ISAAC HERSKO, Plaintiff/Appellant, v. BARRY HERSKO, BELLA HERSKO and THE ROSEVILLE TOWER LLC, CHAIM SIMKOWITZ, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002622-23 **CIVIL ACTION** On Appeal from the Chancery Division, Essex County Docket No. ESX-C-220-21 Sat Below: Hon. Lisa A. Adubato, J.S.C. Hon. James R. Paganelli, J.S.C.

BRIEF OF PLAINTIFF/APPELLANT ISAAC HERSKO

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PRELIMINARY STATEMENT

Appellant, Isaac Hersko ("Appellant" or "Isaac") and his brother, Barry Hersko ("Barry"), have had a complex business relationship for over three decades which includes private mortgage lending and various ownership interests in several residential properties in New York, as well as the property at issue in this case at 140-148 Roseville Avenue, Newark, New Jersey (the "NJ Property) which is undisputedly owned by The Roseville Tower, LLC ("The Roseville Tower"). Indeed, Isaac and Barry were partners for over thirty years until Barry, at gun point, threw Isaac out of the office that they shared after Isaac questioned Barry's vastly excessive withdrawals from their shared account which has resulted in significant pending litigation in the New York courts, as well as this matter which deals only with claims related to various interests in a singular property in New Jersey.

Isaac has been gravely ill and incapacitated and unable to actively participate in this litigation since December 2022. The case was able to proceed because Isaac had a durable power of attorney. However, as a result of Isaac's incapacitation, Isaac voluntarily withdrew his claims related to ownership in the NJ Property or in a Second Mortgage on the NJ Property, as well as for recovery of funds from a joint account that Isaac believed was used to purchase the interest in The Roseville Tower. Therefore, after being permitted to amend his causes of action, Isaac pursued only

two claims at trial – one for declaratory judgment that Isaac holds a 50% interest in a First Mortgage on the NJ Property and another for Money Had and Received for the recoupment of funds contributed to the ongoing maintenance and expenses of the NJ Property by an entity undisputedly solely owned by Isaac.

While the trial court initially indicated that the withdrawn claims would be dismissed without prejudice, the final Order ultimately dismissed the withdrawn claims with prejudice. Isaac appeals the dismissal Order with prejudice and asserts that the trial court was initially correct in determining that a dismissal without prejudice of the withdrawn claims was warranted. Regardless of whether these dismissals were with or without prejudice, these claims were limited to the ownership interests related to the NJ Property and have no bearing on any other assets of Isaac or Barry.

After requesting additional briefing from the parties, the trial court ultimately dismissed the remaining claims of all of the parties based upon the doctrine of unclean hands as a result of wrongful conduct stemming from a false allegation in a foreclosure complaint which was used to defraud the owner of the second mortgage to sell the mortgage on the NJ Property at a steep discount. Notably, this wrongful conduct was brought to the Court's attention by Isaac. Indeed, the emails and documents in evidence and the verified foreclosure complaint signed by Barry establish that the false pleading was approved by and filed at the instruction of Barry

and Simkowitz when they knew the allegation was false. None of the email updates chronicling the progress of the foreclosure action and its dismissal once the second mortgage was purchased for pennies on the dollar even include Isaac, and, as Barry testified, Isaac did not have an interest in the second mortgage. Here, the trial court should not have found that the doctrine of unclean hands applied to Isaac and holding otherwise constituted a gross inequity to Isaac while rewarding the most culpable party, Barry, who will ultimately cash in on the sale of the NJ Property.

Separately, the trial court incorrectly dismissed Isaac's claim for Money Had and Received pursuant to R 4:37-2(b). Isaac asserts that this decision was an error because he made out his *prima facie* claim for Money Had and Received which only as two essential elements: (1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable. Here, the undisputed facts established by the documentary evidence establish that certain payments totaling over $600,000 for ongoing maintenance and expenses for the NJ Property were made at the direction of and on behalf of Isaac while he was under the belief that he was a partial owner of The Roseville Tower. Therefore, if Isaac is not an owner, then The Roseville Tower and its owners received a benefit from Isaac through We Care, Inc., which is not an actual entity and is effectively an alter ego of Isaac. The retention of that benefit by The Roseville Tower and its owners is inequitable.

PROCEDURAL HISTORY

On October 1, 2021, Isaac initiated this action in the Law Division to assert his rightful ownership interest in The Roseville Tower which owns the NJ Property as well as for his interest in funds used to acquire an ownership interest in The Roseville Tower which Isaac believed came from an escrow account that was being held jointly for Isaac and Barry. (Pa033-Pa048). Barry, Bella Hersko ("Bella") and The Roseville Tower (collectively "The Hersko Defendants") filed an Answer to Isaac's Complaint on November 12, 2021. (Pa049-Pa059).

The action was originally assigned docket number ESX-L-7389-21, but after Simkowitz intervened, the matter was transferred to the Chancery Division by Order dated November 19, 2021. (Pa060-Pa061).

Simkowitz filed an Answer, Counterclaims and Crossclaims on November 30, 2021. (Pa062-Pa084). Simkowitz's Counterclaim sought declaratory judgment that he is a 50% owner of The Roseville Tower and that the recorded First and Second Mortgages should be discharged. (Pa062-Pa084). On January 20, 2022, Isaac filed an Answer to the Counterclaims filed by Simkowitz. (Pa085-Pa094).

On January 27, 2022, The Hersko Defendants filed an Answer to Simkowitz's Crossclaims. (Pa095-Pa103). On February 8, 2022, The Hersko Defendants filed an Amended Answer to Simkowitz's Crossclaims. (Pa104-Pa115). On September 27, 2022, The Hersko Defendants filed another Amended Answer to Simkowitz's

crossclaims. (Pa116-Pa127). On September 27, 2022, Simkowitz filed Amended Crossclaims. (Pa128-Pa136). On October 26, 2022, The Hersko Defendants filed an Answer to Simkowitz's Amended Crossclaims. (Pa137-Pa143). On March 7, 2023, The Hersko Defendants filed their Second Amended Crossclaims. (Pa144-Pa151). On March 31, 2023, Simkowitz filed an Answer to the Second Amended Crossclaim of the Hersko Defendants. (Pa165-Pa173). On October 23, 2024, Simkowitz filed a Second Amended Crossclaim which included claims related to an adjacent property owned by Roseville Park, LLC which is an entity that Isaac has not asserted any interest in during the course of this case. (Pa187-Pa195). The Hersko Defendants filed an Answer to Simkowitz's Second Amended Crossclaim on November 13, 2023. (Pa196-Pa202) The crossclaims between The Hersko Defendants and Simkowitz relate to issues related to ongoing expenses and maintenance for the NJ Property, as well as for breach of fiduciary duty by Simkowitz for attempting to have a prearrange sale of the NJ Property and cut Bella Hersko out of the deal. (Pa144-Pa151; Pa165-Pa173 Pa187-Pa195; Pa196-Pa202).

Following significant motion practice, including the denial of summary judgment motions that were filed by Barry, Bella and The Roseville Tower (collectively "The Hersko Defendants") and Simkowitz, Isaac filed a motion for leave to file a First Amended Complaint on November 16, 2022 which was granted, and Isaac filed his First Amended Complaint on March 13, 2023. (Pa152-Pa164).

Isaac's First Amended did not add new causes of action but conformed the pleading to the facts that had been uncovered during the pendency of the case through that date. On April 7, 2023, The Hersko Defendants filed an Answer to Appellant's First Amended Complaint. (Pa174-Pa186).

On December 5, 2023, Isaac filed a cross-motion for leave to file a Second Amended Complaint in response to a second summary judgment motion filed by Simkowitz, and this cross-motion was converted to a motion in limine by the trial court and was adjourned and not heard until the first day of trial on January 23, 2024. (1T13:2-8). At that time, Issac voluntarily withdrew his claims related to ownership in the NJ Property and in a Second Mortgage on the NJ Property, as well as for recovery of funds from a joint account that Isaac believed was used to deposit any profits from the NJ Property and to purchase the interest in The Roseville Tower. (1T9:21-11:20; 1T39:18-23). Those causes of action were never heard by the trial court on the merits. Therefore, after being permitted to orally amend his causes of action to conform to the evidence, Isaac pursued only two claims at trial – one for declaratory judgment that Isaac holds a 50% interest in a First Mortgage on the NJ Property and another for Money Had and Received for the recoupment of funds contributed to the ongoing maintenance and expenses of the NJ Property by an entity solely owned by Isaac, We Care. (1T39:18-40:2). Isaac's proposed Second

Amended Complaint was never filed, and nor were any other additional formal amended pleadings. (1T39:18-40:2).

Trial was conducted in this matter on January 23, 2024 (1T), January 24, 2024 (2T and 3T), January 25, 2024 (4T and 5T) and February 14, 2024 (6T). Isaac rested on January 25, 2024, and on that date, the Hersko Defendants made an oral motion for dismissal based upon their position that Isaac had failed to make out a *prima facie* case. (5T93:16-126:3) The trial court heard this oral motion and requested additional briefing on issues related to the application of the doctrine of unclean hands. (5T151:2-11).

On February 14, 2024, the trial court orally ruled that Isaac's claim for Money Had and Received was dismissed pursuant to R. 4:37-2 and that all of the parties remaining claims were dismissed pursuant to the application of the doctrine of unclean hands. (6T15:12-21:17). The trial court requested additional briefing on whether the dismissal of the claims voluntarily dismissed by Isaac should be with or without prejudice, and the trial court ultimately entered its final Order in this case on April 15, 2024, which dismissed all of Isaac's claims with prejudice and is the subject of this Appeal. (Pa001-Pa007). The Order also attached a Statement of Reasons Pursuant to R. 1:6-2(f). (Pa008-Pa020).

STATEMENT OF FACTS

Facts Related to Ownership Interest in The Roseville Tower and in the First and Second Mortgages on the NJ Property

This case stems from various interests asserted by the parties related to the NJ Property, which was undisputedly purchased in or around April 20, 2007 by The Roseville Tower. (Pa152-Pa164; Pa062-Pa084; Pa144-Pa151; Pa187-Pa195). It is also undisputed that The Roseville Tower continues to own the NJ Property to this day. (Pa152-Pa164; Pa062-Pa084; Pa144-Pa151; Pa187-Pa195).. However, the issues in this case relate to who owns The Roseville Tower, who was responsible and paid for various expenses related to the NJ Property and the ownership and status of two mortgages on the NJ Property. (Pa152-Pa164; Pa062-Pa084; Pa144-Pa151; Pa187-Pa195).

At the time of the purchase on April 20, 2007, The Roseville Tower was owned jointly Shlomo Karpen, Esther Karpen, Israel Perlmutter and Esther Perlmutter and a purchase money mortgage with Isaac and Barry each individually with a 50% interest as lenders was issued with the face amount of $2,500,000 (Pa203-Pa208; Pa209-Pa215, Pa331-332).

On or about April 20, 2007, there was a subordinate or "second" mortgage (the "Subordinate Mortgage") that was also issued for the NJ Property in the face amount of $3,220,000.00 by GIAIP, LLC ("GIAIP") and its principal Gloria Adler. (1T98:12-17; 1T108:18-24; 2T149:1-3).

By agreement dated January 4, 2010, 100% ownership interest in The Roseville Tower, was transferred to Bella as a result of the prior owners' default of the mortgage provided by Isaac and Barry individually each as 50% owners (the "January 4, 2010 Agreement"). (Pa217-Pa225). The January 4, 2010 Agreement states that the First Mortgage is in default and that the current balance due was $1,500,000 and that a payment of $750,000 was made simultaneously with the execution of the January 4, 2010 Agreement which left a remaining balance as of that date of $750,000. (Pa217-Pa225). The January 4, 2010 Agreement provided that the prior owners could redeem their interests by making certain payments, but those payments were not made, and the ownership interest remained with Bella. (Pa217-Pa225; 2T146:23-25).

Once the parties had entered into the January 4, 2010 Agreement, Barry testified that Isaac had no further ownership interest in The Roseville Tower or the First Mortgage. (2T137:22-141:17). However, there is no evidence that Bella provided any consideration other than $1.00 for this ownership interest as Bella had nothing to do with the existing mortgages on the NJ Property. (Pa226; Pa203-Pa208; 2T137:22-141:17; 5T66:2-6).

Simkowitz claims that he purchased a 50% stake in The Roseville Tower on or about October 28, 2010 and in the First Mortgage, but there is no contract or any other document or an assignment to Simkowitz as the assignment dated October 28,

2010 is blank and never filled in even at the time of trial in the case over thirteen years after the assignment. (Pa227; Pa280-Pa283; 1T120:1-121:2; 2T20:10-22:19). In connection with this purported assignment, Simkowitz paid $500,000 in two checks, one for $350,000 to I. Hersko and one for $150,000 to B. Hersko. (Pa216). According to Barry, the payment to I. Hersko was more because it bought out any interest that Isaac had in the NJ Property or the First Mortgage, although Barry also testified in contradictory fashion that Isaac's interest in the First Mortgage was extinguished as of the January 4, 2010 Agreement, even though it says no such thing. (2T137:22-141:17)**.** However, Barry initially testified that it was a gift, then he said it was a loan before finally claiming that it paid of Isaac's interest in the First Mortgage. (3T217:1-218:11; 3T235:23-237:17). Barry's testimony is contradictory, not supported by any documentary evidence, not credible, and it should be wholly disregarded based upon the fraud that he committed on the Court by knowingly verifying the Foreclosure Complaint that contained materially false and misleading information. (Pa231-Pa272).

An Assignment of Mortgage & Promissory Note was executed on May 2, 2011 which assigned the Subordinate Mortgage which had a face amount of $3,200,000 to ISAAC & BARRY, LLC for only $220,000. (1T98:12-102:11; 1T105:24-108:24). At trial, Barry testified that Isaac had no ownership interest in ISAAC & BARRY, LLC and that he is the sole owner of this entity that obtained

the Subordinate Mortgage from GIAIP following the filing of the sham foreclosure complaint on the first mortgage. (2T136:11-22).

At trial, Barry testified that the current amount outstanding on the First Mortgage is $9 million. (2T143:20-145:9). In 2023, there were payments of $540,000 and $900 made on behalf of Bella which Barry testified were applied to the outstanding balances on both mortgages. (Pa279; 5T7-16).

To date, there have been no other assignments or satisfactions of either the First Mortgage or the Subordinate Mortgage as the First Mortgage remains recorded and unsatisfied with Barry and Isaac listed as holding that mortgage and the Subordinate Mortgage remains recorded and unsatisfied with ISAAC & BARRY LLC holding that mortgage. (2T136:11-22; 2T138:21-23; 2T:141:24-142:7).

Facts Specifically Related to the Wrongful Conduct of Barry and Simkowitz to Defraud the Subordinate Mortgagee

Simkowitz testified that he was heavily involved with Barry in defrauding the original holder of the Subordinate Mortgage and that Barry had developed a scheme so that what appeared to be an arm's length foreclosure action could be filed which would cause the subordinate mortgagee to believe its Subordinate Mortgage was essentially worthless. (1T94:18-95:8; 1T105:25-109:12).

On or about December 13, 2010, a foreclosure complaint was filed on the First Mortgage and was assigned Docket No. ESX-F-059134-10 (the "Foreclosure Complaint"). (Pa231-Pa272). Simkowitz testified that he was the one who retained

the attorney who filed the Foreclosure Complaint and that he did not recall discussing the retention with Isaac. (Pa231-Pa272) (2T24:21-32:12). It is the filing of the Foreclosure Complaint that is wrongful conduct that invokes the doctrine of unclean hands because it contained the false allegation that Israel Perlmutter was still the Managing member of The Roseville Tower. This is even one step further than placing the membership interest in The Roseville Tower in Bella's name to shield the identity of the true owner(s). (Pa248 at ¶23) The Foreclosure Complaint contains known false material information and was verified by Barry only. (Pa253). Indeed, Barry and Simkowitz both admitted that the allegation was false and that they knew it was false at the time. (2T12:2-14:8; 2T152:10-155:3).

This sham foreclosure action would ultimately motivate the managing member of original subordinate mortgagee, GIAIP, Gloria Adler, to assign the Subordinate Mortgage for pennies on the dollar ($220,000 for a mortgage with a face value of $3,220,000) to ISAAC & BARRY, LLC which is an entity that Barry testified he solely owns. (1T98:12-17; 1T108:18-24; 2T149:1-3; 2T148:15-149:21). And, as Simkowitz testified, Barry's plan :was executed very well." (T198:12-102:11; 1T105-24-108:24).

Simkowitz further testified that the assignment of membership interest that he paid for and received on October 28, 2010 was left blank in order to hide his identity as an owner as part of the plan for the Subordinate Mortgage to be acquired at steep

discount even though he considered himself to be a 50% of The Roseville Tower from that date forward. (1T125:8-133:23; 1T136:4-139:11). Simkowitz testified that he was free to fill in the assignee information at any time but that he still has never done so. (1T119:5-125:3).

Most importantly for the purposes of this appeal is that there was no credible testimony that Isaac was involved in the fraud. While Isaac's was a nominal party to foreclosure action[1], Simkowitz testified that he is the one who actually retained the lawyer. (2T24:21-32:12). Indeed, all the emails in evidence and the verified foreclosure complaint signed by Barry Hersko establish that the false pleading was approved by and filed on behalf of Barry Hersko and Chaim Simkowitz. (Pa231-Pa278). None of the email updates chronicling the progress of the foreclosure action including the decision to discontinue the foreclosure action once GIAIP had assigned the second mortgage even include Isaac Hersko. (Pa273-Pa278). Further, both Barry and Chaim testified that Isaac had forfeited any interest he had in the First Mortgage either on October 28, 2010 or January 4, 2010, both of which were before the Foreclosure Complaint was ever filed. (2T137:22-141:17). Additionally, Barry also testified that Isaac had no interest in ISAAC and BARRY, LLC (despite the name of the LLC), so according to Barry and Simkowitz, Isaac stood to gain absolutely

[1] Isaac's name and authenticated signature appear on a retainer agreement which is not in evidence. (Pa311-Pa312). However, there is no evidence that Isaac ever had any communications with the attorney who filed the foreclosure action.

nothing from the entire scheme. (2T136:11-22).

Therefore, while the trial court's analysis and determination related to its application of the unclean hands doctrine is correct as to Barry and Simkowitz, the doctrine was incorrectly applied to bar Isaac's equitable claims as well.

Facts Relevant to Isaac's Claim for Money Had and Received

Obviously during the years that parties owed the Roseville Tower, there were expenses that would need to be paid by the owners, and these expenses required capital contributions. (Pa284-Pa310; 2T76:6-15; 2T78:12-19). In many instances, those contributions were made by the company that is exclusively owned by Isaac and is referred to in these documents as We Care, Inc. which may also be known as We All Care, Inc. While the subject checks list an entity called We Care, Inc., no such entity exists, so We Care, Inc. effectively an alter ego of Isaac. (3T205:15-22; 3T207:13-208:25). It is undisputed that Isaac was the sole person in control of the funds from the We Care, Inc. bank account and that Isaac contributed $643,794.10 from this account to the ongoing expenses of The Roseville Tower. (Pa284-Pa310; 2T76:6-15; 2T78:12-19).

During the relevant time period, The Roseville Tower was purportedly owned by Simkowitz and Bella with Barry actually making the important decisions - notwithstanding the absence of technical ownership interest by Barry. (Pa284-Pa289). These payments were made because Isaac believed that he had an ownership

interest in The Roseville Tower, and while Barry claims that these payments were made on behalf of Isaac because Isaac owed Barry money, Barry's testimony is contradictory, not credible and should be disregarded in its entirety. (3T207:13-208:25; 3T227:11-22). As a result of these payments, the owners of The Roseville Tower have received a benefit from Isaac and the retention of this benefit would be inequitable – effectively Barry, Bella and Simkowitz have been unjustly enriched by Isaac making these payments under false pretenses and without consideration given in exchange.

LEGAL ARGUMENT

POINT I

THE FACTUAL RECORD DOES NOT SUPPORT A FINDING OF UNCLEAN HANDS ON THE PART OF ISAAC HERSKO (Pa005-Pa006; Pa015-Pa020)

A. Standard of Review

Findings of fact and issues of credibility are required to be deferred to the court below *if* supported by sufficient credible evidence in the record. See State v. Locurto, 157 N.J. 463, 470-471 (1999); Rover Farmers Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974) (emphasis added). Additionally, numerous rulings made during the litigation process, if they are within the trial court's discretionary authority are measured against the standard of "mistaken exercise" or "abuse of discretion." Gillman v. Bally Mfg. Corp., 286 NJ Super 525, 528 (App. Div. 1996); Morning Ledger v. Sports and Expo., 423 NJ. Super 140, 174-175 (App. Div. 2011). Thus, an appellate court generally defers to the trial court's exercise of discretion unless the trial judge pursued a manifestly unjust course, and the mistaken exercise prejudices the substantial rights of a party. Id.

B. Based upon Barry and Simkowitz's Fraudulent Conduct and Contradictory Testimony, the Maxim of Falsus In Uno Should be Applied to Their Testimony

While the maxim "*falsus in uno*, falso in omnibus" meaning "false in one thing, false in everything" is not a mandatory rule of evidence, but a permissive

inference which permits the fact finder to disregard all of a parties' testimony, we respectfully submit that its application is appropriate here. See State v. Ernst, 32 N.J. 567, 583 (1960); see also Hargrave v. Stockloss 115 N.J.L. 262, 266 (E.&A. 1945); Hargrove v. Stockloss, 127 N.J.L. 262 (E&A 1941). *Falsus in uno* is a permissible inference that a fact finder may or may not draw when convinced that an attempt has been made to willfully, knowingly or intentionally mislead them in some material respect. Addis v. Rushmore, 74 N.J.L. 650 (Ct. or Errors and App. 1907); State v, Samuels, 92 N.J. L. 131, 133 (NJ. Cup. Ct. 1918).

Based on the conduct related to the Foreclosure Complaint described at length during the trial, as well as the extensive trial testimony provided by Barry and Simkowitz, which contradicts their own deposition testimony regarding material facts at issue in this case, the maxim of *falsus in uno*, is wholly appropriate when considering the testimony of Barry and Simkowitz in this case. (Pa231-Pa278).

Indeed, all the testimony that Barry provided regarding his denial of knowledge of the Foreclosure Complaint, or of the e-mails that he sent or received regarding same, should be wholly disregarded. (T2157:3-159:1; 163:22-167:18). Likewise, any contradictory testimony by Simkowitz related to Isaac's alleged involvement with the Foreclosure Complaint should be wholly disregarded. Ultimately, without this not credible testimony, there is no clear and convincing evidence of Isaac's involvement in this wrongful conduct.

C. Application of Appellate Standard to The Trial Court's Ruling on the Unclean Hands Doctrine

Two long-standing equitable doctrines are 1) that a court will not become an instrument of injustice; and 2) that a party seeking relief must come before the court with clean hands. See Warner v. Giron, 141 N.J. Eq. 493, 498 (Ch. Div. 1948); Brower v. Glen Wild Lake Co. 86 N.J. Super. 341, 350 (App. Div. 1965); Weisbrod v. Lutz, 190 N.J. Super. 181, 186 (App. Div. 1983). A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949) ("[h]e who comes into equity must come with clean hands"); Pellitteri v. Pelliteri, 266 N.J. Super. 56, 65 (App. Div. 1993) ("court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit").

Nor will equity allow any wrongdoer to enrich himself because of his own criminal acts. Jackson v. Prudential Ins. Co. of America, 106 N.J. Super. 61, 68 (Law Div.1969). In this sense, equity follows the common law precept that no one will be allowed to benefit by his own wrongdoing. Neiman v. Hurff, 11 N.J. 55, 60 (1952). Thus, where the bad faith, fraud or unconscionable acts of a petitioner form the basis of his lawsuit, equity will deny him its remedies. Goodwin Motor Corp. v. Mercedes Benz of N.A., Inc., 172 N.J.Super. 263 (App.Div.1980). The Third Circuit has also recently stated that "[t]he equitable doctrine of unclean hands applies when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." Kars 4 Kids, Inc. v. America Can!, 98

F.4th 436, 449,450 (3d Cir. 2024) citing Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 174 (3d Cir. 2001).

Not only should a court of equity decline to provide equitable relief to wrongdoers, but a court of equity in the State of New Jersey should not even listen to a party that comes before it with unclean hands. See Ryan v. Motor Credit Co., Inc., 132 N.J. Eq. 398, 403 (Ct. Err. and App. 1941).

Indeed, in Ryan which has been cited as recently as 2021 by the Appellate Division, the Court stated the following:

> **…** It is a maxim of equity that a **court of conscience will not even listen to a suitor who comes into that tribunal with unclean hands**, and this doctrine is applicable whenever it appears that the litigant seeks to be relieved of the consequences of a fraud in which he has been an active participant. The courts of this state have steadfastly refused to lend their aid to a wrongdoer either by the enforcement of an illegal contract or by relieving the wrongdoer from the obligations thereof; and this they do, not out of regard for the defendant in the action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends in aiding schemes [sic] which are in their nature venal, or for the purpose of relieving parties from the liabilities which such schemes create.

Id. (emphasis added)

Further, as the seminal case of Sheridan v. Sheridan, 247 N.J. Super. 552 (Ch. Div. 1991) demonstrates, it is not required that the wrongful conduct harm parties to the litigation or that there is a direct nexus between the relief sought and the wrongful conduct. A New Jersey Court should deny a party who has engaged in wrongful

conduct that has not directly harmed other parties to the litigation and has only harmed third-parties not involved in the matter being litigated. Id.at 567.

In Sheridan, the husband and wife were fighting over marital assets in a divorce case. Through the process of discovery, it became apparent to the Court that a significant amount of the marital assets at issue had been acquired through fraudulent or criminal wrongdoing. Id. at 557. The persons harmed were not parties to the divorce action and were not impacted by how the marital assets were divided. Rather, very much like this case, they were third-parties which included the Internal Revenue Service, the New Jersey Division of Taxation, and customers who had purchased oil from a company which employed one of the Sheridans and who were shorted in provision of oil deliveries. Id. at 567. Even though the wronged parties were not before the Court, the Court declined to provide any relief to either of the Sheridans. Id. Indeed, the Court took affirmative action to protect the interests of the third-parties by reporting the parties' apparent criminal actions to the proper authorities. Id. at 563. In Sheridan, the Court applied "common sense" to conclude that Judges were not "to be tellers or [ ] courtroom[ ] counting houses for the division of tainted assets purchased with dirty money." Id. at 561. The Court stated, "[t]he policy of this state is unambiguous in that regard: We do not reward wrongdoers!" Id. The Court also noted that "[t]o allow plaintiff to seek equity's aid in dividing

marital assets acquired with illicit funds would substantially demean that policy and sully the judicial process. Courts cannot permit that to be done." Id. at 562. [2]

This maxim is based on public policy, and may be relaxed in the interest of fairness. Rasmussen v. Nielsen, 142 N.J. Eq. 657, 661 (E & A 1948). As noted in A. Hollander & Sons v. Imperial Fur Blending Corp., 2 N.J. 235, 247 (1949). Indeed, while the maxim, '[h]e who comes into equity must come with clean hands,' has a very wide application, it has also its limitations. See Neubeck v. Neubeck 94 N.J.Eq. 167, 170 (E&A 1922).

The Court in Neubeck went on to state the following:

> [This maxim] does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought. Pendleton v. Gondolf, 85 N. J. Eq. 308, 96 Atl. 47, and cases collected in 21 C. J. 182, and 10 R. C. L. p. 391. A recent illustration of the proper application of the doctrine is to be found in Prindiville v. Johnson & Higgins (N. J. Err. & App.) 116 Atl. 785.

[2] Although the Court in Sheridan was construing equitable distribution statutes, the same norms of common sense apply equally here in a case where unrelated third parties and the New Jersey Court system have been the victim of substantive misrepresentations and false statements with respect to the relationship between the owners and mortgagees. The division assets in a divorce is analogous to the division of the interests related to the subject property and mortgages at issue in this case.

Neubeck 94 N.J.Eq. at 170.

The doctrine of unclean hands generally requires "*clear, convincing evidence* of egregious misconduct before invoking the doctrine of unclean hands." Kars 4 Kids, Inc., 98 F.4th at 449-450 quoting Citizens Fin. Grp., Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110, 129 (3d Cir. 2004) (internal quotation marks and citation omitted) (emphasis added).

Similarly, as cited in the trial court's opinion, in Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237, 251 (App. Div. 2007), the Appellate Division stated as follows:

> A fraud on the court occurs "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir.1989); Perna v. Elec. Data Sys. Corp., 916 F.Supp. 388, 397 (D.N.J.1995). Unlike common law fraud on a party, fraud on a court does not require reliance. Separate and distinct from court rules and statutes, courts possess an inherent power to sanction an individual for committing a fraud on the court. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Perna, supra, 916 F.Supp. at 388; Penwag Prop., supra, 148 N.J.Super. at 505, 372 *A*.2d 1162 (Kole, J.A.D., concurring).

In this case, it cannot legitimately be disputed that Barry and Simkowitz have engaged in wrongful, criminal conduct that implicates the doctrine of unclean hands, and the Court was correct to invoke the doctrine based on the evidence of their conduct. See Order. Indeed, the assets at issue are tainted because, as testified by

Simkowitz at length at trial, Barry and Simkowitz agreed to a scheme to obtain the subordinate mortgage for pennies on the dollar by filing a foreclosure complaint that made false representations designed to conceal their ownership of both the mortgagor and mortgagee to deceive the subordinate mortgagee. (T1 105:25-106:15; 107:6-11; 129:17-136:7). The fraud is thus not merely superficial, but it is substantial and caused significant damage to the third-party subordinate mortgagee, GIAIP and its principal Gloria Adler. As a result, there is clearly a nexus between the conduct and the subject of this action which makes the application of the equitable doctrine appropriate as to Barry and Simkowitz. (P001-P020).

Conversely, Isaac continues to assert that the factual record does support a finding of unclean hands as to Isaac, and certainly does not support a finding based upon *clear and convincing* evidence. Perhaps one of the most important facts to support this contention is that Isaac would have had nothing to gain from the fraud based on the testimony of Barry and Simkowitz, since according to them, any interest that he had in the NJ Property or any or the mortgages was extinguished prior to the filing of the Foreclosure Complaint in December 2010. (1T137:3-7; 2T85:14-85:4; 2T137:22-141:17).

And, even if Isaac does own the 50% interest in the First Mortgage, as Isaac continues to contend, he still would have had nothing to gain from this fraudulent scheme which only benefitted the assignee of the Subordinate Mortgage which Barry

testified was an LLC owned solely by himself. (2T136:11-22). Worse yet, if Isaac is improperly found to have unclean hands, he along with Simkowitz are powerless to stop Barry, who Simkowitz testified devised the plan and who verified the false pleading, as he cashes in on the sale of the property. (T198:12-102:11; 1T105-24-108:24). Therefore, the Unclean Hands doctrine should not have been found to apply to Isaac on this record and holding otherwise constitutes a gross inequity to Isaac while rewarding the most culpable party, Barry.

In its Order dated April 15, 2024, the trial court notes the facts that it was relying upon the following facts in applying the doctrine to Issac:

1) That Isaac signed the January 4, 2010 agreement. This is true, but this agreement alone did not constitute a basis for the finding of unclean hands.

2) That Simkowitz testified that Isaac participated in the plan to foreclose on the First Mortgage. As discussed in greater detail below, the doctrine of "*falsus in uno*, falso in omnibus" permits the Court to disregard Simkowitz's testimony, especially when it was self-serving as it is on this point.

3) That Isaac was signatory on the October 2010 Assignment of Mortgage. Isaac believes this is a mistake in the trial court's Order as there is not an October 2010 Assignment of Mortgage and Isaac did not sign the October 2010 Assignment of LLC Interest.

4) That Isaac's name appears on the retainer agreement with the Feinsilver Law Group for the foreclosure action and that there was no handwriting expert to say that Isaac had not signed it. Isaac does not dispute that Isaac's name is on the retainer agreement and that there is no expert handwriting testimony. However, there is no credible testimony that Isaac signed the retainer agreement, and Simkowitz testified that he made the arrangements for the attorney. (2T24:21-32:12). Further, Barry testified that Isaac no longer had an interest in the First Mortgage during the time period when

the attorney was retained, and the Foreclosure Complaint was filed. (2T137:22-141:17).

5) That Isaac was a party to the Foreclosure Complaint. This is not disputed, but there is no evidence that Isaac was aware of the false allegation contained the foreclosure complaint. Indeed, all the emails in evidence and the verified complaint signed by Barry Hersko establish that the false pleading was approved by and filed on behalf of Barry Hersko and Chaim Simkowitz. (Pa231-Pa278). None of the email updates chronicling the progress of the foreclosure action including the decision to discontinue the foreclosure action once GIAIP LLC had assigned the second mortgage even include Isaac Hersko. (Pa231-Pa278).

6) That in his proposed Second Amended Complaint, Isaac asserted an interest in the second mortgage which is owned by ISAAC & BARRY, LLC. This allegation was contained in the proposed pleading, but ultimately Isaac had no evidence that he actually had an interest in ISAAC & BARRY, LLC, so this claim was not pursued at trial.

The ultimate outcome of this incorrect ruling is manifestly unjust course, and the mistaken exercise prejudices the substantial rights of a party. A Court of equity can never allow itself to become an instrument of injustice. Which unfortunately is the effective outcome of this decision. See Sheridan v 247 N.J. Super. at 556. Bella (and effectively Barry) maintains ownership of at least 50% of the NJ property, and Barry effectively owns both mortgages. Isaac ends up without the ability to obtain any relief even though he owns 50% of the First Mortgage and paid over $600,000 toward carrying expenses for the NJ Property.

Based on these findings, the trial court was incorrect that there was clear and convincing evidence that Isaac had engaged in the fraud on the court. The doctrine

of unclean hands should not have been applied to Isaac and should only have applied to bar the equitable claims of Barry and Simkowitz.

POINT II

THE FACTS CLEARLY SUPPORT A FINDING THAT ISAAC HERSKO HAS A 50% INTEREST IN THE FIRST MORTGAGE (Pa005)

The trial court dismissal of Isaac's cause of action for a declaratory judgment that Isaac has a 50% interest in the First Mortgage was not on the merits but was rather based upon the trial court's determination that all claims for equitable relief by all parties would be dismissed based upon the doctrine of unclean hands. (Pa001-Pa007) Therefore, Isaac understands the trial court's ruling that the unclean hands doctrine, as to be applied to Isaac, would need to be reversed before the Appellate Division considers the merits of Isaac's claims related to the First Mortgage. (Pa001-Pa007). Regardless, the facts are clear that Isaac has a 50% interest in the First Mortgage, and it is an unjust result for any other finding. (Pa203-Pa208).

Indeed, it is undisputed that there have been no other assignments or satisfactions of either the First Mortgage First Mortgage remains recorded and unsatisfied, with Barry and Isaac listed as holding that mortgage. (2T138:21-23; 2T141:18-142:2). Further, at trial, Barry testified that the current amount outstanding on the First Mortgage is $9 million. (2T144:14-145:9). In 2023, there were payments

of $540,000 and $900 made on behalf of Bella which Barry initially testified were applied to the outstanding balances on both mortgages and then changed his testimony to say only the second. (Pa279) (2T181:17-184:1; 5T56:5-8; 5T65:23-67:7).

None of the other agreements, including the January 4, 2010 Agreement, provide any basis to extinguish Isaac's 50% ownership stake in the first mortgage. (Pa217-Pa225). Therefore, the documentary evidence is uncontroverted.

Barry and Simkowitz attempt to provide testimony that undermines Isaac's rightful 50% interest in the First Mortgage. Specifically, Barry also provided significant contradictory testimony regarding how Isaac's interest in the first mortgage was allegedly paid off and why Isaac allegedly received the $350,000 check at the October 28, 2010 closing, all of which should be disregarded. (3T217:1-218:11; 3T235:23-237:17)

Ultimately, if the maxim of *falsus in uno* is applied to this case as it should be, Isaac submits that he should prevail on his Declaratory Judgment claim regarding his 50% ownership stake in the valid and enforceable First Mortgage as this claim is clearly supported by the documentary evidence. (Pa203-Pa208).

POINT III

INVOLUNTARY DISMISSAL OF ISAAC'S MONEY HAD AND RECEIVED CLAIM PURSUANT TO R. 4:37 WAS INCORRECT (Pa002-Pa003; Pa014-Pa015; 6T:16:4-21:17)

A. Standard of Review for Involuntary Dismissal Pursuant to R. 4:37

As a general rule, questions or law addressed to the trial court are not entitled to deference and an appellate panel's review of legal issues is de novo. Manalapan Realty v. Tnsp. Committee, 140 N.J. 366, 378 (1995). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The standard of review of an involuntary dismissal requires an appellate court to "examine the evidence, together with legitimate inferences which can be drawn therefrom, and determine whether the evidence could have sustained a judgment in favor of the party who opposed the motion." Tannock v. N.J. Bell Tel., 223 N.J. Super. 1, 6 (App. Div. 1988).

B. The Facts in the Record Establish a *prima facie* claim for Money Had and Received

Under New Jersey law, a claim under the quasi-contractual theory of unjust enrichment has only two essential elements: "(1) that the defendant has received a

benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable." Wanaque Borough Sewerage Auth. v. West Milford, 144 N.J. 564, 575 (1996) (internal citations omitted).

In this case, it is undisputed that there were expenses that would need to be paid by the owners of The Roseville Tower, and these expenses required capital contributions. (Pa284-Pa289). In many instances, those contributions were made by the company that is exclusively owned by Isaac and is referred to in these documents as We Care, Inc. which is not a real entity (there is a corporation known as We All Care, Inc.) (3T197:6-11). While the subject checks list an entity called We Care, Inc., no such entity exists, which makes We Care, Inc. effectively an alter ego of Isaac. (3T197:6-11). It is undisputed that Isaac was the sole person in control of the funds from the We Care, Inc. bank account and that Isaac contributed $643,794.10 from this account to the ongoing expenses of The Roseville Tower. (Pa284-Pa310**).**

The above referenced payments were made when the NJ Property was owned by Bella and potentially Simkowitz. (Pa284-Pa310; 2T76:6-15; 2T78:12-19). These payments were made because Isaac believed that he had an ownership interest in The Roseville Tower, and while Barry claims that these payments were made on behalf of Isaac because Isaac owed Barry money, Barry's testimony is contradictory, not credible and should be disregarded in its entirety based upon the maxim of *falsus in uno*, falso in omnibus, and there is no proof of same. As a result of these payments,

the owners of The Roseville Tower have received a benefit from Isaac and his retention of this benefit would be inequitable – effectively the Barry, Bella and Simkowitz have been unjustly enriched by Isaac making these payments under false pretenses. (Pa284-Pa310).

Barry did testify that these payments were made by We Care for rent that was owed on account for other properties as part of the brothers' complex business relationship, and that he maintained a record of these payments in a chesbon which is essentially a ledger. (4T76:7-77:25). However. the maxim of *falsus in uno* should be applied be to permit the court to disregard any of Barry's testimony regarding the cheshbon/ledger and the alleged rent on account that the We Care payments were meant to cover. (4T76:7-77:25) Therefore, Isaac submits that he has established a *prima facie* case on his Money Had and Received Claim as this claim is clearly supported by the documentary evidence. (Pa284-Pa310).

Based on the foregoing, the involuntary dismissal of Isaac's claims for Money Had and Received should be reversed.

POINT IV

THE CLAIMS VOLUNTARILY DISMISSED BY ISAAC PRIOR TO TRIAL SHOULD BE DISMISSED WITHOUT PREJUDICE (Pa002-Pa003; Pa008-Pa014)

On the first day of trial, January 23, 2024, prior to opening statements, Isaac

withdrew the following claims contained in his First Amended Complaint: Count I as it relates to a Declaratory Judgment of Isaac's ownership interest in The Roseville Tower or in the subordinate mortgage; Count II for Constructive Trust based upon Isaac's ownership interest in The Roseville Tower, LLC; Count III for Conversion, Count IV as it related to a claim for Money Had and Received from an account held by Abraham Weisel, Esq., and Count V for an Accounting. (1T9:21-11:20.)

R. 4:37-1(b) provides that such a dismissal may be without prejudice at the discretion of the court. The trial court initially ruled that those claims were withdrawn and that it would not make any further ruling on those claims. (1T21:5-16). Therefore, those claims were not part of the trial in this case, were never heard on the merits, and, while initially the trial court indicated that it wase not ruling whether the dismissal was with or without prejudice, Judge Adubato subsequently stated that she "accept[ed] the withdrawal of the claims and I've never ruled on these anyway." (1T38:3-7; 1T37:5-38:7). Indeed, Judge Adubato stated the following: [I] "never inten[ded] to say that means that they were never valid claims. So, I just wanted to make that clear. The withdrawal of the claims, I think, is an acknowledgement that [Plaintiff doesn't] have the proofs here today to make those claims, meet their burden. I don't know what would happen somewhere else because I don't know what the other cases are." (1T37:14-21).

While as is noted in the trial court's final decision and Order that Judge

Adubato was well within her right to reevaluate and change her mind, Isaac asserts that he was prejudiced by this change as he proceeded through trial with the understanding that these claims were dismissed without prejudice. Further, Isaac asserts that a dismissal without prejudice is appropriate under these circumstances, especially given Isaac's medical condition which prevented him from being deposed or participating in the trial.

Regardless of whether these dismissals were with or without prejudice, these claims were limited to the ownership interests related to the NJ Property and have no bearing on any other assets of Isaac or Barry, as the only allegations made in this case relate to the NJ Property, and this Court does not have jurisdiction over any of the other properties owned by Isaac or Barry outside of the State of New Jersey.

CONCLUSION

Based on the foregoing, the trial court's Order entered on April 15, 2024, should be reversed in part as follows:

1) The ruling dismissing all equitable claims against all parties should not apply to appellant, Isaac Hersko;
2) The dismissal of appellant, Isaac Hersko's claim for a declaratory judgment that he is a 50% owner of the First Mortgage should be reversed and remanded for further proceedings;
3) The involuntary dismissal pursuant to R. 4:37-2 should be reversed and remanded for further proceedings; and
4) That the dismissal with prejudice of the claims voluntarily dismissed by appellant, Isaac Hersko, before trial should be reversed and made without prejudice.

Respectfully submitted,

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Attorneys for Appellant
Isaac Hersko

By: */s/ Thomas K. Murphy III*
THOMAS K. MURPHY III

DATED: August 15, 2024

ISAAC HERSKO, Plaintiff, v. BARRY HERSKO, BELLA HERSKO, THE ROSEVILLE TOWER LLC, and CHAIM SIMKOWITZ, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION APPELLATE DOCKET NO.: A-2622-23 TRIAL COURT DOCKET NO.: ESX-C-220-21 Sat Below: Hon. Lisa M. Adubato, J.S.C. Hon. James R. Paganelli, J.S.C.

DEFENDANTS BARRY HERSKO'S AND BELLA HERSKO'S CONSOLIDATED BRIEF IN RESPONSE TO APPEAL OF ISAAC HERSKO AND IN SUPPORT OF CROSS-APPEAL AGAINST CHAIM SIMKOWITZ

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INTRODUCTION

Plaintiff Isaac Hersko's ("Isaac") appeal challenges the trial court's weighing of the evidence against him. The trial court's evaluation of the evidence was proper, there was no error, and this Court should affirm.

Isaac's claims against his brother and his sister in law, Barry Hersko ("Barry") and Bella Hersko ("Bella"), were everchanging and contradictory. Initially, he asserted a direct 50% ownership interest in the "Tower Property," as well as a 50% interest in funds in Barry's lawyer's escrow account. In his First Amended Complaint, Isaac modified his property ownership claim to assert a direct 50% interest in "Tower LLC" (the entity that owns the Tower Property, which is owned 50% each by Bella and Intervenor-Defendant Chaim Simkowitz ("Simkowitz")). He also added allegations to his constructive trust claim that he allegedly contributed funds to the operations of the Tower Property through an entity he owns called "We All Care, Inc." And while he alleged that he had a direct interest in the First Mortgage and an interest in Isaac & Barry LLC (Barry's entity that owned the Subordinate Mortgage), he did not expressly assert claims of ownership based on those allegations.

After discovery closed and less than two months before trial, Isaac moved for leave to file a Second Amended Complaint, which expressly added claims of ownership of the First Mortgage and Isaac & Barry LLC (thus the Subordinate

Mortgage). In asserting an interest in Isaac & Barry LLC, Isaac's proposed pleading now alleged there was a "scheme" to file a sham foreclosure action on the First Mortgage, designed to induce the previous subordinate mortgagee (a non-party entity) to sell the Subordinate Mortgage at a discount.

But on the first day of trial, Isaac reversed himself. He withdrew his claims for ownership of any interest in Tower LLC, the Tower Property, Isaac & Barry LLC, and the Subordinate Mortgage, as well as his claims for ownership of funds in Barry's lawyer escrow account. He only sought to present two claims – one, for a 50% interest in the First Mortgage; and the second, a previously unpled theory of money had and received to recoup the funds We All Care, Inc. allegedly contributed to the operations of the Tower Property.

Isaac's counsel represented that Isaac withdrew his other claims because they determined Isaac was unable to prove them. During trial, Isaac's motives became clearer. The modified case he presented centered around attempting to prove his affirmative claims by showing that Barry and Simkowitz engaged in wrongdoing relating to the alleged sham foreclosure. Chanting the mantra "*falsus in uno, falsus in omnibus*," Isaac asked the trial court to reject all of the defendants' defenses and testimony, which he believed would make him automatically victorious. Despite his previous allegations, and his claims that he was a 50% owner of Tower LLC and the entity that owned the Subordinate

Mortgage, Isaac now tried to distance himself from the transactions and portray himself as an innocent bystander to his brother's "scheme."

Isaac's strategy backfired. In its reasoned decision, based on numerous exhibits and three days of trial testimony, the trial court pointed to several specific events and documents showing that Isaac participated in the very same acts of "unclean hands" that he accused the defendants of engaging in. Isaac's affirmative case, therefore, actually undermined his remaining claims and established the *defendants'* affirmative defense to his equitable claims. The trial court thus dismissed Isaac's claim seeking a 50% interest in the First Mortgage based on Isaac's unclean hands. It further dismissed Isaac's claim seeking to recoup We All Care, Inc. payments because Isaac failed to establish the elements of his claim, including that he made the payments personally or the reason for the payments. And it dismissed with prejudice the claims that Isaac withdrew at trial, concluding Isaac should not be able to recommence those claims after prosecuting them for two years.

The trial court acted within its discretion when it dismissed all of Isaac's claims with prejudice. Isaac's appeal is nothing more than disagreement with how the trial court weighed the evidence. This Court should affirm.

PROCEDURAL HISTORY

Barry and Bella do not dispute the chronological aspects of the Procedural History set forth in Isaac's opening brief. (Pb4-7). A more fulsome description of the pleadings and court rulings is set forth in the Statement of Facts, below.

STATEMENT OF FACTS

A. Isaac and Barry's Relationship

Isaac is Barry's older brother. (4T, 7:1-7). Barry testified that, until recently, he and Isaac were very close. (4T, 22:24-23:21). Barry initially worked for Isaac selling corrugated material (4T, 8:3-9:11), until Barry developed his own real estate business (4T, 10:15-25:22).

Over the years, through a series of entities, Barry acquired several residential properties in New York. (4T, 26:5-11). He successfully enrolled in a special program with the City of New York to make his vacant apartment units available to homeless individuals (4T, 27:20-29:12), which required contracting with an intermediary service provider.

When Barry enrolled in the program, he knew that Isaac's corrugated materials business was no longer successful, and that Isaac was struggling financially. (4T, 30:10-17). Barry proposed to Isaac that Isaac form his own entity to lease the apartments from Barry's affiliated entities and manage the apartments as the intermediary service provider. (4T, 35:3-9). Isaac formed We

All Care, Inc. and is the owner of that entity. (4T, 29:13-24, 38:11-12). Barry's affiliated entities then leased the vacant apartments to We All Care, Inc., and We All Care, Inc. made the apartments available for homeless individuals under the City program. (4T, 30:23-35:11). We All Care, Inc. was obligated pay Barry's affiliated entities a daily rate for the apartments; and We All Care, Inc. would, in turn, collect the City funding and profit from the difference. (4T, 35:19-36:22; 37:25-38:10).

Because of Isaac's involvement with We All Care, Inc., Barry gave Isaac an adjacent desk in his office, where the two brothers worked in close proximity for several years. (4T, 71:10-20). At a certain point in time, We All Care, Inc. stopped paying Barry's property ownership entities and built up millions of dollars of debt to these entities. (4T, 39:5-12).[1]

B. <u>The Mortgage Loans</u>

On April 20, 2007, The Roseville Tower LLC ("Tower LLC"), which was then owned by Messrs. Karpen and Perlmutter, purchased the property located at 140-148 Roseville Avenue, Newark, New Jersey ("Tower Property") from GIAIP, LLC ("GIAIP") for approximately $5.825 million. (Pa203, 2T:179:22-

[1] Barry and Bella introduced a document identified as "D-14" at trial, which was a ledger showing payments We All Care, Inc. owed to Barry's affiliated entities for the properties used in the homeless shelter program. (4T, 78:1-79:2). However, over Barry and Bella's objection, the document was not admitted into evidence. (4T, 79:3-90:5).

180:6). The Tower Property comprises approximately 270 abandoned residential units; but the property is vacant, needs significant repairs, and has been abandoned for decades. (4T, 39:20-40:7). At all times relevant to this case, it has never produced income. (4T, 40:9-10).

To effectuate the sale, a $2.5 million loan was given to Tower LLC to acquire the Tower Property, memorialized in a "Note" and secured by a "First Mortgage." (Pa203, Pa331). The Note and First Mortgage list "Barry Hersko and Isaac Hersko" as the "Lender." (Pa203, Pa331). However, Barry testified that Isaac did not contribute any money to the mortgage loan (4T, 43:16-44:3), and there was no evidence otherwise.

The same day, the seller, GIAIP, provided $3.22 million in seller financing to the buyer, Tower LLC, which was secured by the Subordinate Mortgage on the Tower Property. (Da1). Barry testified that in the years that followed, a representative of GIAIP kept in touch with him. (2T, 147:14-148:18, 177:16-25, 178:1-179:2, 180:17-23).

C. The January 4, 2010 Mortgage Workout Agreement

Barry testified that by January 2010, although Tower LLC had repaid approximately $1 million on the First Mortgage, it was repeatedly in default on its payments. (4T, 44:13-46:23, 48:22-49:6). On January 4, 2010, Barry, Isaac, Bella, and the members of Tower LLC entered into an agreement to resolve

issues relating to the First Mortgage defaults ("Mortgage Workout Agreement"). (Pa217). The Mortgage Workout Agreement states that one of the members of Tower LLC (Mr. Karpen) would immediately pay $750,000 as a lump sum to reduce the principal balance on the First Mortgage. (Pa218, ¶ 2). Barry testified that the money was, in fact, paid and reduced the remaining principal balance from $1.5 million to $750,000. (4T, 49:21-50:3, 61:14-20).

Under the Mortgage Workout Agreement, the remaining principal balance was due by June 25, 2010 and was secured by 100% of the membership interest in Tower LLC, which was assigned on a contingent basis to Barry's wife, Bella. (Pa218, ¶ 4; Pa219, ¶ 5). If Tower LLC defaulted in the payment under the Agreement, Bella would retain the 100% membership interest collateral; if the payment were made in full, the collateral would be returned. (Pa218-19, ¶¶ 4-10). Although Isaac claims in his brief that placing the interest in Bella's name was a wrongful act to shield the identity of the owner of the entity (Pb12), Isaac signed this Agreement, and his signature was notarized. (Pa222-23).

Tower LLC did, indeed, default under the Mortgage Workout Agreement by failing to pay any of the remaining $750,000. (4T, 65:17-19). As a result, 100% of the membership interest in Tower LLC vested in Bella. (4T, 63:13-18; Pa226).

D. The October 28, 2010 Transaction

In 2010, Barry had discussions with Intervenor-Defendant Chaim Simkowitz ("Simkowitz") about acquiring an interest in Tower LLC from Bella, and the parties agreed that Bella would sell 50% of her interest in Tower LLC to Simkowitz. (1T, 89:10-23). On October 28, 2010, Bella executed a document assigning 50% of her interest in Tower LLC. (Pa227). There was also a document bearing the same date in which Isaac and Barry purported to assign 50% of the First Mortgage. (Pa280-281). Simkowitz testified that Isaac signed the document in his presence. (Pa280, 2T, 87:16-88:15).

At the October 28, 2010 closing of the sale of a 50% interest in Tower LLC to Simkowitz, Simkowitz wrote two checks: a check for $350,000 to "I Hersko" and a check for $150,000 to "B Hersko." (Pa216; 2T, 84:14-22). Simkowitz testified that he gave the check to Isaac and understood the $350,000 check satisfied Isaac's interest in the First Mortgage in full. (2T, 84:14-85:4). Barry confirmed that the $350,000 check was the last payment in satisfaction of Isaac's interest. (3T, 215:8-216:3).

E. The December 2010 Foreclosure Action

Simkowitz wanted to clear the Subordinate Mortgage from title on the Tower Property so he could develop it. (1T, 97:1-98:11). A plan was developed in which Isaac and Barry would use their leverage with the First Mortgage to

attempt to buy the Subordinate Mortgage at a discount.[2] (1T, 94:18-96:22). Simkowitz repeatedly confirmed that Isaac was part of those discussions. (1T, 99:16-100:6; 102:15-25; 2T, 19:2-20, 24:19-25:4).

After he acquired a 50% interest in Tower LLC, Simkowitz contacted Feinsilver Law Group ("FLG"), a law firm he had worked with in the past, to prepare and file a foreclosure action on the First Mortgage. (2T, 28:21-30:10; 3T, 29:11-30-6). The trial record included a retainer agreement purporting to bear Isaac's and Barry's signatures, in which Isaac and Barry are identified as "clients" of the law firm. (Pa311). Simkowitz testified that his office paid FLG a $5,000 retainer. (2T, 127:10-128:8).

On or about December 13, 2010, the FLG law firm filed a complaint on behalf of Isaac and Barry to foreclose the First Mortgage. (Pa231). The Complaint identified "Barry Hersko and Isaac Hersko" as the plaintiffs, and identified "The Roseville Tower, LLC," "GIAIP, LLC," and "Israel Perlmutter" (the former managing member of Tower LLC) as the named defendants. It alleged that the First Mortgage and Note were in default, that payment had been demanded but was not made, and that as of December 1, 2010, $3.4 million was due and owing on the Note. (Pa233-34, ¶¶ 13-15).

[2] Isaac and Barry remained the mortgagees of record on the recorded First Mortgage, even after Isaac's interest was satisfied. (2T, 137:19-138:23).

F. The May 2011 Assignment of the Subordinate Mortgage

Since making the First Mortgage, Barry had been in contact with a representative of the Subordinate Mortgagee (i.e., GIAPP, the seller that provided seller financing). (2T, 147:14-148:18, 177:16-25, 178:1-179:2, 180:17-23). Barry testified that after the foreclosure action was filed, the Subordinate Mortgagee called him and asked him to purchase the Subordinate Mortgage. (4T, 92:2-10). According to Barry, they negotiated a price but did not discuss the foreclosure action in those negotiations. (4T, 92:11-93:13).

On May 2, 2011, the Subordinate Mortgage was assigned to a non-party entity, Isaac & Barry LLC. (Da6). Barry is the 100% owner of that entity. (2T, 136:18-22). Isaac presented no evidence that he had an interest in the entity, and Simkowitz admitted at trial he has no ownership interest in Isaac & Barry LLC. (2T, 113:8-17). On May 10, 2011, Simkowitz wrote to the FLG law firm, "I am happy to report that we settled, we can now discontinue the [foreclosure] action." (Pa278).

G. Simkowitz Operates Tower LLC

For the next several years, Simkowitz managed Tower LLC's affairs through a non-party entity he owns named Northside Towers LLC. (4T, 146:3-14). Simkowitz maintained a ledger of the capital inflows, which were used to pay Tower LLC's expenses. (2T, 70:12; Pa288-89). For several contributions

on behalf of Bella, Simkowitz noted that payment came "from We Care Inc." (Pa288-89). Barry testified that the payments came from "We All Care Inc."—the non-party entity owned by Isaac to operate the apartments used for the New York City homeless shelter program. (4T, 73:23-75:24).

Barry testified that at times when he would receive capital calls from Simkowitz, he would tell Isaac to have We All Care, Inc. pay Northside Towers LLC directly. (4T, 70:9-75:24). The payments from We All Care, Inc. to Northside Towers LLC reduced the amounts We All Care, Inc. owed to Barry's affiliated entities for rental of properties in the homeless shelter business, and at the same time satisfied Bella's capital contributions to Tower LLC. (4T, 70:9-75:24). All of the checks and check stubs in the evidence corroborate this arrangement, as each stub references a "*rental expence*" (sic), showing that the We All Care, Inc. payments were made on account to Barry in connection with the New York homeless shelter business. (Pa284-310).

The embossed name on the checks was mistakenly "We Care Inc." rather than "We All Care, Inc." (Pa284-310). Isaac's own pleadings acknowledged the payments were on behalf of We All Care, Inc. (Pa160, ¶ 72), and his counsel stated that the name on the checks was later corrected. (5T, 115:23-116:3).

H. Isaac Was Unavailable, Yet Expanded His Claims Until the First Day of Trial.

Isaac's attorneys claimed that Isaac was incapacitated[3] during the litigation and that he had given a Durable Power of Attorney to some of his children. (1T, 9:21-10:7; 18:15-19:8). Neither Isaac nor his powers of attorney appeared for a deposition or testified at trial. (1T, 10:1-7). At no time did Isaac seek a stay of the case based on Isaac's unavailability or attempt to preserve his testimony through alternative means. (6T, 44:8-13; Pa13). The trial court warned Isaac's counsel that Isaac would not receive any special treatment if he proceeded with trial, merely because he was unavailable. (6T, 44:8-13; Pa13).

i. The Original Complaint

In his original Complaint, Isaac asserted claims for a 50% ownership interest in the Tower Property, and 50% of the funds in Barry's attorney's escrow account, including a share of "approximately $45,000,000" that Barry allegedly withdrew from the account. (Pa35; Pa40, ¶¶ 39). He did not assert an interest in Tower LLC or either of the mortgages on the Tower Property.

ii. The First Amended Complaint

Seventeen months after commencing the action, Isaac filed a First Amended Complaint. (Pa152). There, he alleged that he and Barry were "equal

[3] No evidence was presented to support counsel's claim that Isaac was unavailable.

partners" in the Tower Property and Tower LLC. (Pa157, ¶ 49). The factual allegations in the First Amended Complaint alleged Isaac's belief that he had ownership interests in the First Mortgage and Isaac & Barry LLC, which owned the Subordinate Mortgage – although he did not assert any claim of ownership to those interests in his pleading. (Pa156, ¶ 39; Pa157, ¶¶ 44-46, 49, 61). Recognizing that discovery had revealed the existence of a $350,000 check to "I Hersko" (Pa216), Isaac alleged that he did not specifically recall receiving his check and that his interest in the First Mortgage, therefore, was not extinguished. (Pa159, ¶¶ 56-59). In addition, Isaac alleged a claim for a constructive trust, which now included allegations that, based on his belief he had a 50% interest in Tower LLC, he allegedly paid hundreds of thousands of dollars to fund Tower LLC's operations through checks from We All Care, Inc., which he acknowledged were embossed with "We Care Inc." (Pa160, ¶¶ 71-73).

iii. The Proposed Second Amended Complaint

On May 23, 2023, the trial court entered a Case Management Order and scheduled trial for January 23-25, 2024. (Pa29). The parties then conducted discovery (without Isaac's participation due to his alleged incapacity).[4]

[4] Although Isaac's counsel claimed that Isaac was unable to participate in the litigation, Barry's counsel advised the trial court that in a related New York

On November 17, 2023, Simkowitz filed a motion for partial summary judgment seeking, *inter alia*, a judgment against Isaac declaring Tower LLC to be the exclusive owner of the Tower Property, declaring that Simkowitz and Bella each own 50% of Tower LLC, and declaring that Isaac has no interest in Tower LLC. (CHC2023326816). In response, after the close of discovery and just seven weeks from the January 23, 2024, trial date, Isaac filed a cross-motion seeking leave to file a Second Amended Complaint. (CHC2023343218).

The proposed Second Amended Complaint maintained the substance of Isaac's allegations in the First Amended Complaint, but added significant detail about the Subordinate Mortgage. (Da9). He now alleged that the January 4, 2010 Mortgage Workout Agreement (to which he was a signatory) made Bella the sole member of Tower LLC "as part of a scheme to acquire the Subordinate Mortgage" at a discount. (Da14-15, ¶¶ 46-50). Critical to the "scheme," was the December 2010 foreclosure complaint that the FLG law firm filed in December 2010. (Da15, ¶ 53).

In the proposed Second Amended Complaint, Isaac alleged that as a result of the foreclosure complaint, the Subordinate Mortgage (which had a face value of $3.22 million) was assigned to Isaac & Barry LLC for $220,000 (Da15, ¶ 54),

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Action between Issac and Barry, Isaac attended depositions by video. (6T, 46:2-8).

that the funds to acquire the Subordinate Mortgage came from the brothers' allegedly joint attorney escrow account (Da15, ¶ 55), and that Isaac and Barry jointly own Isaac & Barry LLC (Da15, ¶ 57). Thus, Isaac asserted that he and Barry were "equal partners" in the Tower Property and Tower LLC, and expressly sought relief that would make him a 50% owner of the First Mortgage, and a 50% owner of Isaac & Barry LLC, which owned the Subordinate Mortgage. (Da16, ¶ 58; Da18).

In a pretrial conference on January 5, 2024, the Court deferred until trial its ruling on Isaac's motion for leave to file the proposed Second Amended Complaint. (1T, 13:2-14:10).

I. Isaac Drastically Modifies His Case on the First Day of Trial

When the parties appeared for trial, Isaac's counsel—presumably at the direction of Isaac—reversed course on everything. His counsel explained that Isaac would only pursue two claims: (1) a claim for declaratory judgment that Isaac owns 50% of the First Mortgage with Barry; and (2) an unpled claim for "money had and received" based on the payments from We All Care, Inc. to Northside Towers LLC. (1T, 9:21-11:20). Aside from those claims, Isaac withdrew all of his other claims and potential claims. Isaac's counsel explained at the time that the decision to withdraw most of Isaac's case was made after

"assessing the deposition testimony . . . [and] the documentary proof" and determining Isaac could not prove his claims. (1T, 9-21:10-7).

The trial court accepted Isaac's request to dismiss virtually all his claims, but reserved decision on whether it would dismiss the voluntarily withdrawn claims with or without prejudice. (1T, 21:10-16 ("I am not ruling that it's with prejudice, without prejudice. They are dropping the claim, that's all I need to know. There's nothing that I have to add to that."); 1T, 38:3-7). However, the trial court acknowledged that Isaac voluntarily dismissed his claims because of a lack of proof. (1T, 37:5-21). At the request of counsel, the court allowed Barry and Bella to submit briefing on whether Isaac's voluntarily dismissed claims should be dismissed with prejudice. (5T, 154:20-155:5).

J. The Parties' Trial Motions

Isaac presented his affirmative case over three trial days—January 23, 24, and 25, 2024. (See 1T to 5T). He called Simkowitz, Barry, and Bella as witnesses. Neither Isaac nor his Durable Powers of Attorney testified. (See 1T to 5T). On January 25, 2024, Isaac rested his case. (5T, 89:10-11).

At the close of Isaac's case, Barry and Bella moved for involuntary dismissal of Isaac's claims pursuant to Rule 4:37-2(b). (5T, 93:16-103:22). Isaac's counsel asked the trial court to apply the doctrine of unclean hands to the Defendants based on their participation in the 2010 foreclosure, and to

discredit all of Simkowitz's and Barry's testimony based on the maxim *falsus in uno, falsus in omnibus*—effectively relying on those doctrines to affirmatively prove Isaac's case. (5T, 91:3-8, 104:3-107:1, 128:3-18, 129:4-24, 131:8-132:20). In doing so, Isaac attempted to distance himself from the so-called "scheme" to file a sham foreclosure to obtain the Subordinate Mortgage at a discount, even though he sought an interest in Tower LLC and the Subordinate Mortgage just weeks earlier. (5T, 132:4-20; 5T, 135:5-136:3). The trial court reserved decision on the motions, and instructed the parties to submit briefing on the issue of how the unclean hands doctrine should apply to the case. (5T, 144:10-145:13).

K. The Trial Court's Dismissal Order

On February 14, 2024, the parties appeared for the continued trial. (6T). But, before any Defendant presented its defense case, the Court dismissed all of the parties' claims, counterclaims, and crossclaims against each other. (6T, 15:12-30:11).

i. The Trial Court Dismisses Isaac's Claims Presented at Trial

In a bench ruling, the trial court dismissed Isaac's claim for money had and received, in which he sought over $600,000 for the payments by We All Care, Inc. to Northside Towers LLC. (6T, 15-21:17). The trial court concluded that Isaac failed to support a *prima facie* claim for relief. (6T, 15:19-21:17).

The trial court reasoned that Isaac—the only plaintiff in the case—failed to show any evidence that he personally paid the funds to Northside Towers LLC, which negated Isaac's standing in his individual capacity to sustain the claim. (6T, 19:1-7). It rejected Isaac's contention that a typographical error in the name of the entity on the check stubs meant the court should treat the payor entity as Isaac's "alter ego," rather than being payments by We All Care, Inc. (6T, 19:8-20:7). The court also reasoned that Isaac failed to show "any compulsion attached to the payments nor any superior right Plaintiff might have to that money;" it explained that, "absent rank speculation," there was no evidence from which a factfinder could conclude "what the purpose of those payments were." (6T, 20:8-22).

As the trial court summarized:

> Ultimately, there is zero proof that Isaac, even assuming he personally paid this money, paid it for an interest in the LLC, as opposed to some other reason. Whether it was owed for some other things or some possible nefarious purpose, there is not anything Plaintiff can point to which would allow any fact finder to base a determination of the practical compulsion of Isaac to pay the money or again, that he has established a superior right to those funds. Thus, even under the involuntary dismissal standard, Plaintiff has not and cannot sustain his burden to allow the claim for monies paid and received to continue. That count is therefore dismissed with prejudice.

(6T, 21:4-17).

Separately, the trial court dismissed with prejudice Isaac's equitable claim for declaratory relief seeking 50% ownership of the First Mortgage, based on Isaac's unclean hands in connection with the 2010 foreclosure. (6T, 23:9-26:15). The trial court reasoned that the 2010 foreclosure was a "sham" filing triggering the unclean hands doctrine, because the pleading "hid[] the true ownership interest in the [Tower LLC] in order to deceive and defraud the subordinate mortgagee and cause her to sell the subordinate mortgage for pennies on the dollar." (6T, 23:9-16). The trial court noted that Isaac was one of the named parties to the complaint and "cannot believably [sic] feign ignorance thereof." (6T, 23:16-20).

The trial court rejected Isaac's attempts to distance his participation in the 2010 foreclosure from Simkowitz's and Barry's participation. (6T, 26:24-27:4). It found that the evidence supported a finding that Isaac played a role in the foreclosure scheme, stating as follows:

> Isaac was, at best . . . complicit in the bogus assignment of the mortgage and the fake foreclosure. He was a party to both and there is no evidence that would negate his participation.

(6T, 26:10-15).

The trial court later expanded its reasoning based on the timing of Isaac's maneuvers – finding that "only after the court expressed skepticism of the

foreclosure procedure did Isaac attempt to distance himself from ownership of the second mortgage." (Pa19).

ii. The Trial Court Dismisses the Unpresented Crossclaims Between Barry and Bella, and Simkowitz.

Although Isaac was the only party that presented his case, the trial court's bench ruling went further and dismissed all the remaining claims – including the not-yet-presented crossclaims between Barry and Bella and Simkowitz. (6T, 29:10-14 ("In the totality of the circumstances of this case, this Court determines that the unclean hands of the parties shall result in a dismissal of all the claims.")).

Simkowitz's crossclaims involved allegations relating to capital shortfalls in connection with Tower LLC (as to Bella) and the LLC that owned the adjacent parcel (as to Barry), as well as claims for judicial dissolution of those entities. (Pa187). Barry and Bella's crossclaims involved allegations for breach of fiduciary duty (based on Simkowitz secretly planning to acquire from Bella and Barry 100% of the interests in the LLCs that owned the Tower Property and the adjacent parcel, then resell those interests to a third-party at a profit); and an accounting of the respective LLC interests. (Pa144).

iii. The Trial Court Dismisses Isaac's Voluntarily Withdrawn Claims.

Finally, the trial court clarified that its bench ruling dismissing all of the claims applied to the claims Isaac's decided not to pursue at trial. (6T, 31:5-32:6). However, the trial court did not immediately rule on whether the dismissal of those not-yet-presented claims would be with or without prejudice. (6T, 32:1-6). Instead, it instructed the parties to submit proposed orders under the "five-day rule," with briefing to explain the proposed order (6T, 34:8-36:25), which the parties did.

iv. The Trial Court's Final Order Dismisses All Claims with Prejudice.

On April 15, 2024, the trial court entered the final Order at the heart of the parties' appeals, which dismissed all claims of all parties with prejudice (save four claims, which were dismissed as moot). (Pa1-7). The trial court also issued an accompanying Statement of Reasons (Pa8-20), which amplified its bench ruling and listed some of the evidence on which it relied when it applied the unclean hands doctrine to Isaac (Pa18-19). That evidence—all of which had record support—was as follows:

- "Isaac was a signatory to the [Mortgage Workout Agreement]." (Pa19; see also Pa217).

- "Defendant Simkowitz testified that Isaac participated in the plan to foreclose the first mortgage." (Pa19; see also 1T, 99:16-100:6; 102:15-25; 2T, 19:2-20, 24:19-25:4).
- "Isaac was a signatory to the October 2010 Assignment of Mortgage." (Pa19; see also Pa280).
- "Isaac is identified as a 'client,' and his name appears on the retainer agreement with the [FLG] law firm. In addition, the retainer agreement bears Isaac's signature and there is no evidence (e.g., no handwriting expert and no testimony) that it is not Isaac's signature." (Pa19 (emphasis in original); see also Pa311).
- "Isaac was a party to the foreclosure complaint." (Pa19; see also Pa231).
- In his proposed Second Amended Complaint, Isaac claimed that he was an owner of Isaac & Barry LLC, which held the Subordinate Mortgage. As the trial court explained, "[o]nly after the court expressed skepticism of the foreclosure procedure did Isaac attempt to distance himself from ownership of the Subordinate Mortgage. Isaac continued to seek to benefit from maintaining an ownership interest in the alleged

'sham' in the form of an interest in the First Mortgage." (Pa19; see also 1T, 9:21-11:20; Da9).[5]

Applying Rule 4:37-1(b), the Order and Statement of Reasons further determined that Isaac's voluntarily withdrawn claims were dismissed with prejudice. (Pa8-12). The trial court emphasized that Isaac constantly expanded his claims during the litigation—i.e., "continuously" claiming an interest in the Tower Property, then expanding his claims to claim an interest in the Tower LLC, the First Mortgage, and Isaac & Barry LLC (which owned the Subordinate Mortgage). (Pa9-10). And it recognized that Isaac's tactics caused Defendants significant prejudice in the litigation. (Pa11). The court also acknowledged that Isaac voluntarily withdrew most of his case because he lacked proof to prevail on those claims, which further supported dismissal with prejudice. (Pa12; see also 1T, 9-21:10-7).

The trial court dispensed with Isaac's concern that its initial colloquy about the voluntary withdrawal may have caused Isaac prejudice. (Pa8-9; Pa13). It also rejected Isaac's argument that his inability to participate in the litigation warranted a different outcome—noting that Isaac's counsel never tried to stay

[5] Tellingly, although the trial court expressly relied on Isaac's proposed Second Amended Complaint as support for its decision to apply the unclean hands doctrine against Isaac, Isaac did not include that pleading in his Appendix. Barry and Bella are therefore providing a copy of that proposed pleading in their Appendix (Da9).

the case or take other steps to deal with Isaac's situation; noting that Isaac's powers of attorney did not participate; and noting that the trial court previously warned Isaac's counsel that Isaac's unavailability "would not be a basis for special treatment." (Pa13).

The trial court also ruled that Simkowitz's counterclaims against Isaac, as well as Simkowitz's and Barry and Bella's crossclaims against each other were dismissed with prejudice—before those claims were even presented at trial. (Pa5-6; Pa15-20).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING ISAAC'S CLAIMS WITH PREJUDICE BASED ON ISAAC'S UNCLEAN HANDS

The trial court has discretion to apply the unclean hands doctrine based on the totality of the circumstances. Borough of Princeton v. Bd. of Chosen Freeholders of Cnty. of Mercer, 169 N.J. 135, 158 (2001) (quoting Heuer v. Heuer, 152 N.J. 226, 238 (1998)); Untermann v. Untermann, 19 N.J. 507, 517-18 (1955). This Court reviews the trial court's decision to apply the unclean hands doctrine for an abuse of discretion. See Murray v. Lawson, 264 N.J. Super. 17, 36 (App. Div. 1993), vacated on other grounds 513 U.S. 802 (1994). When reviewing for an abuse of discretion, the Court should "reverse only when

the exercise of discretion was manifestly unjust under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (internal quotation marks omitted). In making that determination, the trial court's findings of fact "are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015).

Here, the trial court acted within its discretion when it applied the unclean hands doctrine and dismissed Isaac's claims with prejudice. While Barry disagrees with the trial court's determination that he engaged in conduct to trigger the unclean hands doctrine in connection with the foreclosure action, the trial court properly rejected Isaac's attempt to point the finger at Barry and Simkowitz and portray himself as an innocent bystander. (6T, 26:24-27:4). On that basis, the trial court should be affirmed.[6]

As an initial matter, Isaac acknowledges that the evidence at trial supported a finding of unclean hands. (Pb22-23). But, Isaac fundamentally misunderstands the doctrine of unclean hands; it is an affirmative defense – not

[6] To the extent the trial court found Barry had unclean hands, that was *dictum*. Unclean hands is an affirmative defense to Isaac's claims – the only claims that were presented at trial. See Clark v. Watts, 10 N.J. Super. 283, 286-87 (Ch. Div. 1950). Barry did not assert any claims against Isaac and never had the opportunity to present any claims at trial against any party. Thus, Barry's "unclean hands" was not the subject of any issue before the trial court.

an affirmative claim. See Clark v. Watts, 10 N.J. Super. 283, 286-87 (Ch. Div. 1950) ("The doctrine of unclean hands may be invoked only against a suitor for relief, whether he be the plaintiff or counterclaimant or [cross-claimant], but never against the defendant as such.").

The trial court did not abuse its discretion when it applied the doctrine to Isaac. The unclean hands doctrine derives from the maxim "[h]e who comes into equity must come with clean hands." Untermann, 19 N.J. at 517; Borough of Princeton, 169 N.J. at 158. The doctrine means that "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511 (1981); see also Goodwin Motor Corp. v. Mercedes-Benz of N. Am., Inc., 172 N.J. Super. 263, 271 (App. Div. 1980) ("[A] court of equity will deny its remedies to a suitor who has been guilty of bad faith, fraud or unconscionable acts in the transaction which forms the basis of the lawsuit.").

The doctrine authorizes the trial court to dismiss a plaintiff's claims when those claims have a nexus to inequitable or fraudulent conduct. Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 156 (App. Div. 2002), abrogation on other grounds recognized by In re Estate of Figlio, 2010 WL 1189650, at *7 (N.J. Super. Ct. App. Div. Mar. 30, 2010); Untermann, 19 N.J. at 517-18; Hageman v. 28 Glen Park Assoc., LLC, 402 N.J. Super. 43, 47-48 (Ch. Div. 2008). The

New Jersey Supreme Court has instructed that the decision to apply the doctrine requires a holistic view of the transaction for which redress is sought:

> It is the effect of the inequitable conduct on the total transaction which is determinative whether the maxim shall or shall not be applied. Facades of the problem should not be examined piecemeal. Where fraudulent conduct vitiates in important particulars the situation in respect to which judicial redress is sought, a court should not hesitate to apply the maxim.

Untermann, 19 N.J. at 518.

Here, as the trial court explained, the record was "replete" with evidence to support such a finding against Isaac. (6T, 23:9-20, 26:10-15). The trial court's Statement of Reasons specifically cited six key pieces of evidence that supported application of the unclean hands doctrine to Isaac—namely, Isaac's participation in, and execution of, the 2010 Mortgage Workout Agreement (Pa217), which Isaac states was intended to shield the identity of the owners of Tower LLC (Pb12); Simkowitz's testimony about Isaac's participation in the plan to foreclose the First Mortgage (1T, 99:16-100:6; 102:15-25; 2T, 19:2-20, 24:19-25:4); Isaac's purported signature on the October 2010 document purporting to assign the First Mortgage (Pa280); Isaac's name and purported signature on the FLG retainer agreement (Pa311); Isaac's name on the 2010 foreclosure complaint (Pa231); and Isaac's proposed Second Amended Complaint seeking an interest in the very same Subordinate Mortgage he

claimed had been fraudulently assigned (Da18). (Pa18-19). As explained above, all of the trial court's findings had support in the record. See Factual Background § (K)(iv), supra.

Isaac's arguments for reversal are nothing more than an attempt to second-guess the trial court's weighing of the evidence.

Isaac acknowledges that the maxim *falsus in uno, falsus in omnibus* is a permissive, not a mandatory, rule of evaluating witness credibility. (Pb16-17). Yet, he argues that the trial court erred when it failed to apply the maxim to discredit all of Barry's and Simkowitz's testimony supporting its unclean hands decision against Isaac. (Pb16-17). That argument has no merit. The maxim is simply another way of saying that a factfinder may weigh the credibility of one statement based on the credibility of another statement from the same witness. See MODEL CIVIL JURY CHARGE 1.12M ("False in One, False in All").

In fact, Isaac has not cited a single case where the factfinder's failure to apply the maxim to a witness's testimony resulted in reversal. (Pb16-17). To the contrary, all of the cases he cites confirm that the doctrine is discretionary. State v. Ernst, 32 N.J. 567, 583-84 (1960) ("[A] trial judge in his discretion may give the charge in any situation in which he reasonably believes a jury may find a basis for its application."); Hargrove v. Stockloss, 127 N.J.L. 262, 266 (E&A 1941) ("[T]he court is allowed to exercise discretion in the matter."); Addis v.

Rushmore, 74 N.J.L. 650, 650 (E&A 1907) (explaining the doctrine goes to "the weight of the evidence, and [is not] a positive rule of law, to be applied in all cases."); State v, Samuels, 92 N.J.L. 131, 133 (Sup. Ct. 1918) ("[T]he jury *may* reject all *or any portion* of the testimony given by such witness . . . ." (emphasis added)).

Paradoxically, Isaac's arguments prove the point. Isaac repeatedly asks this Court to credit Simkowitz's and Barry's testimony when it favors him, and to disregard Simkowitz's and Barry's testimony when it does not. (Pb23-25). Needless to say, even if the doctrine *falsus in uno, falso in omnibus* were somehow a mandatory rule of evidence (it is not), and also somehow dispositive (it is not), Isaac's argument is the opposite of "false in all." The trial court ultimately had significant discretion to make its own credibility findings, and Isaac's disagreement with those findings is not a basis to reverse.

Isaac also claims that "one of the most important facts" as to why the trial court's unclean hands decision was error is that, unlike Barry and Simkowitz, Isaac had nothing to gain from the 2010 foreclosure. (Pb23-24). That argument is completely nonsensical because it challenges Barry's and Simkowitz's alleged wrongdoing while seeking to benefit from that very wrongdoing. Of Isaac's two claims presented at trial, one of those claims sought ownership of the First Mortgage (1T, 11:4-11). In addition, as the trial court recognized, from

inception of the case until the first day of trial, Isaac asserted an interest in the Tower Property—either directly or through an alleged 50% interest in Tower LLC. (Pa9-10; Pa41). And in his proposed Second Amended Complaint, Isaac sought an interest in Isaac & Barry LLC, which was assigned the Subordinate Mortgage. (Da15-16, 19). In short, until he strategically sought to change course on the first day of trial, Isaac's position was that he was an owner of Tower LLC and of both mortgages, and would have benefitted from extinguishing or controlling the $3.22 million Subordinate Mortgage through the foreclosure action.

Appealing to a vague notion of fairness, Isaac argues that affirming the trial court's unclean hands ruling would leave Isaac "powerless to stop Barry" from benefitting in the form of ending up with interests in the First Mortgage, the Subordinated Mortgage, Tower LLC, and the Tower Property. (Pb24). Isaac affirmatively dropped all of his claims to any interest in the Tower LLC, the Tower Property, or the Subordinated Mortgage. (1T, 9:21-11:20). He cannot now complain that it is "unfair" someone else would have interests in those assets when he dropped those claims prior to trial. In any case, Isaac, not Barry, invoked the judicial machinery seeking to obtain a property or mortgage interest that—in his own words—was "tainted" by the foreclosure action. (Pb22). The

trial court's decision to apply the unclean hands doctrine against Isaac was well within its discretion.

Finally, Isaac attempts to parse the totality of the evidence into discrete parts, arguing that the trial court improperly weighed each piece of evidence when it dismissed Isaac's claims with prejudice. (Pb24-25). Contrary to Isaac's argument, the decision to apply the unclean hands doctrine is based on the totality of evidence. Untermann, 19 N.J. at 518.

All of Isaac's arguments go to the weight of evidence and the credibility of witnesses. (Pb24 (arguing that the trial court improperly weighed Simkowitz's testimony about Isaac's participation in the plan to foreclose the First Mortgage); id. (arguing the trial court made a "mistake" when it relied on Isaac signing an assignment of 50% of the First Mortgage in October 2010, despite that document being in Plaintiff's appendix (Pa280)); Pb24 (arguing that the trial court improperly relied on Isaac's name as a listed "client" on the FLG law firm retainer because there was no handwriting expert to corroborate Isaac's signature).[7]

[7] To use just one example for why Isaac's cherry-picking does not provide a basis to disturb the trial court's ruling: while Isaac points to the emails about the foreclosure action having been directed only to Barry, that is hardly surprising. Barry was Simkowitz's primary contact, and the emails from Simkowitz's office were sent to the same office where Isaac had an adjoining desk with Barry. (4T, 71:14-16).

The totality of evidence at trial fully supports the trial court's conclusions as to Isaac.

- Isaac admits that he signed the January 4, 2010, Mortgage Workout Agreement. (Pb24). Isaac claimed that agreement made him 50% owner of the Tower Property or Tower LLC (Pa217, Pa157, ¶¶ 47-50), and he also claims that the agreement was intended to shield the true ownership of Tower LLC (Pb12). Those assertions, in turn, demonstrate Isaac's state of mind as to how he believed he stood to benefit from the 2010 foreclosure action.
- Simkowitz testified that Isaac was involved in the discussions concerning the First Mortgage and the Subordinate Mortgage. (2T, 21:14-22:7, 80:10-82:12).
- Barry testified that he regularly discussed all aspects of the business with Isaac, as they worked together in the same office. (4T, 66:2-9).
- Isaac attended the October 2010 closing with Simkowitz when the strategies concerning the mortgages was developed. (2T, 80:10-82:12).
- Isaac was a named plaintiff in the foreclosure action. (Pa231).
- Notably, although Isaac put the 2010 foreclosure and unclean hands defense "in issue" (1T, 11:12-20; 33:14-23), he failed to put on a single

witness or document to support the theory that he was somehow unaware of the foreclosure or the underlying discussions (1T, 34:14-20). The fact that Isaac has misgivings about his strategy to point the finger about conduct that he himself was clearly involved in, does not amount to abuse of discretion.

Isaac's pleadings also fully support the trial court's decision to apply the unclean hands doctrine against him. In multiple pleadings over multiple years, Isaac asserted interests in the Tower Property, Tower LLC, the First Mortgage, and the entity that owns the Subordinate Mortgage. (Pa33, Pa152, Da9). In the proposed Second Amended Complaint—filed just weeks before trial—Isaac detailed the foreclosure action, including referencing its docket number, and the plan to obtain an assignment of the Subordinate Mortgage. (Da14-16). But rather than disclaim involvement, Issac alleged he was entitled to an interest that would have benefitted from this plan. (Da18-19). As the trial court recognized, "only after the court expressed skepticism of the foreclosure procedure did Isaac attempt to distance himself from ownership of the second mortgage." (Pa19). Isaac's change of strategy on the first day of trial to withdraw those claims so that he could assert an unclean hands theory against Barry and Simkowitz, all while trying to portray himself as an innocent bystander, does not erase his prior

admissions and conduct showing his knowledge and participation in the foreclosure action.

The trial court's decision to apply the unclean hands doctrine to Isaac had ample support in the record and was a proper exercise of its discretion. The order should be affirmed.

POINT II

THE TRIAL COURT CORRECTLY DECLINED TO DECIDE ISAAC'S INTEREST IN THE FIRST MORTGAGE

Although the trial court dismissed the parties' claims before any Defendant presented a defense, Isaac asks this court to make its own findings of fact and conclusions of law that Isaac owns 50% of the First Mortgage in the first instance. (Pb26-27).

The trial court did not reach this issue because it did not need to—Isaac was barred from pursuing this claim because he has unclean hands. Because the trial court's unclean hands ruling against Isaac should be affirmed, there is no need for this Court to address ownership of the First Mortgage.

Even assuming, *arguendo*, that the Court reverses the trial court's unclean hands ruling, Isaac's argument that this Court should declare him the owner of 50% of the First Mortgage should be denied.

Remarkably, Isaac seeks this declaration even though Defendants have not yet presented their defense because the case was dismissed at the close of Isaac's

case. Due process requires that Defendants have the opportunity to put on evidence before the claim could be decided on the merits. See, e.g., Zahner v. Pathmark Stores, Inc., 321 N.J. Super. 471, 476 (App. Div. 1999) ("Appellate review does not consist of weighing evidence anew and making independent factual findings; rather, the function is to determine whether there is adequate evidence to support the judgment rendered below.").

At best, Isaac's presentation demonstrated there is contested evidence about his interest in the First Mortgage. For example, Barry testified that Isaac received almost all of monies paid on the First Mortgage – more than his 50% interest. (4T, 48:22-49:6, 61:14-24). Moreover, at the October 2010 closing with Simkowitz, Isaac received a $350,000 check from Simkowitz, which Barry and Simkowitz testified they understood was payment to extinguish Isaac's interest in the First Mortgage. (Pa216; 2T, 84:14-22; 2T, 84:23-85:4; 4T, 61:14-24; 4T, 48:22-49:6).

While Isaac asks this Court to disregard all this testimony and infer that Isaac remained 50% owner of the First Mortgage (Pb27), the fact remains that he did not present a single witness or fact to affirmatively support his position. In sum, Isaac is not entitled to a summary decision from this Court in his favor on a claim subject to a dismissal at the close of his evidence, before the defendants presented their defense.

POINT III

THE TRIAL COURT CORRECTLY DISMISSED ISAAC'S CLAIM FOR MONEY HAD AND RECEIVED

The trial court correctly dismissed Isaac's claim for "money had and received" (i.e., unjust enrichment) based on insufficient proof at trial. (Pb28-30).

"An appellate court applies the same standard when it reviews a trial court's grant or denial of a Rule 4:37–2(b) motion for involuntary dismissal." ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 511 (2014). The standard on a motion for involuntary dismissal under Rule 4:37-2(b) is as follows:

> A motion for involuntary dismissal is premised on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. The motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor. If the court, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, finds that reasonable minds could differ, then the motion must be denied.

Id. at 511 (internal quotation marks and citations omitted) (quoting Rule 4:37-2(b)).

A claim for money had and received is equitable in nature. Twp. of Franklin v. Jones, 86 N.J.L. 224, 225 (E&A 1914). A *prima facie* case requires that "one has money in his hands belonging to another which in equity and good conscience he ought to pay over to that other." Id. (internal quotation marks omitted).

Isaac failed to present evidence from which a factfinder could find liability in his favor. As an initial – fatal – matter, the money must actually belong to the *plaintiff*, and must have been given to the *defendant*, not by or to a third party. See Twp. of Franklin, 86 N.J.L. at 225 ("All that the plaintiff need show is that *defendant holds money which* in equity and good conscience *belongs to him*; but if he fails to show such superior right he cannot recover." (emphasis added)). Here, neither the payor (i.e., We All Care, Inc.) nor the payee (i.e., Northside Towers LLC) are parties to the case. See R. 4:26-1 ("Every action may be prosecuted in the name of the real party in interest"). And Isaac presented no evidence that he personally paid any of the funds he sought to recover. To the contrary: all the payments came from the non-party, We All Care, Inc. (Pa284-310).

Isaac also presented no affirmative evidence about the reason We All Care, Inc. made payments to Northside Towers LLC to support his claim that these payments were his capital contributions. The only evidence in the record

showed that We All Care, Inc. made payments to Northside Towers LLC because it owed Barry's affiliated entities payment for apartment rentals in connection with the New York homeless shelter business. (4T, 70:9-75:24). Barry asked Isaac to have We All Care, Inc. pay Northside Towers LLC directly to satisfy Barry's and Bella's capital contribution requirements. (4T, 70:9-75:24). Barry testified that any We All Care, Inc. payments to Northside Towers LLC were to satisfy a debt We All Care, Inc. owed to Barry's affiliates—nothing more. (4T, 70:9-75:24). The check stubs from We All Care Inc. corroborate that testimony—each stub references a "*rental expence*" (sic), showing that the We All Care Inc. payments were made on account to Barry in connection with the New York homeless shelter business. (Pa284-310).

Against this substantial evidence, Isaac's argues that there was a typographical error in the embossed name of the entity on We All Care, Inc.'s checks (i.e., "We Care Inc."); that the misspelled entity name is not a real entity; and the payments should therefore be deemed to come from Isaac directly. (Pb29). Not a shred of evidence supports Isaac's theory. The trial court found that Isaac's argument about the typographical error on the checks was not credible. (6T, 19:8-20:7). It correctly determined that the record contains no evidence that the checks came from anywhere other than an account held by

"We All Care Inc." In fact, the check stubs all have "We All Care" typed at the bottom. (Pa290-310).

Indeed, when pressed, Isaac's counsel conceded that the checks bearing the name "We Care Inc." were written against We All Care Inc.'s bank account and that Isaac had acknowledged long ago that the checks were simply a typographical error that he later corrected. (5T, 112:5-12, 116:1-117:5).

While Isaac suggests that Barry's testimony about the reason We All Care, Inc. paid Northside Towers LLC should be ignored (Pb29-30), this does not negate Isaac's failure to present any facts to support his *prima facie* case. The trial court's decision was correct and should be affirmed.

POINT IV

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DISMISSING ISAAC'S VOLUNTARILY WITHDRAWN CLAIMS WITH PREJUDICE

Although Isaac appeals the trial court's decision to dismiss his voluntarily withdrawn claims with prejudice, he does not present any material legal argument to support his view that this was error.

The decision to dismiss with or without prejudice is within the trial court's discretion. Shulas v. Estabrook, 385 N.J. Super. 91, 97 (App. Div. 2006). Here, the trial court acted within its discretion when it dismissed the claims Isaac voluntarily withdrew on the first day of trial with prejudice under Rule 4:37-1.

At an advanced stage of litigation, a plaintiff's voluntary dismissal of claims should only be with prejudice. See id. at 100-102; Wilmington Sav. Fund Soc'y v. Pfefferkorn, A-0813-21, 2023 WL 2594002, at *1 (App. Div. Mar. 22, 2023) (vacating and remanding with instructions to dismiss with prejudice, where the voluntary dismissal was sought after the defendant had moved for summary judgment) (Da25); Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953) (dismissing with prejudice where lengthy injunction proceedings had already taken place; "although the voluntary dismissal was attempted before any paper labeled 'answer' or 'motion for summary judgment' was filed, a literal application of Rule 41(a)(1) to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached."); Shady Records, Inc. v. Source Enterprises, Inc., 371 F. Supp. 2d 394, 397 (S.D.N.Y.2005) ("The case has been pending for well over a year, discovery has been completed, summary judgment motions by all parties adjudicated, pretrial submissions made, and the case is ready for trial in less than two weeks. To permit the plaintiff to discontinue the case at this late stage, and then to reinstate the same action whenever it felt like it in the future, would authorize intolerable manipulation of the Court's calendar and the defendants' resources."); cf. In re Urohealth Systems, Inc., 252 F.3d 504, 508 (1st Cir. 2001)

("[A] plaintiff cannot conduct a serious product liability claim in a federal court, provoke over a year's worth of discovery and motion practice, allow the case to reach the stage at which the defendant filed a full-scale summary judgment motion, and then when matters seemed to be going badly for plaintiff simply dismiss its case and begin all over again in a state court in what is essentially an identical proceeding.").

Isaac acknowledges that the trial court had discretion to dismiss his voluntarily withdrawn claims with prejudice. (Pb31). He also acknowledges that the trial court was within its discretion to reserve decision on the issue during trial, and then to dismiss his claims with prejudice after briefing on the issue. (Pb31).

Yet, Isaac argues that the trial court's dismissal with prejudice was error because during a colloquy, the court suggested that those claims might be withdrawn without prejudice; and the decision, after briefing, to dismiss those claims with prejudice somehow prejudiced Isaac's case at trial. (Pb30-32).

Isaac's argument that the trial court's reasoned decision caused him prejudice requiring reversal is meritless. Isaac voluntarily withdrew his claims before the trial even began, not knowing whether or not they would be dismissed with prejudice. (1T, 9:21-11:20). At that point, his claims, strategy, and anticipated proofs (or lack thereof) were, presumably, already set. Notably,

Barry and Bella objected and put Isaac on notice that they would seek dismissal with prejudice. (1T, 19:12-17). Isaac does not identify any evidence he would have presented differently had the trial court dismissed his claims with prejudice immediately after he voluntarily withdrew them.

Isaac mischaracterizes the trial court's statements during the first day colloquy. The court merely stated that it was not deciding whether dismissal was with prejudice or without prejudice; what mattered, at the time, was that Isaac had voluntarily and significantly narrowed the scope of issues for trial. (1T, 21:10-16 ("I am not ruling that it's with prejudice, without prejudice. They are dropping the claim, that's all I need to know. There's nothing that I have to add to that.")). Clearly, the trial court did not definitively rule one way at the beginning of trial, then change its tune and rule differently after Isaac rested his case. Isaac's suggestion that the trial court's statements led him down a different trial path is unfounded.

Isaac argues that the withdrawn claims should have been dismissed without prejudice because of his medical condition. (Pb32). But the trial court repeatedly warned Isaac's counsel that Isaac would not receive special treatment because of his medical condition. (6T, 44:8-13; Pa13). Yet, Isaac never sought to stay the case and never sought to limit his claims before the parties prepared and appeared for trial. Isaac obviously directed his counsel to commence this

action, amend the complaint on two occasions, and conducted discovery while he was ill. During his alleged incapacity, Isaac personally attended Barry's deposition in a New York litigation via video. (6T, 46:2-8).

The trial court dismissed Isaac's voluntarily withdrawn claims with prejudice to make sure Isaac does not get a do-over on claims he prosecuted but for which he failed to marshal support for over two years. That outcome would run afoul of New Jersey's public policy—embodied in numerous legal doctrines—that litigation should resolve all issues between parties in a single lawsuit. See, e.g., Olds v. Donnelly, 150 N.J. 424, 431 (1997) (discussing public policies behind the entire controversy doctrine); Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) (discussing policy against piecemeal litigation when ruling on a motion for interlocutory appeal).

Finally, without any citation or analysis of the claims, Isaac makes the self-serving statement that the trial court's Order only relates to Isaac's claim to an ownership interest in the Tower Property. (Pb32). Isaac is attempting to gain an advantage in parallel litigation pending in New York State Court, in which he asserts, virtually verbatim, the identical set of claims to an interest in the $45,000,000 in funds held in an alleged joint attorney escrow account, by having this Court opine on the *res judicata* effect of the trial court's order. (1T, 20:16-24). That is not something this Court can or should do.

POINT V

THE HERSKO DEFENDANTS ARE ENTITLED TO A RECIPROCAL RULING AS TO THEIR ACCOUNTING CLAIMS AGAINST SIMKOWITZ (Pa006)

Barry and Bella's cross-appeal against Simkowitz is based on reciprocity in the event that Simkowitz's crossclaims are restored on appeal.

Simkowitz, on one hand, and Barry and Bella, on the other hand, asserted competing crossclaims for an accounting relating to their interests in Tower LLC (which owns the Tower Property) and Roseville Park LLC (a non-party entity owned 50% by Barry and Simkowitz, which owns the vacant lot adjacent to the Tower Property known as the "Park Property"). (Pa144, Pa187). Simkowitz also sought dissolution of those entities. The trial court dismissed those claims with prejudice because it concluded Simkowitz, Barry, and Bella had unclean hands stemming from the 2010 foreclosure, and their conduct in the 2010 foreclosure had a nexus to the competing crossclaims. (6T, 29:10-14).

Simkowitz cross-appealed against the Hersko Defendants and will likely argue that the crossclaims have no nexus to the 2010 foreclosure action. Should the Court reverse as to Simkowitz—thereby allowing him an opportunity to present an affirmative case for an accounting—it should respectfully reverse as to the Hersko Defendants as well, so that both party-groups have an opportunity to present their accounting claims against one another.

CONCLUSION

For the foregoing reasons, Barry Hersko and Bella Hersko respectfully request: (1) that the trial court's Order be affirmed as to Isaac's claims; and (2) in the event that Simkowitz's crossclaims are restored on appeal, that the trial court's Order be reversed as to Barry and Bella's crossclaims against Simkowitz.

Dated: October 15, 2024

s/ Michael R. Darbee

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ISAAC HERSKO, Plaintiff-Respondent, v. BARRY HERSKO, BELLA HERSKO, THE ROSEVILLE TOWER LLC, and CHAIM SIMKOWITZ, Defendants-Appellants.	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-002622-23 : : On Appeal From: : : SUPERIOR COURT OF NEW JERSEY : CHANCERY DIVISION : ESSEX COUNTY : : : Sat Below: : : Hon. Lisa M. Adubato, J.S.C. : DOCKET NO. C-220-21 :

RESPONDENT/CROSS APPELLANT, CHAIM SIMKOWITZ's BRIEF IN RESPONSE TO APPEAL OF ISAAC HERSKO AND IN SUPPORT OF SIMKOWITZ's CROSS-APPEAL

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PRELIMINARY STATEMENT

This appeal arises out of an order entered on April 15, 2024 (the "Order"), following an incomplete bench trial, dismissing *all* of the claims, asserted by *all* of the parties, *with prejudice*. The basis for nearly all of these dismissals was the application of the doctrine of unclean hands.

The Roseville Tower, LLC ("Tower LLC") owns property at 140-148 Roseville Avenue, Newark, New Jersey (the "Tower Property"), a 274-unit cluster of mid-rise apartment buildings in the Lower Roseville section of Newark, not far from Branch Brook Park. The complex is vacant. Roseville Park LLC ("Park LLC") owns the adjacent property (a parking lot) at 401-407 Seventh Avenue, Newark New Jersey (the "Park Property"). Tower LLC is owned 50% by Chaim Simkowitz ("Simkowitz") and 50% by Bella Hersko ("Bella"). Park LLC is owned 50% by Simkowitz and 50% by Bella's husband, Barry Hersko ("Barry"). (Tower LLC and Park LLC are sometimes collectively referred to hereinafter as the "LLCs.")

After years of attempting, unsuccessfully, with Barry, to develop the Tower Property, Simkowitz entered into an agreement with Bella, Barry and their affiliates (collectively, the "Bella/Barry Parties"), in July of 2021, whereby Simkowitz would buy out the interests of the Bella/Barry Parties in the LLCs and take an assignment of first and second mortgages that remained of record on the properties (collectively, the "Mortgages"). Before the transaction could be consummated, however, Isaac

Hersko ("Isaac"), Barry's brother, started this lawsuit, alleging that he held an interest in the Tower Property. Over the course of two years, the case expanded to include a web of claims, counterclaims and crossclaims, with issues that went well beyond the scope of Isaac's original complaint.

Isaac's lawsuit effectively untracked the sale of the Tower Property (which was rescinded during the course of the litigation). Moreover, the Tower Property remains burdened by the Mortgages, because: (i) Simkowitz was not permitted to try his claims to discharge them (see below); and (ii) the Order dismissed the claims *with prejudice*. The Order also prevented the untangling of the financial interests of the deadlocked LLC members and the liquidation of the LLC properties because it dismissed *with prejudice* Simkowitz's claim for statutory dissolution of the entities. While Simkowitz's interest in the outcome is admittedly purely personal, he submits that having the Tower Property remain *in stasis*, undeveloped, vacant and unusable, in a city that has an extreme shortage of affordable apartments, is not in the public interest.

The aforesaid dismissals, as well as the dismissal of Simkowitz's other claims against Bella and Barry for non-payment of capital contributions, were ordered notwithstanding that Simkowitz was denied the right to present his case-in-chief, the Trial Court having decided that it had heard enough during *Isaac's* case-in-chief. Now, Simkowitz does not question the proposition that a court may employ the

doctrine of unclean hands to bar relief to a party who has engaged in inequitable behavior. But the doctrine is not to be used in the same fashion as a bulldozer, nor is it a license to dispense with basic due process rights, such as the opportunity to offer testimony and other evidence on one's own claims and to rebut the testimony adduced by one's adversary.

The basis for the Trial Court's application of unclean hands was the litigants' fraudulent conduct surrounding the deep-discount purchase of the second mortgage by an entity controlled by Barry, including the filing of a sham foreclosure complaint. The undersigned well understands the Trial Court's antipathy toward the litigants and their past behavior. However, the foreclosure complaint was filed in a different case, the seller of the mortgage was a non-party, and relief from the second-mortgage transaction was not the subject of any claim made in the instant case. As the New Jersey Supreme Court made clear in Untermann v. Untermann, infra, "the inequity which deprives a suitor of a right to justice in a court of equity . . . must be evil practice or wrong conduct *in the particular matter or transaction in respect to which judicial protection or redress is sought."* (Emphasis added). The court's use of unclean hands to forever extinguish *all* claims, even those that were unconnected with the offending conduct or the Mortgages (e.g., claims for capital contribution shortfalls and for dissolution of the LLCs) was simply beyond the pale.

PROCEDURAL HISTORY

Isaac filed his original complaint in the Law Division in October 2021. (Pa033). Simkowitz intervened in the case in November 2021. (Pa060). The case was subsequently transferred to the Chancery Division. (Pa060).

When this case was filed, Isaac claimed that he had an ownership interest in Tower LLC, the owner of the Tower Property. (Pa033). Simkowitz counterclaimed for, *inter alia*, a discharge of the mortgages on the Tower Property and a declaration that Isaac had no ownership interest in the Tower Property. (Pa033-Pa047). Simkowitz also crossclaimed against Bella and Barry, seeking dissolution of Tower LLC and Park LLC and for capital contribution shortfalls against his co-members, Bella and Barry. (Pa080-Pa082; Pa128-Pa135; Pa187-Pa194). Bella and Barry also asserted crossclaims against Simkowitz relating the LLCs. (Pa111-Pa114; Pa124-Pa126; Pa144-Pa151).

The Honorable Lisa M. Adubato, J.S.C. conducted a bench trial on January 23, 24, and 25, 2024 and February 14, 2024. (1T, 2T, 3T, 4T, 5T & 6T). On the first day of trial, Isaac made an oral motion to withdraw all of his claims except for his claims for money had and received and his amended claim seeking a declaration that he had a 50% interest in the first mortgage on the Tower Property. (1T9-22 – 1T11-13). According to Isaac's counsel, he was seeking "limited declaratory relief" – that "the first mortgage is a mortgage that Isaac Hersko has an interest in and a

valid and enforceable interest." (1T22-5 – 1T22-10). At that time, Isaac also asserted an "unclean hands argument that isn't a cause of action." (1T11-15 - 1T11-17). During the next few days of trial, Isaac presented his affirmative case on the remaining two causes of action and on his unclean hands "defense". (1T; 2T; 3T; 4T; 5T). At the trial, counsel for the Barry/Bella Parties asserted that the abandoned claims should be dismissed with prejudice. (1T19-13). However, the Trial Court declined to rule on the withdrawal being with prejudice. (1T20-10 - 1T20-14). After Isaac rested his case on January 25, 2024, the Trial Judge requested that the parties submit briefs on the application of the doctrine of unclean hands and permitted the Barry/Bella Parties to submit papers on the issue of whether the claims withdrawn by Isaac at the outset of trial should be dismissed with prejudice. (5T144-10 - 5T145-7; 5T151-2 - 5T151-11; 5T152-5 - 5T153-17).

On February 14, 2024, the Trial Judge ended the trial and dismissed all claims as to all parties based on unclean hands, finding that the parties acted *in pari delicto*. (Pa005-Pa006; 6T26-9; 6T29-10 - 6T29-14). Declining to consider unclean hands in the context of an affirmative defense, the Trial Judge used "the unclean hands of all parties that permeate this entire case" as the basis for dismissal. (6T22-5 - 6T22-6). The Trial Court also dismissed with prejudice the claims withdrawn by Isaac on the first day of trial and dismissed Isaac's claim against Barry for money had and received for failure to state a claim. (6T21-14 - 6T21-17). Per the Court's

instruction, all parties submitted proposed forms of order pursuant to the Five-Day Rule of R. 4:42-1(c) with letter explanations on the issue of whether claims should be dismissed with or without prejudice. (6T30-3 - 6T30-11; 6T31-21 - 6T31-23). Ultimately, the Court entered an Order on April 15, 2024, disposing of the case in full (the "Order"). (Pa001). The Order included a Statement of Reasons pursuant to R. 1:6-2(f). (Pa008-Pa020).

COUNTERSTATEMENT OF FACTS

The First Mortgage. On or about April 20, 2007, Barry and Isaac, as lenders, were given a mortgage by Tower LLC on the Tower Property in the principal sum of $2,500,000.00 (the "First Mortgage"). (Pa204; Pa209). At the time the First Mortgage was executed, Shlomo Karpen ("Karpen") and Israel Perlmutter ("Perlmutter") were each the holders of a 50% interest in Tower LLC. (Pa217).

By way of Agreement dated January 4, 2010, Barry and Isaac, as mortgagees, Tower LLC, as mortgagor, and the former members of Tower LLC and guarantors, Karpen and Perlmutter,[1] set forth the terms and conditions upon which the First Mortgage was to be reinstated following default (the "2010 Agreement"). (Pa217). Per the 2010 Agreement, the present principal balance due on the First Mortgage was the sum of $1,500,000.00.[2] (Pa217). Simultaneously with the execution of the Agreement, Karpen paid over to Isaac and Barry the sum of $750,000.00, which reduced the principal balance due to the First Mortgage from $1.5 million to $750,000.00. (Pa218). Receipt of these monies was acknowledged in the language

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[1] Esther Karpen and Esther Perlmutter, the wives of Karpen and Perlmutter, were also parties to the 2010 Agreement, as they guaranteed the repayment of the First Mortgage with their husbands. (Pa217). Karpen and Perlmutter are referred to in the singular for ease of reference.

[2] Per Barry's testimony at trial, a million dollars of principal was paid a couple of weeks before the Agreement was executed. (4T61-4 - 4T61-13).

of the 2010 Agreement (Pa218); and Barry testified at trial that the $750,000.00 payment was made, thereby reducing the principal balance to $750,000.00. (4T49-21 - 4T50-5; 4T61-14 - 4T62-5).

The Assignment of Tower LLC to Bella. The 2010 Agreement also provided that Karpen and Perlmutter were to assign and transfer 100% of the membership interest in Tower LLC to Bella as "collateral security". (Pa218). This was accomplished by way of an Assignment of Membership Interest dated January 4, 2010. (Pa226). Per the 2010 Agreement, Karpen and Perlmutter had the option to redeem the membership by June 25, 2010 if they paid the remaining $750,000.00 plus monthly interest payments. (Pa220). In the event that payment was not made, the 2010 Agreement provided that Bella can "assign, hypothecate, transfer or pledge" the property because the right of redemption expired. (Pa218). In fact, Bella wound up owning 100% of Tower LLC. (Pa226; 5T71-17 - 5T72-2).

Simkowitz Becomes a Member of Tower LLC. On October 28, 2010, Chaim Simkowitz ("Simkowitz") acquired a 50% membership interest in Tower LLC from Bella (the "Roseville Tower Interest"). (Pa227). Prior to October 28, 2010, as explained above, Bella owned 100% of Tower LLC. (Pa226; 5T71-17 - 5T72-2). At trial, Bella admitted that she sold 50% of her interest in Tower LLC (and by extension, the Roseville Tower Property) to Simkowitz. (5T77-19 - 5T77-

21; 5T80-7 - 5T80-18). At the closing in 2010, Simkowitz paid $500,000 for the Roseville Tower Interest. (Pa216; 5T77-19 - 5T77-21). Bella executed an assignment of 50% of her interest in Tower LLC on October 28, 2010. (Pa227; 5T81-1 - 5T81-18). On October 28, 2010, Barry and Isaac, as Assignors, also executed an Assignment of Mortgage, assigning 50% of their interest in the First Mortgage. (Pa280–Pa283). Simkowitz testified that the assignment was in blank and that he – Simkowitz – could fill in the name of the assignee at any time. (1T124-2 - 1T125-7).

The Second Mortgage and the 2010 Action to Foreclose the First Mortgage. During his testimony at trial, Simkowitz admitted that, at Barry's urging, he retained a New Jersey attorney to initiate a foreclosure action of the First Mortgage against the holder of a subordinate lien on the Tower Property. (2T27-18 - 2T29-6; Pa240-Pa272). Isaac and Barry as clients signed a retainer agreement with The Feinsilver Law Group, P.C. to engage that firm "to represent them solely with respect to the foreclosure action against The Roseville Tower, LLC and GIAIP, LLC."[3] (Pa311–Pa312). A Complaint in Foreclosure was filed on December 13, 2010. (Pa240). GIAIP, LLC, the holder of a second mortgage on

[3] Isaac's counsel challenged Isaac's signature on the retainer. (6T39-22). However, no witness testimony was offered on this issue and no handwriting expert was offered to dispute the authenticity of Isaac's signature on this document. (Pa019).

the Roseville Tower Property (the "Second Mortgage"), was named as a defendant therein. (Pa248). Isaac and Barry were the plaintiffs. (Pa244). Simkowitz admitted that this action was initiated, as part of Barry's plan, to induce the subordinate mortgagee to give up its mortgage at a discount. (1T94-18 - 1T96-5; 1T105-25 -1T109-12). Simkowitz also testified that Isaac was aware of the plan to buy down the Second Mortgage.[4] (1T96-21 - 1T96-22; 1T99-24 - 1T100-6; 1T102-12 - 1T102-25).

The Second Mortgage was ultimately purchased by Barry for an amount in the $300,000 range and assigned to Isaac & Barry LLC sometime in 2011. (2T147-14 – 2T147-18; 2T149-4 – 2T149-22). Isaac & Barry, LLC, despite its name, is owned solely by Barry. (2T136-11 – 2T136-22). Neither GIAIP, LLC, nor its principal, Gloria Adler, is a party to this litigation. (Pa152). The Foreclosure Complaint identified Israel Perlmutter as the managing member of Tower LLC (Pa 248), when in fact, as stated above, Simkowitz and Bella were the members of Tower LLC as of October 2010 (PA 227).

The Purchase of the Adjacent Roseville Park Property by Park LLC in 2016. Subsequently, on or about May 18, 2016, Roseville Park LLC ("Roseville

[4] It should be noted that Isaac did not introduce any evidence to dispute this testimony; his counsel merely continued to claim that he was incapacitated and therefore unable to participate in the litigation.

Park") purchased the property at 401-407 Seventh Avenue, Newark, New Jersey, a parking lot adjacent to the Roseville Tower Property. (Compare Pa187-Pa188 at ¶¶ 2-7 with Pa196-Pa197 at ¶¶ 2-7).[5] Roseville Park is owned 50% by Barry and 50% by Simkowitz. (See Pa188 at ¶¶ 5 & 7). Isaac makes no claim to Roseville Park or the Roseville Park Property. (Pa033; Pa152).

The 2021 Buyout Agreement Between the LLC Members. In July of 2021, Simkowitz entered into an agreement (the "2021 Agreement") with, *inter alia*, Barry and Bella, to acquire Bella's remaining 50% membership interest in Tower LLC and Barry's 50% membership interest in Park LLC. (Pa313–Pa322). In October of 2021, the parties scheduled a closing, but a title run-down search revealed the filing of a notice of lis pendens on the Tower Property by Isaac, aborting the closing. (Pa076 at ¶ 15). The Bella/Barry Parties sought rescission of the 2021 Agreement and Simkowitz ultimately agreed to the relief; the result was an Order Decreeing Rescission entered on October 11, 2023. (Sa001-Sa012).[6]

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[5] Certain facts are supported by citation to pleadings because Simkowitz was unable to give or elicit testimony on many of his claims, nor was he able to offer any documents into evidence. The reason? The Trial Judge ended the trial prematurely. As the undersigned pointed out at the trial on the afternoon of January 25, 2024, "the record isn't closed" as "[w]e have a case to put on yet." (5T143-17 – 5T143-18).

[6] Citations to "Sa" refer the Appendix filed by Simkowitz along with this Brief.

The LLCs and Property Expenses. Simkowitz alleges in his crossclaims that Bella and Barry have not funded their share of the LLC expenses since January of 2020, resulting in capital account shortfalls. (Pa187-Pa191). By way of his crossclaims, Simkowitz sought to recover those shortfalls. He also sought to have the LLCs dissolved and the businesses wound up[7] (Pa187-Pa195), based on the allegations (1) that each LLC is held 50/50 by two members; (2) that the parties are unable to agree on anything; (3) the lack of trust between the principals; and (4) the claims still to be litigated that the LLCs simply could not, as a practical matter, carry on the activities for which they were formed. (Pa192-Pa194).

[7] The facts relating to Simkowitz's crossclaims are also supported by citation to various pleadings. Simkowitz was unable to give or elicit testimony on these claims at trial because the Trial Court ended the proceeding immediately after Isaac rested his case. Simkowitz had voluminous documents to support the payments he made in connection with the development and upkeep of the Tower Property and the Park Property. Without the opportunity to put in his case, Simkowitz was unable to introduce any of these documents into evidence.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING A CLAIM IT INCORRECTLY IDENTIFIED AS HAVING BEEN MADE BY THE TOWER LLC. (Pa004; Pa006.)

A. The Order Contains Misstatements of Fact as to Tower LLC.

The Trial Court incorrectly included "Tower LLC" in its dismissal of Simkowitz's request for declaratory relief as against Isaac, Barry, and Isaac & Barry, LLC, to discharge the First Mortgage and the Second Mortgage. Simkowitz respectfully submits that in this regard the Order is contrary to the facts and flies in the face of the claims asserted. Indeed, the Order contains material misstatements of fact. Specifically, Section II 1 of the Order erroneously states that Simkowitz made an oral motion to deem the first counterclaim as "asserted by Simkowitz **and Tower LLC**" for declaratory relief during the trial on February 14, 2024. (Pa004) Similarly, Section IV 4(a)(iv) refers to Simkowitz's request for a declaration to discharge the mortgages as "conformed to be asserted by Simkowitz **and Tower LLC.**" (Pa006)

While the undersigned did make an oral motion, it was only to amend the claims of Simkowitz. It is clear from the transcript of the trial on February 14, 2024 that Simkowitz was the movant – there is no mention of Tower LLC ("Tower LLC").

Tower LLC's counsel, Blank Rome, did not join in Simkowitz's request for relief.[8] The undersigned counsel for Simkowitz had the following discussion on the record with the Court the morning of February 14, 2024:

> MR. MALLOY: So Judge, the – we obviously have a counterclaim against Isaac Hersko and that is for discharge of the two mortgages. Now, let me put an asterisk in there because as Your Honor knows and . . . my recollection from the pretrial is, Your Honor has been hearing testimony and this has been submitted with respect to both mortgages.
>
> And we are litigating that issue of whether there is anything due on them and looking over our pleadings and actually, Mr. Flanders was kind enough to point out [in] one of his submissions. There's a little gapage. So while we counterclaim for discharge of the two mortgages as against Isaac, it didn't find it[s] way into the cross-claim against Barry. So I guess I'm looking for guidance from Your Honor. Do you want me to file a formal –
>
> THE COURT: No.
>
> MR. MALLOY: -- motion or can we deem it amended?
>
> THE COURT: It's – I had been assuming the whole time it was against both.
>
> MR. MALLOY: Yes.
>
> THE COURT: I'm not going to get that technical. I don't see any way that that's a surprise. I'll hear from Barry's side but I really think that any argument that it was unclear that the discharge would go against both, that's how I had been proceeding. [6T11-11 – 6T12-12].

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[8] In fact, Craig Flanders, Esq. of Blank Rome acknowledged that his clients have "no counterclaims, Barry and Bella, against Isaac." (6T10-13)

This oral motion could not possibly have included an amendment for or on behalf of Tower LLC, for two reasons: (1) Finestein & Malloy, L.L.C. did not represent Tower LLC - - Blank Rome did; and (2) there was nothing to amend, because no counterclaim was ever filed in the case by Tower LLC. Moreover, as the Trial Court was aware, Tower LLC is a 50/50 deadlocked entity.[9] Bella – Barry' wife – is the other member.

The factual inaccuracy of the Order in this regard was identified in submissions to the Court made in advance of the Order's entry, specifically, in the letters dated on March 6, 2024 and March 11, 2024. (Sa013-Sa019). In those letters, it was brought to the Court's attention that both Isaac and the Bella/Barry Parties had erroneously included verbiage in their proposed forms of order to the effect that "Simkowitz and the Tower LLC" had made an oral motion to amend. Nonetheless, the Trial Court entered an order dismissing claims that "Tower LLC" had never made.

B. The Order Was Entered in Contravention of the Rules of Court.

There was clearly an error in the procedure that led to entry of the Order. Rule 4:42-1(c), the so-called "five-day rule", provides:

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[9] This is one of the reasons that the right to seek dissolution of the entity *must* be preserved.

> In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising that unless the judge and the proponent of the judgment or order are notified in writing of specific objections thereto within 5 days after such service, the judgment or order may be signed in the judge's discretion. If no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter may be listed for hearing in the discretion of the court. [R. 4:42-1(c).]

"It is, of course, clear that an order should never be either submitted or signed under this rule, unless it accurately memorializes court dispositions, is submitted following default, or has all parties' consent endorsed thereon." Pressler & Verniero, Current N.J. Court Rules, Comment 3 on R. 4:42-1 (2024) (citing City of Jersey City v. Roosevelt Stadium Marina, Inc., 210 N.J. Super. 315 (App. Div. 1986), certif. denied, 110 N.J. 152 (1988)).

Here, at the Trial Judge's direction (6T55-2), the parties each submitted their own form of order under R. 4:42-1(c). Each then submitted letters to the Trial Court, objecting to each other's forms of order for various reasons. Ultimately, the Trial Court entered the Order on April 15, 2024. But the Order was not an accurate memorialization of the decision that the Trial Court made on the record on February 14, 2024, because the Trial Judge never ruled as to whether certain claims would be dismissed with or without prejudice. Moreover, it was clear that the parties had a dispute as to certain portions of the Order. The competing letters filed with the Trial

Court required the judge to determine, in the exercise of her discretion, whether the matter should have been listed for a hearing. See R. 4:42-1(c). Simkowitz submits that as no explanation was given for why there was no hearing, the Trial Judge abused her discretion in this regard. Flagg v. Essex County Prosecutor, 171 N.J. 561, 572 (2002) (finding that "an abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'") (citation omitted).

Moreover, the inclusion of "Tower LLC" was not discussed in the Statement of Reasons that accompanied the Order. This failure violated R. 1:7-4 which requires a "Court [to] find the facts and state its conclusions of law." "Trial judges are under a duty to make findings of fact and to state reasons in support of their conclusions." Giarusso v. Giarusso, 455 N.J. Super. 42, 53 (App. Div. 2018) (quoting Heinl v. Heinl, 287 N.J. Super. 337, 347 (App. Div. 1996). "Failure to make explicit findings and clear statements of reasoning " 'constitutes a disservice to the litigants, the attorneys, and the appellate court." ' " Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Curtis v. Finneran, 83 N.J. 563, 569-70 (1980)). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion. In the absence of reasons, [the Appellate Division is] left to conjecture as to what the judge may have had in mind." Salch v. Salch, 240 N.J. Super. 441, 443

(App. Div. 1990); see also Straham v. Straham, 402 N.J. Super. 298, 310 (App. Div. 2008).

Thus, although the appellate standard of review is generally limited in this area, where inadequate fact findings are made or where issues are not addressed, like in the case at bar, the Appellate Division is constrained to remand for further proceedings. See Gormley v. Gormley, 462 N.J. Super. 433, 449 (App. Div. 2019) (" 'The omission of critical factual findings ... requires a remand limited to this issue.' " (quoting Elrom v. Elrom, 439 N.J. Super, 424, 443 (App. Div. 2015).

C. Entry of an Order Dismissing a Claim Wrongfully Attributed to Tower LLC Could Potentially Lead to an Inequitable Result.

In addition to the Order being factually incorrect and issued in contravention of the Rules of Court, the Order, as entered, could potentially cause an inequitable and unintended result. Specifically, the Order – as entered – does not dismiss any claims of Barry, Isaac and Isaac & Barry, LLC as to the Mortgages. This despite the Trial Court's assurance on the record that "the validity of the mortgages *on both sides,* everybody pointing to the mortgages that that – those are dismissed." (6T31-8 - 6T31-10) (emphasis added). Thus, the preposterous claim of Barry that the Mortgages as to which no payment has been made in over a dozen years, remain valid and enforceable, to the tune of some $19 million dollars, remains alive. This would allow for the possibility of a foreclosure action by Isaac and Barry (the first

mortgage holder) and/or by Isaac and Barry, LLC (the second mortgage holder) which they might contend Tower LLC is precluded from contesting, because its claims for the discharge of those instruments were dismissed with prejudice by the Trial Court.

Accordingly, to accurately reflect the record, paragraphs II(1) and IV(4)(a)(iv) of the Order must be modified to delete the references to "and Tower LLC."

POINT II

THE TRIAL COURT ERRED IN DETERMINING THAT THE STANDARDS FOR THE APPLICATION OF THE UNCLEAN HANDS DOCTRINE HAD BEEN MET AND USING THAT AS THE BASIS FOR THE DISMISSAL OF ALL OF SIMKOWITZ'S CLAIMS. (Pa015-Pa020; 6T22-1 - 6T29-14).

In its written decision of April 15, 2024, the Trial Court found that "all remaining claims between the parties are dismissed with prejudice pursuant to the application of the unclean hands doctrine." (Pa015) Inasmuch as "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995), this Court must conduct a *de novo* review of the Trial Court's decision. Simkowitz respectfully submits that following such review, this Court will agree that the decision must be reversed as to all claims in the case,[10] including those of Simkowitz. As discussed in detail below, the controlling case law in this State supports such reversal.

[10] There is one exception, being Barry's claim against Isaac for money had and received, which was dismissed on grounds of failure to state a claim.

A. The Hageman Case Is Not Binding Authority and, In Any Event, Is Distinguishable From the Case at Bar.

The doctrine of unclean hands should not have been applied in this case to preclude a judicial determination, on the merits, of Simkowitz's claims. In its Statement of Reasons, the Trial Court stated that it was "secure in its decision to apply the equitable doctrine [of unclean hands] in this case for reasons stated in its February 14, 2024 oral opinion." (Pa015 - Pa016). The oral opinion, however, leaned heavily on Hageman v. 28 Glen Park Assoc. LLC, 402 N.J. Super. 43 (Ch. Div. 2008), a trial-level decision. In explaining its reliance on Hagemen, the Trial Court had the following to say: "Although not bound by a court of equitable jurisdiction, sorry, of equal jurisdiction, I find very persuasive the reasoning of the Court in Hageman v. 28 Glen Park Associates, L.L.C., that's 402 N.J. Super. 43, it's a Chancery Division case from 2008, which has been cited with approval of the Appellate Division on a number of occasions." (6T23-11 – 6T24-2).

Two threshold points are appropriately made as to The Trial Court's stated reliance on Hageman: First, the Court admitted that the case was not binding precedent. Second, the Court's statement that Hageman was cited with approval by this Court is, depending upon one's point of view, either hyperbolic or something of a reach. As to the first point, it is axiomatic that "[t]he precedential reach of a published opinion depends on the place in the judicial hierarchy of the court issuing the opinion." Pressler & Verniero, Current N.J. Court Rules, Comment 3 to R.1:36-

3 (2024). Specifically, opinions of higher courts bind all lower courts but opinions of co-equal courts do not bind each other. Id. Thus, the decisions of the Supreme Court bind the Appellate Division and all trial courts. Scannavino v. Walsh, 445 N.J. Super. 162, 172 (App. Div. 2016). Decisions of the Appellate Division bind all trial courts, and while a lower court is free to express disagreement with a published opinion of a higher court, it must nevertheless follow it. Crespo v. Crespo, 408 N.J. Super. 25, 37 (App. Div. 2009), aff'd on other grounds 201 N.J. 207 (2010); Petrusky v. Maxfli Dunlop Sports, 342 N.J. Super. 77, 81 (App Div.), certif. den., 170 N.J. 388 (2001). Hageman was a decision issued by neither the Supreme Court nor the Appellate Division.

As to the second point, in its oral decision, the Trial Court stated that Hageman was cited with approval by the Appellate Division on a number of occasions. (6T23-23 - 6T24-2). This statement is neither as accurate nor as meaningful as it appears at first blush. It is true that Hageman has been cited by the Appellate Division in three opinions, but all were unpublished. See Gateway 2001, LLC v. Weiss, 2019 WL 3282729, *16+ (N.J. App. Div. July 22, 2019); HSBC Bank USA, Nat'l Ass'n v. Lia, 2015 WL 96943367, *8 (N.J. App. Div. Jan. 8, 2016); Simons v. Lewis, 2014 WL 4916616, *9+ (N.J. App. Div. Oct. 2, 2014).[11] A trial court is not bound by

[11] Copies of these unpublished opinions are included in Simkowitz's Appendix in accordance with the requirements of R. 2:6-1((a)(1)(H).

unpublished opinions of an appellate court. In re Bacharach, 344 N.J. Super. 126, 133 (App. Div. 2001). More importantly, none of these decisions relied on the particular facts or the specific reasoning of Hageman. Indeed, Gateway 2001, *distinguished* Hageman, stating that defendants' "reliance on Hageman . . . is misplaced" because "there is no claim of unclean hands here." 2019 WL 3282729 at *16. As to both the Lia and Simons cases, the Appellate Division cited to Hageman only as citing to another case, Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 13 (App. Div. 1981), for the general proposition that "[t]he clean hands doctrine is 'an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy'". 2015 WL 96943367 at *8; 2014 WL 4916616 at *9.

Principles of precedent and legal authority aside, Hageman was wrongly decided. New Jersey courts have refused to bar relief sought by claimants on the basis of unclean hands in cases where the offending conduct took place in a *prior proceeding or transaction*. "The unclean hands doctrine cannot be invoked save in a proceeding in which the unconscionable conduct took place." See City of Paterson v. Schneider, 31 N.J. Super. 598 (App. Div. 1954), and the cases cited therein. Indeed, the Hageman court acknowledged the requirement, citing to the Supreme Court decision of Untermann v. Untermann, 19 N.J. 507 (1955), and a cluster of other cases, as "concern[ing] conduct occurring in or relating to the particular matter

in which judicial protection is sought." Id. at 49. The Hageman court also acknowledged the plaintiff's argument that because the offending conduct had taken place solely in the prior (foreclosure) proceeding, the doctrine could not be applied. *The court applied it anyway,* while citing to no unclean hands case in which the doctrine was applied where the inequitable behavior had occurred in a different proceeding.

If the Hageman decision was not to be relied upon by the Trial Court because a) it was not precedential and b) it did not *itself* follow precedent, it was also not to be relied upon because it was clearly distinguishable from the case at bar. In Hageman, unlike in the instant case, the court was able to establish clear cause-and-effect *linkage* of plaintiff's claim to his prior bad conduct. Plaintiff's lies to the court in the first proceeding enabled him to extend the timeline of the foreclosure of his home, which in turn enabled him to redeem the property and enter into a sale-leaseback arrangement with a third party. In the second action he claimed that the sale-leaseback arrangement was an elaborate "foreclosure rescue scam." Based on these facts, the court found linkage, i.e., but for the opportunity afforded by his prior bad conduct (lying to forestall the foreclosure sale), plaintiff would not have been able to enter into the rescue scam that he sought relief from.

The nexus found by the court in Hageman is absent in the instant matter. There is no cause-and-effect "through line" between the offending conduct that facilitated

the acquisition of the Second Mortgage and the relief sought by Simkowitz for the recovery of unpaid LLC capital contributions and for the dissolution of the LLCs. They were neither actually related to one another nor did they correlate chronologically. The sham foreclosure complaint and the tactics employed in the buy-out of the second mortgagee did not enable the formation of the LLCs (Tower LLC was in place years before the foreclosure complaint was filed and Park LLC - - having to do with a separate property - - was formed years later) or have anything to do with the financial responsibilities of the LLC members *inter se*. As to the relief sought by Simkowitz with respect to the Mortgages - - discharge of same - - this also does not arise out of machinations that led to the 2012 purchase of the mortgage by the entity controlled by Barry.[12] This relief is related to and arises from the simple fact that the Tower Property is encumbered by the Mortgages, as it was before 2012.

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[12] Unlike in Hageman, the offending conduct in the instant matter was not the basis for any relief previously granted by the court. While a foreclosure complaint was filed with respect to the second mortgage, there was no further activity in the case.

B. The Trial Court's Application of Unclean Hands Was Not in Accordance With the Guidelines Set Forth in Untermann.

Untermann is an expression of the State's highest court on the subject of unclean hands. While The Trial Court liberally referred to and quoted from Untermann in its oral opinion, it selectively embraced certain pronouncements in the opinion while underweighting others. First and foremost, Simkowitz argues, the Court ignored the Supreme Court's bedrock advice that the doctrine should be "used sparingly." Simkowitz further submits that the Court failed to heed Untermann's cautionary instruction that it "is not general iniquitous conduct unconnected with the act of the Defendant" that triggers the application of unclean hands, but rather the "evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Id. at 517. Simkowitz promoted this properly restrictive view of unclean hands as the authoritative one, which is presumably what led the Trial Court to characterize the "parties' interpretation" of Untermann as "much too narrow a reading of the general prohibition." (6T16-17 – 6T16-18). If by "general prohibition" the Trial Court was referring to the above-quoted statement of the *law* by the Supreme Court, it requires no "interpretation." Its plain meaning is that to be subjected to the harsh bar of unclean hands, a litigant must be seeking relief from a result he previously obtained by way of his bad conduct. As the court declared in Neubeck v. Neubeck, 94 N.J. Eq. 167 (E & A 1922): "[T]he unclean hands doctrine is applicable only to cases where the particular

claim is tied up to inequitable conduct as an *element of its creation*." Id. at 171 (emphasis added).

None of Simkowitz's claims was "created" by his participation in the maneuverings that resulted in the sale of the Second Mortgage. The claim for the discharge of that mortgage, as well as the First Mortgage, arose out of the fact that a) Simkowitz is a member of the LLC that owns the Tower Property and b) the Tower Property was encumbered by the Mortgages. Indeed, it was encumbered *prior* to the 2011 transfer of the Second Mortgage to Barry's entity. And the other claims - - for unpaid capital contributions and for dissolution of the entities - - are completely independent LLC-based causes of action having *nothing* to do with the Mortgages or the events of 2010-2011. Indeed, the Park Property was not even purchased until 2016 and is unencumbered by the Mortgages. Yet the Trial Court also dismissed the claims as to the Park Property. As a consequence, access to the courts has been barred, not just as to issues with respect to the apartment building, but as to the parking lot next door, at a time when both LLCs are in 50-50 deadlock status, with no prospects for a consensual resolution. Make no mistake about it - - the indiscriminate dismissal of all claims, with prejudice, under the auspices of an equitable doctrine, has wrought a wholly *in*equitable result.

C. The Court Failed To Take Into Account The Other Requirements For The Justifiable Application of Unclean Hands.

In addition to the requirement that unclean hands can only be invoked in the proceeding in which the unconscionable conduct took place, and the requirement of a through line between the bad conduct and the relief sought, in order to preclude a claim, the conduct must have been directed at the party defending against the claim. As the Appellate Division observed in City of Paterson, supra, "[t]he unclean hands doctrine does not call into consideration whether the plaintiff was guilty of any reprehensible conduct *with any person other than the defendants*. 31 N.J. Super. at 607 (emphasis added).

Illustrative of the refusal of our courts to accept inequitable conduct *toward a third party* as grounds for the application of unclean hands is Goldfarb v. Solomine, 2019 WL 2635918 (N.J. App. Div. June 26, 2019).[13] In that case plaintiff sued an asset manager who reneged on an offer of employment. The defendant raised a number of defenses, including unclean hands, based on plaintiff's disloyalty to his *prior* employer. The court, noting the requirement that the inequitable behavior must have been part of the controversy between the litigants themselves (i.e., by one litigant toward the other), held:

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[13] Pursuant to R. 2:6-1((a)(1)(H), a copy of this unpublished opinion is included in Simkowitz's Appendix at Sa064 – Sa079.

> Defendant has not shown that that plaintiff's alleged disloyalty caused defendant harm or that it related to his promise to plaintiff. See Untermann, 19 N.J. at 517 (stating that only "evil practice or wrong conduct in the particular matter or transaction" forming the basis of a claim will deprive a plaintiff the "right to justice in a court of equity (quoting Neubeck v. Neubeck, 94 N.J. Eq. 167, 170 (E. & A. 1922))); see also Sprenger v. Trout, 375 N.J. Super. 120, 136-37 (App. Div. 2005) (declining to apply the unclean hands doctrine where plaintiff's alleged wrong was against his employer, not defendants whom he hired to repair and customize his vehicle); Med. Fabrics Co. v. D.C. McLintock Co., 12 N.J. Super. 177, 181 (App. Div. 1951) (declining to apply the unclean hands doctrine where the wrongful conduct was "insufficiently related to the basic controversy"). **Here, defendant cannot demonstrate any injury he suffered from plaintiff's alleged breach of loyalty to his former employer.** [Id. at *10 (emphasis added).]

The Appellate Division added, in the course of its opinion, that "a litigant usually has no standing to assert the rights of a third party." Id. (quoting In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004)). And so it is in the case at bar. Regardless of any inequitable behavior that may have occurred in 2012, such behavior was directed only at a third party (GIAIP, LLC, the original second mortgagee), who is not a litigant in this case. For this reason, as well as the other reasons discussed *supra,* it was error for the Trial Court to conclude that the doctrine of unclean hands could be appropriately applied to bar all relief sought by Simkowitz.

As argued above, the Trial Court's heavy reliance upon the Hageman case was not justified, as Hageman was neither precedential nor, in the view of the undersigned, correctly decided. Assuming for argument's sake, however, that reliance on a trial-level decision was appropriate, there were other Chancery cases more factually similar to the instant case, including one - - Hunt v. Hunt, 10 N.J. Misc. 675 (Ch. Ct. 1932), that presents a striking parallel to the case at bar, in terms of the lack of identity between the party allegedly injured by the inequitable conduct and the defendant on the claim as to which preclusion is sought. The Hunt Court declared, unambiguously, that "'clean hands' means a clean record with respect to the transaction with the defendant, and *not with respect to any third party*.'" Id. at 684 (citations omitted) (emphasis added).

In Hunt, two brothers, Williams and Fred, ran a livery stable business in Newark in the early 1900s. Their partnership "dwindled into insignificance," as the court put it, when the automobile came of age. In the wake of the business downturn, litigation ensued between the duo, with Williams (who "knows horses and little else") suing Fred (who "handled the finances") for an accounting and restoration of title to what was referred to as the "garage property" (the land and the stable they built). Fred, citing Williams' perjured testimony in bankruptcy hearings about the source of the money used to pay for the garage property, claimed unclean hands. The court was unmoved:

> The doctrine of unclean hands has no applicability to the suit in hand. Williams' wickedness in the prior suit, his perjured testimony as to the source of the money used to purchase and improve the garage property, manufactured by Fred, spoken by his puppet and perpetrated upon Fred's creditors to defeat seizure of the property in satisfaction of their debts, did not make unclean the copartnership obligations and Williams' right, that springs from it, to an accounting from Fred for the money contributed by him and for his share of the profits. His misconduct was not an element in the creation of his rights in the partnership or in the consequent right to an accounting; it is unconnected with the present litigation and in no manner affects the equitable responsibility of Fred to account to Williams for partnership property. **Williams' falsehoods were inequitable to Fred's creditors, but not to Fred's copartnership.** [Id. at 685 (emphasis added).]

According to the court in Hunt, "[t]he sinner, however corrupt, is not denied relief in equity *unless the right he seeks to vindicate is tainted with sin.*" Id. at 684 (emphasis added). Accordingly, lying to third parties - - including, apparently, the bankruptcy court - - about how the property was acquired, did not affect Williams' right to an accounting from his brother with respect to their partnership, notwithstanding that the garage property was the principal asset of the partnership. The court conceded that while "Williams' perjury impeaches his veracity as a witness in this cause…relief is not to be withheld if his rights are otherwise established and are not infected by his iniquity." Id. Like Williams, Simkowitz, as the holder of an interest in the LLCs, sought to have this Court determine the issues relating to the Mortgages. His alleged misconduct in connection with a prior proceeding, directed

at an entity – GIAIP, LLC – that is not a party to the instant proceeding, does not affect this right.

POINT III

THE TRIAL COURT ERRED IN DISMISSING CHAIM SIMKOWITZ'S CLAIMS AGAINST BARRY HERSKO FOR INSUFFICIENT CAPITAL CONTRIBUTIONS TO ROSEVILLE PARK LLC AND FOR THE DISSOLUTION OF THAT ENTITY. (Pa015-Pa020).

While Simkowitz rejects the result and the rationale for dismissal of his crossclaims as to the Tower LLC and the Tower Property, (collectively, the "Roseville Tower Crossclaims"), Simkowitz does not dispute the fact that the Court's order accurately reflects its decision in this regard. The same cannot be said of the dismissal of his crossclaims as to Park LLC and the Park Property (collectively, the "Roseville Park Crossclaims"). Those claims sought: (1) a judgment against Barry in the amount representing the shortfall in his Park LLC capital account; and (2) a judgment for the dissolution of Park LLC and wind-up of its affairs pursuant to per N.J.S.A. 42:2C-48 and 49.

A. The Dismissals As To Roseville Park Were Unsupported By The Record And Unexplained By the Trial Court.

The Roseville Park Crossclaims were not in any way connected to the inequitable conduct cited by the Court, which revolved around the filing of "a sham foreclosure complaint," as the basis for applying the doctrine unclean hands. That conduct, the Court found, resulted in the subordinate mortgagee on the Tower

Property selling her interest at a deep discount. But that happened in 2011. Park LLC, a *separate* entity, was not even formed until 2016, when it purchased a *separate* property. There were no allegations of fraud or wrongdoing leveled by any party concerning the acquisition of the Park Property and there were no mortgages on the Park Property that were at issue. Most importantly, there was no evidence - - indeed, no *allegation* - - of any tie-in between Roseville Park (the LLC *or* the property) and the foreclosure action that had been filed years before.

At the end of its Statement of Reasons, the Court made the following "omnibus" declaration: "For the foregoing reasons, all remaining counts by and between the parties brought before the court in this matter are dismissed with prejudice." (Pa020). Now, the Court made no reference to Roseville Park, either in its oral decision or in its Statement of Reasons. Clearly, though, the Court intended to include the Roseville Park Crossclaims in its sweeping decree, notwithstanding the fact that Simkowitz was never afforded an opportunity to try the Roseville Park Crossclaims - - or *any* of his crossclaims for that matter. Even if one buys the Court's rationale for the application of unclean hands, why should the Roseville Park Crossclaims - - discrete as they were - - have suffered the same fate as claims made with respect to the Tower Property and Tower LLC? No explanation was given. The Statement of Reasons merely cites "the foregoing reasons" as the basis for the dismissal of "all remaining counts." But the only *stated* reason had to do with the

Tower Property and the associated mortgages. As the Court explained: "The court's application of the equitable doctrine of unclean hands is a direct result of the conduct of the parties, including the filing of a sham foreclosure complaint which included knowingly false allegations related directly to the mortgages put before this court by all parties in the instant action." (Pa015). The Court articulated no such through line - - from conduct to dismissal - - with respect to the Park Property. As discussed *supra*, such a through line is a necessary element of the application of unclean hands. Neubeck, supra, 94 N.J. Eq. at 171 ("[T]he unclean hands doctrine is applicable only to cases where the particular claim is tied up to inequitable conduct as an element of its creation.").

B. The Dismissals As To Park LLC Were Also Unsupported By The Case Law.

In its oral decision, the Court relied not only upon Hageman, discussed supra, but also upon Sheridan v. Sheridan, 237 N.J. Super. 552 (Ch. Div. 1990), in determining that the unclean hands doctrine should be broadly applied, all parties being *in pari delicto*. (6T26-9). But these cases were discussed in the context of the parties' claims with respect to the *mortgages* on the *Tower* Property. Their reasoning was not extended by this Court to the other claims in the case, including the Roseville Park Crossclaims.

While the court in Hageman may not have hewed as closely as it should have to precedent, it did recognize the critical importance of establishing a clear nexus between the offending conduct and the subject matter of the relief sought. By contrast, this Court never attempted to find linkage between Simkowitz's involvement in the sham foreclosure and the years-later Roseville Park investment as to which he seeks recompense and a business divorce from Barry. Not that it *could have* done so - - the 2016 acquisition of the Park Property and the formation/operation of Park LLC were not made possible by anything Simkowitz did in 2010-2011, in connection with a different property and a different LLC. Nonetheless, the Court below painted all claims with the same broad brush, declaring: "In the totality of the circumstances of this case, this Court determines that the unclean hands of the parties shall result in a dismissal of all the claims." (6T18-1 – 6T18-4).

As to Sheridan, the undersigned had pointed out during the last day of court proceedings on February 14, 2024 – and this Court acknowledged (6T25-19 – 6T25-23) – that Sheridan did not preclude *all* claims made in that case. Specifically, while the Sheridan court barred claims for equitable distribution of monies illegally acquired, it allowed Mrs. Sheridan to prosecute her claims for alimony and child support. As the Court held:

> Plaintiff's misconduct which resulted in the dismissal of her equitable distribution petition does not bar her request

> before the Court for alimony, child support and counsel fees that are related to these issues. Courts of equity in applying the maximum of unclean hands must use just discretion in determining under what circumstances, to what extent, and what policy reasons will constitute cause to banish a litigant or to bar her relief. [237 N.J. Super. at 568.]

The Roseville Park Crossclaims do not arise out of and are not tainted by the parties' conduct with respect to the Mortgages. Accordingly, deciding not to apply the unclean hands doctrine to these claims would not be issuing a license to litigate over the "fruits of the poisonous tree," which was the outcome that the Sheridan Court was determined to prevent. Simkowitz's claims for capital shortfalls have only to do with the two parties reconciling their financial obligations within Park LLC. And the dissolution claim seeks a termination and wind-up of a dysfunctional entity, which has nothing to do with the inequitable conduct cited by the Court as the basis for applying unclean hands. The Trial Court's dismissal of the dissolution claim *with prejudice* was akin to the Sheridan court having refused to grant the parties a divorce.

C. In Any Event, The With-Prejudice Dismissals Were Unwarranted.

The Court also dismissed the Roseville Park Crossclaims *with prejudice*, which was at odds with the following statement it made from the bench on the last day of the trial: "The mortgage claims, whatever they may be, are all dismissed with prejudice. Anything having to do with, that I didn't specifically address, is dismissed

without prejudice because I haven't really ruled on them, other than to say that I do not find that they belong in this case because they are also part of everything that I ruled on." (6T20-14 – 6T20-21). The foregoing statement is notable in two respects. First, it clearly differentiates between mortgage-related claims, i.e., Roseville *Tower* claims, and all other claims. Second, by way of its statement, the Court acknowledged that those claims it "didn't specifically address" - - that it hadn't "really ruled on" - - should be dismissed *without* prejudice. But that did not happen, nor did the Court attempt to explain, in its Statement of Reasons (Pa008-Pa020), why the Order it ultimately entered had deviated from the logical and reasonable conclusion it had articulated from the bench on February 14, 2024.

Moreover, in its Statement of Reasons, the Court misapplied the factors for dismissal with prejudice in cases of fraud on the court articulated by the District Court of the District of New Jersey in Perna v. Electronic Data Systems, Corp., 916 F. Supp. 388 (D.N.J. 1995). In Perna, the District Court found that the Ninth Circuit case of Halaco Engineering Co. v. Costle, 843 F.2d 376 (9th Cir. 1988), and the Fourth Circuit case of U.S. v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993), were instructive. The Perna Court went on to cite to the six-factor tests listed in these cases. Perna, 916 F. Supp. at 398. Recognizing that "[t]he tests outlined in both the Ninth and Fourth circuits provide guidance", the Perna Court outlined its own requirements or criteria that must be met in order to punish a party and dismiss

an action for perpetration of a fraud upon the court. Id. 397. The criteria set forth in Perna are: (1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the consideration of lesser sanctions to rectify the wrong and to deter similar conduct in the future, (4) *the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case*, (5) prejudice and the public interest, and (6) the degree of the wrongdoer's culpability.[14] Id. (emphasis added).

The Trial Court used the *wrong* list of factors in its analysis. It cited to the test articulated by the Fourth Circuit (Pa017), not the test articulated in Perna. As a result, it ignored the factor concerning "the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case." Applying this factor to Simkowitz's claims for dissolution of and contributions to Park LLC, it is clear that no nexus exists between the Park Property/Park LLC and the 2010 foreclosure action. The First Mortgage that was to be foreclosed per the 2010 Complaint was never a lien on the *Park* Property.

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[14] These specific criteria set forth by the District Court were utilized by the New Jersey Chancery Division in Cortland Associates, LP v. Cortland Neighborhood Condo Ass'n, 2005 WL 1405123, *5 (N.J. Ch. Div. June 10, 2005). Pursuant to R. 2:6-1((a)(1)(H), a copy of this unpublished opinion is included in Simkowitz's Appendix at Sa080 – Sa085.

Accordingly, inasmuch as any nexus is lacking, the Court could not have found that all Perna factors had been satisfied with respect to the Roseville Park Crossclaims.

Therefore, even assuming *arguendo* that this Court does not reverse the dismissal of the Roseville Park Counterclaims (though it certainly should), in all fairness, the dismissal must be without prejudice. As the Trial Court recognized, "a dismissal with prejudice is a drastic remedy to be employed 'only sparingly'". (Pa016) (citing Zaccardi v. Becker, 88 N.J. 245, 253 (1982).) It should not have been employed with respect to the Roseville Park Crossclaims.

POINT IV

THE TRIAL COURT ERRED IN DISMISSING *WITH PREJUDICE* CHAIM SIMKOWITZ'S CLAIMS AGAINST BELLA HERSKO FOR INSUFFICIENT CAPITAL CONTRIBUTIONS TO THE TOWER LLC AND FOR THE DISSOLUTION OF THAT ENTITY. (Pa015-Pa020).

Simkowitz's crossclaims against Bella as to Tower LLC and the Tower Property (collectively, the "Roseville Tower Crossclaims"), for shortfall in capital contributions and for judicial dissolution of the LLC, should not have been dismissed with prejudice, largely for the same reasons that the Park Crossclaims should not have been dismissed (see Point III *supra*). As in the case of the Park Crossclaims, there is no nexus between the inequitable conduct of 2010-2011 and the Tower Crossclaims, which are solely for: (a) the reconciliation of financial obligations within Tower LLC; and (b) the dissolution of that dysfunctional entity. The sham foreclosure complaint and the machinations that led to purchase of the Second Mortgage did not enable the formation of Tower LLC, which was in place years before the foreclosure complaint was filed, or have anything to do with the financial responsibilities of the LLC members *inter se*.

Not only were the Tower Crossclaims dismissed but, as in the case of the Park Crossclaims, the dismissals were *with prejudice*. This actually came as a surprise given that the Trial Court, on the last day of trial, had indicated, citing Sheridan, that

as to "the additional claims", it would simply leave the parties where it found them and even suggested that they could be the subject of a "separate case":

> The additional claims, I just, based on the reasoning that I set forth, I'm going to apply what was done in Sheridan and in Ryan and *leave you where I found you*. I am not going to get involved in that. *That may be a separate case* that doesn't involve all of this and I'm not saying that,you know -- so let's be really -- I think there is a point to be made there about the with prejudice versus without prejudice dismissal. (6T31-11 – 6T31-19 (emphasis added)).

There was no attempt made by the Court, in its Statement of Reasons that followed, to reconcile these remarks with the blanket, with-prejudice, dismissals memorialized in the Order.

POINT V

THE TRIAL COURT ERRED WHEN IT ABRUPTLY ENDED THE TRIAL IMMEDIATELY AFTER ISAAC HERSKO RESTED, DENYING CHAIM SIMKOWITZ THE RIGHT TO PROSECUTE HIS CLAIMS FOR CAPITAL CONTRIBUTIONS, FOR DISSOLUTION OF THE LLCs AND FOR DISCHARGE OF THE MORTGAGES ON THE ROSEVILLE TOWER PROPERTY. (6T29-10 – 6T29-14).

The Trial Court not only erred in its substantive rulings, but in *sua sponte* ending the trial at the close of plaintiff's case, precluding the presentation by Simkowitz of his affirmative claims. While the Rules of Court, specifically R. 4:37-2(b) (made applicable to counterclaims, cross-claims and third-party claims by R. 4:37-3), provides for involuntary dismissal of a counterclaims or cross-claims in a case, such a dismissal can only be sought "after having completed the presentation of the evidence on all matters other than the matter of damages". R. 4:37-2(b). Ordinarily, such a motion should not be granted until all proofs are adduced. Pressler & Verniero, Current N.J. Court Rules, Comment 2.2 to R. 4:37-2 (2024) (citing Perth Amboy Iron Works v. Am. Home, 226 N.J. Super. 200 (App. Div. 1988), aff'd o.b. 118 N.J. 249 (1990)).

The principles that formed the basis for the Appellate Division's decision in Klier v. Sordini Skanska Cost., 337 N.J. Super. 76 (App. Div. 2001), are fully applicable to the case at bar. There, plaintiff argued on appeal "that the trial judge

erred in *sua sponte* instituting the summary procedure and dismissing their complaint." Id. at 83. The essential facts are as follows. The judge assigned to preside over the trial invoked a "shortcut" to resolve perceived concerns about plaintiff's cause of action. Id. at 81-82. He instructed the plaintiff to place on record the "the best case" it expected to prove at trial, after which the judge, applying the standard for deciding a motion to dismiss at the end of plaintiff's case, would decide if the claim was sustainable. Id. After granting plaintiff's counsel some additional time to obtain his file and his expert's report, and after hearing argument, the judge dismissed the complaint. Id. at 82. The Appellate Division reversed, stating:

> Our ultimate goal is not, and should not be, swift disposition of cases at the expense of fairness and justice. Rather, our ultimate goal is the fair resolution of controversies and disputes. R.H. Lytle Co. v. Swing-Rite Door Co., Inc., 287 N.J. Super. 510, 513 (App. Div. 1996). Eagerness to move cases must defer to our paramount duty to administer justice in the individual case. Audubon Volunteer Fire Co. No. 1 v. Church Constr. Co., 206 N.J.Super. 405, 406 (App. Div. 1986). Stated another way, while the concepts of "judicial administration" and fairness are not necessarily incompatible, the desire to facilitate judicial administration must take a back seat to our primary goal which is to adjudicate cases fairly and impartially. Shortcuts should not be utilized at the expense of justice.
>
> The minimum requirements of due process of law are notice and an opportunity to be heard. Doe v. Poritz, 142 N.J. 1, 106 (1995). The opportunity to be heard contemplated by the concept of due process means an

> opportunity to be heard at a meaningful time and in a meaningful manner. Ibid.
>
> [Id. at 83-84.]

Deciding that the time given to plaintiff's counsel to respond did not cure the fundamental defect in the proceedings, the Appellate Division went on to conclude that "[w]e cannot condone a procedure whereby a judge *sua sponte*, without notice to a party, resorts to a 'shortcut' for the purposes of 'good administration' and circumvents the basic requirements of notice and opportunity to be heard." Id. at 84-85.

Like the plaintiff in Klier, Simkowitz's due process rights were vitiated by the premature termination of the trial. Accordingly, should this Court, as urged, reverse the dismissal of Simkowitz's claims based on unclean hands, a remand is required for further proceedings to accommodate the prosecution of same. Even if this Court were to affirm the dismissal of Simkowitz's claims (a result Simkowitz insists, respectfully, would be not be in accordance with law), the Order should certainly be modified to memorialize a *without*-prejudice dismissal, for the reasons explained *supra*, with Simkowitz free to institute an independent action or actions with respect thereto, if he so chooses.

POINT VI

WHILE SIMKOWITZ MAINTAINS THAT THE TRIAL COURT'S OMNIBUS APPLICATION OF THE UNCLEAN HANDS DOCTRINE WAS UNJUSTIFIED, ASSUMING *ARGUENDO* IT WAS JUSTIFIED, THE TRIAL COURT PROPERLY REFUSED TO EXCEPT THEREFROM ISAAC HERSKO'S FIRST MORTGAGE CLAIM. (Pa015-Pa020; 6T23-16 – 6T23-20; 6T26-10 – 6T26-13).

A. The Trial Court Correctly Ruled That "Falsus in Uno Falsus in Omnibus" Was Not Applicable.

Isaac contends that the maxim of "falsus in uno falsus in omnibus" applies in the instant case as against the testimony of Simkowitz relating to Isaac's knowledge and involvement in the 2012 Foreclosure Action. (Pb16-Pb17). The "falsus in uno, falsus in omnibus" or "false in one, false in all" doctrine may be invoked by a trial judge when a witness has testified falsely to a material fact. State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div. 1960). Its application is a matter of the trial judge's discretion and goes to the weight to be given to the testimony in question. Hargrave v. Stockloss, 127 N.J.L. 262, 266 (E&A 1941). As the New Jersey Supreme Court explained in State v. DiIppolito, 22 N.J. 318 (1956): "Inadvertent misstatements or immaterial falsehoods are not ground for complete rejection of a witness' testimony." Id. at 324.

In the case at bar, Isaac asserts that at no time during the trial or during his deposition, did Simkowitz deny his involvement in the filing of the 2010 foreclosure

complaint. The Trial Judge, who had an opportunity to see the witnesses and hear their testimony, chose to believe Simkowitz. The verdict of a court sitting without a jury should not be set aside as against the weight of the evidence unless it convincingly appears that it has no support in the proofs. Fleckenstein, 60 N.J. Super. at 409. Here, the findings of the Trial Judge are supported by adequate, substantial, and credible evidence, and there was no abuse of discretion. The false in one, false in all doctrine is not applicable and there was no error in the judge's determination that Simkowitz was credible when he testified about Isaac's complicity in the filing of the foreclosure complaint in 2010.

B. Isaac Failed To Present Any Testimony In Support of His Counsel's Assertion That He Was Not Involved In the Filing of the Foreclosure Complaint in 2010.

Isaac, due to illness, was allegedly unavailable for both deposition and trial testimony. As a result, Isaac did not elicit any direct testimony to contradict that of Simkowitz concerning Isaac's involvement in the 2010 foreclosure or to contest Isaac's signature on the retainer letter. Isaac's inability to participate in the litigation once he allegedly became incapacitated[15]appeared to have had no impact on the Trial

[15] Plaintiff's counsel never filed a certification from Isaac's doctor, verifying his inability to participate in the litigation. Nor was there ever an explanation as to why plaintiff's attorneys-in-fact (his sons) failed to appear in the action. (5T42).

Court's decision . As the Trial Court noted: "Isaac's counsel was warned from the bench that continuing the trial without Isaac's participation would not be a basis for special treatment or any undue advantage." (Pa013).

C. The Trial Court's Credibility Findings Must Stand, As An Appellate Court Is Not Permitted To Make Its Own Findings in That Regard.

It is "improper for the Appellate Division to engage in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). And where the lower court has made credibility determinations, even without specifically articulating detailed findings of credibility, where the reasons for its determination may be inferred from the record, the Appellate Division is not free to make its own credibility determination. Id. at 472-75; see also Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 492 (1956) (opining that credibility is always for the factfinder to determine). That is exactly what Isaac is asking this Court to do. The Statement of Reasons issued by the Trial Court outlines the testimony given by Simkowitz, and identifies the trial exhibits and other evidence that the Court considered in determining that Isaac had knowledge of the foreclosure complaint. (Pa019). And, as stated above, Isaac offered no contrary testimony. Accordingly, Isaac failed to make a credible case for his "innocence" as a reason to exclude him from the bar of unclean hands.

POINT VII

THIS COURT CANNOT MAKE A FINDING AS TO WHETHER ISAAC HERSKO HAS A 50% INTEREST IN THE FIRST MORTGAGE. (Not Argued Below).

For his part, Simkowitz rejects the contention that Isaac owns 50% interest in the First Mortgage. Of course, it is Simkowitz's position that *nothing* is owed on the First Mortgage regardless of any claims to ownership thereof. In any event, any determination with respect to Isaac's claim to a 50% interest in the First Mortgage could only be made after resumption of the trial and development of a full record. It would then be up to the Trial Court to weigh the evidence and adjudicate the claim on remand.

Pursuant to R. 2:10-5, "[t]he appellate court may exercise . . . original jurisdiction as is necessary to the complete determination of any matter on review." This original fact-finding authority, however, must be exercised only "with great frugality and in none but a clear case free of doubt." In re Boardwalk Regency Corp. Casino License Application, 180 N.J. Super. 324, 334 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982). Resort to the original-jurisdiction authority of R. 2:10-5, is inappropriate where, as here, "fact-finding or further fact-finding is necessary in order to resolve the matter." Pressler & Verniero, Current N.J. Rules of Court, Comment to R. 2:10-5 (Gann 2024) (citations omitted). This is

particularly so when the required fact-finding requires credibility determinations. Id. (citations omitted). Thus, if this Court were to determine that Isaac's claim to a 50% interest in the First Mortgage should not have been dismissed pursuant to the doctrine of unclean hands, the factual issue of whether Isaac is a 50% owner and of what should be remanded to the Trial Court for further factual findings.

POINT VIII

THE TRIAL COURT CORRECTLY DISMISSED WITH PREJUDICE THE CLAIMS VOLUNTARILY WITHDRAWN BY ISAAC HERSKO PRIOR TO TRIAL. (Pa008 – Pa014).

Throughout the pendency of this case, including up until the first day of trial, Isaac claimed an ownership interest in the Tower Property. Isaac filed his initial complaint on October 1, 2021. (Pa033). Thereafter, Isaac filed a First Amended Complaint in March 2023. (Pa152). On the eve of trial in December 2023, Isaac once again sought leave to amend.[16] Isaac's complaint contained five causes of action – declaratory judgment, constructive trust, conversion, money had and received, and accounting – all centering around his purported ownership rights. (Pa033). Each amendment included the same five counts, merely adding facts or issues to the claims. (Pa152). Isaac's amended complaints only expanded his claims to include an interest in Isaac & Barry, LLC, the First Mortgage, and the Second Mortgage. At no point prior to his oral motion on the first day of trial did Isaac seek to withdraw any of his causes of action.

Pursuant to R. 4:37-1(b), "an action shall be dismissed at the plaintiff's instance only by leave of court and upon such terms and conditions as the court

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[16] Isaac's motion to amend was filed as a cross-motion in response to Simkowitz's motion for summary judgment (which threatened to extinguish most, if not all, of Isaac's lawsuit). The motion for summary judgment was later withdrawn.

deems appropriate." Adjudication of a R. 4:37-1(b) motion "rests within the sound discretion of the trial judge." Shulas v. Estabrook, 385 N.J. Super. 91, 99 (App. Div. 2006). "Whether to dismiss with or without prejudice, whether to impose terms, and the crafting of terms that are fair and just in the circumstances, are all matters that lie within the court's sound discretion." Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 258 (App. Div. 1990). In its Statement of Reasons, the Trial Court cited to the Appellate Division decision of Shulas, supra, in support of the proposition that voluntary dismissal at an advanced stage in the litigation should only be with prejudice. Id. at 100-01. The Trial Court also considered the companion Federal Rule of Civil Procedure 41(a)(2) and the federal caselaw cited by the Appellate Division in Shulas[17] in rendering its decision. (Pa011; Pa012).

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[17] Shady Records, Inc. v. Source Enterprises, Inc., 371 F. Supp. 2d 394, 397 (S.D.N.Y. 2005) ("The case has been pending for well over a year, discovery has been completed, summary judgment motion by all parties adjudicated, pretrial submissions made, and the case is ready for trial in less than two weeks. To permit plaintiff to discontinue the case at this late stage, and then to reinstate the same action whenever it felt like it in the future, would authorize intolerable manipulation of the Court's calendar and the defendants' resources); Doe v. Urohealth Sys., 216 F.3d 157, 163 (1st Cir. 2000) ("We do think that a plaintiff cannot conduct a serious product liability claim in a federal court, provoke over a year's worth of discovery and motion practice, allow the case to reach the stage at which the defendant filed a full-scale summary judgment motion, and then when matters seemed to be going badly for plaintiff simply dismiss its case and begin all over again in a state court in what is essentially an identical proceeding."). These federal cases are cited by the Shulas Court (385 N.J. Super. at 100-01) and the Trial Court in its Statement of Reasons. (Pa011; Pa012)

In analyzing Isaac's motion to voluntarily dismiss claims, the Trial Court recognized that defendants expended significant effort and funds to bring this case to trial and would be prejudiced if Isaac's withdrawal was without prejudice. (Pa011). Isaac filed his first complaint in this action on October 1, 2021. (Pa152). Thereafter, as the Trial Court noted, Isaac sought to amend his complaint twice, which resulted in amended answers and crossclaims from both Simkowitz and the Hersko Defendants. Simkowitz and the Hersko Defendants both filed motions for summary judgment, and the parties attended seven days of depositions for five separate deponents. (Pa011). And, as the Trial Court recognized, the defendants prepared for trial and submitted voluminous pre-trial submissions. (Pa011). Allowing Isaac to simply withdraw his claims "would authorize intolerable manipulation of the Court's calendar and the defendants' resources." Shady Records, Inc. v. Source Enterprises, Inc., 371 F. Supp. 2d 394, 397 (S.D.N.Y. 2005).

The circumstances and timing of Isaac's eleventh-hour withdrawal of most of his claims clearly support dismissal with prejudice. "When examining a trial court's exercise of discretionary authority," this Court should "reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 424 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union County Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)). In this case, the Trial Court did not abuse

its discretion. The record is replete with support for a dismissal with prejudice, and as the Trial Court recognized, "termination of the proceedings without prejudice will place the defendant 'in the probable position of having to defend, at additional expense, another action.'" (Pa012) (citing Shulas, 385 N.J. Super. at 97 (quoting Union Carbide Corp. v. Litton Precision Prods., Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967)). Noting that "Isaac acknowledged that the counts were being dismissed for lack of proof," the Trial Court acknowledged that it "would not grant a motion for voluntary dismissal without prejudice made solely to avoid an unfavorable ruling." (Pa012). Moreover, as the Trial Court recounted: "Isaac's counsel was warned from the bench that continuing the trial without Isaac's participation would not be a basis for special treatment or any undue advantage." (Pa013).

In light of the above, this Court should affirm the dismissal with prejudice of the claims voluntarily withdrawn by Isaac.

CONCLUSION

For the reasons set forth above:

(1) The references to "Tower LLC" in Section II 1 and IV 4(a)(iv), relating to discharges of the two mortgages, should be stricken from the Order of April 15, 2024.

(2) The dismissal of all claims of Simkowitz (both counterclaims and crossclaims) based upon application of the doctrine of unclean hands should be reversed and the matter remanded to the Trial Court for the resumption and completion of the trial, to include the opportunity for Simkowitz to put in his case with respect to his counterclaims and crossclaims and to defend against any crossclaims against him; or, in the alternative, reverse the with-prejudice dismissals of Section IV 5(b) and 5(e) relating to capital contributions and dissolution of Roseville Park LLC and of Section IV 5(a) and 5(d) relating to capital contributions and dissolution of The Roseville Tower LLC.

(3) The Trial Court's dismissal with prejudice of Isaac's withdrawn claims should be affirmed.

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Attorneys for Defendant/
Respondent/Cross Appellant,
Chaim Simkowitz

By: _____
Michael D. Malloy

Dated: October 15, 2024

MORRIS HERSKO and ABRAHAM HERSKO as co-executors of the ESTATE OF ISAAC HERSKO,

Plaintiff/Appellant/Cross-Respondent,

v.

BARRY HERSKO, BELLA HERSKO and THE ROSEVILLE TOWER LLC, CHAIM SIMKOWITZ,

Defendants/Respondents/Cross-Appellants.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002622-23

CIVIL ACTION

On Appeal from the Chancery Division, Essex County

Docket No. ESX-C-220-21

Sat Below:
Hon. Lisa A. Adubato, J.S.C.
Hon. James R. Paganelli, J.S.C.

BRIEF OF PLAINTIFF/APPELLANT/CROSS-RESPONDENT MORRIS HERSKO and ABRAHAM HERSKO as co-executors of the ESTATE OF ISAAC HERSKO

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PRELIMINARY STATEMENT

Appellant, Morris Hersko and Abraham Hersko as co-executors of the Estate of Isaac Hersko ("Appellant" or "Isaac") file this brief in response the briefs filed by respondents Barry Hersko ("Barry") and Bella Hersko ("Bella") (collectively the "Hersko Defendants") and Chaim Simkowitz ("Simkowitz").

As set forth in Appellant's opening brief, Isaac and Barry had a complex business relationship for over thirty years until Barry, at gun point, threw Isaac out of the office that they shared after Isaac questioned Barry's vastly excessive withdrawals from their shared account which has resulted in significant pending litigation in the New York courts, as well as this matter which deals only with claims related to various interests in a singular property located at 140-148 Roseville Avenue, Newark, New Jersey (the "NJ Property) which is undisputedly owned by The Roseville Tower, LLC ("The Roseville Tower"). Regardless of the outcome of this appeal, all of the claims in this matter that were before the trial court and now this Court are limited to the ownership interests related to the NJ Property and have no bearing on any other assets of Isaac or Barry, as the only allegations made in this case relate to the NJ Property, and this Court does not have jurisdiction over any of the other properties owned by Isaac or Barry outside of the State of New Jersey. Notably, Simkowitz also has no other involvement connection with Barry or Isaac's other assets or other pending litigation.

Appellant is also compelled to address up front that both the Hersko Defendants and Simkowitz imply that Isaac Hersko was not incapacitated or somehow was directing his trial strategy from afar. This assertion is simply false as Isaac was incapacitated since December 2022 and ultimately died while this appeal was pending in October 2024. Further, Isaac would obviously have been far better served participating in and testifying both during discovery and at trial which would have allowed him to prove all of his claims, including the claims that he voluntarily dismissed before trial. Unfortunately, this false rhetoric regarding Isaac is consistent with the type of false testimony provided throughout the trial by Barry and Simkowitz.

Specifically, as a result of his incapacitation, voluntarily withdrew most of his claims related to the NJ Property and only pursued two claims at trial – one for declaratory judgment that Isaac holds a 50% interest in a First Mortgage on the NJ Property and another for Money Had and Received for the recoupment of funds contributed to the ongoing maintenance and expenses of the NJ Property.

Here, Isaac has appealed 1) the dismissal of his claim for declaratory judgment regarding his 50% stake in the first mortgage based upon the improper application of the doctrine of unclean hands on Isaac; and 2) the dismissal of Isaac's claim for Money Had and Received pursuant to R 4:37-2(b); and 3) the dismissal with prejudice of his voluntarily withdrawn claims as the trial court was initially correct

in determining that a dismissal without prejudice of the withdrawn claims was warranted.

In their brief, the Hersko Defendants take the position that the trial court's evaluation of the evidence was proper and that this Court should affirm. However, in doing so, the Hersko Defendants ask this Court to ignore the clear documentary evidence that Isaac has a 50% interest in the First Mortgage on the NJ Property, among other things, and seek to rely almost exclusively on the trial testimony of Barry, which should be wholly disregarded by the maxim of *falsus in uno*. Further, this outcome constitutes a gross inequity to Isaac while rewarding the most culpable party, Barry, who will ultimately cash in on the sale of the NJ Property, which is not proper for a court of equity. Likewise, in addition to Barry's testimony, Simkowitz seeks to rely on his own testimony which should also be disregarded by maxim of *falsus in uno* to argue that the trial court properly dismissed Isaac's claims and applied the doctrine of unclean hands to him, but then Simkowitz in turn attempts to argue that the doctrine should not apply to him or preclude his claims.

Ultimately, the doctrine of unclean hands should not apply to Isaac since there are no credible facts in the record to prove culpable conduct by Isaac. Therefore, the dismissal of Isaac's claims should be reserved and remanded for the trial court to make findings on the clear documentary evidence and with disregard to the self-serving testimony of Barry and Simkowitz.

PROCEDURAL HISTORY

Appellant refers to the procedural history set forth in its opening brief. (Pb4-7), but supplements here with additional relevant procedural history.

Subsequent to the filing of Appellant's opening brief, Isaac Hersko, who had been incapacitated and unable to participate in this litigation since December 2022, died on October 26, 2024, so Appellant filed a motion to stay these appellate proceedings. (Transaction ID E1664492-11182024). This motion to stay was granted by the Appellate Division's Order entered on December 11, 2024. In accordance with the Court's Order and the Case Manager's instructions, Appellant filed a letter on January 13, 2025 requesting that the appropriate parties be substituted and that the caption be amended accordingly, and this request was granted by the Court that same day. (Transaction ID E1674516-01132025).

The Hersko Defendants specifically reference that Isaac's proposed Second Amended Complaint was not included in Appellant's Appendix, but Second Amended Complaint was not included because, while it was a proposed pleading, leave to file it was never actually granted and it was never filed. (Db23;Da9; (1T39:18-40:2).). By way of background, on December 5, 2023, Isaac filed a cross-motion for leave to file a Second Amended Complaint in response to a second summary judgment motion filed by Simkowitz, and this cross-motion was converted to a motion *in limine* by the trial court and was adjourned and not heard until the

first day of trial on January 23, 2024. (1T13:2-8). At that time, Issac voluntarily withdrew his claims related to ownership in the NJ Property and in a Second Mortgage on the NJ Property, as well as for recovery of funds from a joint account that Isaac believed was used to deposit any profits from the NJ Property and to purchase the interest in The Roseville Tower. (1T9:21-11:20; 1T39:18-23). Those causes of action were never heard by the trial court on the merits. Therefore, after being permitted to orally amend his causes of action to conform to the evidence, Isaac pursued only two claims at trial – one for declaratory judgment that Isaac holds a 50% interest in a First Mortgage on the NJ Property and another for Money Had and Received for the recoupment of funds contributed to the ongoing maintenance and expenses of the NJ Property by an entity solely owned by Isaac, We Care. (1T39:18-40:2). Isaac's proposed Second Amended Complaint was never filed, nor were any other additional formal amended pleadings. (1T39:18-40:2).

COUNTERSTATEMENT OF FACTS

Appellant hereby incorporates its complete Statement of Facts from its opening brief and sets forth the following counterstatement of certain relevant facts in response to the facts alleged by the Hersko Defendants and Simkowitz.

A. Isaac and Barry's Relationship

The Hersko Defendants mischaracterize the business relationship between Barry and Isaac based almost exclusively upon the false testimony of Barry at trial

which should be disregarded for the reasons set forth herein. (Db4-5). However, ultimately, Isaac and Barry's relationship beyond the scope of interests in the NJ Property is not relevant to the appeal before this Court.

B. Facts Related to the First Mortgage

It is undisputed that at the time of the purchase on April 20, 2007, The Roseville Tower was owned jointly by Shlomo Karpen, Esther Karpen, Israel Perlmutter and Esther Perlmutter and that a purchase money mortgage with Isaac and Barry each individually with a 50% interest as lenders was issued with the face amount of $2,500,000 (the "First Mortgage") (Pa203-Pa208; Pa209-Pa215, Pa331-332). The Hersko Defendants assert that Barry testified that Isaac did not contribute any money towards First Mortgage, but there is no evidence to support this assertion, and for the reasons set forth herein, Barry's testimony should be disregarded or at least discredited when the testimony is self-serving and to his own benefit. (Db6; 4T43:16-44:3).

It is undisputed that by agreement dated January 4, 2010, 100% ownership interest in The Roseville Tower, was transferred to Bella as a result of the prior owners' default of the mortgage provided by Isaac and Barry individually each as 50% owners (the "January 4, 2010 Agreement"). (Pa217-Pa225). It is also undisputed that the January 4, 2010 Agreement states that the First Mortgage is in default and that the current balance due was $1,500,000 and that a payment of

$750,000 was made simultaneously with the execution of the January 4, 2010 Agreement which left a remaining balance as of that date of $750,000. (Pa217-Pa225). Additionally, it is undisputed that the January 4, 2010 Agreement provided that the prior owners could redeem their interests by making certain payments, but those payments were not made, and the ownership interest remained with Bella. (Pa217-Pa225; 2T146:23-25).

Barry testified that Isaac had no further ownership interest in The Roseville Tower or the First Mortgage once the parties had entered into the January 4, 2010 Agreement, but there is no evidence to support this assertion, and for the reasons set forth herein, Barry's testimony should be disregarded or at least discredited when the testimony is self-serving and to his benefit. (2T137:22-141:17).

At trial, Barry testified that the current amount outstanding on the First Mortgage is $9 million. (2T143:20-145:9). In 2023, there were payments of $540,000 and $900 made on behalf of Bella, which Barry testified were applied to the outstanding balances on both the outstanding mortgages on the NJ Property. (Pa279; 5T7-16).

To date, there have been no other assignments or satisfactions of the First Mortgage as it remains recorded and unsatisfied with Barry and Isaac listed as holding that mortgage. (2T136:11-22; 2T138:21-23; 2T:141:24-142:7). Indeed,

Barry admitted that the is no document that reflects that Isaac relinquished his interest in the First Mortgage. (2T141:9-12).

C. Facts Related to Isaac's Claim for Money Had and Received

Notably, the respondents do not dispute that Isaac was the sole person in control of the funds from the We Care, Inc. bank account and that Isaac contributed $643,794.10 from this account to the ongoing expenses of The Roseville Tower. (Pa284-Pa310; 2T76:6-15; 2T78:12-19). During the relevant time period, The Roseville Tower was purportedly owned by Simkowitz and Bella, with Barry actually making the important decisions - notwithstanding the absence of technical ownership interest by Barry. (Pa284-Pa289).

The Hersko Defendants do not dispute these facts, but they do attempt to argue that these payments were made because debts owed to Barry, and the Hersko Defendants reference a ledger showing amounts that We All Care, Inc. owed to Barry which was properly not admitted into evidence by the trial court and should not be considered by this Court. (Db5; 4T79:3-90:5). Rather, these payments were made because Isaac believed that he had an ownership interest in The Roseville Tower, and while Barry claims that these payments were made on behalf of Isaac because Isaac owed Barry money, Barry's testimony is contradictory, not credible and should be disregarded in its entirety. (3T207:13-208:25; 3T227:11-22). As a result of these payments, the owners of The Roseville Tower have received a benefit

from Isaac and the retention of this benefit would be inequitable – effectively Barry, Bella and Simkowitz have been unjustly enriched by Isaac making these payments under false pretenses and without consideration given in exchange.

D. The Alleged Fraudulent Conduct Giving Rise to the Application of the Unclean Hands Doctrine

An Assignment of Mortgage & Promissory Note was executed on May 2, 2011 which assigned a subordinate mortgage that had a face amount of $3,200,000 (the "Subordinate Mortgage") to ISAAC & BARRY, LLC for only $220,000. (1T98:12-102:11; 1T105:24-108:24). This assignment for pennies on the dollar was made possible because of the filing of a foreclosure complaint related to the First Mortgage that included material information that was known to be false. (Pa311-Pa312). Notably, Simkowitz testified that his office paid the retainer fee for the attorney who filed the foreclosure complaint on behalf of Barry and Isaac. (2T127:10-128:8).

Contrary to the assertions by the respondents, there was no credible testimony that Isaac was involved in the fraud. Since Isaac has a 50% interest in the First Mortgage, his name and unauthenticated signature do appear on a retainer agreement for the foreclosure action. (Pa311-Pa312). However, there is no evidence to establish that he was involved in any of the decisions related to the foreclosure litigation. (2T24:21-32:12; Pa231-Pa278; Pa273-Pa278). In fact, there is no evidence that Isaac ever had any communications with the attorney who filed the foreclosure action.

(Pa311-Pa312). Simkowitz further testified that he is the one who actually retained the lawyer. (2T24:21-32:12). Indeed, all the emails in evidence and the verified foreclosure complaint signed by Barry Hersko establish that the false pleading was approved by and filed on behalf of Barry Hersko and Chaim Simkowitz. (Pa231-Pa278). None of the email updates chronicling the progress of the foreclosure action including the decision to discontinue the foreclosure action once GIAIP had assigned the Subordinate Mortgage even included Isaac Hersko. (Pa273-Pa278).

Further, both Barry and Simkowitz testified that Isaac had forfeited any interest he had in the First Mortgage either on October 28, 2010 or January 4, 2010, both of which were before the Foreclosure Complaint was ever filed. (2T137:22-141:17). Additionally, Barry also testified that Isaac had no interest in ISAAC and BARRY, LLC (despite the name of the LLC) which owns the Subordinate Mortgage and was the true beneficiary of the scheme. (2T136:11-22). Therefore, according to Barry and Simkowitz, Isaac stood to gain absolutely nothing from the entire scheme. (2T136:11-22). Therefore, while the trial court's analysis and determination related to its application of the unclean hands doctrine is correct as to Barry and Simkowitz, the doctrine was incorrectly applied to bar Isaac's equitable claims as well.

LEGAL ARGUMENT

POINT I

THE RESPONDENTS' ARGUMENTS FAIL TO OVERCOME THE FACTUAL RECORD THAT SUPPORTS A FINDING OF UNCLEAN HANDS AGAINST BARRY HERSKO AND CHAIM SIMKOWTIZ BUT FAILS TO SUPPORT A FINDING OF UNCLEAN HANDS ON THE PART OF ISAAC HERSKO (Pa005-Pa006; Pa015-Pa020)

Two long-standing equitable doctrines are 1) that a court will not become an instrument of injustice; and 2) that a party seeking relief must come before the court with clean hands. See Warner v. Giron, 141 N.J. Eq. 493, 498 (Ch. Div. 1948); Brower v. Glen Wild Lake Co. 86 N.J. Super. 341, 350 (App. Div. 1965); Weisbrod v. Lutz, 190 N.J. Super. 181, 186 (App. Div. 1983). A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949). Not only should a court of equity decline to provide equitable relief to wrongdoers, but a court of equity in the State of New Jersey should not even listen to a party that comes before it with unclean hands. See Ryan v. Motor Credit Co., Inc., 132 N.J. Eq. 398, 403 (Ct. Err. and App. 1941).

Further, as the seminal case of Sheridan v. Sheridan, 247 N.J. Super. 552 (Ch. Div. 1991) demonstrates, it is not required that the wrongful conduct harm parties to the litigation or that there is a direct nexus between the relief sought and the wrongful conduct. A New Jersey Court should deny a party who has engaged in wrongful

conduct that has not directly harmed other parties to the litigation and has only harmed third-parties not involved in the matter being litigated. Id.at 567.

This maxim is based on public policy, and it may be relaxed in the interest of fairness. Rasmussen v. Nielsen, 142 N.J. Eq. 657, 661 (E & A 1948). As noted in A. Hollander & Sons v. Imperial Fur Blending Corp., 2 N.J. 235, 247 (1949). Indeed, while the maxim, '[h]e who comes into equity must come with clean hands,' has a very wide application, it has also its limitations. See Neubeck v. Neubeck 94 N.J.Eq. 167, 170 (E&A 1922). The doctrine of unclean hands generally requires "*clear, convincing evidence* of egregious misconduct before invoking the doctrine of unclean hands." Kars 4 Kids, Inc., 98 F.4th at 449-450 quoting Citizens Fin. Grp., Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110, 129 (3d Cir. 2004) (internal quotation marks and citation omitted) (emphasis added).

Nor will equity allow any wrongdoer to enrich himself because of his own criminal acts. Jackson v. Prudential Ins. Co. of America, 106 N.J. Super. 61, 68 (Law Div.1969). In this sense, equity follows the common law precept that no one will be allowed to benefit by his own wrongdoing. Neiman v. Hurff, 11 N.J. 55, 60 (1952).

In its Order dated April 15, 2024, the trial court notes that the facts that it was relying upon in applying the doctrine to Issac were the following:

1) That Isaac signed the January 4, 2010 agreement. This is true, but this agreement alone did not constitute a basis for the finding of unclean hands.

2) That Simkowitz testified that Isaac participated in the plan to foreclose on the First Mortgage. The doctrine of "*falsus in uno*, falso in omnibus" permits the Court to disregard Simkowitz's testimony, especially when it was self-serving as it is on this point.

3) That Isaac was signatory on the October 2010 Assignment of Mortgage. Isaac acknowledges that there is an October 2010 Assignment of Mortgage which purports to have his unauthenticated signature. However, the assignment is blank and is, in and of itself, not proof of any wrongful conduct by any individual.

4) That Isaac's name appears on the retainer agreement with the Feinsilver Law Group for the foreclosure action and that there was no handwriting expert to say that Isaac had not signed it. Isaac does not dispute that Isaac's name is on the retainer agreement and that there is no expert handwriting testimony. However, there is no credible testimony that Isaac signed the retainer agreement, and Simkowitz testified that he made the arrangements for the attorney. (2T24:21-32:12). Further, Barry testified that Isaac no longer had an interest in the First Mortgage during the time period when the attorney was retained, and the Foreclosure Complaint was filed. (2T137:22-141:17).

5) That Isaac was a party to the Foreclosure Complaint. This is not disputed, but there is no evidence that Isaac was aware of the false allegation contained in the foreclosure complaint. Indeed, all the emails in evidence and the verified complaint signed by Barry Hersko establish that the false pleading was approved by and filed on behalf of Barry Hersko and Chaim Simkowitz. (Pa231-Pa278). None of the email updates chronicling the progress of the foreclosure action including the decision to discontinue the foreclosure action once GIAIP LLC had assigned the second mortgage even included Isaac Hersko. (Pa231-Pa278).

6) That in his proposed Second Amended Complaint, Isaac asserted an interest in the second mortgage which is owned by ISAAC & BARRY, LLC. This allegation was contained in the proposed pleading, but ultimately Isaac had no evidence that he actually had an interest in ISAAC & BARRY, LLC, so this claim was not pursued at trial. (Da9)

These findings do not provide a basis Isaac had engaged in the fraud on the court such that the doctrine of unclean hands should be applied to him certainly do not do so by clear and convincing evidence. Indeed, Isaac continues to assert that the factual record does support a finding of unclean hands as to Isaac, and the record certainly does not support a finding based upon *clear and convincing* evidence.

On the other hand, the documentary evidence supports a finding of unclean hands as to Barry, and all of Barry's testimony denying is own knowledge of the Foreclosure Complaint, whether he signed the verification or regarding the e-mails that he sent or received regarding same, should be wholly disregarded. (T2157:3-159:1; 163:22-167:18). Likewise, any contradictory testimony by Simkowitz related to Isaac's alleged involvement with the Foreclosure Complaint should be wholly disregarded. (1T97:1-98:11; 1T99:24-102:25). See State v. Ernst, 32 N.J. 567, 583 (1960); see also Hargrave v. Stockloss 115 N.J.L. 262, 266 (E.&A. 1945); Hargrove v. Stockloss, 127 N.J.L. 262 (E&A 1941). *Falsus in uno* is a permissible inference that a fact finder may or may not draw when convinced that an attempt has been made to willfully, knowingly or intentionally mislead them in some material respect, and this maxim is applicable here. See Addis v. Rushmore, 74 N.J.L. 650 (Ct. or Errors and App. 1907); State v, Samuels, 92 N.J. L. 131, 133 (NJ. Cup. Ct. 1918).

Additionally, perhaps one of the most important facts to support this contention is that Isaac would have had nothing to gain from the fraud based on the

testimony of Barry and Simkowitz, since according to them, any interest that he had in the NJ Property or any or the mortgages was extinguished prior to the filing of the Foreclosure Complaint in December 2010. (1T137:3-7; 2T85:14-85:4; 2T137:22-141:17).

Further, even if Isaac does own the 50% interest in the First Mortgage, as Isaac continues to contend, he still would have had nothing to gain from this fraudulent scheme which only benefited the assignee of the Subordinate Mortgage which Barry testified was an LLC owned solely by himself. (2T136:11-22). Worse yet, if Isaac is improperly found to have unclean hands, he along with Simkowitz are powerless to stop Barry, who Simkowitz testified devised the plan and who verified the false pleading, as he cashes in on the sale of the property. (T198:12-102:11; 1T105-24-108:24).

Conversely, in this case, it cannot legitimately be disputed that Barry and Simkowitz have engaged in wrongful, criminal conduct that implicates the doctrine of unclean hands, and the Court was correct to invoke the doctrine based on the evidence of their conduct, and in fact, Barry does not even argue otherwise. (P001-P020; Db25). Indeed, the assets at issue are tainted because, as testified by Simkowitz at length at trial, Barry and Simkowitz agreed to a scheme to obtain the subordinate mortgage for pennies on the dollar by filing a foreclosure complaint that made false representations designed to conceal their ownership of both the

mortgagor and mortgagee to deceive the subordinate mortgagee. (T1 105:25-106:15; 107:6-11; 129:17-136:7). The fraud is thus not merely superficial, but it is substantial and caused significant damage to the third-party subordinate mortgagee, GIAIP and its principal Gloria Adler. As a result, there is clearly a nexus between the conduct and the subject of this action which makes the application of the equitable doctrine appropriate to Barry and Simkowitz. (P001-P020).

Therefore, the Unclean Hands doctrine should not have been found to apply to Isaac on this record and holding otherwise constitutes a gross inequity to Isaac while rewarding the most culpable party, Barry. Indeed, the Hersko Defendants do not even argue that Barry's conduct was not wrongful or that the doctrine of unclean hands should not apply to him based upon the factual record of his conduct. (Db25). Rather, the Hersko Defendants argue that the doctrine of unclean hands is inapplicable to Barry because he did not assert counterclaims or present his crossclaims at trial. (Db25). However, Barry should not be permitted to benefit immensely by his own wrongdoing. See Neiman v. Hurff, 11 N.J. 55, 60 (1952). A court of equity can never allow itself to become an instrument of injustice, which unfortunately is the effective outcome of this decision. See Sheridan v 247 N.J. Super. at 556. Bella (and effectively Barry) maintains ownership of at least 50% of the NJ property, and Barry effectively owns both mortgages. Isaac ends up without

the ability to obtain any relief even though he owns 50% of the First Mortgage and paid over $600,000 toward carrying expenses for the NJ Property.

Nothing in respondents' briefs changes these facts and that doctrine of unclean hands was improperly applied to Isaac to bar his claim regarding the First Mortgage and should only have applied to bar the equitable claims of Barry and Simkowitz.

POINT II

IF THE APPELLATE DIVISION FINDS THE TRIAL COURT ERRED IN APPLYING THE DOCTINE OF UNCLEAN HANDS TO CHAIM SIMKOWITZ THAN IT MUST ALSO REVERSE THE TRIAL COURT'S APPLICATION OF THE DOCTRINE TO ISAAC HERSKO (Pa005-Pa006; Pa015-Pa020)

While Appellant's position is that the doctrine of unclean hands should apply to Barry and Simkowitz, to the extent that this Court entertains Simkowitz's argument that the doctrine should not apply to him, then it should certainly not apply to Isaac. This is a point that Simkowitz even concedes in his brief by stating that "Simkowitz respectfully submits following such review that this Court will agree that the decision must be reversed as to all claims in this case." (Sb20). Therefore, to the extent that this Court accepts the argument that the actions of Simkowitz related to the foreclosure complaint do not provide a basis to apply the doctrine of unclean hands against Simkowitz, the same is true for Isaac.

POINT III

THE UNCONTROVERTED FACTS CLEARLY SUPPORT A FINDING THAT ISAAC HERSKO HAS A 50% INTEREST IN THE FIRST MORTGAGE (Pa005)

The trial court dismissal of Isaac's cause of action for a declaratory judgment that Isaac has a 50% interest in the First Mortgage was not on the merits but was rather based upon the trial court's determination that all claims for equitable relief by all parties would be dismissed based upon the doctrine of unclean hands. (Pa001-Pa007) Therefore, Isaac understands the trial court's ruling that the unclean hands doctrine, as to be applied to Isaac, would need to be reversed before the Appellate Division considers the merits of Isaac's claims related to the First Mortgage. (Pa001-Pa007). Regardless, the facts are clear that Isaac has a 50% interest in the First Mortgage, and it is an unjust result for any other finding. (Pa203-Pa208).

Indeed, it is undisputed that there have been no other assignments or satisfactions of the First Mortgage which recorded and unsatisfied, with Barry and Isaac listed as holding that mortgage. (2T138:21-23; 2T141:18-142:2). Further, at trial, Barry testified that the current amount outstanding on the First Mortgage is $9 million. (2T144:14-145:9). In 2023, there were payments of $540,000 and $900 made on behalf of Bella which Barry initially testified were applied to the

outstanding balances on both mortgages and then changed his testimony to say only the second. (Pa279) (2T181:17-184:1; 5T56:5-8; 5T65:23-67:7).

None of the other agreements, including the January 4, 2010 Agreement, provide any basis to extinguish Isaac's 50% ownership stake in the first mortgage. (Pa217-Pa225), and respondents can point to no other admissible evidence to the contrary. Quite simply, the documentary evidence is uncontroverted, which is precisely why it is so inequitable that this claim was dismissed.

Barry and Simkowitz attempt to provide testimony that undermines Isaac's rightful 50% interest in the First Mortgage. Specifically, Barry also provided significant contradictory testimony regarding how Isaac's interest in the first mortgage was allegedly paid off and why Isaac allegedly received the $350,000 check at the October 28, 2010 closing, all of which should be disregarded. (3T217:1-218:11; 3T235:23-237:17).

The respondents further attempt to argue that Isaac's claim for an interest in the First Mortgage fails because Isaac was incapacitated and only presented adverse witnesses at trial. (Db35; Sb47). However, these arguments fail because of the uncontroverted documentary evidence that reflects Isaac's continued 50% interest in the First Mortgage. (Pa203-Pa208; Pa217-Pa225).

Based on the foregoing, Isaac submits that he should prevail on his Declaratory Judgment claim regarding his 50% ownership stake in the valid and

enforceable First Mortgage as this claim is clearly supported by the documentary evidence. (Pa203-Pa208), or, in the alternative, that the case be remanded for further proceedings regarding this claim.

POINT IV

THE TRIAL COURT ERRED IN GRANTING AN INVOLUNTARY DISMISSAL OF ISAAC'S MONEY HAD AND RECEIVED CLAIM PURSUANT TO R. 4:37 (Pa002-Pa003; Pa014-Pa015; 6T:16:4-21:17)

Under New Jersey law, a claim under the quasi-contractual theory of unjust enrichment has only two essential elements: "(1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable." Wanaque Borough Sewerage Auth. v. West Milford, 144 N.J. 564, 575 (1996) (internal citations omitted).

In this case, it is undisputed that there were expenses that would need to be paid by the owners of The Roseville Tower, and these expenses required capital contributions. (Pa284-Pa289). In many instances, those contributions were made by the company that is exclusively owned by Isaac and is referred to in these documents as We Care, Inc. which is not a real entity (there is a corporation known as We All Care, Inc.) (3T197:6-11). While the subject checks list an entity called We Care, Inc., no such entity exists, which makes We Care, Inc. effectively an alter ego of Isaac. (3T197:6-11). It is undisputed that Isaac was the sole person in control of the

funds from the We Care, Inc. bank account and that Isaac contributed $643,794.10 from this account to the ongoing expenses of The Roseville Tower. (Pa284-Pa310**).**

The above referenced payments were made when the NJ Property was owned by Bella and potentially Simkowitz. (Pa284-Pa310; 2T76:6-15; 2T78:12-19). These payments were made when Isaac believed that he had an ownership interest in The Roseville Tower, and while Barry claims that these payments were made on behalf of Isaac because Isaac owed Barry money, Barry's testimony is contradictory, not credible and should be disregarded in its entirety based upon the maxim of *falsus in uno*, falso in omnibus, and there is no proof of same. As a result of these payments, the owners of The Roseville Tower have received a benefit from Isaac and his retention of this benefit would be inequitable – effectively the Barry, Bella and Simkowitz have been unjustly enriched by Isaac making these payments under false pretenses. (Pa284-Pa310).

In their responsive brief, the Hersko Defendants attempt to rely upon Barry testimony that these payments were made because Isaac owned Barry or some Barry owned affiliated entity for apartment rentals in connection with a homeless shelter business in New York, and that these debts were recorded in an unproduced cheshbon/ledger. (4T70:9-75:24;76:7-77:25). However, the maxim of *falsus in uno* should be applied be to permit the court to disregard any of Barry's testimony regarding the cheshbon/ledger and the alleged rent on account that the We Care

payments were meant to cover. (4T76:7-77:25). This point is not addressed in Simkowitz's responding brief.

Based on the foregoing, Isaac submits that he has established a *prima facie* case on his Money Had and Received Claim as this claim is clearly supported by the documentary evidence the involuntary dismissal of Isaac's claims for Money Had and Received should be reversed. (Pa284-Pa310).

POINT V

THE CLAIMS VOLUNTARILY DISMISSED BY ISAAC PRIOR TO TRIAL SHOULD BE DISMISSED WITHOUT PREJUDICE (Pa002-Pa003; Pa008-Pa014)

The respondents attempt to imply that Isaac was playing tactical and strategic games by being incapacitated and unable to participate in most of this litigation and at trial when in actuality the sole result of Isaac being unable to participate in this trial and ultimately passing away and being unable to participate in this appeal is that Isaac was unable to prove several of his claims which resulted in Isaac withdrawing several claims before the trial began. (1T9:21-11:20.) Specifically, Issac voluntarily withdrew Count I as it relates to a Declaratory Judgment of Isaac's ownership interest in The Roseville Tower or in the subordinate mortgage; Count II for Constructive Trust based upon Isaac's ownership interest in The Roseville Tower, LLC; Count III for Conversion, Count IV as it related to a claim for Money

Had and Received from an account held by Abraham Weisel, Esq., and Count V for an Accounting. (1T9:21-11:20.)

The trial court initially ruled that those claims were withdrawn, and it was indicated that the claims would be dismissed without prejudice and that the trial court would not make any further ruling on those claims. (1T21:5-16). Therefore, those claims were not part of the trial in this case, were never heard on the merits, and, while initially the trial court indicated that it wase not ruling whether the dismissal was with or without prejudice, Judge Adubato subsequently stated that she "accept[ed] the withdrawal of the claims and I've never ruled on these anyway." (1T38:3-7; 1T37:5-38:7). Indeed, Judge Adubato stated the following: [I] "never inten[ded] to say that means that they were never valid claims. So, I just wanted to make that clear. The withdrawal of the claims, I think, is an acknowledgement that [Plaintiff doesn't] have the proofs here today to make those claims, meet their burden. I don't know what would happen somewhere else because I don't know what the other cases are." (1T37:14-21). Judge Adubato also made clear that she did not intend to rule or impact proceedings pending in other jurisdictions, specifically, the Judge Adubato stated the following: "I'm not going to rule on something, as I said, that then – if there's a pending case in another jurisdiction, make your arguments to that court but my intention is to just deal with the case in front of me." (1T21:5-9).

R. 4:37-1(b) provides that such a dismissal may be without prejudice at the

discretion of the court, and while it is noted in the trial court's final decision and Order that Judge Adubato was well within her right to reevaluate and change her mind, Isaac asserts that he was prejudiced by this change as he proceeded through trial with the understanding that these claims were dismissed without prejudice. Further, Isaac asserts that a dismissal without prejudice is appropriate under these circumstances, especially given that it was Isaac's grave medical condition that ultimately resulted in his death that prevented him from being deposed or participating in the trial.

Regardless of whether these dismissals were with or without prejudice, these claims were limited to the ownership interests related to the NJ Property and have no bearing on any other assets of Isaac or Barry, as the only allegations made in this case relate to the NJ Property, and this Court does not have jurisdiction over any of the other properties owned by Isaac or Barry outside of the State of New Jersey.

POINT VI

SIMKOWITZ'S ASSERTIONS RELATED TO THE PROCEDURE FOR ENTRY OF THE ORDER FINAL ORDER AND CLAIMS BY THE ROSEVILLE TOWER LLC ARE INACCURATE (Pa004-Pa006)

Simkowitz argues that he did not assert a claim on behalf of The Roseville Tower as The Roseville Tower was represented by counsel for the Hersko Defendants which Isaac does not dispute. However, Simkowitz did seek to have the

subject mortgages discharged which is a claim that could only be brought by the mortgagor which is The Roseville Tower, not Simkowitz, at least with regard to the First Mortgage. (Pa203-Pa208; Pa209-Pa215, Pa331-332).

It must also be noted that The Roseville Tower has chosen not to participate in this appeal and counsel for the Hersko Defendants advised this Court and the parties that it was not representing The Roseville Tower in connection with this appeal. (Transaction ID E1655253-09302024).

Lastly, with regard to the assertion that Appellant submitted an Order with erroneous verbiage, Appellant feels compelled to clarify the record. In an effort to simplify the competing proposed Orders being submitted to the Court, Appellant submitted a redline of a proposed Order that was originally submitted by the Hersko Defendants which contained references to claims by The Roseville Tower which was represented by counsel for the Hersko Defendants in the underlying action. (Pa333-Pa362). Therefore, Appellant did nothing more than conform with the submission of counsel for The Roseville Tower.

POINT VII

IF RESPONDENTS ARE PERMITTED TO PURSUE THEIR CROSSCLAIMS THAN ISAAC MUST BE ENTITLED TO A RECIPROCAL RULING (Pa006)

The trial court dismissed respondents' crossclaims because it held that Barry, Simkowitz and Bella had unclean hands. (6T29:10-14). Isaac takes no position on

the merits of the respondents' crossclaims other than to reassert that the trial court was correct to invoke the doctrine of unclean hands against respondents and that there would be no legitimate basis to for this Court to reverse that ruling without also reversing the application of the doctrine of unclean hands with regard to Isaac's affirmative claims as well.

CONCLUSION

Based on the foregoing, the trial court's Order entered on April 15, 2024, should be reversed in part as follows:

1) The ruling dismissing all equitable claims against all parties should not apply to appellant, Isaac Hersko;
2) The dismissal of appellant, Isaac Hersko's claim for a declaratory judgment that he is a 50% owner of the First Mortgage should be reversed and remanded for further proceedings;
3) The involuntary dismissal pursuant to R. 4:37-2 should be reversed and remanded for further proceedings; and
4) That the dismissal with prejudice of the claims voluntarily dismissed by appellant, Isaac Hersko, before trial should be reversed and made without prejudice.

Respectfully submitted,

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Attorneys for Plaintiff/Appellant/Cross-Respondent
Morris Hersko and Abraham Hersko as co-executors of the Estate of Isaac Hersko

By: */s/ Thomas K. Murphy III*
THOMAS K. MURPHY III

DATED: February 7, 2025

ISAAC HERSKO, Plaintiff, v. BARRY HERSKO, BELLA HERSKO, THE ROSEVILLE TOWER LLC, and CHAIM SIMKOWITZ, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION APPELLATE DOCKET NO.: A-2622-23 TRIAL COURT DOCKET NO.: ESX-C-220-21 Sat Below: Hon. Lisa M. Adubato, J.S.C. Hon. James R. Paganelli, J.S.C.

DEFENDANTS BARRY HERSKO'S AND BELLA HERSKO'S BRIEF IN RESPONSE TO CROSS-APPEAL OF CHAIM SIMKOWITZ

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INTRODUCTION

Cross-Appellant Chaim Simkowitz ("Simkowitz") continues the same "Not me, but them," approach rejected by the trial court when it dismissed all claims as to all parties. The trial court's evaluation of the evidence and application of the law was proper, and this Court should affirm.

The April 15, 2024 Order (the "Order") was not a snap judgment or the "bulldozer" portrayed in Simkowitz's appeal. Instead, after two years of litigation, fifteen different pleadings, summary judgment, three days of trial testimony, and several rounds of post-trial letter briefing, the trial court noted the "unclean hands of all parties that permeate this entire case" and found that "[a] Court of Equity can never allow itself to become an instrument of injustice", and dismissed all claims with prejudice. (6T, 22:5-6).

After a thorough discussion of the facts and applicable law, the court concluded: "the parties acted in pari delicto[.]" (Pa018). All parties were found to have participated in the questioned conduct, and all claims were dismissed. Simkowitz cannot portray himself as the sole innocent non-participant.

The trial court's discussion and application of New Jersey case law was also proper. Simkowitz's attack on the trial court for citing an analogous, yet non-binding decision – something the trial court explicitly noted on the record – does not somehow mean that the Order is infirm. The trial court's Statement

of Reasons is replete with binding authority and correctly applied the applicable precedent.

The trial court did not err in dismissing a mortgage discharge claim as to the Roseville Tower, LLC ("Tower LLC"), a defendant in the action. Tower LLC is the owner of the subject property, mortgagor of the subject mortgage, and is managed by its 50% owner, Simkowitz. The trial court repeatedly explained that all parties were subject to an unclean hands finding (including Tower LLC and its two members) and that "the mortgage claims, whatever they may be, are all dismissed with prejudice." (6T, 31:24-25). Tower LLC was not mistakenly included in the trial court's Order (which Simkowitz's opposed several times before entry of the Order); Tower LLC was included so that all parties were subject to the same treatment. Tower LLC, as mortgagor, was a necessary party to accomplish the dismissal, so that Simkowitz could not bring the same claim again on Tower LLC's behalf.

Simkowitz's attempt to carve out and maintain his claims against Barry Hersko ("Barry") and Bella Hersko ("Bella") concerning the two LLC's that own the subject adjacent properties ignores the evidence cited by the trial court. The trial court found that "the conduct of the parties, across the board, has infected this very subject matter in this litigation" and noted the improper use of the owner LLC's "in a manner that goes beyond the intent of those

instruments[.]" (6T, 28:5-18). Simkowitz's claims related to the operation of those LLC's were not somehow separate from the other claims in this litigation and were properly dismissed with prejudice.

Simkowitz's argument that the trial court dismissed his claim prematurely also has no merit. The trial court's Order came after Simkowitz took the stand for two days of testimony and admitted to his role in the conduct that served as the basis for the trial court's "unclean hands" finding, and after the parties submitted briefing on the issue. The trial court was not required to put its head in the sand, ignore the evidence and testimony that had been presented, and allow Simkowitz to present claims based on the same underlying facts. Simkowitz was on notice that the court may dismiss the action based on the doctrine of unclean hands and submitted a letter brief on that topic before the trial court issued its Order. (Da032). The trial court's decision to ultimately apply that doctrine was not *sua sponte* and was not an abuse of discretion.

The trial court acted within its discretion when it dismissed all of Simkowitz claims with prejudice, and the carve outs that Simkowitz continues to seek are unsupported. This Court should affirm the trial court's Order in all respects.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Barry and Bella do not dispute the chronological aspects of the Procedural History set forth in Simkowitz's brief in support of his cross-appeal. (Db4-6). A more fulsome description of the pleadings and court rulings is set forth in Barry and Bella's Consolidated Brief in Response to the Appeal of Isaac and in Support of their Cross-Appeal Against Simkowitz dated October 15, 2024.

STATEMENT OF FACTS

A full description of the factual background is set forth in Barry and Bella's Consolidated Brief in Response to the Appeal of Isaac and in Support of their Cross-Appeal Against Simkowitz. For the purposes of this Response, relevant facts concerning Simkowitz's Cross-Appeal are included below.

A. The Mortgage Loans

On April 20, 2007, Tower LLC, which was then owned by Messrs. Karpen and Perlmutter, purchased the property located at 140-148 Roseville Avenue, Newark, New Jersey ("Tower Property") from GIAIP, LLC ("GIAIP") for approximately $5.825 million. (Pa203, 2T, 179:22-180:6). The Tower Property comprises approximately 270 residential units; but the property has been vacant for decades and needs significant repairs. (4T, 39:20-40:7). At all times relevant to this case, the property has never produced income. (4T, 40:9-10).

To effectuate the sale, a $2.5 million loan was given to Tower LLC to acquire the Tower Property, memorialized in a "Note" and secured by a "First

Mortgage." (Pa203, Pa331). The Note and First Mortgage list "Barry Hersko and Isaac Hersko" as the "Lender." (Pa203, Pa331).

The same day, the seller, GIAIP, provided $3.22 million in seller financing to the buyer, Tower LLC, which was secured by a second mortgage on the Tower Property (the "Subordinate Mortgage"). (Da1).

B. <u>The January 4, 2010 Mortgage Workout Agreement</u>

Barry testified that by January 2010, although Tower LLC had repaid approximately $1 million on the First Mortgage, it was repeatedly in default on its payments. (4T, 44:13-46:23, 48:22-49:6). On January 4, 2010, Barry, Isaac, Bella, and the then members of Tower LLC entered into an agreement to resolve issues relating to the First Mortgage defaults (the "Mortgage Workout Agreement"). (Pa217). The Mortgage Workout Agreement states that one of the members of Tower LLC (Mr. Karpen) would immediately pay $750,000 as a lump sum to reduce the principal balance on the First Mortgage. (Pa218, ¶ 2). Barry testified that the money was, in fact, paid and reduced the remaining principal balance from $1.5 million to $750,000. (4T, 49:21-50:3, 61:14-20).

Under the Mortgage Workout Agreement, the remaining principal balance was due by June 25, 2010 and was secured by 100% of the membership interest in Tower LLC, which was assigned on a contingent basis to Barry's wife, Bella. (Pa218, ¶ 4; Pa219, ¶ 5). If Tower LLC defaulted in the payment under the

Agreement, Bella would retain the 100% membership interest collateral; if the payment were made in full, the collateral would be returned. (Pa218-19, ¶¶ 4-10).

Tower LLC did, indeed, default under the Mortgage Workout Agreement by failing to pay any of the remaining $750,000. (4T, 65:17-19). As a result, 100% of the membership interest in Tower LLC vested in Bella. (4T, 63:13-18; Pa226).

C. The October 28, 2010 Transaction

In 2010, Barry had discussions with Intervenor-Defendant Simkowitz about acquiring an interest in Tower LLC from Bella, and the parties agreed that Bella would sell 50% of her membership interest in Tower LLC to Simkowitz. (1T, 89:10-23). On October 28, 2010, Bella executed a document assigning 50% of her interest in Tower LLC. (Pa227). There was also a document bearing the same date in which Isaac and Barry purported to assign 50% of the First Mortgage. (Pa280-281).

At the October 28, 2010 closing of the sale of a 50% interest in Tower LLC to Simkowitz, Simkowitz wrote two checks: a check for $350,000 to "I Hersko" and a check for $150,000 to "B Hersko." (Pa216; 2T, 84:14-22). Simkowitz testified that he gave the check to Isaac and understood the $350,000 check satisfied Isaac's interest in the First Mortgage in full. (2T, 84:14-85:4).

Barry confirmed that the $350,000 check was the last payment in satisfaction of Isaac's interest. (3T, 215:8-216:3).

D. <u>The December 2010 Foreclosure Action</u>

Simkowitz testified that, as part of his purchase of a 50% interest in Tower LLC, and the plan to develop the property, there was a "need to deal with G.I.A.I.P. and Doctor Adler, the second mortgagee[.]" (1T, 94:24-25). Simkowitz testified that "once we finish squeezing down the second lender […] we'll be able to refinance and with that redevelopment property." (1T, 95:3-8). Simkowitz wanted to obtain control of the Subordinate Mortgage on the Tower Property so he could develop it. (1T, 97:1-98:11). A plan was advanced in which Isaac and Barry would use their leverage with the First Mortgage to attempt to buy the Subordinate Mortgage at a discount.[1] (1T, 94:18-96:22). Simkowitz defined this plan as "the basis for which Barry [was] proposing the partnership. And with sort of knocking out the second mortgage makes it a very viable investment." (1T, 97:11-14).

After Simkowitz acquired a 50% interest in Tower LLC, Simkowitz contacted Feinsilver Law Group ("FLG"), a law firm he had worked with in the past, to prepare and file a foreclosure action on the First Mortgage. (2T, 28:21-

[1] Isaac and Barry remained the mortgagees of record on the recorded First Mortgage, even after Isaac's interest was satisfied. (2T, 137:19-138:23).

30:10; 3T, 29:11-30-6). The trial record included a retainer agreement purporting to bear Isaac's and Barry's signatures, in which Isaac and Barry are identified as "clients" of the law firm. (Pa311). Simkowitz testified that his office paid FLG a $5,000 retainer (2T, 127:10-128:8), and when FLG prepared the proposed foreclosure complaint, it was initially sent only to Simkowitz and his business partner, Joseph Hoffman, not Barry and Isaac. (*See* Pa273).

On or about December 13, 2010, FLG filed a complaint on behalf of Isaac and Barry to foreclose the First Mortgage (the "Foreclosure Complaint"). (Pa231). The Foreclosure Complaint identified "Barry Hersko and Isaac Hersko" as the plaintiffs, and identified "The Roseville Tower, LLC," "GIAIP, LLC," and "Israel Perlmutter" (the former managing member of Tower LLC) as the named defendants. It alleged that the First Mortgage and Note were in default, that payment had been demanded but was not made, and that as of December 1, 2010, $3.4 million was due and owing on the Note. (Pa233-34, ¶¶ 13-15).

E. <u>The May 2011 Assignment of the Subordinate Mortgage</u>

Since making the First Mortgage, Barry had been in contact with a representative of the Subordinate Mortgagee (*i.e.*, GIAPP, the seller that provided seller financing). (2T, 147:14-148:18, 177:16-25, 178:1-179:2, 180:17-23). Barry testified that after the Foreclosure Complaint was filed, the

Subordinate Mortgagee called him and asked him to purchase the Subordinate Mortgage. (4T, 92:2-10). Barry testified that they negotiated a price but did not discuss the foreclosure action in those negotiations. (4T, 92:11-93:13).

On May 2, 2011, the Subordinate Mortgage was assigned to a non-party entity, Isaac & Barry LLC. (Da6). Barry is the 100% owner of that entity. (2T, 136:18-22). Simkowitz admitted at trial he has no ownership interest in Isaac & Barry LLC. (2T, 113:8-17). On May 10, 2011, Simkowitz wrote to the FLG law firm, "I am happy to report that we settled, we can now discontinue the [foreclosure] action." (Pa278).

F. <u>Simkowitz Operates Tower LLC and Park LLC as One</u>

On or about May 18, 2016, Roseville Park LLC ("Park LLC"), through its two 50% members, Simkowitz and Barry, purchased the property at 401-407 Seventh Avenue, Newark, New Jersey, a parking lot directly adjacent to the Tower Property. (*See* Pa187-Pa188 at ¶¶ 2-7 (collectively refereeing to Park LLC and Tower LLC as "the 'LLC'"); Pa196-Pa197 at ¶¶ 2-7).

Simkowitz managed Tower LLC and Park LLC's affairs, and the two conjoined lots, through a non-party entity he owns named Northside Towers LLC. (4T, 146:3-14). Simkowitz maintained a ledger of the capital inflows, which were used to pay Tower LLC and Park LLC's expenses. (2T, 70:12;

Pa288-89). Simkowitz managed these two LLCs through one ledger and with one account. (2T, 71:23–72:21).

G. The 2021 Buyout Agreement and Resulting Litigation

In July of 2021, Barry, Bella, and Simkowitz entered into an agreement (the "2021 Agreement") by which Simkowitz sought to acquire Bella's 50% membership interest in Tower LLC and Barry's 50% interest in Park LLC. (Pa3 l3-Pa3 22). In October of 2021, the parties scheduled a closing, but a title search revealed that Isaac had filed his Complaint in this action and a notice of *lis pendens* on the Tower Property, derailing the closing. (Pa076 at ¶15). The 2021 Agreement was ultimately rescinded by Court Order Decreeing Rescission entered on October 11, 2023. (Sa001-Sa012).

Simkowitz initially responded to Isaac's Complaint alleging three counterclaims and one omnibus crossclaim against Barry and Bella. (Pa074-Pa082). Simkowitz's first and second counterclaims against Isaac sought declarations that (i) Simkowitz was a 50% owner of Tower LLC, (ii) Isaac did not have an interest in Tower LLC, (iii) the *lis pendens* be discharged, (iv) the properties be sold, (v) the two mortgages be discharged, (vi) Simkowitz be granted a lien on the properties, and that (vii) the 2021 Agreement be specifically performed. (Pa078-Pa079). Simkowitz's third counterclaim sought damages against Isaac for slander of title. (Pa080). The crossclaim against Barry and Bella sought a declaration ordering, *inter*

alia, that (i) the properties be sold, (ii) Simkowitz be granted a lien on the properties, and that (vii) the 2021 Agreement be specifically performed. (Pa082).

Simkowitz later amended his crossclaims, alleging four crossclaims against Barry, Bella, Tower LLC, and Park LLC. (*See* Pa187). Simkowitz's first crossclaim sought damages from Barry based on his alleged failure to contribute sufficient capital to Park LLC and from Bella based on her alleged failure to contribute sufficient capital to Tower LLC. (Pa190). Simkowitz's second claim was for unjust enrichment against Barry and Bella based on the same theory. (Pa190-191). The third crossclaim sought judicial dissolution of Tower LLC and the fourth sought dissolution of Park LLC. (Pa192-193). Simkowitz's crossclaims against Barry, Bella, Tower LLC, and Park LLC did not seek to discharge the mortgages on the property, only his counterclaim against Isaac sought such relief. (*Compare* Pa078-Pa079 to Pa187-194).

Barry and Bella's crossclaims against Simkowitz involved allegations for breach of fiduciary duty (based on Simkowitz secretly planning to acquire Barry and Bella's interests in the LLCs, to, then resell those interests to a third-party at a profit); and an accounting of their respective interests in Tower LLC and Park LLC. (Pa144).

H. The Trial

Isaac presented his affirmative case over three trial days—January 23, 24, and 25, 2024. (*See* 1T to 5T). Isaac's counsel called Simkowitz, Barry, and Bella as witnesses, but neither Isaac nor his Durable Powers of Attorney testified. (*See* 1T to 5T). On January 25, 2024, Isaac rested his case. (5T, 89:10-11).

At the close of Isaac's case, Barry and Bella moved for involuntary dismissal of Isaac's claims pursuant to Rule 4:37-2(b). (5T, 93:16-103:22). Isaac's counsel asked the trial court to apply the doctrine of unclean hands to the Defendants based on their participation in the 2010 Foreclosure Complaint, and to discredit all of Simkowitz's and Barry's testimony based on the maxim *falsus in uno, falsus in omnibus*—effectively relying on those doctrines to affirmatively prove Isaac's case. (5T, 91:3-8, 104:3-107:1, 128:3-18, 129:4-24, 131:8-132:20). In doing so, Isaac attempted to distance himself from the so-called "scheme" to file a sham foreclosure to obtain the Subordinate Mortgage at a discount, even though he sought an interest in Tower LLC and the Subordinate Mortgage just weeks earlier. (5T, 132:4-20; 5T, 135:5-136:3). The trial court reserved decision on the motions and instructed the parties to submit briefing on the issue of how the unclean hands doctrine should apply to the case. (5T, 144:10-145:13).

Following the briefing on unclean hands, on February 14, 2024, the parties appeared for the continued trial. (6T). Simkowitz sought to amend and clarify his claim for discharge of the two mortgages on the properties. (6T, 11:11-12:14). While Simkowitz had only plead the mortgage discharge claim against Isaac, he sought to bring it against Barry as well. *Id.* The Court instructed:

> I had been assuming the whole time it was against both […] I'm not going to get that technical. I don't see any way that that's a surprise. I'll hear from Barry's side but I really think that any argument that it was unclear that the discharge would go against both, that's how I had been proceeding.
>
> [Simkowitz's Counsel]: And I, so I appreciate that, Your Honor.

(6T, 12:5-14).

I. The Trial Court's Dismissal Order

On the sixth day of trial, after discussion about the status of the parties' claims and a brief recess, the Court dismissed all of the parties' claims, counterclaims, and crossclaims against each other. (6T, 15:12-30:11).

i. The Trial Court Dismisses the Crossclaims Between Barry and Bella, and Simkowitz.

While Isaac was the only party that presented his case, the trial court had heard testimony and received evidence from Barry, Bella, and Simkowitz. Once Isaac rested, the trial court issued a ruling from the bench, dismissed all the remaining claims – including the crossclaims between the defendants. (6T, 29:10-14 ("In the totality of the circumstances of this case, this Court determines

that the unclean hands of the parties shall result in a dismissal of all the claims.")). The trial court found that:

> This record is replete with admissions of fraudulent filings, unethical and otherwise questionable conduct, which without any doubt, includes the filing of a sham foreclosure complaint, hiding the true ownership interest in the Roosevelt Tower, L.L.C., in order to deceive and defraud the subordinate mortgagee and cause her to sell the subordinate mortgage for pennies on the dollar. Defendant Simkowitz fully admitted his role in the scheme and both Barry and Isaac Hersko were named as parties in that complaint and cannot believabl[y] feign ignorance thereof. These are undisputed facts.
>
> […]
>
> For this Court to make any finding as to the validity of a mortgage or any right to discharge same would cause this Court to turn a fully blind eye to the admitted orchestration of a scheme that was perpetuated by all of these parties, on third-parties and on the Court. These parties were in pari delicto.

(6T, 23:9-20, 6T, 26:4-9). While the Court found that "Defendant Simkowitz and Barry Hersko were at the core of the bad conduct" and that Bella was "merely a nominal participant," Bella was included in the dismissals given her interest in Tower LLC. (6T, 26:14-21).

In issuing its ruling from the bench, the court did not immediately rule on whether dismissal would be with or without prejudice. (6T, 32:1-6). Instead, the trial court instructed the parties to submit proposed orders under Rule 4 :42-1 (c), the "five-day rule" with briefing to explain each party's proposed order, which the parties did. (6T, 34:8-36:25; Da056).

ii. The Trial Court's Final Order Dismisses All Claims with Prejudice.

On April 15, 2024, after receiving the parties' proposed orders and related briefing, the trial court entered its final Order, which dismissed all claims of all parties with prejudice (save four claims, which were dismissed as moot)[2]. (Pa1-7). The trial court also issued an accompanying Statement of Reasons (Pa8-20).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING SIMKOWITZ'S CLAIMS WITH PREJUDICE BASED ON THE DOCTRINE OF UNCLEAN HANDS

The unclean hands doctrine derives from the maxim "[h]e who comes into equity must come with clean hands." *Untermann v. Untermann*, 19 N.J. 507, 517 (1955); *Borough of Princeton v. Bd. of Chosen Freeholders of Cnty. of Mercer*, 169 N.J. 135, 158 (2001). The doctrine means that "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Faustin v. Lewis*, 85 N.J. 507, 511 (1981); *see also Goodwin Motor Corp. v. Mercedes-Benz of N. Am., Inc.*, 172 N.J. Super. 263, 271 (App. Div. 1980) ("[A] court of equity will deny its remedies to a suitor who has been guilty of bad

[2] Simkowitz's claims for declarations that he had a 50% membership interest in Tower LLC and Park LLC, as well as his claim to discharge the *lis pendens* were dismissed as moot. (Pa005). Barry and Bella's claim for recission of the 2021 Agreement was dismissed as moot. (Pa006).

faith, fraud or unconscionable acts in the transaction which forms the basis of the lawsuit.").

A trial court has discretion to apply the unclean hands doctrine based on the totality of the circumstances. *See Borough of Princeton*, 169 N.J. at 158 (2001) (quoting *Heuer v. Heuer*, 152 N.J. 226, 238 (1998)); *Untermann*, 19 N.J. at 517-18. This Court reviews the trial court's decision to apply the unclean hands doctrine for an abuse of discretion.[3] *See Murray v. Lawson*, 264 N.J. Super. 17, 36 (App. Div. 1993) ("Use of the unclean hands doctrine is within the court's just discretion."), *vacated on other grounds* 513 U.S. 802 (1994). When reviewing for an abuse of discretion, the Court should "reverse only when the exercise of discretion was manifestly unjust under the circumstances." *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 174 (App. Div. 2011) (internal quotation marks omitted). In making that determination, the trial court's findings of fact "are binding on appeal when supported by adequate, substantial, credible evidence." *Gnall v. Gnall*, 222 N.J. 414, 428 (2015).

[3] Simkowitz, without citation to any supporting case law, incorrectly claims that the Court must conduct a *de novo* review. (Db20). "Abuse of discretion" is the correct standard of review.

The trial court acted within its discretion when it applied the unclean hands doctrine to Simkowitz and dismissed his claims with prejudice. The trial court should be affirmed.

A. The Unclean Hands Doctrine Was Properly Invoked in this Separate, But Related Proceeding

i. New Jersey's Unclean Hands Standards Require that the Improper Conduct Be Connected to the Claims, Not Necessarily Taking Place in the Case at Bar

Simkowitz claims that the unclean hands doctrine can "only be invoked in the proceeding in which the unconscionable conduct took place" (Db28) and that the trial court's reliance on the Foreclosure Complaint to dismiss claims here was somehow without a "through line" and improper. This argument is incorrect, as the trial court properly identified the existing relationship and applied the doctrine in agreement with New Jersey precedent.

In *Untermann v. Untermann*, the Supreme Court explicitly rejected "piecemeal" application of the unclean hands doctrine to separate parts of an integrated transaction or related conduct. 19 N.J. 507, 518 (1995) ("It is the effect of the inequitable conduct on the total transaction which is determinative whether the maxim shall or shall not be applied. Facades of the problem should not be examined piecemeal. Where fraudulent conduct vitiates in important particulars the situation in respect to which judicial redress is sought, a court should not hesitate to apply the maxim."). Before and since

Untermann, New Jersey courts have applied the unclean hands doctrine when the objectionable conduct occurred outside of, but related to, the case then before the court. *See Sheridan v. Sheridan*, 247 N.J. Super. 552, 556 (Ch. Div. 1990) (applying unclean hands doctrine to bar equitable distribution claim in divorce action where "tainted assets" were acquired through "illegal activities.")[4]; *Hageman v. 28 Glen Park Assoc., L.L.C.*, 402 N.J. Super. 43, 49 (Ch. Div. 2008) (unclean hands doctrine applied where unjust conduct at issue occurred in a "prior foreclosure proceeding.").

Simkowitz's reliance on *City of Paterson v. Schneider*, 31 N.J. Super. 598, 607 (App. Div. 1954) to argue that the conduct must take place in the case at bar is inaccurate. First, the court in *Paterson* found that the plaintiff was "not guilty of any fraudulent or unconscionable conduct[.]" *Id.* at 607. Nonetheless, in *dicta*, the *Paterson* court still confirmed that if the court were to have applied the unclean hands doctrine, the fraudulent conduct must "be related to the act of the plaintiff which is the subject matter of the cause of action, and it must be an evil practice or wrongful conduct in the particular transaction in respect to which

[4] Simkowitz argues that *Sheridan* stands for the premise not all claims must be dismissed because of unclean hands because the court in *Sheridan* allowed the wife to recover alimony. (Db36-37). There, however, the court found that, given the "somewhat different policy considerations" associated with alimony, and the fact that "[a]limony is a personal right in the nature of an annuity," an award of alimony could escape the reach of an unclean hands finding. *Sheridan*, 247 N.J. Super. at 569-570. Here, no such policy considerations in Simkowitz's business dispute.

the plaintiff seeks redress." *Id*. No distinction was made about conduct in prior proceedings or as to non-party victims, and the "related to" standard would have applied.

The decisions in *Goldfarb v. Solomine*, A-3740-16T2, 2019 WL 2635918 (N.J. App. Div. June 26, 2019) (Sa064) and *Hunt v. Hunt*, 10 N.J. Misc. 675 (Ch. Ct. 1932), the two other cases relied upon by Simkowitz, are no different and confirm that the prior unclean hands need only be "related" or "connected" to the subsequent litigation. *See Goldfarb,* 2019 WL at *10 ("Defendant has not shown that that plaintiff's alleged disloyalty caused defendant harm *or that it related to his promise to plaintiff*.") (emphasis added); *Hunt*, 10 N.J. Misc. at 684 (declining to apply unclean hands doctrine where conduct was "unconnected with the present litigation"; "It [the maxim of unclean hands] must be understood to refer to willful misconduct in regard to the matter in litigation, and not to misconduct, however gross, which is unconnected therewith and with which the opposite party in the cause has no concern.") (internal citations omitted).

ii. The Trial Court Properly Found that the Foreclosure Complaint Relates to and Was in Furtherance of Simkowitz's Claims Here

The trial court found that the record was "replete" with evidence to support a finding of unclean hands, the "conduct of the parties, across the board, has infected this very subject matter in this litigation" and "Defendant

Simkowitz fully admitted his role in the scheme." (6T, 23:9-20, 28:5-18). Simkowitz testified that acquiring the Subordinate Mortgage at a discount was "the basis for which Barry [was] proposing the partnership" and made it "a very viable investment." (1T, 97:11-14). Simkowitz also confirmed that he reached out to a law firm he had worked with in the past, paid their retainer, and they prepared and filed the "sham foreclosure complaint" at the center of the trial court's unclean hands finding. (2T, 28:21-30:10, 127:10-128:8; 3T, 29:11-30-6, Pa015).

The trial court found that this conduct, the plan associated with the Foreclosure Complaint, "related directly" to Simkowitz's claims here, which concern the same mortgages, the same properties, and the same property owner LLC's (whose same owners were found to have orchestrated the Foreclosure Complaint). (Pa005-6, Pa015-20). The relation or "through line" between the Foreclosure Complaint and Simkowitz's claims in this case served as proper grounds to apply the unclean hands doctrine.

Simkowitz's attempt to downplay his conduct, and argue that the doctrine should be applied sparingly, should also be ignored. While the doctrine of unclean hands should not be invoked against "every unconscientious act or general iniquitous conduct," the trial court clearly found that Simkowitz's conduct warranted its application. *Untermann,* 19 N.J. at 517. The trial court did

not find that this was a general unconscientious act, and instead held that "failing to impose the harshest remedy available to the court in a situation such as this would clearly undermine the public's confidence in our judicial system." (Pa019). The Order was not an abuse of discretion.

iii. Simkowitz's Claims Concerning Park LLC Were the Proper Subject of the Trial Court's Unclean Hands Finding

The trial court did not abuse its discretion by treating that Tower Property owned by Tower LLC (of which Simkowitz is the manager and 50% owner) and the adjacent parking lot owned by Park LLC (of which Simkowitz is the manager and 50% owner) as one development site. Simkowitz managed the two LLC's, which owned the two adjacent lots as one, combined their financial recording, and Simkowitz's crossclaims made joint allegations about "the LLCs." (2T, 71:23–72:21, Pa189). The two adjacent properties, and the two LLC's owners (Simkowitz, Barry, and Bella) are not independent from the Foreclosure Complaint or the rest of this case.

As to the underlying "unclean" conduct, the Foreclosure Complaint not only concerned the same underlying mortgage and property that were the subject of this case, but it was also used by Simkowitz to better secure his investment in both Tower LLC and Park LLC. (*See* 1T, 94:18-96:22). This creates a "sufficient nexus" to apply the doctrine of unclean hands. *Feldman v. Urban Commercial, Inc.*, 87 N.J. Super. 391, 400-401 (App. Div. 1965) ("[T]here was

a sufficient nexus between the finding by Judge Collester that the plaintiff had been guilty of unclean hands and had perpetrated an unconscionable scheme in order better to secure his investment, and the issues here involved, to estop plaintiff from recovering on the policy insuring his mortgage."). The trial court's Order confirmed that nexus:

> The court's application of the equitable doctrine of unclean hands is a direct result of the conduct of the parties, including the filing of a sham foreclosure complaint which included knowingly fraudulent allegations related directly to the mortgages put before this court by all parties in the instant action.

(Pa015).

The trial court's unclean hands finding was sufficiently connected and well within the court's discretion. The Order complies with New Jersey law and should be affirmed.

B. The Trial Court's Discussion of the *Hageman* Case Did Not Somehow Affect the Order or the Underlying Facts

On appeal, Simkowitz takes issue with the trial court's discussion of *Hageman v. 28 Glen Park Assoc. LLC*, 402 N.J. Super. 43 (Ch. Div. 2008), a decision which the trial court recognized was not binding but found to be persuasive. (*See* 6T, 23:21-24:2). While Simkowitz cites dozens of cases confirming that an unpublished decision from a court of equal jurisdiction is not binding, there is no authority under New Jersey law which states that such

decisions must be ignored, or that any order citing them are automatically reversable.

Further, Simkowitz's argument that "*Hageman* was wrongly decided," is misleading and incorrect. (Db23). Simkowitz's brief states "'[t]he unclean hands doctrine cannot be invoked save in a proceeding in which the unconscionable conduct took place.' *See City of Paterson v. Schneider*, 31 N.J. Super. 598 (App. Div. 1954)." (*Id.*). However, that quote is not taken from the *Paterson*, and is instead from *White v. White*, 32 N.J. Super. 382, 389 (Ch. Div. 1954), a chancery court decision Simkowitz does not cite in his brief, and which, according to Simkowitz's appeal, has no precedential value. *See White*, 32 N.J. Super. at 389 (citing *Paterson*, 31 N.J. Super. 598). As discussed above, the *dicta* in *Paterson* did not make that holding, and confirmed that the improper conduct and the claims to which the unclean hands doctrine applies need only be "related." *See supra* Point I(A)(i).

Further, Simkowitz argues that the *Hageman* court recognized that the 'unconscionable conduct' occurred in a prior foreclosure proceeding, but nonetheless applied the doctrine in that case. (Db23-24) ("*The court applied it anyway"*) (emphasis in original). Again, that argument is false. The court in *Hageman* rejected plaintiff's attempt to distance the prior foreclosure

proceeding and confirmed that the conduct did not have to exclusively occur in the same exact legal proceeding, it only need be related, holding:

> Plaintiff argues that the deception occurred solely in the prior foreclosure proceedings, which are unrelated to the subject matter of the complaint in this case. However, it is evident that plaintiff has an unduly restrictive and crabbed view of the facts. He ignores the reality that his applications for extensions of time created the opportunity for the transaction with defendants. Plaintiff enabled and affirmatively sought the arrangement of which he now complains.

Hageman, 402 N.J. Super. at 49-50.

The *Hageman* plaintiff's prior "fraudulent 'mortgage foreclosure rescue scam'" related to and prevented recovery in the subsequent litigation concerning the property buy-back from a different party. *Id.*

Here, Simkowitz raises the same arguments as the unsuccessful plaintiff in *Hageman*, but as discussed above, Simkowitz confirmed that the basis of his investment included the plan to buy the Subordinate Mortgage at a discount, thereby making it a "viable investment." (1T, 94:18-96:22; 1T, 97:1-98:11). The unclean hands from the first "sham foreclosure" were in furtherance of, if not the entire "basis" of the transactions underlying this litigation and allowed Simkowitz to develop and finance the properties without the second mortgagee. The *Hageman* court's application of the *Paterson* standard was not in error.

Further, assuming *arguendo* that trial court's discussion of *Hageman* was somehow improper, the Order actually relied on the unclean hands standard

discussed in *Untermann* and the court's separate authority to dismiss claims and sanction a fraud on the court under *Zaccardi v. Becker*, 88 N.J. 245, 253 (1982) and *Triffin v. Automatic Data Processing, Inc.*, 394 N.J. Super. 237, 251 (App. Div. 2007) ("[A] court may use its inherent powers to sanction the perpetration or attempted perpetration of a fraud upon the court."). It was not an abuse of discretion for the trial court to reference a non-binding case with similar facts before applying unquestioned precedent.

POINT II

THE TRIAL COURT PROPERLY INCLUDED TOWER LLC IN ITS DISMISSAL OF THE MORTGAGE DISCHARGE CLAIM

A. The Order Purposefully and Correctly Included Tower LLC in its Dismissal

It is undisputed that Simkowitz sought a declaratory judgment discharging the First Mortgage and the Subordinate Mortgage on the property owned by defendant Tower LLC (of which, Simkowitz was a 50% member). (*See* Pa078-Pa079; 6T, 12:5-14). If Simkowitz received the relief he sought, Tower LLC (not Simkowitz individually) would be free and clear from the two mortgages on the property.

On the last day of trial, the trial court issued a ruling from the bench – comprising over fifteen pages of transcript – dismissing the mortgage discharge claim, explaining its reasoning and the scope of the dismissal over fifteen pages of transcript. (*See* 6T, 15:12-30:11). The trial court specifically noted a "sham

foreclosure complaint, hiding the true ownership interest in the Roosevelt Tower, L.L.C." and Simkowitz's "fully admitted [] role in the scheme[.]" (6T, 23:12-20). Then, when Simkowitz's counsel sought clarification, the trial court made clear that "[t]he mortgage claims, whatever they may be, are all dismissed with prejudice." (6T, 31:24-25).

Following the decision from the bench, but before entry of the Order, Simkowitz sought to limit the scope of the Court's dismissal to exclude Tower LLC, making the same argument he makes here in two letters to the trial court, one embossed "**IMPORTANT**." (Sa013-Sa019) (emphasis in original). Simkowitz argued that while a dismissal with prejudice would prohibit Simkowitz from seeking to discharge the two mortgages in a future action, the mortgagor, Tower LLC, who owns the property subject to the mortgages (and of which Simkowitz is a 50% member) should not be similarly prohibited. (*See id.*; Da108). The trial court considered these arguments and disagreed. (Pa008 ("Multiple submissions were made on behalf of all parties, and the court has considered those submissions in their entirety.")) The Order properly held that neither Simkowitz nor the real party in interest, defendant-mortgagor Tower LLC, could seek a declaration discharging the mortgages, as the claim was dismissed with prejudice. (Pa006).

Simkowitz's arguments concerning an alleged "misstatement of fact" are without merit, as the trial court sought to prohibit any future attempt to discharge the mortgages (whether by Tower LLC or its 50% member Simkowitz).

B. The Trial Court and its Order Complied with the Rules of Court

The trial court's rejection of an argument raised by Simkowitz in two post-trial, pre-Order letters was not an abuse of discretion and did not violate any Rules of Court. (*See* Sa013-Sa019).

Rule 4:42-1(c) explicitly provides that "[i]f objection is made, the matter *may* be listed for a hearing in the discretion of the court." (emphasis added). The Rule does not provide an automatic right to a hearing and Simkowitz has not cited a single case where the failure to hold a hearing alone constitutes an abuse of discretion. Simkowitz had two opportunities to argue why the Order should not include Tower LLC, the trial court reviewed those submissions and disagreed. (*See* Sa013-Sa019 (post-trial letters); Pa008 (trial court confirming receipt and review of submissions)).

Nor can the trial court's fifteen page decision from the bench and the Order (which included a thirteen page Statement of Reasons pursuant to Rule 1:6-2(f)) possibly be challenged.

An abuse of discretion arises "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002)

(internal citation omitted). A trial court will be found to have abused its discretion where the decision is "arbitrary, capricious, whimsical, or manifestly unreasonable" or where there are "naked conclusions" without factual findings correlated with "the relevant legal conclusions." *Id.*; *Curtis v. Finneran*, 83 N.J. 563, 569-70 (1980); *see also Great Atlantic & Pacific Tea Co., Inc. v. Checchio*, 335 N.J. Super. 495, 498 (App. Div. 2000) (abuse of discretion where opinion "devoid of analysis or citation to even a single case.").

Here, the trial court made clear that its "application of the equitable doctrine of unclean hands is a direct result of the conduct of the parties, including the filing of a sham foreclosure complaint which included knowingly fraudulent allegations related directly to the mortgages put before this court by all parties in the instant action." (Pa015). As a "party" to this litigation, Tower LLC was subject to that holding. The trial court's Order quoted the prior bench ruling and the "hiding [of] the true ownership interest of Roseville Towers, LLC" and went on to discuss and apply the factors to be considered when determining the appropriateness of a dismissal with prejudice. (*See* Pa015-Pa020) (citing *Zaccardi v. Becker*, 88 N.J. 245, 253 (1982); *In re Forrest*, 158 N.J. 428,437 (1999); *Triffin v. Automatic Data Processing Inc.*, 394 N.J. Super. 237 (App. Div. 2007). Ultimately, the trial court imposed "the ultimate sanction of dismissal against all the parties." (Pa015).

The trial court's inclusion of Tower LLC in its dismissal of Simkowitz's mortgage discharge claim was not a mistake and it was not arbitrary, capricious, whimsical, or manifestly unreasonable. As a result of the with prejudice dismissal, Tower LLC, the party actually subject to the two mortgages, is prohibited from relitigating those claims, not just its 50% owner and manager Simkowitz.

C. The Inclusion of Tower LLC in the Dismissal with Prejudice Was the Only Way to Dismiss Simkowitz's Mortgage Discharge Claim

As discussed above, by naming both Tower LLC and Simkowitz in the dismissal with prejudice, the Order included the true party interested in discharging the two mortgages, defendant Tower LLC, and not just its 50% member Simkowitz. (Pa006). An order dismissing Simkowitz's mortgage discharge claim without including the actual mortgagor, Tower LLC, would have been a nullity as Tower LLC could immediately file the same claim for discharge. The trial court was not carrying out some inequitable result, it was making sure that its holding applied to the correct parties.

Simkowitz's concern that this may lead to the mortgagees seeking to foreclose upon the mortgages and Tower LLC (as mortgagor) being precluded from seeking discharge is exactly what the Order sought to carry out. As a result of the trial court's dismissal with prejudice, and based on a finding of unclean hands, the mortgagor cannot once again seek to discharge the mortgages.

POINT III

THE TRIAL COURT CORRECTLY DISMISSED SIMKOWITZ'S CLAIMS FOR LLC DAMAGES AND DISSOLUTION

A. The Trial Court Correctly Applied the Unclean Hands Doctrine in Barring Simkowitz's Claims for Damages and Dissolution

Within months of Simkowitz's investment into Tower LLC, he admittedly orchestrated a plan to "squeeze down" and "ge[t] a discount" on the Subordinate Mortgage. (1T, 94:22-96:2). The nexus, or through-line between that conduct and Simkowitz's claims here is obvious in his causes of action to obtain damages for contributions to those same LLCs and to discharge the same underlying mortgages for the same LLC owners and mortgagee. (*See* Pa078-Pa079). The trial court relied upon the sham Foreclosure Complaint, the parties "hiding [of] the true ownership interest in the Roosevelt Tower, L.L.C [Tower LLC]," and the improper use of the LLC's "in a manner that goes beyond the intent of those instruments." (6T, 23:9-20, 28:5-18).

Further, Simkowitz's repeated attempt to separate out Park LLC, the owner of an adjacent parking lot purchased by Simkowitz and Barry as an obvious (and necessary) compliment to the Tower Property, is disingenuous. As discussed above, Simkowitz managed the two LLC's, which owned two adjacent lots, as one. (2T, 71:23–72:21, Pa189). While Simkowitz seeks to recover purported damages from Barry and Bella in relation to their joint investments in Tower LLC and Park LLC,

the unclean hands doctrine does not allow a claimant to parse out such directly related conduct or claims.

In *Yeiser v. Rogers*, 19 N.J. 284 (1955), the Supreme Court of New Jersey quoted and recognized the holding in *Neubeck v. Neubeck*, 94 N.J. Eq. 167 (E. & A. 1922), a case cited by Simkowitz on appeal, which found that the unclean hands doctrine should only be applied where "the particular claim is tied up to inequitable conduct as an element of its creation[.]" With that in mind, the *Yeiser* court confirmed that the unclean hands doctrine is "a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors *for any and every purpose*" and that if unclean hands are found "then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, *or to award him any remedy*." *Yesier*, 19 N.J. at 289 (quoting *Pomeroy's Equity Jurisprudence* (5*th ed.*) §397) (emphasis added). As a result of Simkowitz's unclean hands, and the referenced conduct that permeates his interest in Tower LLC and Park LLC, the trial court properly held that it would not hear Simkowitz's claim for damages and dissolution related to the same offending entities, dismissing those claims along with the mortgage related claims. (Pa015-020).

B. Simkowitz's Claims for Damages and Dissolution Were Properly Dismissed with Prejudice

The decision to dismiss with or without prejudice is within the trial court's discretion. *Shulas v. Estabrook*, 385 N.J. Super. 91, 97 (App. Div. 2006). It serves to not only protect the fair and efficient administration of justice but denies "[t]he permission given to plaintiff to pursue a new, identical complaint without consequence[.]" *Id.* at 102. Here, the trial court acted within its discretion when it dismissed Simkowitz's claims with prejudice.

After arguing that the trial court should be reversed for citing an unpublished Chancery Division opinion, *Hageman*, Simkowitz argues that the dismissal with prejudice was improper because the trial court did not follow the decision from the United States District Court for the District of New Jersey in *Perna v. Electronic Data Sys., Corp.*, 916 F. Supp. 388 (D.N.J. 1995) to the letter. (Db 38-40). In *Perna*, the court noted that it was "unaware of a Third Circuit case that provides an analytical framework to determine when a court's inherent power to dismiss a case under these circumstances is appropriate" and looked to decisions from the ninth and fourth circuits as "instructive for this purpose." *Id.* at 398. The *Perna* court discussed the various factors used by these federal circuits, but, for the first time, created its only analytical framework. (*Id.* ("I will outline the relevant criteria I will consider in making my determination

of whether or not to dismiss this case pursuant to the court's inherent power to punish the perpetration of fraud upon the court.")).

While the trial court may not have quoted *Perna*'s "nexus" factor – one of the twelve factors it said could be considered – it was clearly applied. *See supra* Point I. The trial court referenced not only the sham Foreclosure Complaint, but the improper use of the LLC's. (6T, 23:9-20, 28:5-18). Simkowitz's claims directly related to the operation of those same LLC's and sought damages for the same. The trial court's finding that Simkowitz's claims were related to improperly used LLC and hidden ownership interest, while not strictly citing to all the considerations employed by the district court in *Perna*, supported dismissal with prejudice and was not an abuse of discretion.

Further, the trial court's statement that "I'm seeing, potentially, a distinction on whatever the dissolution is […] because that's solely between the[m] […] I will consider your submissions[,]" entirely disproves Simkowitz's argument that the trial court did not consider whether there was a sufficient nexus or through-line requiring dismissal of Simkowitz's claims with prejudice. (6T, 37:24-38:6). Simkowitz's disagreement with the Order and the resulting dismissal with prejudice does not weaken the trial court's reasoned holding.

POINT IV

THE TRIAL COURT DID NOT NEED TO HEAR MORE EVIDENCE BEFORE DISMISSING SIMKOWITZ'S CLAIMS WITH PREJUDICE BASED ON THE UNCLEAN HANDS DOCTRINE

A trial court's dismissal of claims "at the early state of proceedings" may be found to be procedurally improper to the extent that it "circumvents the basic requirements of notice and opportunity to be heard." *Klier v. Sordoni Skanska Const. Co.*, 337 N.J. Super. 76, 84-85 (App. Div. 2021); *Perth Amboy Iron Works, Inc. v. Am. Home Assur. Co.*, 226 N.J. Super. 200, 215 (App. Div. 1988). However, "[t]hat is not to say that a judge who senses that an issue may be disposed of, even during trial, by a summary judgment motion or mini-trial within the case may not give the parties an opportunity to make proffers based upon certifications or even brief testimony." *Perth Amboy*, 226 N.J. Super. at 215, n.12. Here, after hearing the testimony of Simkowitz and Barry, the trial court specifically requested, and the parties submitted, briefing on the application of the unclean hands doctrine to all claims. (Da056). Separate from Simkowitz's multiple post-trial letters, where Simkowitz argued that his claims should be dismissed without prejudice, Simkowitz (and the other parties) submitted letter briefs to the trial court as to whether or not the unclean hands doctrine could preclude the claims in this action all together. *Id.* Simkowitz was on notice of the application of the unclean hands doctrine and possible dismissal,

he was heard on that argument, and after three days of trial, Simkowitz's testimony, and the related letter briefs, the trial court had heard enough.

The trial court's dismissal of Simkowitz's claims, with prejudice, was not an abuse of discretion and did not limit Simkowitz's ability to be heard on that exact result. As to Simkowitz's claims, the trial court's Order should be affirmed.

POINT V

THE HERSKO DEFENDANTS CROSS-APPEAL SEEKS A RECIPROCAL RULING IF SIMKOWITZ'S CROSSCLAIMS ARE RESTORED

Barry and Bella's cross-appeal against Simkowitz is based on reciprocity in the event that Simkowitz's crossclaims are restored on appeal.

Simkowitz, Barry, and Bella asserted competing crossclaims for an accounting relating to their interests in Tower LLC and Park LLC. (Pa144, Pa187). The trial court dismissed those claims with prejudice because it concluded Simkowitz, Barry, and Bella had unclean hands stemming from the Foreclosure Complaint, and that that conduct was related to competing crossclaims. (6T, 29:10-14).

Simkowitz's cross-appeal against Barry and Bella argues that the crossclaims have no nexus to the Foreclosure Complaint (Db Point II). While Barry and Bella disagree, should the Court reverse as to Simkowitz—thereby allowing him and

Tower LLC an opportunity to re-allege their claims—the Court should respectfully reverse as to the Hersko Defendants as well, so that both party-groups have an opportunity to present their crossclaims against one another.

CONCLUSION

For the foregoing reasons, Barry Hersko and Bella Hersko respectfully request that the trial court's Order be affirmed as to Simkowitz's claims.

Dated: March 24, 2025

s/ Michael R. Darbee

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March 24, 2025

REPLY LETTER BRIEF OF RESPONDENT/CROSS-APPELLANT CHAIM SIMKOWITZ

Via eCourts
Honorable Judges of the Appellate Division
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 Market Street, 5th Floor, North Wing
Trenton, New Jersey 08625-0006

Re: Morris Hersko and Abraham Hersko, as co-executors of the Estate of Isaac Hersko v. Barry Hersko, et al.
Appellate Docket No. A-002622-23

Dear Honorable Judges of the Appellate Division:

Please accept this Reply Letter Brief on behalf of Respondent/Cross Appellant, Chaim Simkowitz ("Simkowitz"), pursuant to R. 2:6-2(b) and R. 2:6-5, in reply to: a) the brief filed by Appellants/Cross Respondents Morris Hersko and Abraham Hersko, as co-executors of the Estate of Isaac Hersko ("Isaac;" collectively, the "Estate") on February 7, 2025; and b) the brief filed by Defendants/Cross-Appellants Barry Hersko and Bella Hersko (the "Barry/Bella parties") on October 15, 2024; and in further support, generally, of Simkowitz's Cross-Appeal of the Order entered by the Honorable Lisa M. Adubato on April 15, 2024 (the "Order").

Simkowitz incorporates herein by reference the Counterstatement of Facts (Sb7-12) and the Procedural History (Sb4-7) set forth in his initial brief.

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PRELIMINARY STATEMENT

Simkowitz submits that his arguments on appeal have been fully set forth in his initial brief filed with the Court on October 15, 2024. Accordingly, the purpose of this Reply Brief is limited to: (1) addressing those arguments made by the Estate or the Barry/Bella Parties in their briefs that merit counter-argument or commentary beyond what was included by Simkowitz in his initial brief; and (2) clarifying/supplementing Simkowitz's arguments, in instances where the arguments of the Estate or the Barry/Bella Parties may tend to confuse or cast doubt on positions taken by Simkowitz.

LEGAL ARGUMENT

POINT I

THE ESTATE'S ARGUMENT THAT THE DOCTRINE OF UNCLEAN HANDS SHOULD NOT HAVE BEEN APPLIED TO ISAAC HERSKO, BECAUSE HE WAS AN INNOCENT OR LESS CULPABLE PARTY, IS WHOLLY VITIATED BY THE RECORD.
(Pa005-Pa006; Pa015-020; 6T23-16; 6T26-10-6T26-1)

Simkowitz maintains that the omnibus application of the unclean hands doctrine to dismiss all claims in the case was unjustified, but assuming arguendo it *was* justified, there is no reason that Isaac's claim to ownership of the First Mortgage should be spared the scythe. In arguing that there was an insufficient factual basis for the Trial Court to conclude that the doctrine of unclean hands should be applied to the claims of Isaac, the Estate catalogues the facts relied upon by the Court. (Prb12-13). Ironically, the recitation of the list alone makes the case against Isaac. Accordingly, assuming arguendo that the Trial Court's wholesale application of the unclean hands doctrine was justified, there was no reason to exclude Isaac Hersko's claims from said application. As noted by Simkowitz in his initial brief (Sb46-48), and by the Barry/Bella Parties in their initial brief (Db32-33), there was ample evidence for the Court to conclude that the unclean hands

doctrine should be applied to the claims of Isaac. And the Estate's attack on the quality of the evidence is wholly undermined by the fact neither Isaac nor any of his attorneys-in-fact had testified, either at trial or in a deposition, concerning matters as to which the Court below made the findings now complained of by the Estate. (Db23-24).

Accordingly, without Isaac having adduced any rebuttal testimony, the Estate is reduced to arguing - - ineffectually - - that the Trial Court weighed the evidence improperly and that it should have disregarded certain testimony entirely, pointing to the archaic and sparingly used doctrine of *falsus in uno, falsus in omnibus*. (Prb14). As to the latter, the Barry/Bella Parties, in their initial brief, convincingly eviscerated Isaac's reliance thereon, noting that Isaac sought to credit "Simkowitz's and Barry's testimony when it favors him, and to disregard [that testimony] when it does not." (Db29). It should also be noted that the core element of the doctrine is that the witness in question must have testified falsely. Coleman v. Public Service Coordinated Transport, 120 N.J.L. 384 (1938). Certainly as to Simkowitz, there is no indication in the record that the Trial Court - - however troubled it may have been about his involvement in the filing of the 2010 complaint to foreclose the First Mortgage - - found his testimony *at trial* to have been false.

POINT II

THERE IS NO EQUIVALENCY BETWEEN THE NON-MORTGAGE RELATED CLAIMS OF SIMKOWITZ AND THE FIRST MORTGAGE CLAIM OF THE ESTATE, SUCH AS WOULD COMPEL THE REVERSAL OF THE TRIAL COURT'S APPLICATION OF "UNCLEAN HANDS" TO THE FIRST MORTGAGE CLAIM OF ISAAC, IF THIS COURT DECIDED TO REVERSE THE APPLICATION OF THE DOCTRINE TO THE NON MORTGAGE-RELATED CLAIMS OF SIMKOWITZ.
(Pa005-Pa006; Pa015-Pa020)

The Estate argues that "to the extent that this Court entertains Simkowitz's argument that the doctrine [of unclean hands] should not apply to him, then it should certainly not apply to Isaac." (Prb17). In support, the Estate claims that this is a point conceded by Simkowitz in his brief when he stated: "Simkowitz respectfully submits following such review that this Court will agree that the decision must be reversed as to all claims in this case." (Pb17). But this statement was based upon Simkowitz's threshold argument that the doctrine of unclean hands should not have been applied *at all*. If this Court disagrees, Simkowitz nonetheless argues (Sb33-42) that the doctrine should not have been applied to dismiss his non mortgage-related claims (i.e., for capital contributions from Barry and Bella, as well as for dissolution of the LLCs). There is no equivalency between these claims, which do not arise out of the First Mortgage, and Isaac's claim to ownership of the First Mortgage, which is *directly* related thereto. Accordingly, reversal of the Trial Court's unclean-hands decision as to Simkowitz's non mortgage-related claims does not - - and should not - - trigger a reversal of the Court's unclean-hands decision as to Isaac's First Mortgage claim.

POINT III

EVEN IF THE UNCLEAN HANDS RULING WERE REVERSED AS TO ISAAC, THIS COURT CANNOT ADJUDICATE HIS CLAIM OF A 50% INTEREST IN THE FIRST MORTGAGE.
(Not argued below)

As both Simkowitz and the Barry/Bella Parties have argued, Isaac's claim with respect to the First Mortgage was never fully litigated (Sb49-50; Db34-35), and there was no opportunity for the Respondents to defend the claim, because the matter was dismissed at the close of Isaac's case. Therefore, even if Isaac succeeds in convincing this Court that the unclean hands doctrine should not have been applied to his First Mortgage claim, it would be inappropriate for this Court to

exercise original jurisdiction to determine the issue, which should be remanded to the Trial Court for further proceedings.

POINT IV

AT TRIAL, ISAAC FAILED TO PRESENT PROOFS THAT SATISFIED THE ELEMENTS OF A CAUSE OF ACTION FOR MONEY-HAD-AND-RECEIVED.
(Pa002-Pa003; Pa014-Pa015)

Simkowitz refers to and incorporates herein by reference the arguments made by the Barry/Bella Parties in their initial brief. (Db36-39).

POINT V

THE TRIAL COURT ACTED PROPERLY IN DISMISSING WITH PREJUDICE THE CLAIMS OF ISAAC THAT WERE NOT WITHDRAWN BY HIM UNTIL THE FIRST DAY OF TRIAL, AS ANY OTHER RESULT WOULD HAVE BEEN PATENTLY UNFAIR.
(Pa008-Pa014)

Simkowitz refers to and incorporates herein by reference the arguments made by Simkowitz in his initial brief (Sb51-54) and by the Barry/Bella Parties in their initial brief. (Db 39-43).

POINT VI

THERE WAS NO CLAIM MADE BY THE ROSEVILLE TOWER LLC FOR DISCHARGE OF THE MORTGAGES; ACCORDINGLY, THE ATTRIBUTION OF SAID CLAIM TO THE LLC, AND ITS DISMISSAL AS A CLAIM MADE BY THE LLC, WAS PLAIN ERROR.
(Pa004-Pa006)

The Estate contends that the erroneous redline of the proposed Order, referring to the claim for discharge of the mortgages as having been asserted by "Simkowitz *and Tower LLC"* (Pa4;Pa6)

was originally submitted by the Barry/Bella Parties. (Prb25). That may be, but it is neither here nor there, the salient point being that The Roseville Tower ("Tower LLC") never made that claim, neither in pleadings nor at trial. The claim was made solely by Simkowitz, by and through the undersigned, who did *not* represent Tower LLC. (Sb13-15). It was counsel for the Barry/Bella Parties who represented Tower LLC, a fact the Estate concedes. (Prb24). And no such claim was made by said counsel. Clearly, a claim never made in the litigation cannot have been dismissed with prejudice, depriving Tower LLC of its right, as mortgagor, to a determination of the validity and extent of the mortgage, as and when it needs to or chooses to assert such a claim.

POINT VII

THE ESTATE WOULD NOT BE ENTITLED TO PURSUE ISAAC'S CLAIM TO OWNERSHIP OF THE FIRST MORTGAGE IF THE DISMISSAL OF THE RESPONDENTS' CROSSCLAIMS WAS VACATED BECAUSE UNLIKE THE CROSSCLAIMS, THE FIRST MORTGAGE CLAIM IS DIRECTLY RELATED TO CONDUCT THAT WAS THE BASIS FOR APPLICATION OF "UNCLEAN HANDS."
(Pa005-Pa006; Pa015-020)

See Point II above.

POINT VIII

SIMKOWITZ DOES NOT DISAGREE WITH THE POSITION OF THE BARRY/BELLA PARTIES THAT IF DISMISSAL OF SIMKOWITZ'S CROSSCLAIMS IS VACATED, THEN DISMISSAL OF THEIR CROSSCLAIMS SHOULD BE VACATED.
(Pa006)

Neither set of crossclaims should have been dismissed, let alone dismissed with prejudice. The Court stopped the trial after Isaac put in his case. Consequently, the crossclaims were never

litigated. Simkowitz respectfully refers the Court to and incorporates herein by reference the arguments made by Simkowitz in his initial brief (Sb33-45), the reasoning for which also applies to the Barry/Bella Parties and their crossclaims.

CONCLUSION

For the reasons set forth above:

(1) The references to "Tower LLC" in Section II 1 and IV 4(a)(iv), relating to discharges of the two mortgages, should be stricken from the Order of April 15, 2024.

(2) The dismissal of all claims of Simkowitz (both counterclaims and crossclaims) based upon application of the doctrine of unclean hands should be reversed and the matter remanded to the Trial Court for the resumption and completion of the trial, to include the opportunity for Simkowitz to put in his case with respect to his counterclaims and crossclaims and to defend against any crossclaims against him; or, in the alternative, reverse the with-prejudice dismissals of Section IV 5(b) and 5(e) relating to capital contributions and dissolution of Roseville Park LLC and of Section IV 5(a) and 5(d) relating to capital contributions and dissolution of The Roseville Tower LLC.

(3) The Trial Court's dismissal with prejudice of Isaac's withdrawn claims should be affirmed.

Respectfully submitted,

FINESTEIN & MALLOY, LLC
Attorneys for Respondent/Cross-Appellant
Chaim Simkowitz

By: _____
Michael D. Malloy

MDM/mdm
cc: All counsel of record (via eCourts)