trial court erred in awarding $71,246.97 in attorney's fees and costs to the defendants (A150).

The provision in question provides, "Default. **If Borrower fails to make any payment required by this Note within thirty days after the due date** the Lender may declare Borrower in default on the Mortgage and this Note. **Upon default**, Borrower must immediately pay the full amount of all unpaid principal and any other amounts due on the Mortgage and this Note, the Lender's **costs of collection** and reasonable attorney fee." A156 (emphasis added). Respondents' claim that this clause supports the trial judge's award to them of more than $70,000 in attorney's fees fails for several reasons. Most fundamentally, this was not a "collection" action, and the trial court never ruled that the plaintiffs had "failed to make" this $200,000 payment "within thirty days after the due date" and thus "defaulted" within the meaning of this provision allowing recovery of attorney's fees.

This was not a collection action. To the contrary, the plaintiffs filed this lawsuit against the defendants. They argued that the defendants breached their contractual obligations by failing to pay the plaintiff for the remediation costs.

The trial court never determined whether the plaintiffs "defaulted" under the Amended Mortgage Note. Neither of the two judges assigned to this case—Judge Perry or Judge Oxley—ruled that the plaintiff was in "default." In fact, the court denied the defendants' motion for permission to pursue a foreclosure action against

the plaintiffs based on default. After the plaintiffs filed this lawsuit, the defendants moved to dismiss the plaintiffs' complaint and sought to proceed with a foreclosure against the plaintiffs for default under the Amended Mortgage Note. On December 7, 2018, the trial court denied the defendants' motion. A61. The defendants did not appeal the decision in the previous appeal this Court heard and did not pursue any such claim of default. A61.

Whether the plaintiffs had "failed to make" the $200,000 payment "within thirty days after the due date" and thus "defaulted" was a contested issue. The defendants claimed that the final $200,000 of the purchase price was due in 2018; the plaintiffs said it was not due until the remediation was complete, which had not occurred.

The trial court did not decide that contested issue, partly because resolving it depended on which version of the Amended Mortgage Note was credited. In claiming that the payment was due in 2018, the defendants (the sellers) relied on a handwritten note in the otherwise typed agreement stating that Paradigm "agreed to pay the balance of $200,000.00 'within thirty (30) days of the completion of the Remediation work at the property or **by March 21, 2018, whichever is sooner**'" (handwritten note emphasized). The plaintiffs consistently stated they never agreed to that handwritten part; it was not present when they signed the agreement and was added afterwards by the defendants' counsel without their knowledge or consent.

The plaintiffs affirmed that they agreed to a provision stating that the $200,000 was due "within thirty (30) days of the completion of the Remediation work at the property." The trial court never determined which version of the Amended Mortgage Note reflected the actual agreement.

Nor did the plaintiffs admit they had "defaulted," contrary to the Respondents' statement on page 4 of their Brief ("At the conclusion of a three-day Bench Trial, Plaintiffs rested and Stipulated the Mortgage Note was not paid when due. (Trial 7/22/21 T46:10-15)." The plaintiffs only acknowledged that they had not paid the final $200,000 of the purchase price to the defendants, but this was not a "default" – the plaintiffs argued that the $200,000 was due "within thirty (30) days of the completion of the Remediation Work at the Property," which had not yet happened. A132. The plaintiffs did not admit to breaching the parties' contract.

Yes, Judge Oxley ruled that the plaintiffs should pay the defendants the remaining $200,000 of the purchase price, but this was not a ruling that the plaintiffs had "defaulted" or breached the parties' contract. This decision was based on Judge Oxley's denial of the plaintiffs' breach of contract claim and his ruling that the parties' agreement did not require the defendants to pay the plaintiff for the costs of remediation. The outcome of the trial court's decision was that the defendants owed no money to the plaintiffs; the only amount still due was the final $200,000 of the purchase price. Judge Oxley thus stated, "defendants have proven that they are

entitled to repayment of the mortgage in the amount of [$200,000], together with simple interest at the annual rate of four percent for March 20th, 2017." A132. This is not a ruling that the plaintiffs "failed to make" the $200,000 payment "within thirty days after the due date," breaching the contract, or "defaulted" as defined by the Amended Mortgage Note and the provision allowing recovery of attorney's fees.

Respondents rely on their own attorney's "declaration" of default in his July 18, 2018, letter to the plaintiffs, see Da1 ("The Plaintiffs were declared in Default under the terms of the Mortgage and Note on July 18, 2018"). This is simply a letter from one party's lawyer to the other claiming a breach of contract, which in this case was a litigated issue that the court never definitively resolved. One party cannot merely "declare" default, i.e., breach, when the other party contests it, Jones v. Gabrielan, 52 N.J. Super. 563 (1958) (the defendants denied that a default had occurred under the contract, which required judicial intervention to resolve the dispute); Kaur v. Assured Lending Corp., 405 N.J. Super. 468 (2009) (the court criticized the entry of default without proper legal analysis, emphasizing the need for judicial scrutiny to establish default).

Nothing in the language of the parties' agreement indicates that the parties intended to provide for over $70,000 in attorney's fees to the defendants for supposedly 'collecting' the remaining $200,000 of a multi-million dollar real estate sale. As emphasized above, the sellers (defendants) did not initiate a "collection"

action or perform "collection efforts" other than the July 18, 2018 letter from their counsel claiming the payment was overdue. The rest of the legal work and expenses incurred by the sellers were for defending against the breach of contract claim brought by the plaintiffs. The parties' agreement does not include any provision for awarding attorney's fees to the defendants for opposing the plaintiffs' claim.

That conclusion is further supported by the fact that the defendants have been paid the full amount they would have received if the plaintiffs had paid the final $200,000 of the purchase price in 2018, when the defendants claimed it was due. The plaintiffs never denied that the $200,000 was owed under the parties' sale agreement; they merely argued it was not yet due. Once Judge Oxley issued his ruling denying the plaintiff's breach of contract claim, the plaintiffs filed their appeal with this Court and deposited $228,712.33 into a New Jersey Superior Court Trust Fund interest-bearing account. This amount included the $200,000 balance owed to the defendants plus the contractual interest accrued to that point. A88. After this Court denied the plaintiffs' appeal, they deposited an additional $20,448.89 in interest, bringing the total to $249,161.22 payable to the defendants. This placed the defendants in the same financial position as if they had received the $200,000 in 2018 when the defendants claimed it was due. A132-49.

The defendants did not suffer any loss, specifically regarding the $200,000 balance of the final purchase price. The only expense they incurred was the

attorneys' fees they incurred in defending against the breach of contract claim brought by the plaintiffs, which had nothing to do with whether the plaintiffs had "defaulted" under the Amended Mortgage Note, which the Court anyway ruled that Plaintiffs did not default. The parties' agreement does not allow an award of attorney's fees to the defendant for defending against the plaintiff's claim that was unrelated to any "collection efforts" by the defendants, where none occurred.

Finally, Respondent's statement that Appellant does "not argue the fees are unreasonable or unnecessary" is incorrect. Appellant's Brief argues extensively that the amount of legal fees awarded is clearly unreasonable, even assuming, arguendo, that the defendants have a legal right under the "default" "collection" provision to recover them (which they do not, as appellants argue here).

Conclusion

The Court should vacate the trial court's order from February 3, 2025, or, at the very least, remand with directions that the trial court limit the attorney fee award to only those fees or costs incurred directly by the defendants in "collection" efforts against the plaintiffs for their declared default.

Respectfully submitted,

/s/ Michael Confusione
Counsel for Appellants

Dated: August 14, 2025