Superior Court of New Jersey

Appellate Division

Docket No. A-002461-23T1

ZHONGHAI REALTY, LLC,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
Plaintiff-Appellant,	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	HUDSON COUNTY
	:	
GALAXY TOWERS CONDOMINIUM ASSN,	:	DOCKET NO. HUD-L-002352-22
	:	
	:	Sat Below:
	:	
Defendant-Respondent.	:	HON. KIMBERLY ESPINALES-MALONEY, J.S.C.
	:	

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Defendant, Galaxy Towers Condominium Association is a condominium consisting of three towers and a mall. The by laws and an amendment to the master deed control the right and responsibilities of the parties.

Per the by laws the unit owners pay a monthly maintenance fee to Defendant which pays for, among other things, maintenance of the common areas including the exterior of the buildings and provides insurance which specifically includes coverage against water damage**.**

A storm in 2014 caused significant flooding which was repaired.

On August 29, 2021 hurricane Ida made landfall in Louisiana as a category 4 storm. She slowly made her way up the East Coast leaving a wake of destruction that was front page news on a daily basis. On September 1, 2021 the Governor declared a state of emergency for the entire state. Ida reached the New York metropolitan area the following day. Wendy gave notice of the damage to Defendant including some photos on the day of the storm.

Brendon Bare, then assistant manager (now manager) promised that they would pay to repair the damage but were unable to pay for damage to inventory. Some time afterwards Defendant supplied photos of the damage and repairs that were underway.

Plaintiff provided Defendant with repair invoices based upon Mr. Bare's

promise to pay. At that point Mr. Bare informed Plaintiff that they would not be paying.

Both management and unit owners were on site when Ida hit. Management begged Plaintiff to assist in getting workers to remove the water and repair the damage as expediently as possible as it was difficult to hire workers as there was a huge demand dealing with the aftermath.

While Defendant made repairs in the aftermath of the 2014 storm there were no observable improvements made to the property to prevent a reoccurrence.

In the aftermath of Ida Defendant apparently recognized that if they did not take some action this cycle was likely to repeat in the future and so Defendant installed a gate at the top of the stairs leading to a courtyard that had flooded both times as water cascaded down the stairs and accumulated at a double glass door, waist high (as the air conditioning compressors adjacent to the doors were under water). Now, when the gate is closed any accumulation of water instead of flowing down the stairs would instead flow through newly created rectangular holes in what had previously been a solid wall and would fall to the cliffs below. A relatively small amount of water would penetrate around the edges of the gate and flow through a drain.

This should and most certainly could have been done previously. No

different than a landlord repairing a broken banister after the tenant fell on the stairs or closing the barn door after the horses got out.

Per the By Laws Plaintiff did not have the authority to install sandbags or take any other measures affecting the exterior of the building which is the sole purview of the Defendant. As such management should pay for her damages as they have chosen to do with every other unit owner who was impacted by Ida.

PROCEDURAL HISTORY[1]

A complaint was filed on July 19, 2022 as a result of Defendant's refusal to honor it's promise to reimburse plaintiff the cost of repairs in the aftermath of hurricane Ida on September 1, 2021 and Hon. Kimberly Espinales- Maloney was assigned to the matter. (Pa22)

On October 21, 2022 Defendant filed an answer, counterclaim jury demand and a discovery demand (Pa25) which was corrected on November 1 to a motion to dismiss w prejudice for failure to state a claim (Pa40) which Plaintiff opposed (Pa46) on December 1, 2022. Oral arguments were held on December 6, 2022 and the complaint was dismissed without prejudice. (Pa49) On February 13, 2023 (Pa51) Defendant filed a motion to dismiss with

prejudice (Pa54) and on February 22, 2023 Plaintiff filed a cross motion to reinstate case and included an amended complaint. Pa 56, 58) On February 27, 2023 Defendant filed opposition to reinstatement. On February 28, 2023 the clerk gave notice to dismiss due to a discovery delinquency. On March 27, 2023 the court issued an Order denying the motion to dismiss due to a discovery delinquency (Pa67) and an Order to reinstate the case.(Pa69)

On April 18, 2023 Hon. Joseph A Turula appointing Edward R. Matthews to mediate and the following day a mediation notice was filed.

On May 17, 2023 Defendant filed a motion to dismiss with prejudice for discovery delinquency and a second motion to compel discovery both returnable June 9, 2023. Discovery was sent in the form of a thumb drive via Fedex and on December 7, 2027 Defendant requested an adjournment request for one cycle to await the Fed Ex from Plaintiff which was denied

On June 9 and the court issued an Order dismissing complaint with prejudice (Pa70)

On June 12, 2023 the court issued a discovery end date reminder for August 17, 2023. On June 28, 2023 Plaintiff filed a motion to reinstate case

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[1] 1T refers to Transcript of Motion, dated December 6, 2022; 2T refers to Transcript of Motion, dated June 9, 2023; 3T refers to Transcript of Motion, dated July 24, 2023; 4T refers to Transcript of Motion, dated March 1, 2024.

and on July 12, 2023 Defendant filed opposition. On July 21, 2023 Plaintiff requested an adjournment to August 1st which was denied and on July 24, 2023 the court entered an Order denying reinstatement. (Pa88)

On February 14, 2024 Mario Blanche, Esq. filed a motion to reinstate case (Pa89) and Defendant responded in opposition on February 22, 2024 resulting in the court issuing an Order on March 1, 2024 denying the motion to vacate the dismissal with prejudice from which Plaintiff filed this appeal. (Pa1)

STATEMENT OF FACTS

On March 1, 2024 Plaintiff moved to vacate the Order of June 9, 2023 which was a dismissal with prejudice. (4T p. 4 lines 18-20)

In November 2022 Defendant filed a motion to dismiss with prejudice for failure to state a claim which was opposed (4T p.5 lines 3-5)

The Order noted that Plaintiff's counsel did allege possible allegations but the complaint it self was void and it was dismissed without prejudice and no specific date to refile was listed (error in transcript as it was dismissed without prejudice) Plaintiff did not amend. (4T p. lines 6-12)

On February 13, 2023 Defendant moved to dismiss with prejudice, the 60 days having run (4T p. 5 lines 13-17)

Plaintiff opposed the motion and included an amended complaint. (4T p. 5 lines 18-20)

Defendant took the position that the amended complaint was insufficient as written and the court gave Plaintiff 10 days in which to revise (4T p. 5 lines 21-24)

Defendant then filed again to dismiss with prejudice as Plaintiff did not file another revision and did not file opposition (4T p. 5 lines25 - p. 6 lines 1-2

A discussion took place on the record in which I was waiting for Plaintiff to contact me. (4T p.6 lines 2-7)

The Court dismissed the complaint with prejudice (4T. p.6 line 8)

A new motion was filed by Plaintiff to restore which the court denied without prejudice stating it would have to be a motion to vacate the prior Order (4T p. 6 lines- 9-15)

At this point Plaintiff retained the services of Mario Blanche, Esq. who reviewed the file and on February 14, 2024 filed a motion to 1) vacate the dismissal with prejudice; 2) permitting an amended complaint to be filed; 3) permit the Defendant 10 days in which to respond to the amended complaint; 4) schedule a case management conference.

In terms of communicating with Ms. Wang and access to ecourts, Ms. Steiner who argued the motion for Mr. Blanche, states that Ms. Wang

understands English but her accent makes it difficult to understand her and she was in China (I believe for 5 months) (4T p.8 lines 8-25)

On February 22, 2024 Defendant filed opposition and the court scheduled a hearing for March 1, 2024 in which Plaintiff's motion was denied which is the subject of this appeal.

Defendant argues that there was no substitution or notice of appearance filed by Mr. Blanche which explains why Mr. Blanche did not receive notice through eCourts (4T p. 13 lines 13-20)

Additionally, the court noted no brief was filed pursuant to R. 4:50 (4T p. 14 lines 5-12)

Ms. Steiner argues that since the case was closed such was not necessary. (4T p. 15 lines 1-3)

Notwithstanding not filing either a substitution or an appearance, Mr. Blanche filed the motion and Defendant filed opposition but Mr. Blanche did not get an ecourt notice of the opposition and thus did not file a reply. (4T p. 15 lines 11-16 and 4T p. 15 line 25- page 26 line 2) but did receive notice of date for oral argument (4T p. 26 lines 9-10)

Defendant is given an opportunity to present her opposition to Mr. Blanche's motion (4T p. 17 lines 13-16)

A. No brief pursuant to R.4:50 (4 T p. 17 lines 17-19)

B. Trying to vacate a motion that was never opposed (4T p. 17 lines 20-23)
C. No standing (4T p.17 lines 23-24)
D. Notwithstanding that Ms. Wang was unavailable Benny was per his certification 4T p. 18 lines 10-14
E. The actions or lack of, in the opinion of Defendant's counsel is either carelessness or lack of diligence and it does not rise to the level of excusable neglect per 4:50 referencing Guillaume (4T p. 18 lines 15-22)
F. Defendant goes on to say we have no way to judge what truly exceptional circumstances might me that would justify reopening the matter pursuant to 4:50(f), the catchall (4T p. 19 lines 5-10)
G. The pleading requests punitive damages which Defendant say is prejudicial (4T p. 19 lines 11-15)

Ms. Steiner argues:

A. That there has been communication between Benny and Mr. Tider but no action was taken (4T p. 22 lines 16-19)
B. Offers to remove punitive damage claim (4T p. 22 lines-21-22)

The court declined to adjourn the hearing and determined that

A. The motion before the court is both procedurally and substantively lacking (4T p. 24 lines 8-9)
B. The court will set aside that there is no courtesy copy (4T p. 24 lines 10-11)
C. No substitution of service or notice of appearance set aside (4T p. 24 lines 12-14)
D. No briefs pursuant to R. 4:50-1
E. No citation to a court Rule, no statute, no case the court can recall was referenced in any of Mr. Blanche's filing that the court can rely upon in justifying the use of the catchall to reopen the matter nor a showing of some likelihood of prevailing on the merits (4T p. 24 lines 15-24)
F. The merits are not addressed (4T p. 24 line 25-P. 25 line 3
G. Where is the excusable neglect and truly exceptional circumstances that qualifies under Guillaume? (4T p. 25 line 3-10)

ARGUMENT

As there has been little presented to the court as to the merits of the case please be so kind as to permit me to clarify them.

The Galaxy, originally a rental, was built in 1976 and converted to condominiums in 1980. It advertises itself as a three tower luxury condominium development complex consisting of 1,075 apartments in three interconnected towers with commanding views along the cliffs of the Palisades in Guttenberg, New Jersey including a mall of shops and offices.

The base of the towers abuts River Road in Edgewater and rises up 19 floors to Blvd. East in Guttenberg at the top of the cliffs and then continues up an additional 20 or so floors.

The unit owners pay a monthly maintenance fee to the Management of the condominium association which pays for, among other things, maintenance of the common areas and the exterior of the buildings.

The bylaws (2 variations) and amendment to Master Deed serve as the rules and regulations of the Association and the individual unit owners and specifically state that it is the responsibility of the Association to maintain insurance. Section 2A Insurance (1) Casualty (a)(b) in the first By Laws exhibit, attached verbatim below, specifically states that water damage is

covered. In the second set of By Laws Article 5 Section 2A refers to maintenance and section i covers insurance:

ARTICLE VI
Operation of the Property
SECTION 2. INSURANCE

A. The Board of Directors shall be required to obtain and maintain, to the extent obtainable, the following insurance upon the Commercial Common and Limited Common Elements and upon the equipment and personal property owned by the Association. The policies so obtained shall be for the benefit and protection of the Association and the owners of the Units and their respective mortgages as their interests may appear as well as the condominium to the extent required by the provisions of the Amendment. If agreeable to the insurer, such policies shall include provisions that they be without contribution, that improvements to Units made by Unit Owners shall not affect the valuation of the Property for purposes of insurance and that the insurer waives its rights of subrogation as to any claims against the Unit Owners, the Association and their respective employees, servants, agents and guests. The coverage shall be against the hereinafter enumerated perils and contingencies.

(1) CASUALTY
All improvements upon the Property and all personal property including therein, except such personal property as may be owned by the Unit Owners, shall be insured in an amount equal to the maximum insurable replacement value thereof (exclusive of excavation, foundations and other construction components customarily excluded) as determined periodically by the insurance company affording such coverage. Such coverage shall afford protection against:

(a) Loss or damage by fire or other hazards covered by the standard extended coverage endorsements; and
(b) Such other risks as from time to time customarily shall be covered with respect to buildings similar in construction, location and use

as the building including but not limited to vandalism, malicious mischief, windstorm and water damage

(2) COMPREHENSIVE PUBLIC LIABILTY AND PROPERTY DAMAGE in such amount as in such forms, as shall be required by the Association, including, but not limiting the same to water damage, legal liability hired automobiles, non-owned automobiles and off premises employee and coverages.

(3) WORKMEN'S COMPENSATION coverage to meet the requirements of law. All liability insurance shall contain cross liability endorsement to cover liabilities of the Association and the Unit Owners, as a group, to an individual owner.

Each unit owner shall obtain insurance at his own expense, affording coverage upon his personal property, including betterments and improvements, and for his personal liability and as may be required by law, these By-Laws, the Master Deed and By-Laws of the Galaxy Towers, A condominium, Non Profit Corporation for the State of New Jersey (the "Condominium")dated March 26, 1980 and which was filed in the office of the Register of Hudson Couty on March 26, 1980 in Deed Book 3297 at page 775 et. Seq. as thereafter amended and the Amendment to the Master Deed filed buy the property dated May 2, 2008 and filed in the office of the Hudson County Register on May, 2008 in Deed Book at Page . All such insurance shall contain the same waiver of subrogation as that referred to hereinabove (if same is available) and can be obtained from their own insurance company or agent or that insuring the Association. Said insurance shall be for the same risk liability or peril if the Association has such coverage.

B. All insurance policies maintained by the Association shall be for the benefit of the Association and the Unit Owners, and their mortgagees as their respective interest may appear., and shall provide that all proceeds payable as a result of casualty losses shall be paid by the Association. The Association shall hold such proceeds for the benefit of the Association, the Unit Owners, and their respective mortgagees in the following manner:

POINT 1.
NEGLIGENCE
NOT RAISED BELOW

On August 29, 2021 hurricane Ida made landfall in Louisiana as a category 4 storm. She slowly made her way up the East Coast leaving a wake of destruction that was front page news on a daily basis. On September 2, 2021 Ida reached the New York metropolitan area. The day before, Governor Murphy signed Executive Order 259 declaring a state of emergency for all 23 counties in New Jersey.

Management took no action at all. No plywood was installed to reinforce doors and windows at it's entrances on Boulevard East. No concrete barriers or sandbags were brought in to divert water until sang bags were brought in *after* Ida had passed. No maintenance was performed to ensure the drains installed when the property was built were clear. As a result what occurred was a repeat performance of a 2014 flood as water literally cascaded down the steps of the courtyard and accumulated waist high as indicated by the fact the air conditioning compressors adjacent to the doors were under water and eventually the pressure was so great that water came crashing through doors and flooding the lower level of the mall including the section in which Plaintiff's units are located and several floors of residential apartments and a garage underneath. I have photos of what occurred in 2014 and in 2021 which

were provided to Defendant both well before filing the complaint and in discovery but since the case never got that far along they were never presented to the court and thus I have not included them in this appeal.

Brendon Bare, assistant manager and others employed by Defendant as well as Wendy Wang (sole principal of Zhonghai Realty and the owner and occupant of a residential unit in one of the buildings) were present when Ida struck. Wendy sent an email with notice of the damage and photos to Management on September 2, 2021, the day of the storm. A number of in person and telephonic conversations ensued in which Mr. Bare promised to reimburse Wendy for the cost of repairs but informing Wendy that her inventory was not covered by the policy. When repairs were completed Wendy submitted her invoices along with more photos expecting Management to pay them. Management provided there own photos of damage and repairs. As to reimbursement, Management did an about face and denied them.

In the interim Management begged Wendy to assist in getting workers to remove the water and repair the damage as expediently as possible as there was concern about the development of mold and it was difficult to hire workers as there was a huge demand dealing with the aftermath of Ida. These were in person and phone calls. I have no emails or text messages Corroborating these conversations.

Wendy had three insurance policies and submitted a claim to all of them via email copying Management. All of the insurance claims were denied.

It is my understanding that Management did pay for the repairs to the common areas as well as the residential unit owners, none of whom filed suit, but inexplicably reneged on it's promise to pay for Plaintiff's damages notwithstanding the terms in the By-Laws.

Management did not dispute the damage occurred. Management was present throughout the repairs. There was no argument that the bills were not reasonable. Just that they declined to pay. It is not possible for management to say that they had no idea what had occurred. Management cannot argue that this was a selective act of God for one unit owner and not another.

In the aftermath Management has apparently decided that simply repairing the damage and awaiting the next storm is not a prudent policy and so Management decided to install a gate at the top of the stairs leading to a courtyard that had flooded both in 2014 and during Ida. It appears that when the gate is closed while some water can leak through around the edges, any significant accumulation of water would flow through newly created rectangular holes at the base of the wall in what had previously been a solid wall and fall to the cliffs below.

I recognize that making repairs after an accident cannot be used to

demonstrate that making a repair serves as an admission of liability. However, hindsight is frequently 20/20 and this or some other remedy should and most certainly could have been done in the intervening 10 years during which Defendant aside from repairing the damage in 2014 did nothing to modify the property to prevent a reoccurrence. People can differ on the causes of climate change but no one can say that there has not been a significant change in the weather. Records are being broken regularly. More heat, more storms of greater intensity, more floods. Certainly far more than when this property was constructed in the 70s. Here Defendant chose to either believe that the incident was a fluke based upon the fact that it had not occurred in the preceding decades and/or the cost of upgrading was either prohibitive or they felt it was not likely to reoccur in the foreseeable future and kicked the proverbial can down the road.

When I turn on the news and weather reports that a storm is expected to hit in some area I see residents taking action to protect their property. Whether it is filling sandbags, nailing up plywood, getting gasoline for generators, they are doing what they can. Management had ample notice of Ida's approach and yet took no observable action in spite of what had occurred in 2014 until after Ida had passed and that is when Defendant brought in sandbags and crews to make repairs and improvements.

The governing body of a condominium association "has a fiduciary obligation to the unit owners 'similar to that of a corporate board to its shareholders.'" *Siddons, 382 N.J. Super. at 7* (quoting *Kim v. Flagship Condo. Owners Ass'n, 327 N.J. Super. 544, 550, 744 A.2d 227 (App. Div. 2000))*. Condominium association board members are required to "act reasonably and in good faith in carrying out their duties." *Jennings v. Borough of Highlands, 418 N.J. Super. 405, 421, 13 A.3d 911 (App. Div. 2011)* (quoting *Papalexiou v. Tower West Condo., 167 N.J. Super. 516, 527, 401 A.2d 280 (Ch. Div. 1979))*.

To sustain a cause of action for negligence against a condominium association, like any other negligence claim, "a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" *Townsend v. Pierre, 221 N.J. 36, 51, 110 A.3d 52 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584, 960 A.2d 375 (2008))*.

"Whether a duty exists is a matter of law, to be decided by the court, not the factfinder." *Siddons, 382 N.J. Super. at 8* (citing *Rogers v. Bree, 329 N.J. Super. 197, 201, 747 A.2d 299 (App. Div. 2000))*. When determining the existence of a duty, courts consider fairness, public policy, and foreseeability of injury to others from a defendant's conduct. *Snyder v. Am. Ass'n of Blood Banks, 144 N.J. 269, 292, 676 A.2d 1036 (1996)*.

In *Siddons*, we illustrated how these concepts of duty and negligence operate. There, the plaintiff's condominium unit was flooded by water from a broken dishwasher hose in another unit. Id. at 5. The condominium association [*11] was aware that similar hoses had previously broken and caused flooding in other units. Ibid. The trial court granted the association's summary judgment motion, finding it owed no duty to warn the plaintiff about the potential Flooding hazard. Ibid. We reversed.

Although the plaintiff in Siddons conceded that the dishwasher was not a common area the association was responsible for maintaining, we reasoned that "under some circumstances the knowledge of a dangerous condition, regardless of control over that condition, may impose upon a person a duty to warn third parties of the danger. Those circumstances exist here." Id. at 10. Before the flooding incident in Siddons that damaged the plaintiff's unit, the association had been notified on "at least three occasions that the dishwasher hoses that had been installed by the original developer caused flooding to other condominium units." Id. at 11. This information was not known by most of the unit owners. In that particular factual setting, we held it would not have been unreasonably burdensome for the association to have a duty to notify the unit owners about the hazard. Ibid. Consequently, we vacated summary judgment in Siddons and remanded the matter for [*12] a trial. Id. at 14.

In this instance notifying the individual unit owners of the approaching storm or the fact that Management had taken no action would not, without more, likely have changed the result although it might have served to have management take some action if unit owners made inquiries as to what was being done in light of the approaching storm and the Governor's declaration.

However, considering what had occurred in 2014 and having taken no action in the ensuing years to protect against a reoccurrence would on it's face be negligent, especially in light of the more extreme weather that has occurred around the world since the building was constructed.

The unit owners pay a monthly fee of which a part of those monies is to be used to maintain the common areas. If nothing had been done to upgrade or take reasonable precautions against a reoccurrence in almost a decade, since the damage from the 2014 flood such would be negligent all things considered. Any such improvements to the exterior would have been noticed by Plaintiff as she is on site on a near daily basis and has noticed the recent change in the installation of the gate and holes in the wall, which would have been hard to miss.

So, per the By Laws and well as the Condominium Act the duty to care is on the Defendant. Defendant breached that duty in two ways. 1. It made no improvements to protect against a reoccurrence in 10 years time and 2. It took

no action to enact temporary protection of some kind notwithstanding the governor's declaration of an emergency. Ida was the proximate cause of the damage and the cost to repair the damages were provided both prior to commencing suit and afterwards for which Defendant was present on a daily basis while the repairs were being made.

POINT 2.
OBLIGATIONS OF THE CONDOMINIUM ASSOCIATION (Pa1)

In Siller v. Hartz Mountain Associates 93 N.J 370, 461 A.2d 568 (1983) the court addressed the then new Condominium Act.

The Legislature recognized a new form of ownership of real property in enacting the Condominium Act. 4 N.J.S.A. 46:8B-1 through -38. The Act requires the developer to execute and file a master deed describing the land, identifying the units, defining the common elements, and providing for an association of unit owners. The condominium property consists of the land and all improvements. N.J.S.A. 46:8B-3(i). The individual condominium purchaser owns his unit together with an undivided interest in common elements. Each unit is a separate parcel of real property which the owner may deal with "in the same manner as is otherwise permitted by law for any parcel of real property." N.J.S.A. 46:8B-4. The result is that the unit owner, having a fee simple title, enjoys exclusive ownership of his individual apartment or unit, while retaining an undivided interest as a tenant in common in the common facilities and grounds used by all the residents. Kerr, "Condominium -- Statutory Implementation," 38 St. Johns L.Rev. 1, 2 (1963); Berger, "Condominium: Shelter on a Statutory Foundation," 63 Colum.L.Rev. 987, 989 (1963); 15A Am.Jur.2d, Condominiums and Cooperative [***7] Apartments, § 1.

[**571] The Act also provides that the condominium will be administered and managed by the association. N.J.S.A. 46:8B-3(b); [*376]

46:8B-12. The business form of the association is unrestricted. N.J.S.A. 46:8B-12. The developer initially controls the [***8] association. When 25% of the units have been sold, the unit owners are entitled to elect at least 25% of the association's governing body. N.J.S.A. 46:8B-12.1(a). The unit owners' authority is increased to 40% when half of the units have been sold. When the unit owners own 75%, they are entitled to elect all the members of the governing body. N.J.S.A. 46:8B-12.1(a). 5 Once that occurs, the developer is required to "relinquish control of the association." N.J.S.A. 46:8B-12.1(d).

The association is charged with the "maintenance, [***9] repair, replacement, cleaning and sanitation of the common elements." N.J.S.A. 46:8B-14(a). The common elements are defined as follows:

"Common elements" means:

(i) the land described in the master deed;

(ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units;

(iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units;

(iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property;

(v) installations of all central services and utilities;

(vi) all apparatus and installations existing or intended for common use;

(vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use; and

(viii) such other elements [***10] and facilities as are designated in the master deed as common elements. [N.J.S.A. 46:8B-3(d)]

[*377] It should be noted that under subsection (d)(viii) above, the common elements may be expanded to include other "elements and facilities" designated in the master deed. The association has a right of access to each unit "as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom." N.J.S.A. 46:8B-15(b).

The association is empowered to assess and collect funds from unit owners for common expenses, to maintain accounting records, and to obtain insurance against loss by fire or other casualties damaging the common elements and all structural portions of the condominium

property. N.J.S.A. 46:8B-14(b), (d) and (g). The statute authorizes the association to "enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a). 6 No unit owner, except as an officer of the association, may bind the association. N.J.S.A. 46:8B-16(a). Nor may a unit owner "contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions [***11] thereto, except through the association and its officers." [**572] N.J.S.A. 46:8B-18. If a unit owner fails to comply with the rules and regulations or any of the provisions in the master deed, he may be subject to a suit for injunctive relief by the association or by any other unit owner. N.J.S.A. 46:8B-16(b).

II

All parties agree that the clear import, express and implied, of the statutory scheme is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property. [*378] The statutory provisions [***12] empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect "common expenses," 7 coupled with the prohibition against a unit owner performing any such work on common elements, are compelling indicia that the association may institute legal action on behalf of the unit owners for damages to common elements caused by third persons.

It would seem clear that the exterior of the building is part of the common element and that an individual unit owner is not permitted to do anything to any of the common areas and that Defendant is solely responsible to maintain and that the Association has the exclusive obligation to maintain it.

Under this it would appear that an RIL case could be made as it seems that the common area is within the exclusive purview of the Association to maintain but that in an of itself is not exclusive control. However, anyone entering the property would for a brief period of time have control of, for example, a door leading into the building. Aside from the obvious question as

to why anyone would want to, I suggest that if there is an accumulation of water several feet high on one side of the door that it would be virtually impossible for anyone to be able to apply sufficient force to open the door at that time under those conditions and therefore under those circumstances the only reason water would come in would be because of the accumulation of water due to the storm and that was within the exclusive control of the Association throughout. When the pressure built up to a sufficient level the doors gave way and water rushed in flooding the lower level including Plaintiffs units and several floors below. Plaintiff had absolutely no ability to prevent this from occurring. Only the Association had the ability and the legal responsibility to act and in this instance they had the better part of a week to do so as the storm moved slowly up the coast.

In Malanga's Auto., Inc. v. Wagner, 2016 N.J. Super. Unpub. LEXIS 1989, *10-11 the court held:

> In some cases, the factfinder "is not competent to supply the standard by which to measure the defendant's conduct." *Sanzari v. Rosenfeld*, 34 N.J. 128, 134-35, 167 A.2d 625 (1961). In those instances, the plaintiff must "establish the requisite standard of care and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." *Giantonnio v. Taccard*, 291 N.J. Super. 31, 42, 676 A.2d 1110 (1996). Our Supreme Court has explained that, when deciding whether expert testimony is necessary, a court properly considers "whether the matter to be dealt with is so esoteric that [factfinders] of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." *Butler*

v. Acme Mkts., Inc., 89 N.J. 270, 283, 445 A.2d 1141 (1982). In such cases, the factfinder "would have to speculate without the aid of expert testimony." *Torres v. Schripps, Inc.*, 342 N.J. Super. 419, 430, 776 A.2d 915 (App. Div. 2001).

When applicable, the doctrine of res ipsa loquitor enables the plaintiff to make out a prima facie case." *Jerista v. Murray*, 185 N.J. 175, 191, 883 A.2d 350 (2005). Res ipsa loquitur permits an inference of negligence, establishing, in turn, a prima facie case of negligence. *Mayer v. Once Upon A Rose, Inc.*, 429 N.J. Super. 365, 373, 58 A.3d 1221 (App. Div. 2013). In order to invoke the doctrine, a plaintiff must establish that [*11] "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." *Ibid.* (quoting *Szalontai v. Yazbo's Sports Cafe*, 183 N.J. 386, 398, 874 A.2d 507 (2005)). The Court has stated that

> [the mere] existence of a possibility of a defendant's responsibility for a plaintiff's injuries is insufficient to impose liability. In the absence of direct evidence, it is incumbent on the plaintiff to prove not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference . . . and would exclude the idea that it was due to a cause with which the defendant was unconnected

Hurricane Ida does not come as a surprise to anyone. It was a slow moving storm that took the better part of a week to get here. The damage she

wrought was in evidence on the news every night. The Association should have learned it's lesson from 2014 and taken some precautions yet did nothing. This suit should never have had to be filed and I am respectfully asking the court to reinstate the matter as to do otherwise would result in a miscarriage of justice.

POINT 3.
STANDARD TO REOPEN (Pa1)

US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 38 A. 3d 570 (2012) is a foreclosure action in which a default judgment was entered. Defendants were unsuccessful in obtaining a modification and took no action for a year resulting in the issuance of a default judgment. There was no showing of excusable neglect entitling them for relief pursuant to R 4:50-1 and the judgment was affirmed.

R. **4**:**50**-**1** governs an applicant's motion for relief from default when the case has proceeded to judgment. The New Jersey **Rules** prescribe a two-step default process, and there is a significant difference between the burdens imposed at each stage. When nothing more than an entry of default pursuant to R. 4:43-1 has occurred, relief from that default may be granted on a showing of good cause. R. 4:43-3. The required good-cause showing for setting aside an entry of default pursuant to that **rule** is clearly a less stringent standard than that

imposed by R. **4**:**50**-**1** for setting aside a default judgment. When the matter has proceeded to the second stage and the court has entered a default judgment pursuant to R. 4:43-2, the party seeking to vacate the judgment must meet the standard of 4:50-1

R. **4**:**50**-**1** is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case. The trial court's determination under the **rule** warrants substantial deference, and should not be reversed unless it results in a clear abuse of discretion. The court finds an abuse of discretion when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.

Excusable neglect may be found when the default was attributable to an honest mistake that is compatible with due diligence or reasonable prudence. Mere carelessness or lack of proper diligence on the part of an attorney is ordinarily not sufficient to entitle an attorney's clients to relief from an adverse judgment. In this instance I reached out without success to my client to have her confirm the revised complaint. I had also presented the revised complaint to Benny who declined to take responsibility.

A defendant seeking to reopen a default judgment must generally show a meritorious defense is available. As the Supreme Court of New Jersey has held in Schulwitz v. Shuster, it would create a rather anomalous situation if a judgment were to be vacated on the ground of mistake, accident, surprise or excusable neglect, only to discover later that the defendant had no meritorious defense. The time of the courts, counsel and litigants should not be taken up by such a futile proceeding.

I believe my prior point of negligence on the part of Defendant in not taking any action notwithstanding the approach of Ida, the 4-5 days timeframe Management had to prepare, the Governor's declaration of a state of emergency and the 2014 flood coupled with the Condominium Act and the By Laws as to insurance coverage and the fact the Condominium Association is solely responsible for the exterior of the building is more than sufficient to demonstrate the likelihood of prevailing on the merits.

R. **4**:**50**-**1**(f) permits courts to vacate judgments for any other reason justifying relief from the operation of the judgment or order. As the Supreme Court of New Jersey has held in Housing Authority of Morristown v. Little, because of the importance that the Court attaches to the finality of judgments, relief under R. **4**:**50**-**1**(f) is available only when truly exceptional circumstances are present. In such exceptional circumstances, R. **4**:**50**-**1**(f) is as expansive as the

need to achieve equity and justice. The **rule** is limited to situations in which, were it not applied, a grave injustice would occur.

In Nr Deed v. Roszko, 2023 N.J. Super. App. Div 2023 Unpub. LEXIS 1319, *1 the court made a decision based upon the facts of the case that the matter warranted reinstatement pursuant to 4:50-1(f). The issue was a tax lien foreclosure that was not timely redeemed. The court held:

> Significantly, *Rule* 4:50-1 is not an opportunity for parties to a consent judgment to change their minds; nor is it a pathway to reopen litigation because a party either views his settlement as less advantageous than it had previously appeared, or rethinks the effectiveness of his original legal strategy. *Rather, the rule is a carefully crafted vehicle intended to underscore the need for repose while achieving a just result. It thus denominates with specificity the narrow band of triggering events that will warrant relief [*10] from judgment if justice is to be served.* Only the existence of one of those triggers will allow a party to challenge the substance of the judgment. [198 N.J. 242, 261-62, 966 A.2d 1036 (emphasis added) (quoting *Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 378, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)).]
>
> Ultimately, "equitable principles" "should . . . guide[]" a court's discretion in considering a motion to vacate judgment. *Hous. Auth. of Morristown v. Little*, 135 N.J. 274, 283, 639 A.2d 286 (1994). Here, in considering defendants' motion, the judge properly focused her attention on subsection (f) and whether defendants were entitled to the equitable relief it provides.
>
> Our task, therefore, is not to conduct de novo review of the terms of the parties' consent order. Rather, we must consider whether the judge clearly abused her discretion by vacating the default judgment pursuant to *Rule* 4:50-1(f).
>
> III.
>
> "A motion to vacate default judgment implicates two oft-competing goals: resolving disputes on the merits[] and providing finality and stability to judgments." *BV001 REO Blocker, LLC v. 53 W. Somerset St. Props., LLC*, 467

N.J. Super. 117, 123, 249 A.3d 236 (App. Div. 2021) (citing *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n*, 74 N.J. 113, 120, 376 A.2d 1194 (1977)). In balancing the two goals, "[a] court should view 'the opening of default judgments . . . with great liberality,' and should tolerate 'every reasonable ground for indulgence . . . to the end that a just result is reached.'" *Ibid.* (alteration in original) (quoting *Mancini v. EDS ex rel N.J. Auto. Full Ins. Underwriting Ass'n*, 132 N.J. 330, 334 (1993), 625 A.2d 484).

Subsection (f) authorizes the court to "relieve a party . . . from a final judgment or order [*11] for . . . any . . . reason justifying relief from the operation of the judgment or order." As the Court explained more than fifty years ago and has reiterated time and again, "No categorization can be made of the situations which would warrant redress under subsection (f). . . . [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice." *DEG, LLC*, 198 N.J. at 269-70 (alteration in original) (quoting *Ct. Inv. Co. v. Perillo*, 48 N.J. 334, 341, 225 A.2d 352 (1966)).

Nonetheless, subsection (f) "affords relief only when 'truly exceptional circumstances are present.'" *Guillaume*, 209 N.J. at 468 (quoting *Little*, 135 N.J. at 286). "Because *R[ule]* 4:50-1(f) deals with exceptional circumstances, each case must be resolved on its own particular facts." *Baumann v. Marinaro*, 95 N.J. 380, 395, 471 A.2d 395 (1984). When considering a motion for relief under subsection (f), "a court's obligation is 'to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" *LVNV Funding, LLC v. Deangelo*, 464 N.J. Super. 103, 109, 234 A.3d 319 (App. Div. 2020) (quoting *Manning*, 74 N.J. at 120).

Here, the record adequately supports the judge's findings of extraordinary circumstances warranting relief from the final judgment in plaintiff's favor. She gave due consideration to the factors we outlined in *Parker v. Marcus*, 281 N.J. Super. 589, 658 A.2d 1326 (App. Div. 1995). There, we said the [*12] "'important factors' to be considered in deciding whether relief . . . should be granted" under subsection (f) included "(1) the extent of the delay in making the application; (2) the underlying reason or cause; (3) the fault or blamelessness of the litigant; and (4) the prejudice that would accrue to the other party." *Id.* at 593 (citing *Jansson v. Fairleigh Dickinson Univ.*, 198 N.J. Super. 190, 195, 486 A.2d 920 (App. Div. 1985)

CONCLUSION

Considering that 1. Defendant is exclusively responsible for maintaining the exterior; 2. This had occurred previously and the Defendant had 10 years in which to act to protect the property from a reoccurrence of another serious storm which was likely to happen at some point due to both the frequency and intensity of storms which appear to have been affected by global warming; 3. The fact that Defendant choice to do nothing during the days before Ida reached the metropolitan area despite the governor's declaration of a state of emergency; 4. Plaintiff had no authority to independently act to shore up the exterior of the building in an effort to avoid a repeat of 2014 by diverting water elsewhere or block water from penetrating into the building; 5. Defendant promised to pay for Plaintiff's damages and then reneged; 6. Plaintiff is not in any way responsible for the events. As such I believe that if the court permits the courts decision to stand would result in a grave miscarriage of justice and I respectfully request that the court permit the matter to be reopened.

Dated: August 5, 2024

Respectfully submitted,

By: /s/ David E. Tider

David E. Tider, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-002461-23T1

ZHONGHAI REALTY, LLC,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
Plaintiff-Appellant,	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	HUDSON COUNTY
	:	
GALAXY TOWERS CONDOMINIUM ASSN,	:	DOCKET NO. HUD-L-002352-22
	:	
	:	Sat Below:
	:	
Defendant-Respondent.	:	HON. KIMBERLY ESPINALES-MALONEY, J.S.C.
	:	

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

Plaintiff/Appellant, Zhonghai Realty, LLC ("Zhonghai") makes three points in its appeal. The first discusses the alleged negligence of the Defendant/Respondent Galaxy Towers Condominium Association ("Galaxy Towers"). The second relates to the Respondent's general obligations, and the third discusses the standard under Rule 4:50. In all of these arguments, Appellant's claims are without merit or legal basis.

The negligence of Respondent, in addition to not being raised below, is without any actual proof or citation to the record. With regard to the negligence claim, Appellant failed to satisfy the plain error standard of review. For all of these reasons, this argument does not provide a basis for the requested relief.

Relative to the argument concerning the obligations of the Galaxy Towers, again, Appellant's arguments are without analysis. They are discussions about a condominium association's obligations generally and not Galaxy Towers' responsibilities in this specific case. There is no support or justification for the claims made by Appellant.

Appellant's Preliminary Statement is replete with lots of claimed facts without any actual proof of their accuracy or support for them. Appellant discusses Hurricane Ida and the response along with

statements about what Respondent "apparently recognized." (App. Brief, p. 2). There is a discussion of subsequent remedial measures in terms of repairs, and an argument that they should have taken place beforehand.

In reply, Respondent notes that Appellant has provided no substantiation for the claims in the Preliminary Statement. There is no report attached and no depositions were taken in this case. Despite some nineteen months of motion practice, and the fact that these arguments were made repeatedly, Appellant has failed to substantiate any of them.

Appellant has failed to meet the standards required pursuant to Rule 4:50(a) or (f), to warrant the relief being sought. The Motion to Vacate was not supported by a Legal Brief, and the underlying Motion was not opposed, which creates a standing issue. Substantively, there is no enunciation of how the excusable neglect standard relative to subsection (a) or the catch-all under subsection (f) has been met now and was met below, to warrant a reversal of the June 9, 2024 Order.

In terms of substance, the present appeal must fail. The Motion to Vacate under Rule 4:50 was procedurally and substantively deficient. Although prior counsel had more than three months to re-file and correct those deficiencies, they chose not to do so, and this appeal now follows.

Appellant's Brief is replete with arguments posited but devoid of any citation to the record, as well as any application of the specific legal support for the arguments being made. Simply making a statement or advancing an argument without factual support in the record or a citation to any legal support deprives the Respondent of the ability to properly respond, instead forcing it to hypothetically argue in the negative. It is submitted by doing so, Appellant affords itself the ability to articulate legal underpinnings in its Reply Brief while depriving Respondent the ability to combat these arguments in writing. Same should not be countenanced.

As such, for the same reasons that Order of March 1, 2024, was granted, it is respectfully submitted that the present Appeal should be denied in its entirety and the Order of March 1, 2024, be allowed to stand.

PROCEDURAL HISTORY

Respondent generally agrees with the procedural history. However, it does appear that the Motions filed in May 2023, while referenced, were not attached. On May 17, 2023, this office filed two Motions. (Da1, Da5). The first was to dismiss for failure to comply with the Court Order and the second was to compel Plaintiff to respond

to both interrogatories and notice to produce. That Motion was carried via correspondence dated June 7. (Da9). On June 9, the court held oral arguments and the Motion to Dismiss was granted (PA70), while the Motion to Compel was denied. (Da11).

Thereafter, on June 29, 2023, Plaintiff filed a Motion to Restore, which was opposed by this office on July 12 and Plaintiff replied on July 17. An Adjournment Request was sent on July 21 and that Motion was denied on July 24. (PA88).

Last, Appellant failed to note that this office filed opposition to the Motion to Vacate of February 22, 2024.

COUNTERSTATEMENT OF ADDITIONAL FACTS

Respondent does not generally dispute Appellant's Statement of Facts but believes that the transcripts speak for themselves.

Appellant also notes that the Court indicated that Ms. Steiner admitted that she was not arguing a failure of notice, but merely explaining why there was a lack of reply paperwork filed. (4T15:11-16). Moreover, the court noted that Ms. Steiner could have gone into E-Courts and found the Notice and the Reply papers. (4T15:18-16:20).

LEGAL ARGUMENT

Standard of Review:

Appellant does not provide this Court with any Standard of Review.

Point I: **Appellant Has No Legal Basis for a Cause of Action**.

Appellant first argues the merits of its case. Same is without value, for a number of reasons. First, as mentioned previously, this Complaint was dismissed prior to much discovery taking place. There was not a single deposition and Appellant only responded partially to initial discovery requests. Second, all of the argument is simply that: argument. There is no citation to the record to support these claims.

The unit owners, like Appellant noted, were supposed to provide their own insurance pursuant to the By-Laws. (PA213). Pursuant to paragraph 10, each owner of the Commercial Sub Unit was to carry the commercial equivalent of an HO-6 insurance policy, and each lessee was to carry the commercial equivalent of an HO-5 insurance policy. (PA213). To date, there has not been, despite requests, any confirmation from Appellant as to whether any claims were made for these damages under that insurance, and, if so, what the response from the insurance carrier was to those claims. (App. Brief, p. 14). A statement that claims

were indeed made and denied is without documentary support. (App. Brief, p. 14).

Appellant's next argument appears to be a negligence argument, which was not raised below. Ordinarily, an appellate court will decline to consider an issue not presented to the trial judge unless it goes to the jurisdiction of the court or concerns a matter of substantial public interest. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 230, 708 (1998), abrogated on other grounds by, Meehan v. Antonellis, 226 N.J. 216, 228 (2016); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Thus, the standard of review is plain error, which requires that the error was "clearly capable of producing an unjust result." Jacobs vs. Jersey Cent. Power and Light Co., 452 N.J. Super. 494, 502-503 (App. Div. 2017).

Counsel contends there are photos, but, without expert testimony, this is irrelevant. There are then citations to emails and conversations, but, again, nothing to confirm the statements made in the Appellant's Brief. Despite argument in prior Motions about a Certification from Wendy Wang, the principal of Zhonghai Realty, Appellant has never submitted one.

There are multiple claims about payments for repairs, failure to dispute the damage, but again, nothing to support these statements. (App. Brief, p. 14). The simple fact of the matter is that a Complaint was filed which failed under Court Rules to state a viable cause of action. Appellant was given multiple opportunities to remedy this deficiency and to date, that has never been done.

Again, the fatal flaw is the lack of any actual justification. Appellant's papers contain multiple statements of fact that are unsupported by any transcript, document, or citation to the record.

There is discussion about a gate that was installed by management subsequent to Hurricane Ida. Appellant acknowledges this is a subsequent remedial measure that would not be admissible at a trial and yet, for some reason, the argument is made to this Court. (App. Brief, pp. 14-15). Procedurally, this argument must fail. Substantively, it must fail as well. There is no support for the idea that Respondent had any legal obligation to enact this work or, moreover, that this would have prevented the claimed damages. Therefore, it is respectfully submitted that this cannot legally form a cognizable cause of action.

There is a discussion of the duties of Condominium Associations and while Respondent generally does not disagree with the case law, it is respectfully submitted that this is unrelated to the present appeal. (App. Brief, pp. 16-17). Certainly, Appellant has not provided this Court, nor the court below, any analysis as to why or how this could provide a cognizable legal theory against Respondent.

Appellant then makes arguments relative to *res ipsa loquitur* doctrine. (App. Brief, pp. 21-23). These arguments were previously made in the Motion to Restore that was argued in front of Judge Espinales-Maloney in July 2023. (3T5:1923). Judge Espinales-Maloney indicated that this case did not involve that doctrine. (3T7:21 - 8:4). Appellant's Brief does not posit any reason, nor make any arguments, as to why the prior denial was improper. The court indicated that there was not a procedural or substantive basis for the relief being sought and reliance on *res ipsa*. (3T13:4-15:2).

Appellant argues that it has proven negligence based on a state of emergency and the By-Laws it is "more than sufficient to demonstrate the likelihood of prevailing on the merits." (App. Brief, p. 26). However, this is not supported by any actual reports or citation. Moreover, Appellant has failed to prove how there was an affirmative

obligation on the part of the Respondent to perform any of these measures. In addition, Appellant has failed to provide this Court or the court below with any proof that any of these measures would have prevented the damages being sought in the underlying Complaint.

In conclusion, Appellant's brief contains multiple claims and arguments which are unsupported by citation. The discussion about subsequent remedial measures and the duties of Condominium Associations generally are without analysis. Moreover, it is respectfully submitted that Appellant fails to provide any legal basis for a sustainable legal theory against Respondent. Certainly, Appellant has not provided this Court with any, nor was Judge Espinales-Maloney below provided with any. For all of these responses, it is respectfully submitted that the present appeal should be denied.

Point II: The Trial Court properly denied the Motion to Vacate the Order of June 9, 2023.

The Court Order that is the subject of this appeal is a Motion to Vacate pursuant to Rule 4:50. Appellant's Brief is devoid of any discussion of how the Motion that culminated in the Order of June 9, 2023, was improperly decided or how Judge Espinales-Maloney abused her discretion. The June 9, 2023 Order was really a Rule 4:49 Motion to Reconsider, which the Appellant failed to substantiate.

Relative to the underlying Order, Appellant failed to provide any basis for reconsideration of same. Procedurally, Appellant failed to oppose the original Motion leading to the June 9, 2023 Order, and, as such, lacked standing to file the Motion to Vacate. Same is apparent on the Order, which is "unopposed." (Pa70). Substantively, the Court did not overlook any controlling decisions or fail to appreciate any competent evidence. Put succinctly, Appellant has failed to comply with the Court Order of March 24, requiring it to file an Amended Complaint. (Pa67-68). Ms. Wang's failure to respond to Mr. Tider did not provide an adequate legal basis for reconsideration. In that Motion, Appellant also cited to Siddons v. Cooke, 382 N.J. Super. 1 (App. Div. 2005), which has also been cited in this appeal. (App. Brief, pp. 16-17). That case involved a claim of a duty to warn with a reservation on the issues of breach and proximate cause. Id. at 12. As in the underlying Motion and this appeal, this has absolutely no relevance to failure to comply with a Court Order. In her ruling, Judge Espinales-Maloney found that Plaintiff/Appellant did not provide procedural and substantive "grounds" to reconsider the prior Order. (3T13-14:17). It is respectfully submitted that the Judge did not abuse her discretion and properly denied reconsideration. (Pa70).

Moving on to the Motion to Vacate, that Motion too was properly decided below. (Pa89-114). Appellant's moving papers in that Motion did not contain a Brief. Moreover, there was no discussion as to whether Plaintiff had standing to even make this Motion since the underlying Motion was not opposed. (Pa70). Substantively, Appellant did not meet the standards under either Rule 4:50(a) or (f). At oral argument, Appellant's counsel confirmed there was no brief submitted, as the Rule requires. (4T14:7-12). In her ruling, the Judge found the Motion to be "procedurally and substantively lacking." (4T24:8-9). Her Honor discussed the lack of a brief and citation to legal authority. (4T24:15-25:20). As above, Appellant has failed to enunciate precisely how the Judge was wrong or abused her discretion in failing to Vacate the Order of Dismissal.

In this appeal, Appellant argues that the excusable neglect standard under that Rule was met because Mr. Tider did reach out to his clients without success. (App. Brief, p. 25). Appellant contends that "I reached out without success to my client to have her confirm the revised Complaint. I had also presented the revised Complaint to Benny, who declined to take responsibility." (App. Brief, p. 25). There is no discussion as to who counsel was referring to when he means his client,

there is no confirmation that this was presented to "Benny." Relative to subsection (a) and the claim of "excusable neglect," the Supreme Court discussed this standard in the case of US Bank Nat. Ass'n v. Guillaume, holding:

> "Excusable neglect" may be found when the default was "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." Mancini, *supra*, 132 N.J. at 335, 625 A.2d 484; see also **581 Baumann, *supra*, 95 N.J. at 394, 471 A.2d 395 (stating that "**mere carelessness or lack of proper diligence on the part of an attorney** is ordinarily not sufficient to entitle his clients to relief from an adverse judgment" (quotation omitted)).

US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 468 (2012) (**emphasis added**).

On appeal, Ms. Wang did not submit any Certification, nor was one submitted in the court below. Neither Judge Espinales-Maloney nor this Court has any indication of the actions actually taken. The Certification of Irfan Alabegu did not provide what actions Appellant took after receipt of emails from counsel. Thus, Appellant fails to meet the standard under Rule 4:50(a) and the Motion to Vacate was properly denied. For all of these reasons, Respondent contends that Appellant has failed to meet the standard under Rule 4:50(a) because Appellant has not

shown anything more than carelessness and lack of proper diligence. *See*, ibid.

Appellant then argues relief under Rule 4:50-1(f), which is "any other reason justifying relief from the operation of the Judgment or Order" and then cites to an unpublished decision, which is obviously not binding on this Court. The Court has as already held that such relief would be granted "only when 'truly exceptional circumstances are present.'" Id. at 469 (*quotation omitted*). It is respectfully submitted that Appellant has not shown any circumstances, much less exceptional circumstances, in the present matter. Appellant did not provide the court below, nor this Court, with these specific facts which could support the relief being sought.

Appellant spends some two pages discussing the case of Nr Deed, LLC v. Roszko, 2023 WL 4874711 (App. Div. 2023). There is a very long citation to the holding of the case, but there is no analysis as to how that case is appliable, how the prior Order was improperly or improvidently decided, or how or why Appellant meets the strictures of Rule 4:50-1(f). (App. Brief, pp. 27-29).

Nevertheless, even looking at that case and the factors for relief under subsection (f), as discussed in Parker v. Marcus, 281 N.J. Super.

589, 593 (App. Div. 1995), it is clear that Appellant falls woefully short. (Ibid., at 4; App. Brief, p. 28). In this case, the underlying Order was granted by Judge Espinales-Maloney on July 24, 2023 (Pa88), and the Motion to Vacate was not filed until February 14, 2024 (Pa89). The passage of some 6½ months does not comply with the factors enunciated in Parker. Appellant, as discussed above, does not provide any underlying reason or cause. Likewise, what Appellant does posit points to the fault, as opposed to the blamelessness, of Appellant itself in its failure to respond to counsel's repeated communications. Last, there is no discussion of prejudice to Respondent. Same, it is respectfully submitted, is significant. This case has been going on since October 2022 and there is still no legally articulated cause of action. For all of these reasons, Appellant fails to satisfy the requirements under paragraph (f), and failed to below, which is why the present appeal should be denied and the Order to Vacate affirmed.

CONCLUSION

This matter comes to the Court from an appeal as to a Motion to Vacate a prior Order under Rule 4:50-1 that was denied. Procedurally and substantively, the Motion to Vacate was properly denied. Appellant had no standing to make that motion, because it did not oppose the