CLAIRE MEKKAWY, Plaintiff, v. SAM SHAHAR, Defendant-Counterclaimant-Third Party Plaintiff v. SALAH MEKKAWY; HAVEN DEVELOPMENT, L.L.C., Third Party Defendants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002884-23 DOCKET BELOW: MRS-L-000855-18 CIVIL ACTION On Appeal from Orders dated February 5, 2024 (3), February 23, 2024, March 15, 2024 and May 2, 2024 Sat Below: Hon. Noah Franzblau, J.S.C.

BRIEF OF DEFENDANT-APPELLANT SAM SHAHAR

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PRELIMINARY STATEMENT

This matter arises out of a failed real estate venture between Defendant-Counterclaimant-Third Party Plaintiff-Appellant Sam Shahar (hereinafter "Shahar") and Third Party Defendant-Respondent Salah Mekkawy. Mr. Shahar appeals from a series of orders from the motion court. These orders effectively granted summary judgment in favor of Plaintiff-Respondent Claire Mekkawy (Salah's wife) on a promissory note and denied Mr. Shahar's cross motion for summary judgment on the plaintiff's claims.

The promissory note at issue matured no later than December 31, 2009 (Da74). The Plaintiff did not file suit until May 3, 2018 (Da68). The three orders resulted in the Court entering an amended judgment against Mr. Shahar on an otherwise time-barred claim in the amount of $504,132.14 (Da58).

The first critical issue for the motion was to determine whether New Jersey or Pennsylvania law governed the transaction and, if the motion court held Pennsylvania law applied, whether the note comprised a sealed document.

The second issue for the motion court was to determine whether the signing of a purported 'Deed in Lieu Agreement' demonstrated intent on Mr. Shahar's part to revive the SOL under the applicable State's law.

The motion court agreed with Mr. Shahar that New Jersey law and not Pennsylvania law governs this action (Da28). To grant summary judgment to the Plaintiff, the motion court thus needed to find as a matter of law that Mr. Shahar agreed to revive a long-expired statute of limitations ("SOL") by signing the 'Deed in Lieu Agreement acknowledging the full amount of the debt and agreeing to pay the alleged debt in full, unconditionally, and on demand. The record, however, shows that Mr. Shahar never agreed to do so.

To grant summary judgment to the plaintiff, the motion judge made a series of *sua sponte* rulings on issues that the plaintiff herself failed to raise in her moving and reply papers (Da30, 59, 61, 531-537). The motion judge also refused to consider evidence proffered by Mr. Shahar that contradicted the court's *sua sponte* rulings (Da49).

The motion judge insisted upon absolute compliance with R. 4:46-2 (Da22) from Mr. Shahar, even though the plaintiff did not make those arguments and thus did not set forth the alleged facts at issue in her statement of material facts or in her brief (Da61; 531-7).

Indeed, the plaintiff primarily argued that Pennsylvania law applied; that Mr. Shahar signed the note under seal; and therefore a 20-year statute applied under Pennsylvania law (as opposed to a four-year SOL for unsealed documents) (Da531-5). The plaintiff never argued in her moving papers the elements of what New Jersey law requires to revive an expired SOL and how that law applies to this case (Da520 et seq.).

Mr. Shahar's deposition testimony, which he cited in his brief (Da968-971), at a bare minimum created a factual issue as to whether Mr. Shahar agreed to pay the alleged debt in full, unconditionally and on demand.

The 'Deed in Lieu Agreement' itself did not contain adequate language to revive the Statute of Limitations (Da77). Instead, the motion judge held the Deed in Lieu Agreement was an "extension" of the original note; inherently that Mr. Shahar somehow knew that New Jersey Law applied and made the original note a demand note by operation of law when it matured; and that by signing the 'Deed in Lieu Agreement', Mr. Shahar agreed to pay the alleged obligation unconditionally and on demand (Da30). To reach that critical finding, the motion judge needed to make a *sua sponte* finding that the promissory note that Mr. Shahar allegedly revived was a demand note by operation of law, and by signing the 'Deed in Lieu" agreement', Mr. Shahar knowingly agreed to pay the otherwise time-barred note in full, unconditionally and on demand (Da30).

The motion court's decisions are not supported by the record. They have resulted in a manifest denial of justice and must be reversed.

STATEMENT OF FACTS

The Parties

At all relevant times, Salah Mekkawy was a highly sophisticated real estate investor. Mr. Shahar met Salah Mekkawy when Mr. Mekkawy was the CEO of Pitcairn Properties, a real estate investment firm with at least seven hundred and fifty million dollars ($750,000,000) of real estate assets under its management. (Da238; 251-2).

Mr. Shahar is an immigrant who received a 7th grade education in Romania. (Da339). When he met Salah Mekkawy, Mr. Shahar admittedly had no real estate experience, and was in the business of selling jeans in Russia (Da240). Saleh Mekkawy testified that Mr. Shahar lacked the knowledge and expertise to develop the subject project on his own. (Da244).

Mr. Shahar considered Mr. Mekkawy to be his mentor and like family (Da361).

Plaintiff and Salah Mekkawy have been married for 45 years, which includes all times at issue in this matter. (Da205). The Mekkawys have three adult children Shaun, Dean and Derrick, ages 35-41 at the time of the depositions (Da204).

At all relevant times, both Mr. Shahar and the Mekkawys resided in Morris County, New Jersey (Da204; 236; 335).

Arthur and Viola Greco, the original payees and holders of the promissory note at issue in the litigation are Claire Mekkawy's parents

(Da207). Mr. Greco passed away during this litigation (Da207). Claire Mekkawy had power of attorney for her mother at the time of the depositions (Da207).

At all relevant times, Salah Mekkawy maintained a business office located at 41 Elm Street, Morristown, New Jersey from which he has operated his businesses for over 40 years (Da244). Deer Haven LLC and its subsidiary Haven Development, LLC (hereinafter collectively "Deer Haven") only had one back account, located at Wachovia Bank/Wells Fargo.[1] Salah Mekkawy kept the checkbook and maintained all of Deer Haven's financial and other records in his Morristown, New Jersey office (Da244). Suzette Velasco, Saleh Mekkawy's long-time assistant and possibly his other employees, prepared all of the Deer Haven accounting documents in Mr. Mekkawy's Morristown office (Da866).

Mr. Shahar never had an office at Salah Mekkawy's Morristown, NJ office. (Da245). Mr. Shahar never wrote or signed a check for Deer Haven (Da369).

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[1] The banks merged.

The Project

Mr. Shahar brought one successful investment to Mr. Mekkawy, the profits from which Mr. Mekkawy and Mr. Shahar rolled into the project at issue. They used Deer Haven, LLC ("Deer Haven") as their operating entity and formed a subsidiary Haven Development, LLC to hold title to properties they acquired for the project (Da240-1).

Mr. Shahar and Mr. Mekkawy agreed to be equal partners regarding the real estate project from which this matter arose. (Da242; 930). The project entailed acquiring multiple tracts of lakefront property in Palymira, Pennsylvania and building and selling residential units on the acquired land (Da242-3).

The parties spent several years acquiring various properties for the project. In addition to several bank loans, the parties raised funds for the project by locating investors.

Salah Mekkawy, however, raised funds by borrowing from, and issuing promissory notes to, his employer Pitcairn Properties, Inc. in the amount of $1,246,831.09 (Da888); the Plaintiff's and his three children in the amount of $167,000 (Da887); and his in-laws Arthur and Viola Greco in the amount of $400,000 (hereinafter the "Greco Note") (Da71). Salah's family members received mortgages on various properties belonging to the project to secure the loans (Da891, 904, 917). Mr. Shahar's family and friends' contributions were treated as equity.

The Greco note is dated December 13, 2007, with an original maturity date of December 13, 2008 (Da71). The parties signed one addendum which extended the maturity date to December 31, 2009 (Da74).

Things went sour after the 2008 financial crisis hit, and several investors sued Deer Haven, Mr. Shahar and Mr. Mekkawy (Da598). Mr. Mekkawy advised Mr. Shahar that the project was no longer feasible. They began liquidating the properties and other company assets and satisfying creditors. All creditors either compromised their debts and/or received real estate in exchange for satisfaction of their loans in full (Da272).

Unbeknownst to Mr. Shahar, the Grecos apparently were the sole exception. Not coincidentally, that is the sole obligation for which Mr. Shahar had any alleged personal liability (Da259). The Grecos agreed to a compromise but, for reasons unknown to Mr. Shahar, Mr. Mekkawy did not process their settlement. The Grecos thus wound up being the only creditors who were not paid or did not compromise the obligations owed by Deer Haven during the company's liquidation (Da259).

The Greco Loan and the Subject Note

Plaintiff's parents loaned $400,000.00 to Deer Haven (Da71). The Note is dated December 13, 2007, with a maturity date of December 12, 2008 (Da87). The parties signed an amendment to the note that extended the

maturity date to December 31, 2009 (Da74). The Grecos also received a mortgage on one of the Deer Haven properties to secure the loan (Da904).

Plaintiff testified that Viola Greco had no knowledge that her late husband and she loaned $400,000 to Deer Haven, and her husband handled the entire transaction (Da208). Plaintiff also alleged her own ignorance of the transaction occurring, or of even asking her husband about it upon learning of the same, despite her acknowledgment that $400,000 was a significant amount of money for her parents to risk (Da208).

No one made a payment against the Greco note (Da78).[2] No one ever demanded payment from Mr. Shahar prior to the filing of this lawsuit (Da26; 210). The six-year statutory period to file a lawsuit on the Greco note expired no later than December 31, 2015 (six years from the extended maturity date).

On or about January 30, 2018, Salah Mekkawy's long-time attorneys prepared an assignment of the time-barred Greco note to the plaintiff (Da28; 483). The plaintiff does not know whether she received an assignment of the subject promissory note before or after it was executed (Da209).

Contrary to the motion court's finding that the plaintiff gave consideration for the assignment (Da31), the assignment was made without

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[2] Whether Deer Haven's transfer of real estate constituted a complete satisfaction of the Greco note or a partial payment is at most a factual dispute.

consideration[3] (Da483) and because Mr. Greco's health was in significant decline (Da209). The plaintiff also does not know whether her parents or she were represented by counsel to draft the assignment (Da209).

At the conclusion of the initial day of his deposition, Salah Mekkawy could not state who his long-time counsel represented regarding the preparation and execution of the assignment (Da275). When he returned on a later date for the continuation of his deposition, Salah Mekkawy still could not state whether the Clemente firm represented the plaintiff; the Grecos; Deer Haven or himself (Da306).

Plaintiff's counsel (Saleh Mekkawy's long-time attorneys) then went on the record and took the position that the firm represented Saleh Mekkawy individually for the preparation of the assignment. Of course, Salah Mekkawy was not a party to the assignment transaction and was a co-obligor of any obligation owed under the Greco note being assigned (Da. 306).

The plaintiff acknowledged that $400,000.00 was a lot of money for her parents (Da208). No explanation is provided for why Saleh Mekkawy did not simply repay his in-laws and then proceed against Mr. Shahar for contribution. It is not disputed that Salah Mekkawy had the ability to repay his in-laws.

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[3] Nominal consideration of ten dollars ($10.00)(Da84). See also Da211, wherein the plaintiff testified that her father assigned the Greco note to her

After the assignment, the plaintiff alleges she spoke with her father about getting back the funds he loaned. She did not believe that her husband was obligated to pay back the money and that only Deer Haven had an obligation to do so (Da209-10). Despite allegedly being asked by her father to get back the money he loaned to Deer Haven, the Plaintiff does not recall having a conversation with her father or her husband about what happened to Deer Haven and why the funds were not repaid (Da210).

The plaintiff never spoke with Mr. Shahar about Deer Haven or any of her husband's business entities (Da207).

At some point, Plaintiff obtained power of attorney for her parents. She did not demand payment of the note until she filed this lawsuit on March 4, 2018, after the statute of limitations already ran. She does not recall doing anything to collect on the Greco note after the assignment (Da212-214).

The 'Deed in Lieu Agreement' that Allegedly Revived the Statute of Limitations

On or about December 17, 2017, Salah Mekkawy hired his long-time attorneys (Clemente Mueller, the plaintiff's counsel herein) to prepare a 'Deed in Lieu Agreement'. The motion court held that this document revived the SOL as a matter of law. Mr. Shahar submits that, as a matter of

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because of health issues.

law, the language of the "Deed in Lieu Agreement" is not sufficient to revive the statute. In particular, the document does not contain an agreement by Mr. Shahar to pay the alleged debt immediately, unconditionally and upon demand as required to revive a SOL under New Jersey law.

The 'Deed in Lieu Agreement' transferred the property upon which the Grecos had a mortgage to them for $100,000.00, and provided a credit against the Greco Note in that amount. The plaintiff and Salah Mekkawy also attempted to revive the time-barred debt and revive the SOL with this document.

The Plaintiff in particular relied upon Article 8 of the 'Deed in Lieu Agreement', which states:

> 8. No equity. Each of the lender, the Borrower, Mekkawy and Shahar hereby acknowledges and agrees that: (i) the present fair market value of the mortgaged property is One Hundred Thousand Dollars ($100,000); (ii) such amount due is less than the amount due under the Note and the conveyance provided for by this Agreement is only in partial, and not in full satisfaction of the Note; and (iii) that the Borrower has no equity in the Mortgaged Property. Notwithstanding anything herein to the contrary, each of Borrower, Mekkawy and Shahar agree and acknowledge that, even after the Mortgaged Property is conveyed to Lender pursuant to this Agreement, there exists and will exist a deficiency under the Loan Documents and nothing contained herein shall be construed as a waiver by Lender of any rights Lender may have under the Loan Documents, at law, or at equity to pursue any sums owned to Lender under the Note or Loan Documents; provided, however, that Lender hereby credits to Borrower One Hundred Thousand Dolars ($100,000) against any sums otherwise due and owing under the Note. The Parties agree that, after application of the $100,000 as contemplated herein: (i) the outstanding balance due under the Loan Documents shall be Seven Hundred

> Seventy Nine Thousand Sixty-Six and 69/100 Dollars ($779,066.69) as of December 6, 2017 (a principal balance of $400,000 and interest in the amount of $379,066.69). Each party agrees that except for the application of $100,000.00 against any sums due and owing under the Note, all provisions of the Note are hereby ratified and confirmed. This paragraph 8 shall survive the Closing.

Nothing in the document references a due date or states when and how funds are allegedly to be paid. There is no reference to reviving the SOL.

When entering the three February 5, 2024 (Da12-43) orders at issue, the motion court did not consider the following citations to the record, which is quoted verbatim from Mr. Shahar's memorandum of law[4] (Da968), which the motion judge advised His Honor read prior to commencing oral argument (2/2/24 tr. 2:19-21):

a) "Mr. Mekkawy knew that Mr. Shahar could not read or understand legal documents on his own, and throughout their relationship, Mr. Mekkawy prepared documents for Mr. Shahar to sign (Da373);

b) The document (executed within a month of their assignment of the note to the Plaintiff for no consideration) was represented to be a deed to transfer the referenced property (on which the Grecos held a mortgage) in full satisfaction of any and all obligations owed to the Grecos (Da417-8);

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[4] Except where text is noted as omitted, and where citations are modified to reflect the location in the Appelate appendix.

c) Mr. Shahar, who had lost his life savings in the underlying transactions, had no reason whatsoever to reaffirm an obligation to the Grecos (Da376);

d) Mr. Shahar was not given a copy of the document to review before he signed it (Da417-8);

e) Mr. Shahar was not presented with the complete document when he signed it (Da375-6; 418);

f) […];

g) Mr. Shahar was not represented by counsel or given the opportunity to obtain counsel before signing the document (Da418); and

h) […].

i) […].

Mr. Shahar testified that Saleh Mekkawy requested that he come to the office and sign what was represented to be a document to transfer the remaining Deer Haven parcel to the Grecos so they could close the company (Da376). Salah Mekkawy represented that Deer Haven was conveying the property to the Grecos, and closing the company with no further obligations to anyone including the Grecos (Da375-6; 417-8).

He further testified (Da418):

"A. He [Salah Mekkawy] said to me, We are going to transfer this deed, this land, to the Grecos, and we are done with this company and everybody is going

home."

Mr. Shahar testified that he did not even understand the meaning of the 'Deed in Lieu Agreement' until after the Plaintiff sued him (Da375-6; Da418). Mr. Shahar testified that he considered Mr. Mekkawy to be "my partner, my best friend, my mentor," and that he trusted Salah Mekkawy to prepare the documents he did not understand (Da416). This was consistent with how the parties operated regarding their initial investment together, where they made a $1.4 million profit that they rolled into the Pennsylvania project (Da422). Mr. Mekkawy capitalized on that trust and confidence to induce Mr. Shahar to sign the document.

It is respectfully submitted that, had the motion judge considered Mr. Shahar's aforementioned deposition testimony, the court could not have found as a matter of law an implication that Mr. Shahar intended to revive the SOL and pay the full amount allegedly owed on the Greco note, unconditionally and on demand.

The 'Deed in Lieu Agreement' contained one other important provision. It declared that New Jersey law applied (Da80). The original Greco Note stated that Pennsylvania law applied (Da72).

The Lawsuit

On May 14, 2018, Salah Mekkawy caused his long-time counsel to file this lawsuit on the Greco note, with his wife Claire as the plaintiff. This was months after he induced Mr. Shahar to sign the 'Deed in Lieu' Agreement. Not surprisingly, the plaintiff never sued Salah Mekkawy, even though he was an alleged obligor on the same documents as Mr. Shahar. She did not sue Deer Haven either. Mr. Shahar joined Salah Mekkawy and Deer Haven as third party defendants.

In case any doubt existed, in her partial opposition to Mr. Shahar's motion for reconsideration, the Plaintiff represented to the court (Da1007):

> "Claire remains married to Salah, and would not seek to collect the portion of the debt that is in excess of Sam Shahar's pro rata share."

The lawsuit proceeded. The parties completed discovery.[5] The Court eventually set a trial date.

The Summary Judgment Motions

On November 17, 2023, the Plaintiff filed her motion for summary judgment on the Greico note. A review of her motion papers, and supporting memorandum of law in particular[6], demonstrates that Plaintiff predicated her entire argument upon Pennsylvania law applying to this

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[5] Delays occurred because Mr. Shahar's first two attorneys became seriously ill in succession and were forced to retire from the practice of law. The Covid-19 pandemic then hit.

matter pursuant to the original Greco note. Indeed, her moving papers never address whether the purported 'Deed in Lieu Agreement' revived the otherwise time-barred claims under New Jersey law, even though the document stated that New Jersey law applies. Instead, the Plaintiff argued that Pennsylvania law applies; that the Greco note was signed under seal pursuant to Pennsylvania law; and therefore a twenty (20) year statute of limitations applies; that she thus filed this lawsuit in a timely manner under Pennsylvania law; and her claims were not barred by the SOL (Da520).

Salah Mekkawy simultaneously filed a motion for summary judgment on the third party complaint (Da538).

Mr. Shahar cross moved for summary judgment on the complaint and on his third party claims against Salah Mekkawy for indemnification and contribution (Da815). Mr. Shahar argued the applicability of New Jersey law. He also expended three pages of his memorandum of law setting forth the deceptive manner in which he was induced to sign the 'Deed in Lieu Agreement' (Da968-971). He also provided a detailed legal argument as to why the language of the 'Deed in Lieu Agreement' was insufficient to revive the SOL under New Jersey law. Given his cited deposition testimony regarding the execution of the 'Deed in Lieu Agreement', it is respectfully submitted that at a bare minimum, a factual dispute existed as to whether

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[6] The relevant briefs/memoranda of law are included in the appendix due to their direct relevance to the arguments at issue.

Mr. Shahar agreed to pay the full amount owed under the Greco note unconditionally and on demand.

In her reply papers, the Plaintiff briefly addressed the argument as to whether Mr. Shahar revived the SOL under New Jersey law. Her primary argument remained that Pennsylvania law applied; that the Greco note constituted a sealed instrument; and a twenty year SOL applied (Da985).

The motion judge heard oral argument on February 2, 2024. The motion judge represented that he read all of the papers submitted and was fully familiar with the pleadings (2/2/24 tr. 4:19-21). The oral argument contained a lengthy discourse as to whether the Deed in Lieu Agreement contained the requisite language to revive the SOL under New Jersey law (2/2/24 tr. 12:5-23; 19:15-23:9; 25:3-21).

The Motion Court's Rulings

The motion judge granted plaintiff's summary judgment motion in its entirety, both granting summary judgment on the first count of her complaint on the promissory note and dismissing any counterclaims against her. The motion court also granted partial summary judgment to Salah Mekkawy on the third party complaint, dismissing all but Mr. Shahar's third party claims for contribution.

As a preliminary matter, the motion judge held that New Jersey law applies. Noting the conflict between the original note and the 'Deed in Lieu

Agreement', the motion court correctly construed the document against the drafter and applied New Jersey law and it's six year SOL (Da28).[7]

In his Statement of Reasons ("SOR"), the motion judge admits the Court disregarded any evidence in the record that is not included in the statement of material facts. After oral argument, the motion court took all matters under advisement and reserved decision. The motion court issued its orders and statement of reasons dated February 5, 2024 (uploaded on February 6, 2024)(Fa12-43).

The plaintiff never argued that the record contained evidence that Mr. Shahar agreed to pay the full amount of the debt unconditionally and on demand. Mr. Shahar's deposition testimony that he did not understand the document, that he lost his life savings on the Palymira project; and that he thought conveying the remaining property to the Grecos was for the purpose of closing out the company; and that doing so satisfied all obligations relating to the Greco note, at a bare minimum created a material factual dispute.

It is respectfully submitted that nothing in the Deed in Lieu Agreement or anything else in the record states that Mr. Shahar agreed to

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[7] The Clemente Mueller firm advised that it represented Salah Mekkawy individually and not the plaintiff when it drafted the 'Deed in Lieu Agreement'. The motion judge inherently recognized the marital unity acted in concert with each other, as the plaintiff testified she had, at most, passive participation regarding the drafting of the document. The motion court

pay anything on the Greco note beyond honoring the prior agreement to convey the remaining lot to the Grecos. Nothing in the record sets forth an explicit or an implied agreement for Mr. Shahar to pay the Greco note in full, unconditionally and on demand (or that he had the ability to do so).

To get past this obvious deficiency, the motion judge buried perhaps his most important ruling, in footnote 7 of his SOR. On pages 16-17 of its SOR (Da30), the Court ruled that Mr. Shahar revived the SOL by signing the 'Deed in Lieu Agreement'. To do so, the motion court *sua sponte*, raised the issue that when no maturity date is stated on a promissory note, it is payable on demand as a matter of law (Da30). The Court then extrapolated that into a finding that Mr. Shahar agreed to pay the original Note on demand by signing the deed in lieu agreement. Of course, the motion court provided no explanation as to how Mr. Shahar would know New Jersey law (or that New Jersey law even applied)(Da30).

At a bare minimum, the testimony that the motion judge willfully disregarded demonstrated a genuine issue of material fact as to whether Mr. Shahar agreed to pay the full balance allegedly owed on the note, on demand and without condition.

Ironically, the Plaintiff's reply brief addresses and even quotes some of the same language of Mr. Shahar's opposition brief that the motion judge

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inconsistently ignored the realities of their relationship when it afforded her holder in due course status.

refused to consider (Da992). Nevertheless, In his SOR on Mr. Shahar's motion for reconsideration, the motion judge confirmed he ignored any allegation of Mr. Shahar for which he failed to list with a reference to the record in his response to the Plaintiff's statement of material facts (Da50, fn. 1).

In its SOR, the motion court recognized that, but for the deed in lieu agreement, the statute of limitations had expired (Da29-30). The motion court also mischaracterized the conveyance of the land as a "partial payment" and a credit against the amount owed (Da30). Of course, absent the 'Deed in Lieu Agreement, nothing was owed. It is respectfully submitted that unknowingly reinstating a time-barred obligation by simultaneously receiving a credit worth approximately 1/10th of the alleged obligation is not a benefit.

It is respectfully submitted that most attorneys reading the document would not make such an extrapolation. To presume (contrary to Mr. Shahar's previously cited deposition testimony) that Mr. Shahar intended to agree to pay the note unconditionally and on demand is illogical, and contrary to New Jersey's public policy of favoring application of the statute of limitations.

The motion judge also admittedly searched the record to find that the Plaintiff was a holder in due course of the Greco note (Da31). It is respectfully submitted that, if the motion judge considered even the same

deposition testimony of Mr. Shahar that the Plaintiff cited in her reply brief, the motion judge could not possibly have determined as a matter of law that Mr. Shahar expressly or implicitly exhibited any intent to repay anything. Indeed, it is respectfully submitted that the only conclusion the Court could have reached is that Mr. Shahar did not revive the SOL despite the Mekkawy family shenanigans.

PROCEDURAL HISTORY

The Plaintiff filed her complaint against Mr. Shahar on or about May 3, 2018 (Da64). She did not name Salah Mekkawy or Haven Development, LLC as defendants. Mr. Shahar's prior counsel filed an answer on or about August 3, 2018 (Da91).

On November 8, 2019, with the leave of the Court, Mr. Shahar filed an amended answer and counterclaim and third party complaint, joining Salah Mekkawy and Haven Development, LLC as third party defendants. (Da98). Plaintiff filed an answer to the counterclaim on January 7, 2020 (Da98)[8]. The third party defendants filed their answer to the third party complaint on January 7, 2020 (Da553).

Mr Shahar deposed Claire Mekkawy on September 9, 2021 (Da202), and Salah Mekkawy on December 10 & 14, 2021 (Da232 and 302). The

[8] Erroneously dated January 7, 2019.

plaintiff and third party defendants deposed Mr. Shahar on December 17, 2021 and January 14, 2022 (Da334 & 412).

On November 17, 2023, plaintiff filed a motion for summary judgment on her complaint and to dismiss Mr. Shahar's counterclaims (Da59). Almost simultaneously on that date, the third party defendants filed a motion for summary judgment dismissing the third party complaint (Da538). On January 9, 2024, Mr. Shahar filed his opposition to the plaintiff's and third party defendants' motions for summary judgment and his cross motion for summary judgment (Da815). The plaintiff and third party defendants filed reply papers, and the motion court heard oral argument on February 2, 2024. On February 5, 2024, the motion court issued three orders with a combined statement of reasons (uploaded February 6, 2024) that: (a) granted plaintiff's motion for summary judgment on her complaint and dismissed Mr. Shahar's counterclaim; (b) granted third party defendants' motion for summary judgment on all but Mr. Shahar's claims for contribution; and (c) denied Mr. Shahar's cross motion for summary judgment (Da12-43).

On February 6, 2024, Mr. Shahar filed a motion for reconsideration (Da999). On March 7, 2024, the Plaintiff and third party defendants filed partial opposition to the motion for reconsideration (Da1005 & 1008). Both the plaintiff and third party defendants agreed that the aspect of Mr. Shahar's motion that sought reconsideration of the denial of the third party complaint

for contribution from Salah Mekkawy should have been granted, and any judgment modified accordingly. Despite the parties' agreement on the contribution issue, the motion court denied the motion for reconsideration in its entirety by order dated March 15, 2024 (Da44).

In the interim, the motion court entered a final judgment in plaintiff's favor and against Mr. Shahar on February 23, 2024 (Da52). The matter also had a trial date on Mr. Shahar's third party claims against Salah Mekkawy and Haven Development.

The parties settled the contribution claims, and submitted a consent order in accordance therewith. The Court entered the consent order on April 24, 2024 (Da54). The Court entered an amended judgment against Mr. Shahar on May 2, 2024, in accordance with the terms of the April 24, 2024 consent order. Mr. Shahar filed his notice of appeal on May 21, 2024 (Da1).

ARGUMENT

I. THE PURPORTED DEED IN LIEU AGREEMENT WAS INSUFFICIENT TO REVIVE THE STATUTE OF LIMITATIONS AS A MATTER OF LAW, AND THE MOTION COURT ERRED BY GRANTING PLAINTIFF'S MOTION AND DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT (Da00012 – Da00041)

A. The Plaintiff's Burden of Proof

As this appeal arose from the motion court's orders granting and denying summary judgment, this court should review its findings pursuant to that standard. E.g., RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). As the issue of reviving the SOL is mixed of fact and law, de novo review is required. Id.

As the motion court recognized (Da30), it is well settled that to revive a statute of limitations after it runs, the agreement must support an implication that the alleged obligor acknowledged the debt and agreed to pay the full amount immediately and upon demand. Denville Amusement v. Fogelsen, 84 N.J.Super. 164 (App.Div. 1964); Burlington Cty. Country Club. V. Midlantic Nat'l Bank, 223 N.J.Super. 227, 235-6 (Ch.Div. 1987); accord Shalit v Shalit, 217 N.J.Super. Lexis Unpub. 2996, p. 5-6 (App.Div. 2017) (Da954). Furthermore, the promise to make payment must be "unconditional and unqualified" to remove the bar of the statute. Shalit, supra, at p. 6, citing Evers v. Jacobsen, 129 N.J.L. 259, 261 (E &A 1942).

The party seeking to revive the Statute of Limitations after it has run must demonstrate that the other party's written promise was to pay the full amount due immediately or on demand. Denville, supra, 84 N.J.Super. at 170. Burlington, supra, 223 N.J.Super. at 235-6; Shalit, supra, (Da956)

Similarly, if relying upon a partial payment, the party seeking to revive the statute must establish the other party's intention to pay the entire claim in full and on demand. Mere partial payment is not enough to revive the statute. Id.; Evers, supra, 129 N.J.L. at 89-90 (partial payment insufficient to revise statute on balance of debt); Bassett v. Christensen, 127 N.J.L. 259, 261 (E&A 1941)(payment not an acknowledgment to owing the balance of an alleged debt).

The Evers case is particularly demonstrative. In Evers, the alleged obligor made a partial payment to the oblige after the SOL had run, and sent a letter promising to "send you more as and when I can". The Court held the same insufficient to constitute an agreement to pay the debt unconditionally and on demand, either by promise or partial payment. The Court held that neither the payment nor the promise revived the SOL.

New Jersey's courts have also consistently stated that their tendency is to favor application of the statute of limitations and against construction that would avoid application of the statute. Denville, supra, 84 N.J.Super. at 170. Burlington, supra, 223 N.J.Super. at 235; Shalit, supra, p. 6.

B. The 'Deed in Lieu Agreement' Does Not Contain All Elements Required To Revive the SOL as a Matter of Law

Article 8 of the 'Deed in Lieu Agreement' is the sole basis by which Mr. Shahar allegedly agreed to revive the SOL. Article 8 does not state that Mr. Shahar (and Saleh Mekkawy or Deer Haven) agreed to pay the full amount remaining on the note immediately, unconditionally or on demand. Indeed, Mr. Shahar testified that he signed the "Deed in Lieu Agreement" for the sole purpose of allowing Deer Haven to divest its remaining real estate and in manner he believed had been effectuated years earlier. Mr. Shahar also testified that he lacked the ability repay the funds had anyone actually demanded that he do so.

C. The Motion Court Committed Reversible Error by Making *Sua Sponte* Findings that Gave the 'Deed in Lieu Agreement' New Meanings that are not Set Forth Therein

As the motion judge himself noted, it is not the motion court's function to make a better contract for the parties than they negotiated for themselves (Da19-20), citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960).

Given the shortcomings of the 'Deed in Lieu Agreement', the motion judge should have ruled that the document was insufficient to revive the SOL as a matter of law, granted Mr. Shahar's cross motion for summary

judgment, and dismissed the complaint with prejudice. Instead, the motion judge made critical *sua sponte* findings on issues that the Plaintiff did not raise, and which are unsupported by the record.

The record is simply devoid of anything that shows Mr. Shahar agreed to pay anything without condition or on demand. The motion judge determined that under New Jersey law, when the agreement between the creditor and debtor is silent as to when a debt is due, the debt is payable on demand, and then extrapolated that into an extension of the maturity of the original Greco note. (Da30). The Plaintiff's attorneys easily could have written a provision in the Deed in Lieu Agreement that expressly extended the maturity date of the Greco note. They did not do so. The Deed in Lieu Agreement could have stated that the obligors agreed to pay the balance owed unconditionally and on demand. No such provision is in the document.

Throughout the oral argument of the summary judgment motion, the plaintiff and Salah Mekkawy argued that Pennsylvania law applied. To enter the three February 5, 2024 orders, the motion court needed to inherently find that Mr. Shahar knew the applicable statute made the Greco note a demand note after its extended maturity date passed, to find that Mr. Shahar agreed to pay the balance of the Greco note unconditionally and on demand. The record reflects, however, that a dispute existed as to which law applied until the Court issued its February 5, 2024 orders and SOR. There is

no evidence in the record that Mr. Shahar agreed to pay any obligation on demand, let alone that he knew the law of multiple jurisdictions (or that they are the same).

Imputing knowledge of New Jersey case law to a person who testified that he could not read or understand legal documents is a substantial stretch at best.

The motion judge also disregarded Mr. Shahar's deposition testimony that it was his understanding that the parties agreed to convey the same property to the Grecos years earlier in full satisfaction of any debt allegedly owed to them; that he agreed to sign the document based upon that representation and to close down the company; and that he believed the transfer to the Grecos constituted full satisfaction of any debt owed to them, and not a "partial payment". Da30.

The plaintiff never addressed the issue of whether Mr. Shahar agreed to pay the amount allegedly owed in full and on demand (although she cited testimony showing that he did not on page 7 of her reply brief). Even without considering Mr. Shahar's aforementioned deposition testimony, it is respectfully submitted that the motion court erred by *sua sponte* charging Mr. Shahar with knowledge that the 'Deed in Lieu Agreement' revived the note and converted it to a payable on demand obligation as a matter of law.

Mr. Shahar gave uncontradicted testimony at this deposition that Mr. Mekkawy deceived him into signing the 'Deed in Lieu Agreement'; that Mr.

Mekkawy represented that he was satisfying any obligations to the Grecos in full when he signed the document; that he had no intention of paying anything further; and to the extent he was actually presented with the full document and able to read it without his glasses, he did not understand it.

As the Court recognized in footnote 7, New Jersey trends against finding for a revival of a statute of limitations. It is respectfully submitted that the motion court erred by making findings that contravene that public policy. This is particularly true where the Plaintiff failed to raise the issue, and the record demonstrates that Mr. Shahar had no knowledge that he was reviving a time-barred debt, let alone agreeing to pay that debt on demand.

D. The Motion Court Correctly Ruled that New Jersey Law Applied

A simple review of the plaintiff's opening memorandum of law confirms she relied upon the Court applying Pennsylvania law and its twenty-year SOL for sealed instruments. Although the note itself says Pennsylvania law governs, the 'Deed in Lieu Agreement' says that New Jersey law governs. The Plaintiffs' attorneys in this litigation and who purportedly represented Salah Mekkawy individually for the 'Deed in Lieu Agreement' prepared that document.

The motion court correctly held that any ambiguity must be construed against the drafter of the documents. As the contrasting choice of law

provisions create a clear ambiguity, the motion judge correctly construed the ambiguity against the drafter and held that New Jersey Law applies to this matter. See e.g., Schor v FMS Financial, 357 N.J.Super. 185, 193 (App.Div. 2002) (ambiguities in contracts are strictly construed against the party who prepares the documents).

Furthermore, as the Plaintiff and Third Party Defendant brought this action and the companion Chancery Division Action in New Jersey, New Jersey's choice of law rules apply. McCarrell v. Hoffmann-LaRoche, 227 NJ 569, 583 (2017)("When a civil action is brought in New Jersey, our courts apply New Jersey's choice of law rules in deciding whether this State's or another state's statute of limitations governs the matter). New Jersey's courts weigh the contact with each state and which state has a greater interest in resolving the dispute to determine which state's statute of limitations applies. Id. at 585-7.

In the case at bar, Pennsylvania has no interest in resolving a dispute regarding liability under a promissory note of a defunct company involving two New Jersey residents.

II. The Motion Court Erred By Not Considering The Proffered Language from Shahar's Memo of Law In Opposition to the Summary Judgment Motions and In Support of the Cross Motion (Da00012 – Da00041)

If the motion judge's original statement of reasons left any doubt, the SOR for the motion denying Mr. Shahar's motion for reconsideration

confirmed that the motion judge refused to consider anything set forth in the briefs or record if the same were not individually listed in the statement of material facts (Da49). This is particularly egregious, as the motion judge found that the Plaintiff did not make the arguments at issue in her moving papers or include the necessary allegations in her statement of material facts (Da30).

The critical allegations are set forth in response to par. #5 of Plaintiff's statement of material fact. Citations to the record of those same facts are set forth in Mr. Shahar's memorandum of law.

New Jersey Courts recognize that the failure to submit numbered paragraphs on the summary judgment motion is not a material deviation from R. 4:46-2 when the material facts are set forth with citations to the record. Pressler & Verniero, New Jersey Court Rules, comment 1.2 to R. 4:46-2, p. 1517 (2024 ed.), citing Hancock v Boro of Oaklyn, 347 N.J.Super. 350, 362 (App.Div. 2002), app. diss. 177 NJ 217 (2003). Furthermore, a respondent's failure to comply with the specific provisions of R. 4:46-2 "will not justify a grant of the motion based on the assumption that the movant's statement of material facts is true when the record as a whole clearly shows a material dispute." New Jersey Court Rules, comment 1.2 to R. 4:46-2, p. 1517 (2024 ed.), citing Leang v Jersey City Bd., 399 N.J.Super. 329, 367 (App.Div. 2008), aff'd in part and rev'd in part on other grounds, 198 NJ 557 (2009).

Furthermore, the motion court is a court of equity. To the extent Mr. Shahar's opposition to the summary judgment motions failed to technically comply with R. 4:26-2(b), Shahar provided the relevant information with citations to the record in his opposition and at oral argument. R. 1:1-2 permits the Court to relax any rule in the interests of justice. It is axiomatic that an unjust judgment should not result due to a technical violation of a Court Rule. Pressler & Verniero, NJ Court Rules, comment #1 to R. 1:1-2, p.25 (2025 ed.).

The Plaintiff also suffered no prejudice from any technical violation of the Court Rules. On page #7 of her reply memorandum of law (Da991), she directly addressed Mr. Shahar's testimony about his believing the deed in lieu agreement satisfied in full any obligations under the Greco note. Plaintiff's own reply papers establish that the motion court's *sua sponte* finding that Mr. Shahar agreed to pay the note on demand is clearly erroneous.

The motion court used that erroneous finding as a basis to hold that the Plaintiff established as a matter of law all elements required to establish a revival of the statute. This finding is not only clearly erroneous, but the opposite is true – as a matter of law, Mr. Shahar established that all requirements were not met, and that he is entitled to summary judgment because the statute of limitations expired.

III. AT A BARE MINIMUM, A GENUINE ISSUE OF FACT EXISTS AS TO WHETHER THE 'DEED IN LIEU AGREEMENT' WAS THE PRODUCT OF FRAUD (Da00012 – Da00043)

The elements of fraud are well known. To establish a prima facie case of common law legal fraud, plaintiff must allege the following elements, "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Realtors, 148 NJ 582, 610 (1997), citing Jewish Ctr. Of Sussex v Whale, 86 NJ 619, 624-5 (1981). The party asserting the fraud bears the burden of proving that fraud through clear and convincing evidence. Scholastic Decisions v DiDomenico, 236 N.J. Super. 388, 395, (App. Div. 1989), certif. denied, 121 N.J. 607, (1990).

As set forth above, Mr. Shahar set forth numerous circumstances surrounding the execution of the 'Deed in Lieu Agreement' that show Mr. Mekkawy procured Mr. Shahar's signature by fraud for his wife's benefit. Even if the Court does not charge Plaintiff with that knowledge, at a bare minimum, the motion court erred by dismissing Mr. Shahar's third party complaint for fraud against Mr. Mekkawy. Such fraud also entitles Mr. Shahar to full indemnification from Mr. Mekkawy, and not just contribution.

Mr. Shahar clearly made out a case of fraud against Mr. Mekkawy. Mr. Shahar alleged that Mr. Mekkawy misrepresented the document as

merely being a deed that resolved all claims regarding the Grecos and the Greco note. Mr. Shahar testified that he reasonably relied upon those misrepresentations when signing the deed in lieu agreement. Now that the Court has granted summary judgment to the Plaintiff, he has damages in the amount of the judgment the Court will enter/has entered in Claire Mekkawy's favor.

The motion court erred by dismissing Mr. Shahar's third party claims for fraud and indemnification.

IV. THE SOL IS NOT A PERSONAL DEFENSE AGAINST ENFORCEMENT OF A PROMISSORY NOTE (Da00012 – Da00043)

There is no dispute that, but for the 'Deed in Lieu Agreement', the SOL to file suit on the Greco note expired several years before the Grecos allegedly assigned the Greco note to the plaintiff. When filing her complaint, the plaintiff notably attached the first addendum to the original Greco note. The plaintiff treated the 'Deed in Lieu Agreement' as a separate document in her complaint.

The fact that the SOL already ran prior to the assignment is available on the face of the note and first addendum. It is not a personal defense of which a holder in due course would have no knowledge (Da49-50). The motion court erred by finding to the contrary.

V. THE MOTION COURT ERRED BY FINDING THE PLAINTIFF IS A HOLDER IN DUE COURSE AS A MATTER OF LAW (Da00012 – Da00041)

It is beyond peradventure that Salah Mekkawy orchestrated the entire chain of events pertaining to the execution of the 'Deed in Lieu Agreement' and this lawsuit. His undisputed goal was to try and launder the Greco note through his wife, and have her claim ignorance. Plaintiff's alleged ignorance of everything that occurred under the circumstances is questionable at best, and creates a significant credibility issue that is inappropriate for summary judgment

The motion court itself held that the plaintiff asserted that she is a holder in due course without making any citation to the record to support her position (Da30). The Court nevertheless chose to search part of the record to afford her that status as a matter of law (Da31).

A holder in due course is one who takes a negotiable instrument for value, in good faith and without notice of any defense or claim against it. N.J.S.A. 12A:3-302; N.J.S.A. 12A:3-102(1)(e); Carnegie Bank v Shallek, 256 N.J.Super. 23, 33 (App.Div. 1992).

The holder in due course doctrine is the UCC codification of the bona fide purchaser doctrine. As the Court held in Harney v. First Nat'l Bank, 52 N.J.Eq. 697, 704 (Ch. Div. 1894):

> "The well-settled and only ground upon which a person dealing with the holder . . .is permitted from him to obtain clear title . . .is that he parts with something of value . . . .This is the very nature of bona fide purchaser. The rule is universal in equity, that in order to constitute a person a bona fide purchaser for value, he must have parted with something either in the way of money or valuable thing ...[and] must have altered his position irretrievably.

The assignment itself references that any consideration was nominal (ten dollars). The plaintiff's own deposition testimony confirms that she received the assignment of the note to collect it for her infirm parents because of their health issues:

> "I think he was more concerned about his health at that time and staying alive. And he gave it to me
> so he wouldn't have to worry.")(Da211).

The Plaintiff never even alleges that she paid the nominal consideration referenced. At a bare minimum, an issue of fact existed as to whether the plaintiff gave consideration for the note.

Furthermore, Salah Mekkawy testified that the attorneys represented him individually for the preparation of the assignment to which he was not a party. Plaintiff testified that she knew almost nothing about the loan when it was made; who was obligated to repay it; and why such obligations existed. This testimony raises such serious credibility questions that the motion court erred by not considering the entire record and finding the plaintiff was a holder in due course as a matter of law.

VI. THE MOTION COURT COMMITTED REVERSIBLE ERROR BY GRANTING SALAH MEKKAWY SUMMARY JUDGMENT ON MR. SHAHAR'S THIRD PARTY CLAIM FOR INDEMNIFICATON (Da00012 – Da00043)

The motion court erroneously granted Salah Mekkawy's summary judgment motion as to the third party claims for indemnification while denying the claims for contribution.

It is axiomatic that partners owe each other a fiduciary duty. Salah Mekkawy was Deer Haven's managing member (Da937). This is a court of equity.

In the case at bar, regardless of what the Court determines about plaintiff's knowledge and culpability, it is beyond peradventure that Salah Mekkawy orchestrated the preparation and execution of the relevant documents. He did so with the obvious intent of creating a situation for his wife sue Mr. Shahar. He made material misrepresentations to Mr. Shahar with the intent that Mr. Shahar rely upon those misrepresentations and sign the 'Deed in Lieu Agreement' and revive an otherwise time-barred debt. The plaintiff acknowledged she would never sue her husband.

Salah Mekkawy breached his fiduciary duties to both Deer Haven and Mr. Shahar. He did so while sitting under his wife's protective umbrella, secure in the knowledge he would not face the consequences he intended for his equal partner in Deer Haven.

At a bare minimum, an issue of fact existed as to whether Mr Shahar is entitled to indemnification and not just contribution from Salah Mekkawy. The motion court committed reversible error by granting summary judgment to Salah Mekkawy on the third party claims for indemnification.

CONCLUSION

For the foregoing reasons, Appellant Sam Shahar respectfully requests that the Court reverse the motion court's 3 orders dated February 5, 2024 and vacate the judgment predicated thereon dated February 23, 2024, as modified by the amended final judgment dated May 2, 2024. Mr. Shahar also respectfully requests that the court grant summary judgment in his favor and against plaintiff-respondent Claire Mekkawy dismissing the complaint with prejudice. In the alternative, Mr. Shahar requests that the court remand this matter for a trial on all issues of material fact.

Most Respectfully submitted,

THE FEINSILVER LAW GROUP, P.C.

By: _____
H. Jonathan Rubinstein

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-002884-23-T4

CLAIRE MEKKAWY, Plaintiff, v. SAM SHAHAR, Defendant / Counterclaimant / Third-Party Plaintiff, v. SALAH MEKKAWY; HAVEN DEVELOPMENT, L.L.C., Third-Party Defendants.	:	**CIVIL ACTION** ON APPEAL FROM ORDERS DATED FEBRUARY 5, 2024 (3), FEBRUARY 23, 2024, MARCH 15, 2024 AND MAY 2, 2024 OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET No. MRS-L-000855-18 Sat Below: HON. NOAH FRANZBLAU, J.S.C.

BRIEF ON BEHALF OF THIRD-PARTY DEFENDANTS

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PRELIMINARY STATEMENT

The Complaint filed by Plaintiff Claire Mekkawy ("Claire") sought recovery on a Promissory Note against Defendant/Third-Party Plaintiff Sam Shahar ("Shahar"). The note was originally between Arthur Greco and Viola Greco, Claire's parents, who gave her an assignment in 2018.

Salah Mekkawy and Claire are married. Salah and Shahar were business partners in Deer Haven, LLC and were pursuing a real estate development project in Pennsylvania in the early 2000s. The Promissory Note provided funds towards the ongoing real estate project.

In response to the Complaint, Shahar filed a Counterclaim and Third-Party Complaint on November 8, 2019 against Claire and Third-Party Defendants Haven Development, L.L.C. and Salah Mekkawy ("Mekkawy").

The Counterclaim and Third-Party Complaint contained Five Counts. Dismissal of Counts I, III, IV, and V were not opposed by counsel for Appellant/Defendant at the trial court level. The trial court properly dismissed these counts for the reasons set forth in the motion papers. The trial court's decision relating to these counts are not the subject of this appeal and should be left undisturbed. The only Count that had any direct bearing on the underlying Promissory Note Complaint was Count II which sought

indemnification and/or contribution from Mekkawy for any judgment entered against Shahar in the Promissory Note litigation. At the trial court level, it was argued on summary judgment that the claim for indemnification must be dismissed as Shahar was not an innocent party whose liability is secondary. The trial court agreed, and properly dismissed the majority of the Third-Party Complaint with prejudice. Shahar is entitled to pursue his claim for contribution as Mekkawy is a co-signatory on the Promissory Note.

Following summary judgment motions, the only remaining third-party claim, the claim for contribution, was resolved by consent order. The consent order agreed to 50% contribution by the Third-Party Defendants and dismissed the Third-Party Complaint with prejudice. As such, Third-Party Plaintiff does not have standing to appeal any portion of the dismissal of the Third-Party Complaint and his appeal must be denied.

PROCEDURAL HISTORY

On May 4, 2018, Claire filed a civil complaint against Defendant/Third-Party Shahar seeking repayment of a promissory note. (Da00064).

On November 8, 2019, Shahar filed an Amended Answer with Counterclaims and Third-Party Complaint. (Da00098).

On January 7, 2020, Third-Party Defendants filed an Answer with Affirmative Defenses, including statute of limitations, to the Third-Party Compliant. (Da00552).

On November 17, 2023, Plaintiff filed a motion for summary judgment on her Complaint and to dismiss Defendant's counterclaims. (Da00059)

Also on November 17, 2023, Third-Party Defendants filed a motion for summary judgment relating to the Third-Party Complaint.[1]

On January 9, 2024, Shahar filed an opposition to the Plaintiff's and Third-Party Defendants' motions for summary judgment and his own cross motion for summary judgment. (Da815).

The motion court heard oral argument on February 2, 2024. (T1).

On February 5, 2024, the motion court issued three orders with a combined statement of reasons that: (a) granted Plaintiff's motion for summary judgment on her complaint and dismissed Shahar's

[1] Third-Party Defendants' motion sought to dismiss all counts except for the claim for contribution.

counterclaim; (b) granted Third-Party Defendants' motion for summary judgment on all but Shahar's claims for contribution; and (c) denied Shahar's cross motion for summary judgment. (Da0012-00043).

On February 23, 2024, the motion court entered a final judgment in plaintiff's favor and against Shahar. (Da00052).

The parties settled the contribution claims, and submitted a consent order in accordance therewith, which was granted by the Court on April 24, 2024. (Da00054).

The Court entered an amended judgment against Shahar on May 2, 2024, in accordance with the terms of the April 24, 2024 consent order. (Da00057)

Shahar filed his notice of appeal on May 21, 2024. (Da0001).

STATEMENT OF FACTS

This matter arose from Plaintiff Claire Mekkawy ("Claire") filed the instant action against Defendant/Third-Party Plaintiff Sam Shahar ("Shahar") seeking repayment of a promissory note on May 4, 2018. (Da00064-Da00090). On November 8, 2019, Shahar filed an Amended Answer with Counterclaims and Third-Party Complaint. (Da00098-Da00110). On January 7, 2020, Third-Party Defendants Salah Mekkawy and Haven Development, L.L.C. ("Mekkawy") filed an answer with affirmative defenses, including statute of limitations, to the Third-Party Compliant. (Da00552).

Shahar and Mekkawy were co-signers on the Promissory Note at issue in Claire's Complaint. (Da00064-Da00090). Shahar and Mekkawy were partners in Deer Haven LLC. (Da00565-Da00597) and (Da00232-Da00301; 30:7-30:30:16).

Deer Haven LLC was formed in December 1999 for the purpose of acquiring, developing, and operating real estate. (Da00565-Da00597) and (Da00232-Da00301; 21:16-22:23).

Shahar presented the idea of using Deer Haven LLC to invest in a real estate development project in Palmyra, Pennsylvania in the early 2000s, and Mekkawy agreed. See (Da00232-Da00301; 30:7-30:30:16).

In addition to themselves, Shahar and Mekkawy obtained loans and investments from multiple individuals to fund the Pennsylvania

development project. (Da00412-Da00472; 205:8-207:25, 210:17-215:23).

The Promissory Note which is the subject of this litigation was a loan to obtain additional funds for the PA real estate investment. (Da00232-Da00301; 71:16-71:24).

In May 2009, the Baratta Plaintiffs, who were investors in the Pennsylvania project, filed a lawsuit against Deer Haven, LLC, Mekkawy, and Shahar, alleging Breach of Contract, Breach of Good Faith and Fair Dealing, Tortious Interference, Breach of Fiduciary Duty, Fraud in the Inducement/Rescission, Consumer Fraud, Unjust Enrichment, Constructive Trust, and Fraudulent Conveyance. (Da00598-Da00616).

In 2010, Deer Haven, LLC was in the process of liquidating and winding the company up. (Da00232-Da00301; 100:24-101:9).

As part of the Baratta litigation, Defendants Deer Haven, Mekkawy, and Shahar were represented by counsel and they denied the allegations asserted by the Baratta Plaintiffs. (Da00617-Da00635).

Shahar testified over the course of three days in the Baratta litigation. (Da00636-Da00697; Da00698-Da00763; and Da00764-Da00807). Shahar testified regarding detailed aspects of the development project including how the funds from investors was being used. (Da00636-Da00697; 67:23-69:2). Shahar was aware of the allegations against him in the Baratta Litigation. (Da00636-

Da00697; 25:20–33:15). Shahar was aware that Mekkawy was funding Deer Haven, LLC in the years prior, that Deer Haven, LLC was in financial troubles, and that Mekkawy was making legal payments. (Da00764–Da00807; 54:11–55:8).

Shahar has certified in discovery that documents proving Shahar's claims against Mekkawy on Counts III and IV asserted in the counterclaim and Third–Party Complaint arose from the same ongoing real estate investment and related transactions which occurred 2000–2009. (Da00180–Da00191, Da00192–Da00201, and Da00490–Da00519).

The email from 2009 which Shahar references is an email from Mekkawy to Shahar's personal account on which Shahar was copied and which discusses loans and adjustments to the ledger. (Da00490–Da00519; Da00302–Da00411, 232:7–233:12; Da00412–Da00472, 220:3–221:2).

Despite acknowledging that Rappaport was his personal accountant since he came to the United States, he introduced him to Mekkawy, and he was copied on emails, Shahar still claims that he was not involved with the Deer Haven, LLC accounting between Mekkawy, Rappaport, and Mekkawy's secretary/office manager. (Da00412–Da00472; 218:4–221:2).

Shahar testified that he was never credited for $500,000 which he was allegedly entitled to in the early 2000s. (Da00412–Da00472; 197:6–200:9).

Shahar was unable to articulate damages as to him at his deposition. (Da00412–Da00472; 205:8–205:21).

Shahar testified in the instant litigation that the transactions which form the basis of Counts III and Count IV of the Complaint occurred during the early 2000s. (Da00412–Da00472; 205:8–207:25; 210:17–215:23).

Third Party Defendants moved for summary judgment on all counts of the Third–Party Complaint with the exception of the claim for contribution. (Da00538– Da00539).

The only portion of Third–Party Defendant's motion which Third Party Plaintiff opposed was the dismissal for the claim for indemnification. (Brief omitted pursuant to Rule 2:6–1(a)(2)).

On April 24, 2024, a executed a consent order was entered which, in relevant part, resolved the claim for contribution and dismissed the Third–Party Complaint with prejudice. (Da00054).

STANDARD OF REVIEW

The Appellate Division's standard of reviewing a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). If there is no genuine issue of material fact, the Court must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007).

LEGAL ARGUMENT

POINT I
THE COURT'S ORDER DISMISSING THE CLAIM FOR INDEMNIFICATION SHOULD BE AFFIRMED

The Court properly considered the legal arguments set forth in the undersigned's original application for summary judgment with respect to the claim for indemnification.

A. The Trial Court Correctly Applied the Law with Respect to Shahar's Claim for Indemnification

Count II of the Third-Party Complaint asserted a common law claim of indemnification against Mekkawy for all amounts found to be owing should Shahar be found liable on Claire's promissory note.[2] Third-Party Defendant sought dismissal of the portion of the Count which sought indemnification because Shahar is not entitled to indemnification under New Jersey case law.

It is well-settled that indemnity may not ordinarily be obtained by a party who has been at fault. Ramos v. Browning Ferris Industries, 103 N.J. 177, 190-191 (1986); Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 566 (1980). At common law, one who was "actively" negligent could not be indemnified and therefore could not recover counsel fees from an indemnitor. Central Motor v. E.I. duPont de Nemours, 251 N.J. Super. 5, 13, (App. Div. 1991). It is the innocent party, whose liability is secondary and arises

[2] The Count asserts an alternative claim of contribution from Mekkawy for apportionment of damages on the Claire's promissory note. Mekkawy did not seek dismissal on the portion of the Count which asserts a cause of action for contribution.

out of the active wrongful conduct of another, who is entitled to indemnity. Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80 (1960).

Here, Shahar and Mekkawy were business partners in Deer Haven, LLC which was involved in a real estate development project from 2000 through 2009. (Da00565–Da00597; Da00598–Da00616; and Da00490–Da00519). During the course of the investment, additional funding was needed, and a Promissory Note was obtained from Arthur and Viola Greco in or around 2007. (Da00064–Da00090). Both Shahar and Mekkawy co-signed the Promissory Note. (Da00064–Da00090). Eventually, the Promissory Note was assigned to Claire. (Da00064–Da00090). Claire filed a Complaint against Shahar for repayment of the defaulted Promissory Note. (Da00064–Da00090).

Shahar seeks indemnification from Mekkawy on the note which is only permissible if Shahar is an "innocent party" whose liability is secondary and arises out of the wrongful conduct of another. This is impermissible. If Mekkawy had signed the note on behalf of himself and Deer Haven, LLC (of which Shahar was a member) and Claire filed a Complaint against only Shahar, then a Third-Party Complaint seeking indemnification against Mekkawy may have been appropriate. However, that is not the case. Shahar is a properly named defendant and has independent liability on the defaulted Promissory Note which forecloses him from being considered an "innocent party" and obtaining complete

indemnification from Mekkawy for any judgment attributed to Shahar on the note.

Shahar failed to present any factual or legal support in opposition to Third-Party Defendants' motion for summary judgment with respect to the claim for indemnification.

The motion judge granted Third-Party Defendants' motion for summary judgment on all counts except for the claim for contribution, including the claim for indemnification. (Da00012-Da00043).

"[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). A party opposing the motion must offer facts that are substantial or material in order to defeat the grant of summary judgment. Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954). "Bare conclusory assertions, without factual support in the record, will not defeat a meritorious application for summary judgment." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012); accord Puder v. Buechel, 183 N.J. 428, 440-41 (2005) ("Conclusory and self-serving assertions by one of the parties are insufficient to overcome the [summary judgment] motion."). "The opponent must 'come forward with evidence' that creates a genuine issue of material fact." Horizon Blue Cross Blue Shield of N.J., 425 N.J. Super. at 32.

At the trial court level, Third-Party Plaintiff failed to present any factual evidence or legal authority in opposition to the portion of Third-Party Defendants' motion for summary judgment which sought dismissal of the claim for indemnification. Therefore, the Trial Court was correct in denying the application for reconsideration of the dismissal of the Third-Party claim for indemnification.

In the instant appeal, Shahar, again, has failed to present any case law or facts supporting that the trial court committed a reversible error in its decision to dismiss the Third-Party claim for indemnification. Shahar attempts to argue that the alleged fiduciary relationship which existed between Shahar and Mekkawy somehow creates a basis for indemnification is without legal basis. Any alleged breaches of fiduciary duty by Mekkawy were dismissed on summary judgment as being barred by the statute of limitations and Third-Party Plaintiff did not oppose their dismissal at the trial court level. Therefore, he is unable to present these alleged fiduciary breaches on appeal as the basis for a claim for indemnification.

Shahar concludes that at a minimum, the decision of indemnification was an issue of fact for a jury. The question of whether indemnification is owed is a legal question – not a factual one. "[P]urely legal questions . . . are questions of law

particularly suited for summary judgment." Badiali v. New Jersey Mfrs. Ins. Group, 220 N.J. 544, 555 (2015).

Additionally, Shahar does not articulate any questions of fact which remain undetermined and requests that the decision denying his motion for summary judgment be reversed. He cannot both argue that questions of fact remain outstanding which would govern the dismissal of the Third-Party claim for indemnification and also argue that he is entitled to summary judgment as no material facts remain outstanding. Therefore, it was an issue ripe for summary judgment and properly decided at the trial level after discovery had concluded. Without any supporting case law or evidence to justify his assertion that the Trial Court errored, the appeal must be denied.

Accordingly, the Trial Court's decision to dismiss the claim for indemnification should be affirmed.

POINT II
THE ENTIRE FEBRUARY 5, 2024 ORDER DISMISSING THE MAJORITY OF THE THIRD PARTY COMPLAINT SHOULD NOT BE DISTURBED

Shahar concludes in his brief (Db38), that all three of the February 5, 2024 summary judgment orders should be reversed. This relief is inappropriate with respect to all portions of the Third-Party Defendants' order granting summary judgment on all claims except for the claim for contribution. As already articulated at length, Third-Party Plaintiff only opposed the portion of the Third-Party Defendants' Motion for Summary Judgment with respect to the claim for indemnification. Therefore, he is unable to appeal the remainder of the claims which were properly dismissed and unopposed below. Thus, the order relating to the granting of summary judgment in favor of third-party defendants must remain intact and Shahar is barred from seeking appellate review of any portion of the motion for summary judgment which was not opposed at the trial level.

POINT III
DEFENDANT/THIRD-PARTY PLAINTIFF'S DOES NOT HAVE STANDING TO APPEAL

Even if the Third-Party Plaintiff did present new facts or law in support of his argument that the Court errored in dismissing the Third-Party Count for indemnification, Third-Party Plaintiff is not entitled to appeal any component of the Third-Party Complaint.

Third-Party Plaintiff signed a properly executed consent order which resolved the only remaining count of the Third-Party Complaint, the claim for contribution, and it dismissed the Third-Party Complaint with prejudice. Third-Party Plaintiff did not reserve the right to appeal previously dismissed portions of the Third-Party Complaint in the executed consent order. The language in the consent order not only resolved the claim for contribution, which was the remaining cause of action, but it specifically dismissed the Third-Party Complaint with prejudice without reservation or exclusion.

It is a long-established principle of appellate jurisprudence in this State that an order consented to by the attorneys for each party is ordinarily not appealable. Winberry v. Salisbury, 5 N.J. 240, 255 (1950); see also N.J. Sch. Constr. Corp. v. Lopez, 412 N.J. Super. 298, 309 (App. Div. 2010); Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009). "This is because the rule allowing an appeal as of right from a final judgment contemplates a judgment entered involuntarily against the losing party." N.J. Sch. Constr. Corp., 412 N.J. Super. at 309 (citing Cooper Med. Ctr. v. Boyd, 179 N.J. Super. 53, 56 (App. Div. 1981)). Even when the consent order includes a clause preserving an issue for appeal, "the practice is disapproved of because it preempts the appellate court's authority to decide whether to hear an interlocutory appeal," improperly placing jurisdiction upon the

appellate court. Ibid. (citing Caggiano v. Fontoura, 354 N.J. Super. 111, 124 (App. Div. 2002)). Further, including a clause in a consent order that preserves the right to appeal does not automatically make the order appealable. Ibid. In Bass v. DeVink, 336 N.J. Super. 450 (App. Div. 2001), the parties consented to dismiss the matter to bypass the strict interlocutory appeal standards. Id. at 454–55. The Appellate Division noted that "a party cannot appeal from a judgment or order to which he consented". Id. at 455.

The Court in New Jersey Schools Constr. Corp. v. Lopez explained:

> Even where the so-called consent final judgment expresses a party's desire to preserve appellate review, the practice is disapproved of because it preempts the appellate court's authority to decide whether to hear an interlocutory appeal and it "'foist[s] jurisdiction'" upon the appellate court. Caggiano, supra, 354 N.J. Super. at 124, 804 A.2d 1193 (quoting CPC Int'l, Inc. v. Hartford Accident & Indem. Co., 316 N.J. Super. 351, 366, 720 A.2d 408 (App.Div.1998), certif. denied, 158 N.J. 73, 726 A.2d 937 (1999)). Indeed, simply "'[b]y saying that he reserved the right to appeal, the plaintiff cannot thereby make appealable an order otherwise unappealable.'" Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir.1996) (quoting Evans v. Calmar S.S. Co., 534 F.2d 519, 522 (2d Cir.1976)).
>
> New Jersey Schools Constr. Corp. v. Lopez, 412 N.J. Super. 298, 309 (App. Div. 2010).

Here, Third-Party Plaintiff is not able to revisit and appeal portions of the Third-Party Complaint which were dismissed on summary judgment as the entire Third-Party Complaint was dismissed with prejudice in the April 24, 2024 consent order. (Da00054). Therefore, any aspect of the appellant's application addressing the review of counts in the Third-Party Complaint must be denied in its entirety.

CONCLUSION

For the foregoing reasons, the Defendant's appeal with respect to the claim for indemnification and any residual issues relating to the Third-Party Complaint should be denied.

Respectfully submitted,

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Attorneys for Third-Party Defendants/Respondents

By: /S/ Jenna Clemente
Jenna Clemente

DATED: October 10, 2024

CLAIRE MEKKAWY, Plaintiff(s)/Respondent(s), vs. SAM SHAHAR. Defendant(s)/Counterclaimant/ /Third Party Plaintiff/ Appellant(s). vs. SALAH MEKKAWY, HAVEN DEVELOPMENT L.L.C. Third Party Defendant(s)/ Respondent(s)	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-002284-23 Civil Action ON APPEAL FROM ORDERS DATED FEBRUARY 5, 2024 (3), FEBRUARY 23, 2024, MARCH 15 2024, AND MAY 2, 2024 Sat Below: Hon. Noah Franzblau, J.S.C. Trial Court Docket No. MRS-L-000855-18

RESPONDENT'S BRIEF
PLAINTIFF/RESPONDENT CLAIRE MEKKAWY

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PRELIMINARY STATEMENT

This is an appeal from an action to recover on a Promissory Note. Salah Mekkawy and Claire Mekkawy are husband and wife. Salah Mekkawy and Sam Shahar were partners in a New Jersey LLC which was formed to develop a piece of land in Pike County, Pennsylvania. In 2007, Sam Shahar and Salah Mekkawy borrowed $400,000 at 12% simple interest from Arthur Greco and Viola Greco, and memorialized the loan in a promissory note dated December 13, 2007. (Da000473-Da000474). The Note was reaffirmed in a First Addendum dated December 13, 2008. (Da000475-Da000476). A Deed in Lieu Agreement was signed on December 7, 2017, in which Salah Mekkawy agreed to transfer land in exchange for a $100,000 credit against the note. (Da000477-Da000482). Because Arthur Greco and Viola Greco were in their 90s at that point, they assigned their interest in the note to Claire Mekkawy, their daughter, by an assignment instrument executed on January 30, 2018. (Da000483-Da000489). Claire brought this action against Sam Shahar to recover on the note. (Da000064-Da000075). Sam Shahar filed a counterclaim against Claire. (Da00103-Da00109). Claire moved for Summary Judgment on the counterclaim. (Da00059-Da00060). Summary Judgment was then properlyentered in Claire's favor on the note. (Da00012-Da00013). After

judgment was entered, Claire gave consent to a reduction of the judgment by half to account for her husband's contribution to the debt. (Da00054-Da00056).

Summary Judgment on the counterclaim against Claire was uncontested in the Trial Court, and is uncontested on this appeal. Therefore, we address the appeal of the trial court's grant of Summary Judgment on the note, only.

At this point, the action underlying this appeal is six (6) years old. While Sam Shahar has attempted to complicate and inject uncertainty into several relatively straightforward issues to skew perceptions, the fact remains that this is, and always has been, a simple action on a promissory note. That is to say, Sam Shahar agreed to borrow money from Claire's parents, delivered a promissory note as evidence of the debt, and never paid the money back. As a result, he was sued, and judgment was entered against him.

STATEMENT OF FACTS

On December 13, 2007, the Defendant, Sam Shahar signed a promissory note evidencing a debt of $400,000.00 to Arthur Greco and Viola Greco, which contained a choice-of-law clause favoring Pennsylvania law. (Da00473-Da00474). On December 13, 2008, the Defendant, Sam Shahar signed a First Addendum to the Promissory Note. (Da00475-Da00476). On December 7, 2017, Sam Shahar signed a Deed in Lieu Agreement. (Da00477-Da00482). Sam Shahar acknowledged in testimony that it is his signature of each of these documents: The Promissory Note (Da00373), the First Addendum (Da000374), and the Deed in Lieu (Da00375). On January 30, 2018, Arthur and Viola Greco assigned their interest in the note to Claire Mekkawy. (Da00483-Da00484). The only Credit ever made on the Note is $100,000.00, which was credited by the Deed in Lieu Agreement. (Da00477-Da00482).

Sam Shahar acknowledged in testimony that he did not read the Deed in Lieu before signing it. (Da00376). When Salah presented the Deed in Lieu agreement to Sam, Sam testified that Salah called him to the office, and Salah said "it's a deed that we transfer the land – we are closing the company" and that he understood "we don't own anything anymore." (Da00417-Da00418). He understood that the document was to transfer property, and did not consult with

his own lawyer, because, in his own words, he trusted Salah, and had signed many documents before. (Da00418).

Sam Shahar fashions himself in both the underlying litigation, and on this appeal, as a poor Romanian Immigrant with a seventh-grade education who was unjustly swindled by persons with superior experience, sophistication, and intellect. The facts suggest otherwise. Sam Shahar speaks five (5) languages. (Da00338-Da00339). Mr. Shahar has taken part in at least fifteen (15) real estate transactions in his lifetime, some of which were complex developments. (Da000350-Da000363). This includes taking a 5% interest in a Manhattan Skyscraper, for which he didn't believe he needed a lawyer to represent him in the transaction. (Da00348, Da00360). He also had experience in international commerce, having bought and sold Jordache Jeans in Russia, (Da000343) and having owned a business in Israel. (Da00345). He drove a Lexus to his deposition, and while working for Deer Haven, he drove a BMW 5 Series. (Da00369).

Mr. Shahar understood that engaging an attorney to review the Deed in Lieu was an option, but he chose not to do so. Mr. Shahar testified that he has used lawyers for real estate transactions before, but that he does not use lawyers because there's no need, and because he does not want to incur the cost.

(Da00354). He retained an attorney when he transferred title in his family home to his wife and daughter in 2011. (Da00354). He testified that he represented himself in obtaining a 5% stake in the Magellan, a Midtown Manhattan skyscraper next to the Empire State Building. (Da000360). When he was divorced from his wife, his wife retained an attorney to transfer the marital home, but Sam did not retain one, because even though his wife was represented by an attorney, the divorce was "friendly". (Da00351). He testified that at one point, he placed a $10,000 deposit on a parcel in South Jersey, and then sold the parcel for $500,000 without engaging an attorney. (Da00362-Da00363). He also testified that in a prior complex securities litigation, he represented himself because he thought that he did nothing wrong. (Da00358).

When asked why he did not consult with a lawyer before signing the Deed in Lieu, Sam Shahar did not testify that he was coerced or lied to. Rather, he testified "I never had any lawyer look at any document that I signed. Why was this one different from all the 30 or 50 things that I signed." (Da00418).

When asking a Court to relieve him of his legal obligations, Sam Shahar holds himself out as an uneducated, unsophisticated victim of various power imbalances. However, when he wants to raise money or begin a new real estate project, he holds himself out as a multilingual and experienced real estate mogul

with experience in international trade, and drives around in luxury cars to emphasize the point, and to present an image of success.

PROCEDURAL HISTORY

Claire Mekkawy brought this action by Complaint filed on May 3, 2018 against Sam Shahar to recover on the note. (Da000064-Da000075). Sam Shahar brought a counterclaim against Claire on June 6, 2019 (Da000098-Da00110) Summary Judgment was granted in Claire's favor on the note on February 5, 2024, and the counterclaim was dismissed with prejudice. (Da000012-Da000037). Final Judgment was entered on Claire's affirmative claim on February 23, 2024. (Da00052-Da00053).

On February 6, 2024, Sam Shahar then moved for reconsideration of the Order against him. (Da00999-Da01001). The motion for reconsideration was denied on March 15, 2024. (Da00044-Da00046).

The matter was then listed for trial on Sam Shahar's count for contribution against Salah Mekkawy. In lieu of a trial, the parties settled. Claire agreed to reduce the amount of the judgment to reflect her husband's contribution, and Sam Shahar agreed to accept that share in settlement. By consent order entered on April 24, 2024, the parties agreed that the judgment would be molded, and reduced by 50% in order to reflect a 50% contribution to the debt by Salah Mekkawy. (Da00054-Da00056). After settling, Sam Shahar filed Notice of this appeal on May 21, 2024. (Da00001).

ARGUMENT

I. STANDARD OF REVIEW

An Appellate Court reviews a trial court's entry of Summary Judgment *de novo*. See Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014), Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014), Turner v. Wong, 363 N.J. Super. 186, 198-199 (App. Div. 2003). On a review *de novo*, the Appellate Court owes no deference to the trial Court's interpretation of 'the meaning of a statute or the common law.' Davis, *supra* at 405, *citing* Nicholas v. Mynster, 213 N.J. 463, 478 (2013). On review *de novo,* the Appellate Court applies the same standard governing the trial Court. Id. at 477-478.

Pursuant to R. 4:46-2 (c) summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2.

Summary judgment is appropriate where there exists no genuine issue of material fact requiring disposition of trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Moreover, the New Jersey Supreme Court in the matter of Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520

(1995) adopted the United States Supreme Court's trilogy of cases establishing the standard for granting summary judgment under Federal Rules. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

To defeat a summary judgment motion, a party cannot simply allege that a fact is in dispute, but must present competent evidence which creates a genuine issue of material fact. Brill, supra. at 529. The trial court must weigh the evidence utilizing a process similar to that which is used on a motion for directed verdict to determine whether or not the evidence is sufficient. In essence, a trial court must decide whether the evidence presents sufficient disagreement to require submission to a jury, or whether it is so one-sided that a party must prevail as a matter of law. Brill. at 536. Where evidence is so one-sided that the 'moving party must prevail', the trial court should allow a litigant immediate relief from a long and extensive trial. Brill. at 540.

II. THE ACTION WAS TIMELY UNDER BOTH PENNSYLVANIA LAW AND NEW JERSEY LAW;

Regardless of the reasoning, and regardless of which State's law applies, the Trial Court correctly held that the action was timely. Entry of Summary Judgment was proper, regardless of which State's law is applied. See Chimes

v. Oritani Motor Hotel, Inc., 195 N.J. Super 435, 443 (App. Div. 1984) ("appeals are taken from judgments, not opinions, and, without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment") We explain, in turn, the law of each state, and its application to the facts of this case. Because the Trial Court relied on New Jersey law to enter judgment, we address New Jersey law first.

A. If New Jersey Law Applies, the Statute of Limitations was Revived;

"An acknowledgment or promise to pay an existing debt is deemed to constitute a new contract; therefore, it must support the implication of a promise to pay the full amount due immediately or on demand, whether made before or after the statute of limitations has run." Burlington County Country Club v. Midlantic Nat. Bank South, 223 N.J. Super 227, 235 (App. Div. 1987). When a partial payment is made after the statutory period has run, the party seeking to revive the statute must show (1) that the payment was partial, and (2) an act or declaration which establishes the debtor's recognition of, and intention to pay, the entire claim. Id.

In this matter, the Deed in Lieu agreement contains an entire paragraph dedicated to the Note, and more specifically: that the credit of $100,000 toward

the loan was a partial payment, that the Lender retained its rights under the loan documents, and that the provisions of the Note were ratified and confirmed:

> 8. No Equity. Each of the Lender, the Borrower, and Shahar hereby acknowledges and agrees that: (i) that the present fair market value of the Mortgaged Property is One Hundred Thousand Dollars ($100,00.0oo); (ii) such amount is less than the amount due under the Note and therefore the conveyance provided for by this Agreement is only in partial, not full, satisfaction of the Note; and (iii) that the Borrower has no equity in the Mortgaged Property. Notwithstanding anything herein to the contrary, each of Borrower, Mekkawy and Shahar agree and acknowledge that, even after the Mortgaged Property is conveyed to Lender pursuant to this Agreement, there exists and will exist a deficiency under the Loan Documents and **nothing contained herein shall be construed as a waiver by Lender of any rights Lender may have under the Loan Documents, at law, or at equity to pursue any sums owed to Lender under the Note or Loan Documents; provided, however, that Lender hereby credits to Borrower One Hundred Thousand Dollars ($100,000.00) against any sums otherwise due and owing under the Note. The parties agree that, after application of the $100,000 as contemplated herein: (i) the outstanding balance due under the Loan Documents shall be Seven Hundred Seventy Nine Thousand Sixty-Six and 69/100 Dollars {$779,066.69) as of December 6, 2017 (a principal balance of $400,000 and interest in the amount of $379,066.69). Each party agrees that, except for the application of $100,000.00 against any sums due and owing under the Note, all provisions of the Note are hereby ratified and confirmed.** This paragraph 8 shall survive the Closing.

(Da00478-Da00479) (Emphasis added)

The language of Paragraph 8 demonstrates a clear and unequivocal payment on the debt, and an intention that the parties intend to pay the debt in full. Specifically, they agreed that "each party **agrees** that, except for the application of $100,000.00 against any sums due and owing under the Note, all provisions of the Note are hereby **ratified and confirmed**" (emphasis added). The note also expressly stated a new balance ($779,066.69). It is hard to say how an intent to pay the balance could possibly be expressed more clearly, than by placing the amount of the balance directly in the instrument.

Given that the Note contained elected Pennsylvania law, with the pre-printed word "Seal" thereon, which invokes a 20 year statute of limitation, as explained *infra*, ratification and confirmation was neither unwarranted, nor unreasonable. The debt was still actionable at the time this agreement, under New Jersey law, and the Deed in Lieu acknowledges that the debt was still valid under Pennsylvania law.

B. If Pennsylvania Law Applies, the Statute of Limitations has not expired;

i. Standard For Choice of Law

This is an action based on a written instrument, and not based in tort. when a choice-of-law has been elected in a contract or written instrument, the

Court only needs to ask whether or not there is a reasonable relationship to the chosen State, and whether the choice of law violates public policy. Instructional Systems, Inc. v. Computer Curriculum Corp., 130 N.J. 324, 341, (1992). See also North Bergen Rex Transport, Inc. v. Trailer Leasing Co., a Div. of Keller Systems, Inc., 158 N.J. 561, 568, (1999); MacDonald v. CashCall, Inc., 883 F.3d 220, (3d Cir. 2018) ("New Jersey courts will enforce a choice-of-law provision unless it violates public policy.").

The parties included a choice-of-law provision within the Note which elected the application of Pennsylvania law, and therefore, Pennsylvania law can be read to apply. By including the choice of law clause, the parties were justified in relying on Pennsylvania law when making decisions about the Note, and how to enforce it. All parties had a reasonable expectation that the Note would be enforced in accord with Pennsylvania law.

We also note that the matter has significant contacts with Pennsylvania, and that Pennsylvania has a significant interest in resolving the action; The Note evidences a loan to purchase real estate in Pennsylvania, the mortgage executed concurrently with the Note was recorded in Pennsylvania, and the parties specifically included a choice-of-law clause in the note to confirm that Pennsylvania law applied.

ii. Under Pennsylvania law, the action is timely because it was brought within four (4) years of payment of principal or interest;

Under Pennsylvania law, an action upon a note must be brought within four (4) years of the later of either a demand, or payment of principal or interest on the note. 42 Pa.C.S. 5525(a)(7).

There was only one payment made on the note. Payment was made on December 7, 2017, when Sam Shahar and Salah Mekkawy entered into the Deed in Lieu Agreement. Paragraph 8 of the Deed in Lieu Agreement provides:

> 8. No Equity. Each of the Lender, the Borrower, and Shahar hereby acknowledges and agrees that: (i) that the present fair market value of the Mortgaged Property is One Hundred Thousand Dollars ($100,00.0oo); (ii) such amount is less than the amount due under the Note and therefore the conveyance provided for by this Agreement is only in partial, not full, satisfaction of the Note; and (iii) that the Borrower has no equity in the Mortgaged Property. Notwithstanding anything herein to the contrary, each of Borrower, Mekkawy and Shahar agree and acknowledge that, even after the Mortgaged Property is conveyed to Lender pursuent to this Agreement, there exists and will exsit a deficiency under the Loan Documents and nothing contained herein shall be construed as a waiver by Lender of any rights Lender may have under the Loan Documents, at law, or at equity to pursue any sums owed to Lender under the Note or Loan Documents; provided, however, that **Lender hereby credits to Borrower One Hundred Thousand Dollars ($100,000.00) against any sums otherwise due and owing under the Note.** The parties

> agree that, after application of the $100,000 as contemplated herein: (i) the outstanding balance due under the Loan Documents shall be Seven Hundred Seventy Nine Thousand Sixty-Six and 69/100 Dollars {$779,066.69) as of December 6, 2017 (a principal balance of $400,000 and interest in the amount of $379,066.69). Each party agrees that, except for the application of $100,000.00 against any sums due and owing under the Note, all provisions of the Note are hereby ratified and confirmed. This paragraph 8 shall survive the Closing.
>
> (Da00478-Da00479) (emphasis added).

The only payment was made on December 7, 2017. This action was commenced on May 4, 2018. Therefore, the action was commenced within four (4) years after any payment of principal or interest on the instrument.

iii. Under Pennsylvania law, the action is timely because it was brought within twenty (20) years upon an instrument under seal;

Even though the Complaint was timely under the four (4) year statute of limitation provided for under 42 Pa.C.S. 5525(a)(7), The note remains subject to a 20 year statute of limitation under Pennsylvania Law because it is an instrument under seal. 42 Pa. C.S. §5529(b) provides "Notwithstanding section 5525(7) (relating to four year limitation), an action upon an instrument in writing under seal must be commenced within 20 years."

> [A]ny flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended; and

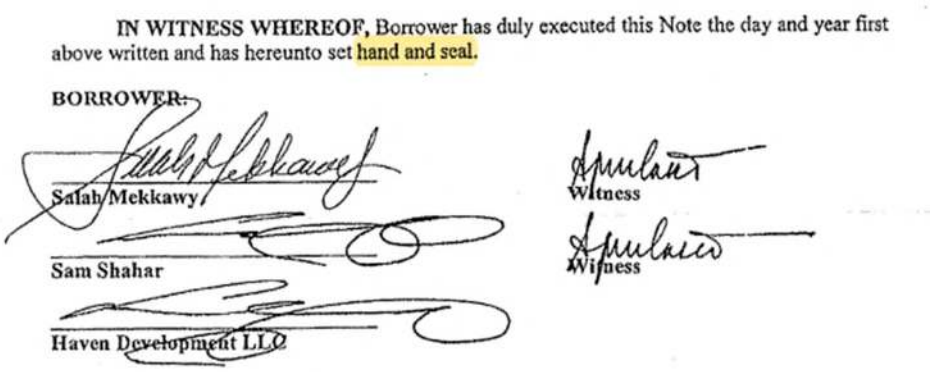
> a fortiori, the same result must be produced by writing the word "seal," or the letters "L.S.," meaning originally "locus sigilli," but now having acquired the popular force of an arbitrary sign for a seal, just as the sign " & " is held and used to mean "and" by thousands who do not recognize it as the middle ages manuscript contraction for the Latin word "et." If, therefore, the word "seal" on the note in suit had been written by Nissley after his name, there could be no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer except such as were clearly struck out or intended to be canceled before signing.
>
> Beneficial Consumer Discount v. Dailey, 434 Pa. Super. 636 (Sup. Ct. 1994) *citing* Loraw v. Nissley, 156 Pa. 329, 331-332, (1893).

Under Pennsylvania law, a document is not sealed with a wax stamp. Rather, sealing is constructive. The word "SEAL" need not be located by the signature line, and the only question that needs to be answered in determining whether a document is sealed is whether the language indicates that the parties intended to treat the document as sealed. If the language of the document indicates an intent that the document be sealed, the document will be treated as

under seal. See Wiley v. Brooks, 263 A. 3d 671, 677 (Sup. Ct. 2021). See Also, Driscoll v. Arena, 213 A.3d 353 (Pa. Super. 2019).

> Unless one distances himself from the pre-printed seal, the other party to a contract should be entitled to rely on the objective manifestations of the maker's actions. There can be no question that the pre-printed "SEAL" is an actual seal and that the [Defendants] signed next to it. The [Defendants] were under no duty to accept the seal, and had every opportunity to inquire about its significance, and signed the agreement freely. We must therefore agree with the trial court that the obligation should be enforced.
>
> Beneficial Consumer, Id. at 640-641.

In this matter, the signature line of the Promissory Note provides:


IN WITNESS WHEREOF, Borrower has duly executed this Note the day and year first above written and has hereunto set hand and seal.

BORROWER:

Salah Mekkawy

Witness

Sam Shahar

Witness

Haven Development LLC

(Da00474) (image from original) (Emphasis added).

Because the Promissory note demonstrates the parties' intent to sign the document under seal, even in the absence of the payment under the deed in lieu agreement, the statute of limitations does not expire until twenty (20) years after the date of execution. Thus, even now, the statute of limitations has not expired.

III. THE DEED IN LIEU AGREEMENT WAS NOT A PRODUCT OF FRAUD;

A. Standard of review for a Claim of Fraud;

The party asserting common law fraud must prove "A material misrepresentation of a presently existing or past fact, knowledge of belief by the Defendant of the falsity, an intention that the other person rely on it, that the reliance was reasonable, and that damages resulted. See Gennari v. Weichert Realtors, 148 N.J. 582, 610 (1997). The party asserting fraud bears the burden of proving that fraud by clear and convincing evidence. Scholastic Decisions v. DiDomenico, 236 N.J. Super 388, 395 (App. Div. 1989).

There is no evidence in the record that Salah Mekkawy made a misrepresentation to Sam Shahar when the Deed in Lieu was signed, and there is no evidence in the record that Sam Shahar's reliance on any representations made by Salah was reasonable.

B. No misrepresentations were made by Salah Mekkawy

When he testified, Sam Shahar was repeatedly asked to describe what representations Salah Mekkawy made that he believed to be false. In response, he repeated several times that the only representation what Salah made to him was that the Deed in Lieu was a Deed that transferred the land to the Grecos. (Da00417-Da00418). The closest that Sam Shahar came to articulating a

misrepresentation was an allegation that Salah said words to the effect of "we are done." These words could have pertained to the company, or with the real estate, or the final tax returns that were about to be filed. Put simply, if the only evidence of fraud is that Sam Shahar was presented with a legal document, and was told "we are done," no a reasonable finder of fact could find a misrepresentation by clear and convincing evidence. There is no allegation that Salah misrepresented the wording or terms of the Deed in Lieu, and Sam Shahar admits that he did not read the Deed in Lieu before signing.

C. Any reliance by Sam Shahar on any representations by Salah Mekkawy were not reasonable

In order for a fraud to exist, there would also need to be proof by clear and convincing evidence that Sam Shahar's reliance on a representation by Salah Mekkawy was reasonable. Despite his plea that he is an innocent, uneducated victim of an imbalanced power dynamic, by 2018, Sam Shahar was a sophisticated real estate investor with significant experience under his belt, as described in the record, including a successful real estate venture in Morristown, a development on the Jersey Shore for which he received $500,000, and the purchase of a 5% stake in a Manhattan skyscraper. See (Da00993-00996).

When signing a deed to transfer property, the reasonable approach is, first, to read the document, and second, to engage an attorney to review the deed

before signing it. Sam Shahar had previously retained an attorney when he transferred title in his family home to his wife and daughter in 2011. (Da00354). However, he does not use lawyers because he doesn't believe that there's a need, and because he does not want to incur the cost. (Da00354). When asked why he did not consult with a lawyer before signing the Deed in Lieu, Sam Shahar did not testify that he was coerced or lied to. Rather, he testified "I never had any lawyer look at any document that I signed. Why was this one different from all the 30 or 50 things that I signed." (Da00418).

The record reflects that Mr. Shahar knew that he could hire a lawyer to review his real estate transactions. He did not do so because he felt that he was equipped to handle such transactions himself, and because he didn't want to pay a lawyer. If Sam Shahar did not hire a lawyer because of the cost, reliance on Salah's representations when executing the Deed in Lieu agreement is not reasonable. If Sam Shahar felt that he was equipped to handle real estate transactions, without a lawyer, reliance on Salah's representations when executing the Deed in Lieu, without actually reading it, is not reasonable.

Salah Mekkawy was not obligated to act as an insurer against Sam Shahar's decisions in conducting real estate transactions. Salah Mekkawy was not obligated to hold off completing the transaction until Sam Shahar retained

counsel, and nor was he required to hire counsel for Sam. Sam Shahar is an fully-functional adult, and reliance solely on Salah for legal advice as to the effect of the Deed in Lieu, is not reasonable when viewed from an objective standard. Therefore, no rational finder of fact could find that Sam Shahar's reliance on Salah Mekkawy's representations was reasonable by clear and convincing evidence.

IV. THE ACTION WAS TIMELY ON THE FACE OF THE NOTE;

Sam Shahar contends that the statute of limitations is not a personal defense against enforcement because expiration of the statute of limitations was apparent on the face of the note. This position is unsound, particularly because the Trial Court held that the action was timely. If the statute of limitations had not actually expired, then the expiration of the statute of limitations could not have been apparent to the holder.

In any event, as explained in Section II.B. *supra.*, the note contains a choice-of-law provision, along with the pre-printed word "Seal" which triggers a 20 year statute of limitations. If viewed in a vacuum, separate and apart from the Deed in Lieu, as Sam Shahar suggests, the opposite conclusion is properly drawn. That is to say, on its face, the statute of limitations on the note had not expired. The trial court only applied the New Jersey statute of limitations,

because New Jersey law was more restrictive, and thus, the language of the Deed in Lieu electing New Jersey law was construed against the drafter. The face of the note itself, however, showed that the statute of limitations, elected Pennsylvania law, under which the statute of limitations had not yet expired.

V. THE PLAINTIFF WAS A HOLDER IN DUE COURSE OF THE NOTE;

The Plaintiff is a holder in due course of the note. Whether or not a person is a holder in due course is controlled by the Uniform Commercial Code, codified in New Jersey at N.J.S.A. 12A:3-302. A person is a holder in due course if there is no evidence of forgery, alteration, or a question of authenticity, and if the instrument was taken for value, in good faith, without notice that the is overdue, or has been dishonored, or that there is an uncured default with respect to payment of another instrument in the same series, without notice of alteration or unauthorized signature, without notice of a possessory right of another, or without notice of a defense or claim of recoupment.

The Defendant bears the burden of affirmatively proving that the that consideration for the transfer did not exist. Govan v. Trade Bank & Trust Co., 109 N.J. Super 271 (App. Div. 1970). The Defendant admits that no payment was made on the note, and has not claimed recoupment, dishonor, or any other defense, nor any other defense which would require the Court to analyze whether

Claire Mekkawy is a holder in due course. See Comment 4 to N.J.S.A. 12A:3-302 ("The primary importance of the concept of holder in due course is with respect to assertion of defenses or claims in recoupment…and of claims to the instrument."). Moreover, an instrument is transferred for value if the instrument is issued or transfer for a promise of performance, to the extent the promise has been performed. See N.J.S.A. 12A:3-303.

Defendant argues, without a single citation to the record, that Claire Mekkawy is not a holder in due course because the Note was not transferred for value. In Govan, supra, the Defendant contended that "oral testimony and circumstantial evidence of payment of consideration were so improbable as to properly be rejected by the finder of fact." In response, the Appellate Division affirmed the trial Court's finding such evidence was sufficient to support a finding of fact as to the payment of consideration. The Plaintiff is presumed to be a holder in due course unless the Defendant can offer evidence to disprove the same. If the Defendant fails to offer evidence that the transfer was not made for value, the Plaintiff is presumed to be a holder in due course. The Assignment instrument acknowledges that consideration was paid in the amount of $10.00 for the transfer of the Note. (Da00483). The recitation of the consideration in

the transfer is evidence that it occurred, and there is no testimony to the contrary from Claire Mekkawy, or any other person.

Without evidence that the transfer is made without consideration, and without evidence that the note was taken with notice of a defense, the presumption controls, and is properly left undisturbed.

VI. THE DEFENDANT DID NOT FILE THE APPEAL WITHIN 45 DAYS OF ENTRY OF A FINAL JUDGMENT;

An appeal of a Court's final judgment must "be filed within forty-five (45) days of their entry." R. 2:4-1(a). "The Supreme Court had earlier declared that to be considered final for purposes of appeal, a judgment 'must be final in the suit, not as to an intermediate or incidental particular but in regard to the principal matter in controversy.'" Adams v. Adams, 53 N.J. Super. 424, 430 (App. Div. 1959) citing In re Url's Estate, 5 N.J. 507, 513 (1950); see Petersen v. Falzarano, 6 N.J. 447, 453 (1951). An order granting summary judgment is "final in nature and can be appealed from" if it "adjudicates or makes moot all the issues raised by the pleadings. Applestein v. United Bd. & Carton Corp., 35 N.J. 343, 350 (1961).

Sam Shahar's appeal must be dismissed as it has been filed after the allowable forty-five (45) day period proceeding a final judgment to appeal. Here, the principal matter in controversy consisted of three counts in Claire

Mekkawy's complaint against Sam Shahar. On February 5, 2024, the Trial Court granted Plaintiff Claire Mekkawy's motion for summary judgment, and denied Sam Shahar's motion for summary judgment. Final Judgment was entered on February 23, 2024. (Da.00052-Da00053). When Sam Shahar moved for reconsideration, his motion was denied on March 15, 2024. (Da00044-Da00046) Thus, all matters in controversy raised by the complaint were resolved by the March 15, 2024 denial of Sam Shahar's motion for reconsideration, amounting to a final judgment from which Sam Shahar may have appealed. After March 15, 2024, summary judgment had been granted, and there were no issues left to be adjudicated on the Complaint. The only issue that remained listed for trial was the issue of contribution, which was raised by the Third Party Complaint, a separate controversy, which was solely between Sam Shahar and Salah Mekkawy. At that point, final judgment was entered, and all issues between Claire Mekkawy and Sam Shahar had been adjudicated, and a final order had been entered.

Sam Shahar filed an appeal sixty-seven (67) days after the March 15th denial for reconsideration; over thirty-two (32) days after the deadline to file an appeal had passed pursuant to R. 2:4-1(a). Because the appeal is not timely filed, the appeal is properly denied.

VII. THE DEFENDANT CANNOT APPEAL AN INTERLOCUTORY ORDER IF THE FINAL ORDER WAS ENTERED ON CONSENT, WHEN THE RIGHT TO APPEAL IS NOT EXPRESSLY RESERVED, AND THE ORDER DOES NOT PROVIDE THAT THE JUDGMENT WILL BE VACATED IF THE INTERLOCUTORY ORDER IS REVERSED;

The judgment that Claire obtained against Sam Shahar is not appealable because the case was settled. The Plaintiff participated in the settlement of the third party complaint, even though judgment had been entered in her favor, in full, on the complaint. That is to say, Claire settled her claim against Sam Shahar in exchange for reducing the judgment in half, in consideration of the dismissal of the third party complaint against her husband. The settlement was memorialized by a consent order.

An order consented to by the attorneys for each party is ordinarily not appealable. Winberry v. Salisbury, 5 N.J. 240, 255 (1950); see also N.J. Sch. Constr. Corp. v. Lopez, 412 N.J. Super. 298, 309 (App. Div. 2010); Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009). "A party cannot appeal from a judgment or order to which he consented". Bass v. DeVink, 336 N.J. Super. 450 (App. Div. 2001). A consent order can reserve the right of a party to appeal an interlocutory order by providing that a judgment would be vacated if the interlocutory order were reversed on appeal. Janicky at 207.

Here, the Consent Order entered on April 24, 2024 did not include a right to appeal an interlocutory order the orders granting summary judgment, nor the orders denying reconsideration. (Da00054). Nor did it provide that the judgment of February 23, 2024, or the amended judgment of May 2, 2024 would be vacated if the Orders granting Summary Judgment were reversed. (Da00054). Even though her case was over, Claire participated in the settlement, and agreed to give up half of the amount owed to her, in exchange for Sam Shahar foregoing a trial against her husband for contribution. Had the matter gone to trial, the contribution amount owed by Claire's husband may have been more, may have been less, may have been 100% or may have been nothing at all. By all accounts, the April 24, 2024 Consent Order, and the resulting Amended Judgment entered on May 2, 2024 are not appealable, because the Defendant consented to their entry. Offer, Acceptance, and Consideration means that there was a settlement. No right was reserved to appeal a prior interlocutory order, and nor did the consent order provide that the judgment would be reversed if an interlocutory order was reversed on appeal.

CONCLUSION

Based upon the foregoing, we respectfully request that this Court dismiss the appeal, or in the alternative, affirm the judgment on the merits.

By: s/ Matthew H. Mueller, Esq.
[electronic signature pursuant to R. 1:32-2A(c)]
Matthew H. Mueller, Esq.

Dated: November 12, 2024

CLAIRE MEKKAWY, Plaintiff, v. SAM SHAHAR, Defendant-Counterclaimant-Third Party Plaintiff v. SALAH MEKKAWY; HAVEN DEVELOPMENT, L.L.C., Third Party Defendants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002884-23 DOCKET BELOW: MRS-L-000855-18 CIVIL ACTION On Appeal from Orders dated February 5, 2024 (3), February 23, 2024, March 15, 2024 and May 2, 2024 Sat Below: Hon. Noah Franzblau, J.S.C.

REPLY BRIEF OF DEFENDANT-APPELLANT SAM SHAHAR

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(Omitted as Duplicative Da00302-Da00411)

REPLY STATEMENT OF FACTS

Plaintiff-Respondent Clair Mekkawy's (hereinafter the Plaintiff") answering brief is remarkable for the factual and legal matters raised in Defendant-Appellant Sam Shahar's (hereinafter "Shahar" or "Defendant") opening brief that she fails to address, and thus tacitly admits. Among other things, Plaintiff tacitly admits that:

a) the 'Deed in Lieu Agreement' which purported to revive the statute of limitations (hereinafter "SOL") for her claims under the subject promissory note, does not contain sufficient language on its own to revive the SOL under New Jersey law, and in particular that it contains no reference to the amount being due immediately and on demand (Pb15-17);

b) the motion judge, to grant summary judgment in her favor and deny Shahar's cross motion for summary judgment, *sua sponte* raised an argument that she never did, namely that Shahar was somehow familiar with the holding of Denville Holding v. Fogelson, 84 N.J.Super. 164, 170 (App.Div. 1964), and that Mr. Shahar is thus chargeable with the knowledge that under New Jersey law, the note was payable on demand (Pb15-17);

c) Indeed, Plaintiff makes no attempt to justify the motion judge's *sua sponte* finding that Shahar knew that New Jersey law made the subject note a demand note, or how he could be certain that New

Jersey law even applied given Plaintiff's ongoing arguments about the applicability of Pennsylvania law (Pb17-24);

d) Absent a finding that the purported 'Deed in Lieu Agreement' revived the SOL, the complaint was filed after the expiration of the limitations period under New Jersey law (and Pennsylvania law if the original note is not deemed a sealed instrument);

e) The motion judge failed or refused to consider deposition testimony in the record and cited to by Shahar in his opposition papers, and that such testimony established as a matter of law that Shahar never agreed to revive the SOL and pay the full amount allegedly due on demand, and without condition, as required by New Jersey law to revive the SOL (Pb17-24); and

f) The motion judge erred by not considering the evidence proffered because Shahar placed certain citations to the record in his memorandum of law instead of the statement of material facts, especially where the motion judge raised issues *sua sponte*.

Instead, as she did in the court below, Plaintiff continues to focus on her erroneous argument that that the motion court erred by applying New Jersey law and not Pennsylvania law to this matter. Of course, she does not dispute that all of the parties at all relevant times resided in New Jersey; that the companies at issue (Haven Development, LLC and Deer Haven, LLC) were New Jersey limited liability companies that operated out of third party

defendant Salah Mekkawy's New Jersey office; or that her attorneys drafted the 'Deed in Lieu Agreement' that created an ambiguity as to the applicable law. The motion court correctly construed that ambiguity against the Plaintiff as the drafter of the document and in Mr. Shahar's favor (Da28).

The Plaintiff makes other incorrect or misleading statements in her answering brief. At Pb9, Plaintiff attempts to paint Mr. Shahar as a sophisticated real estate investor. Salah Mekkawy testified at his deposition, that he had the expertise to develop the Deer Haven project and Shahar did not:

> "Q. You said that you had a number of conversations. Can you tell me anything that you recall about those conversations?
>
> A. Other than Pitcairn[1] has expertise to develop[…] such a large project. I mean, I was totally in agreement with it.
>
> Q. Did Mr. Shahar have expertise?
>
> A. Expertise to develop it?
>
> Q. Yes.
>
> A. No."

At Pb10, the Plaintiff references "prior complex securities litigation". Plaintiff neglects to mention that the referenced litigation is the lawsuit

[1] The real estate company of which Salah Mekkawy was the president, with seven hundred – fifty million dollars ($750,000,000) of assets under its management (Da252).

brought against Salah Mekkawy and Shahar by the investors in the subject project, in which action Salah Mekkawy's counsel also represented Shahar.

At Pb10, the Plaintiff erroneously argues that Mr. Shahar never testified that no one lied to him when he signed the 'Deed in Lieu Agreement'. Mr. Shahar testified that Salah Mekkawy represented that he was signing a deed that resolved any claims related to the Greco loan and any other potential obligation of Deer Haven and Haven Development (Da 375-6; 417-8). Plaintiff also references multiple real estate transactions, without disclosing that the same were for personal residences, done with Salah Mekkawy and/or occurred after the events referenced in this litigation.

At Pb10, Plaintiff also mischaracterizes the transactions. By way of example, Shahar did not put down a $10,000 deposit and sell a property for $500,000. Mr. Shahar testified that when Salah Mekkawy's served as the President of Pitcairn Properties, the company paid him a finder's fee for locating a large investment project for it. (Pa362-3).

At Pb 17, 19, 20, Plaintiff erroneously states that a payment was made against the Greco Note. The motion judge made a similar erroneous finding (D29). The parties merely transferred the property securing the Greco mortgage to the undersecured creditor. This is precisely what someone in Mr. Shahar's position would expect to agree upon - transferring the property and "going home" with no further obligation (Da418).

ARGUMENT

I. THE MOTION COURT CORRECTLY RULED THAT NEW JERSEY LAW APPLIED (Da27-8)

Instead of supporting the motion court's rulings that the 'Deed in Lieu Agreement' revived the SOL under New Jersey law, the Plaintiff continues to advocate that Pennsylvania law applies. The Plaintiff's request that this Court reverse the decision to apply New Jersey law is without merit.

It is not disputed that, although the note says Pennsylvania law governs (Da474), the 'Deed in Lieu Agreement' applies New Jersey law (Da480). To the extent the SOL was revived, this occurred solely because of the transactions that occurred pursuant to the 'Deed in Lieu Agreement'.

The motion court correctly held that any ambiguity must be construed against the drafter of the documents (Da28). The motion judge correctly resolved the ambiguity against the drafter and applied New Jersey Law. See e.g., Schor v FMS Fin., 357 N.J.Super. 185, 193 (App.Div. 2002).

Furthermore, the Plaintiff brought this action in New Jersey.[2] "When a civil action is brought in New Jersey, our courts apply New Jersey's choice of law rules in deciding whether this State's another state's statute of limitations governs the matter." McCarrell v. Hoffmann-LaRoche, 227 NJ 569, 583 (2017). New Jersey's courts weigh the contact with each state and

[2] Third Party Defendant Salah Mekkawy also brought a companion Chancery Division Action (docket no. MRS-C-135-21) in New Jersey[2].

which state has a greater interest in resolving the dispute to determine which state's law applies. Id. at 585-7.

In the case at bar, the Plaintiff does not dispute that all parties were New Jersey residents at all times. The Plaintiff sued Shahar in a New Jersey Court. The limited liability companies at issue were both formed in New Jersey, with their principal place of business located at Salah Mekkawy's Morristown, New Jersey office. Conversely, Pennsylvania had no connection to this matter when the Plaintiff filed the complaint.

The motion court thus correctly applied New Jersey law, both because of the ambiguity created by the 'Deed in Lieu Agreement' and because of New Jersey's substantially greater interest in adjudicating a dispute amongst New Jersey residents in New Jersey courts.

II. THE PURPORTED DEED IN LIEU AGREEMENT WAS INSUFFICIENT TO REVIVE THE STATUTE OF LIMITATIONS AS A MATTER OF LAW (Da00012 – Da00041)

The Plaintiff dies not dispute, and as the motion court recognized (Da30), under New Jersey law, it is well settled that to revive a statute of limitations after it runs, the agreement must support an implication that the alleged obligor acknowledged the debt and agreed to pay the full amount immediately and upon demand. Denville Amusement v. Fogelsen, 84 N.J.Super. 164 (App.Div. 1964); Burlington Cty. Country Club. V.

Midlantic Nat'l Bank, 223 N.J.Super. 227, 235-6 (Ch.Div. 1987); accord Shalit v Shalit, 217 N.J.Super. Lexis Unpub. 2996, p. 5-6 (App.Div. 2017) (Da954). Furthermore, the promise to make payment must be "unconditional and unqualified" to remove the bar of the statute. Shalit, supra, at p. 6, citing Evers v. Jacobsen, 129 N.J.L. 259, 261 (E &A 1942).

Similarly, if relying upon a partial payment, the party seeking to revive the statute is still required to establish the other party's intention to pay the entire claim in full, immediately and on demand. Mere partial payment alone is not enough to revive the statute. Id.; Evers, supra, 129 N.J.L. at 89-90 (partial payment insufficient to revise statute on balance of debt); Bassett v. Christensen, 127 N.J.L. 259, 261 (E&A 1941)(payment not an acknowledgment to owing the balance of an alleged debt).

The Plaintiff does not dispute that New Jersey's courts have also consistently stated that their tendency is to favor application of the statute of limitations and against construction that would avoid its application. Denville, supra, 84 N.J.Super. at 170. Burlington, supra, 223 N.J.Super. at 235; Shalit, supra, p. 6. Plaintiff also does not dispute that the motion court purported to recognize this public policy (Da30), but then proceeded to do the opposite by charging Mr. Shahar with knowledge of obscure law and accepting as true the Plaintiff's Sgt. Schultze routine at her deposition.[3]

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[3] I saw nothing; I heard nothing; and I knew nothing.

The Plaintiff does not dispute Article 8 of the 'Deed in Lieu Agreement' is the sole basis by which Mr. Shahar allegedly agreed to revive the SOL under New Jersey law. Article 8 does not state that Shahar (and Saleh Mekkawy or Deer Haven) agreed to pay the full amount remaining on the note immediately, unconditionally or on demand. Mr. Shahar testified that he signed the "Deed in Lieu Agreement" for the sole purpose of allowing Deer Haven to divest its remaining real estate and in manner he believed had been effectuated years earlier (Da376).

The motion judge also disregarded Mr. Shahar's deposition testimony that it was his understanding that the parties agreed to convey the same property to the Grecos years earlier in full satisfaction of any debt allegedly owed to them; that he agreed to sign the document based upon that representation and to close down the company; and that he believed the transfer to the Grecos constituted full satisfaction of any debt owed to them, and not a "partial payment" (Da30; 376).

Mr. Shahar gave uncontradicted testimony at this deposition that Mr. Mekkawy deceived him into signing the 'Deed in Lieu Agreement'; that Mr. Mekkawy represented that he was satisfying any obligations to the Grecos in full when he signed the document; that he had no intention of paying anything further; and to the extent he was actually presented with the full document and able to read it without his glasses, he did not understand it (Da373-6; 417-8).

III *IN ARGUENDO*, EVEN IF PENNSYLVANIA LAW APPLIED, THE NOTE IS NOT A SEALED INSTRUMENT AND THUS SUBJECT TO A FOUR-YEAR SOL (Da27-8)

In arguendo, even if this Court determines the motion court incorrectly applied New Jersey and not Pennsylvania law, a four-year statute of limitations applies. The Respondents acknowledge that Pennsylvania has a four-year statute of limitations, unless the document is signed under seal.[4] Pennsylvania has a unique process of signing a contract under seal. "Whether an instrument is under seal or not is a question of law for the court, and whether a seal placed on an instrument has been adopted by the maker as his seal is a question of fact[]" for the jury. Swaney v Georges Twp. Rd. Dist., 164 A. 336, 337-8 (PA 1932); accord In re Fidelity America Fin. Corp., 35 B.R. 310, 311-2 (E.D.PA 1983). Pennsylvania precedent deciding this issue is remarkably limited.

In Fidelity, the Debtor's principal and his wife personally guaranteed a corporate loan. The Court needed to determine whether the instrument constituted a sealed instrument under Pennsylvania law. If the document was not a sealed instrument, the claims were time barred. Id.

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[4] If this court holds that the motion court erred by applying New Jersey law and not Pennsylvania law and that the 'Deed in lieu Agreement' is properly sealed in accordance with Pennsylvania law, Shahar acknowledges the applicability of the twenty-year statute of limitations.

Although the guaranty contained the word "seal" on the signature lines, the Court determined that the defendants did not intend to adopt the seals on the contract. Id. at 312.

The Bankruptcy Court distinguished between the situation in Fidelity and one where the contract states: "that the parties intend for this to be a sealed instrument." The Court noted that if the contract clearly states that the parties intend for it to be a sealed instrument, it likely would have found the agreement to be a sealed instrument.

In the case at bar, the subject promissory note neither contains the word "seal" on the signature line nor states in clear language that the parties intended for the note to be a sealed instrument. The note states:

> "IN WITNESS WHEREOF, Borrower has duly executed this Note the day and year first above written and has hereunto set hand and seal."

It is respectfully submitted that such ambiguous, non-sensical legalese, particularly when presented to a layman, is insufficient to demonstrate that the note was a sealed instrument under Pennsylvania Law.

Furthermore, to the extent a court finds that a seal actually existed, Mr. Shahar's testimony demonstrates that he never intended to adopt any alleged seal. He testified that he never had a personal seal. He also testified that when he formed a corporation, he received a book with a metal seal that he never used (Da415). At a bare minimum, this is a factual issue.

IV. THE MOTION COURT ERRED BY FINDING THE PLAINTIFF IS A HOLDER IN DUE COURSE AS A MATTER OF LAW (Da00012 – Da00041)

The motion court held that the Plaintiff presented no evidence that she was a holder in due course (Da30). Although the motion court determined that Shahar failed to present evidence that the Plaintiff was not a holder in due course, the assignment on its face is for nominal consideration (Da84). The Plaintiff also testified that:

> "Q. Did he ever ask you what was going on with your efforts to collect or to try to get the money back?
>
> A. I think he was more concerned about his health at that time and staying alive. And he gave it to me so he wouldn't have to worry." (Da211).

The foregoing, coupled with the credibility issues regarding Plaintiff's professed inability to recall virtually anything relevant about the loan and assignment, at a minimum created a credibility issue and factual dispute as to whether the Plaintiff was a holder in due course without knowledge.

Summary judgment is foreclosed when resolution of a disputed fact depends upon a credibility determination. Strumph v. Schering Corp., 133 N.J. 33 (1993). Cases of fraud notably require a credibility determination.

In the case at bar, the Plaintiff's testimony that she was oblivious to her parents lending what was a significant amount of money to her husband,

and inability to remember anything pertaining to the subject transactions, created a factual issue as to whether she took the assignment for consideration and without knowledge of the circumstances.

V. THE APPEAL AGAINST SALAH MEKKAWY (Da00012 – Da00043)

Shahar's appeal as to Salah Mekkawy is very limited. He merely appeals from the motion court's finding that as a matter of law, Salah Mekkawy did not defraud him into signing the 'Deed in Lieu Agreement'. It is respectfully submitted that the record, when looked at pursuant to the summary judgment standard, contains disputes of fact and credibility as to whether Salah Mekkawy misrepresented to Mr. Shahar the nature of the 'Deed in Lieu Agreement and what he was signing, and whether he reasonably relied upon those misrepresentations.

He is not seeking affirmative damages from Salah Mekkawy. As stated in response to the Court's at oral argument, his damages are any amounts owed to Claire Mekkawy as a result of his signing the 'Deed in Lieu Agreement'. His cross claim for indemnification relates to Salah Mekkawy being responsible for the full amount due to his fraudulent scheme, and not just contribution of his fair share (which the parties agreed was 50%).

Although Shahar believed he had other affirmative claims against Salah Mekkawy when he filed the third party complaint, he acknowledges that many of the same were time barred or unproven.

VI. SHAHAR FILED HIS NOTICE OF APPEAL WITHIN THE REQUIRED TIME PERIOD

At Pb29-30, the Plaintiff argues that Shahar filed his notice of appeal out of time. It is axiomatic that, as the New Jersey Supreme Court held in Silviera-Francisco v. Bd. of Ed. of Elizabeth, 224 N.J. 126, 136 (2016):

> "Thus, in a multi-party, multi-issue case, an order granting summary judgment, dismissing all claims against one of several defendants, is not a final order subject to appeal as of right until all claims against the remaining defendants have by motion or entry of judgment following trial."

Accord, Grow Co. v. Choski, 403 N.J.Super. 443, 457-8 (App.Div. 2008). Indeed, in Grow Co., supra, 403 N.J. Super., the Court lamented the extent attorneys and the Law Division itself attempt to find "loopholes" in the requirement that leave of the Appellate Court is required to confer interlocutory jurisdiction upon the Appellate Division. Id. at 548.

The motion court herein did not dismiss Shahar's third party claims against Salah Mekkawy for contribution until April 24, 2024, when the parties settled solely Shahar's third party contribution claim against Salah Mekkawy (Da54). The resolution of the contribution claims occurred on the eve of the scheduled trial of the contribution claims. Mr. Shahar's filing the

Notice of Appeal on May 21, 2024, is thus timely and within the 45-day time period set forth in R. 2:4-1(a).

Shahar also notes that Plaintiff made this argument as part of her opposition brief as opposed to filing a motion to dismiss the appeal as being out of time. If the Plaintiff and/or Salah Mekkawy truly believed this argument had meruit, it is respectfully that the Mekkawys would have filed an immediate motion to dismiss, as opposed to incurring the expense of having two attorneys draft and file briefs opposing the appeal on the merits.

Similarly, both the Plaintiff (Pb31) and Salah Mekkawy (Tpdb15) erroneously argue that Mr. Shahar is appealing from an order to which he consented. This allegation is erroneous.

The consent order (Da54) resolved solely the contribution claims and no others which were on for trial the following day. Shahar is not appealing the dismissal of his contribution claims.

Plaintiff acknowledged that she would never sue her husband Salah Mekkawy (Da1007). The Plaintiff herself proposed modifying the original judgment to reflect that understanding when she agreed to that aspect of Mr. Shahar's motion for reconsideration that sought summary judgment on his claim for contribution from Salah Mekkawy (Da1007).[5] `Indeed, Plaintiff agreed to the allocation subject to the provision that: "[T]he Court does not

[5] Which the motion court denied despite the Parties' agreement on the proper resolution of the contribution claims (Da44).

disturb any other findings on the motions for summary judgment . . . ." (Da1007), which other findings are the subject of this appeal.

The consent order solely resolved the one open issue left by the motion judge after summary judgment, which was the third party claim for contribution. Neither party wanted to expend funds trying the same. By doing so, all claims were resolved to all parties. This made the matter eligible for a non-interlocutory appeal from a final decision as to all parties.

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, Appellant Sam Shahar respectfully requests that the Court reverse the motion court's 3 orders dated February 5, 2024 and vacate the judgment predicated thereon dated February 23, 2024, as modified by the amended final judgment dated May 2, 2024. Mr. Shahar also respectfully requests that the court grant summary judgment in his favor and against plaintiff-respondent Claire Mekkawy dismissing the complaint with prejudice

Most Respectfully submitted,

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By: _____
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