SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Plaintiff/Appellant FOLEY, INCORPORATED v. Appellant/Respondent AMERESCO, INC.	Case No. A-003241-23 Civil Action On appeal from: Superior Court of New Jersey Law Div. - MIDDLESEX County Docket No. MID L 5205-23 Sat Below: Hon. Joseph L. Rea

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APPELLANT'S BRIEF

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[1]Certain exhibits to counsel's certification have been omitted to avoid duplication, and unpublished opinions which were not considered by the Law Division or relevant to this Court's determination.

[2] This document has been redacted pursuant to R. 1:38.

TABLE OF JUDGMENT, ORDERS, and RULINGS BEING APPEALED

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PRELIMINARY STATEMENT

This case involves a book account claim for release of retainage for a generator set sold by Plaintiff to Defendant and installed at a New Jersey hospital.

Plaintiff filed this claim to enforce an agreement for release of retainage following application of a credit. Defendant acknowledged the release was "stuck" in its system and promised to "follow thru" for payment once a revised invoice was submitted. Defendant did not pay and this lawsuit followed.

Defendant filed a motion to dismiss in lieu of an answer claiming Plaintiff failed to comply with the purchase agreement between the parties governing dispute resolution.

The Law Division declined to entertain argument on the motion and determined Plaintiff did not produce substantive evidence in opposition to the motion. The Law Division did not make findings of fact and conclusions of law until this appeal was filed; that makes review challenging.. The conclusions in a supplemental statement following appeal are not supported by competent evidence submitted by Plaintiff.

An e-mail exchange between the parties demonstrates resolution of the dispute with a promise for payment. Defendant's refusal to make payment following agreement, did not require "re-mediation" or resort to alternative dispute resolution.

On de novo review, the Appellate Division should readily find plain error by the Law Division and reverse the orders under review.

PROCEDURAL HISTORY

The procedural history of this case is straightforward.

Plaintiff filed a complaint on September 15, 2023. (Pa 6) The complaint seeks payment for an open book account balance on account of retainage for a generator sale. The amount claimed is $198,066.38. (Pa 10)

Defendant was timely served and retained counsel. A stipulation extending time to answer was filed October 24, 2023. (Pa 12)

Defendant filed a motion to dismiss in lieu of an answer on November 3, 2023. (Pa 13) The motion was scheduled for hearing on December 1, 2023. Defendant requested an adjournment to December 15th which the court accommodated. (Pa 84)

Plaintiff opposed the motion on December 5, 2023 (Pa 53) The opposition included a detailed certification of Plaintiff's Executive Vice President for Power Systems. (Pa 53-81) Defendant filed a reply brief on December 11, 2023.

The court, on its own motion, adjourned the hearing on multiple occasions to January 5 and 19, February 2 and 15, March 1, April 12 and 26, May 10 and 24, 2024 (Pa 103 and 104) .

On May 24, 2024 (posted May 28, 2024) the Law Division filed an order dismissing Plaintiff's case and awarding Defendant's attorney unspecified fees. (Pa

1) The Law Division did not entertain argument nor did the court make findings of facts or conclusions of law. (Pa 1)

On June 3, 2024 Defendant's attorneys ent a letter requesting $35,517.70, plus costs of $352.33, on account of the motion. (Pa 82)[1] The letter was not submitted to court, and did not contain any documentation to support the fee claim on Defendant's motion to dismiss in lieu of an answer. (Pa 82)

Plaintiff timely filed a notice of appeal on June 20, 2024. (Pa 85)

On June 25, 2024, the Law Division filed an amended order which included a statement of reasons. (Pa 3)

Plaintiff filed a notice of motion to amend its notice of appeal to include the supplemental order. The amendment was important since the original notice of appeal focused on the fact no statement of reasons, findings of fact, or conclusions of law from the Law Division. (Pa 88)

On July 19, 2024, the Appellate Division granted Plaintiff's motion authorizing the amended notice of appeal and case information statement. (Pa 92) Plaintiff promptly filed its amended notice of appeal and case information statement on July 23, 2024. (Pa 93 and Pa 98)

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[1] The document has been redacted to exclude bank account information.

STATEMENT OF FACTS

The facts of this case are straightforward and uncomplicated.

Plaintiff is an authorized Caterpillar dealer with a principal place of business located at 855 Centennial Avenue, Piscataway, New Jersey. (Pa 10, Pa 19, Pa 53, Pa 57)

Defendant maintains a principal place of business located at 111 Speen Street, Framingham, Massachusetts. (Pa 19, Pa 57)

The project at issue in this lawsuit concerns a combined heat and power equipment (generator set) for Trinitas Regional Medical Center, Elizabeth, New Jersey. (Pa 20)

Defendant issued Plaintiff its purchase order for the generator set on September 11, 2019. (Pa 19) The total value of the purchase order is $2,015,253.00. (Pa 19) Defendant added purchase order specifications dated September 3, 2019. (Pa 20, Pa 52)

Plaintiff's lawsuit seeks payment of $198,066.38 which amount is adjusted retainage for the generator set sold and delivered as ordered by Defendant. (Pa 53) This fact is certificated by Plaintiff's Executive Vice President and uncontested by Defendant. (Pa 10-11, Pa 55, Pa 57. Pa 58, Pa 59)

The amount claimed is reflected on Plaintiff's invoice, less agreed credits. (Pa 53, Pa 57, Pa 59, Pa 10)

Plaintiff delivered the generator set to Trinitas Regional Medical Center and received payment, except for the retainage involved in this lawsuit.

Plaintiff filed the within lawsuit after voluntary efforts for payment were unsuccessful. (Pa 54) Plaintiff's efforts toward resolution are evident through a series of e-mails between Plaintiff's Executive Vice President and Daniel R. Gardner of Defendant, amongst others. (Pa 54, Pa 59-Pa 80) E-mails contain detailed recitations and explanations between the parties for credits and request for release of the retainage. Id. The exchanges occurred between October 12, 2022 and July 20, 2023.

Defendant concluded Plaintiff's "retainage invoice has not been processed due to a credit invoice stuck in the system." (Pa 59) Defendant requested a revised invoice for payment and promised to "follow thru the system." Id. Plaintiff conducted the revision which is reflected on the statement of account (Pa 10 and 11)

Notwithstanding the promise and following the extensive efforts toward resolution, Defendant failed, refused, and neglected to make payment. Thereafter, the within lawsuit was filed on September 15, 2023. (Pa 6)

ARGUMENT [Pa1, Pa 3]

ON DE NOVO REVIEW, THE APPELLATE DIVISION SHOULD FIND THE LAW DIVISION COMMITTED PLAIN ERROR BY CONSIDERING HEARSAY DOCUMENTATION AND ENFORCING AN ALTERNATIVE DISPUTE RESOLUTION PROVISION EVEN THOUGH PLAINTIFF PROVIDED EVIDENCE THE DISPUTE WAS RESOLVED PRIOR TO FILING A LAWSUIT [Pa 1, Pa 5, Pa 54, Pa 59]

The Law Division committed plain error by relying on hearsay evidence submitted by Defendant's counsel. Further, the Law Division failed to consider Plaintiff's opposition and the certification of its Executive Vice President who had firsthand knowledge of the events at issue in this lawsuit and proved the agreed resolution of dispute between the parties.

There is very little development in the record of this case. Plaintiff filed its complaint (Pa 6) and Defendant filed a motion to dismiss in lieu of an answer. (Pa 13) Plaintiff opposed the motion with the certification of its Executive Vice President who had firsthand knowledge of interaction between the parties and actively participated in communications to resolve the matter without the necessity of a lawsuit.

Defendant's motion was premised exclusively on the certification of counsel, who attached records of his client. (Pa 15) There was no direct certification from Defendant.

It is well-settled a person who submits a certification or affidavit in support of a motion must otherwise be competent to testify at trial. R. 1:6-6. There is no contention or assertion counsel to Defendant would be a witness in this matter. Moreover, there is nothing in counsel's certification attesting to his firsthand knowledge of the purchase order issued by his client. (Pa 15-17) Thus, the submission constitutes objectionable hearsay which the Law Division should have declined to consider. See, Wang v. Allstate Insurance Company, 125 N.J. 2 (1991), Jameson v. Great Atlantic & Pacific Tea Company, 363 N.J. Super. 419 (App. Div. 2003).

It is well-settled an attorney's hearsay certification is "inadequate to establish" facts asserted therein. Certifications must be made on personal knowledge setting forth only facts which are admissible in evidence to which the affiant is competent to testify. Pascack Bank v. Universal Funding, 419 N.J. Super. 279 (App. Div. 2011) and Jacobs v. Walt Disney World, 309 N.J. Super. 443 (App. Div. 1998) [additional citations omitted]

Courts have also held an attorney's certification which does not reflect firsthand knowledge is inadmissible evidence on a summary judgment motion. Sellers v. Schonfeld, 270 N.J. Super. 424 (App. Div. 1993). Defendant's motion to dismiss in lieu of an answer is equivalent to summary judgment since it is dispositive in nature.

Notwithstanding well-established precedent, the Law Division relied entirely upon hearsay documents presented by defense counsel. This constitutes reversal error as a matter of law.

Moreover, the Law Division did not initially provide any findings of fact or conclusions of law. (Pa 1) Such findings are required on dispositive motions. R. 1:7-4 and Curtis v. Finneran, 83 N.J. 565 (1980) [additional citations omitted]. The Law Division fully declined to entertain oral argument. (Pa 5) The Law Division acknowledged Plaintiff requested oral argument. Id. Argument occurs as a matter of right, once requested on dispositive motions. R. 1:6-2(d).

The Law Division's decision "no amount of oral argument could have changed the outcome" appears closed to Plaintiff's opposition which provided detailed evidence of efforts to resolve the dispute prior to filing a lawsuit. (Pa 5, Pa 59-Pa 81)

Oral argument is a valuable time to clarify any issues a hearing court may have. Plaintiff asserts it would have been helpful in this case.

The Law Division filed a statement of reasons after the within appeal was filed. (Pa 5) This Court permitted an amended notice of appeal to include the supplemental order. (Pa 92)

The post-appeal statement of reasons concluded "the Plaintiff offered nothing substantive in its papers such that the court could view the Plaintiff's position as constituting a meritorious opposition." (Pa 5)

The Law Division focused on Defendant's terms of contract which require informal and formal further actions to resolve disputes prior to filing a lawsuit. (Pa 5, Pa 45)

Contrary to the Law Division's conclusion, Plaintiff offered substantive evidence demonstrating extensive efforts to resolve the dispute prior to filing a lawsuit. (Pa 55, Pa 58, Pa 10)

Most importantly, the e-mail exchange between Plaintiff and Defendant on July 20, 2023 demonstrates resolution of the dispute with an agreement for payment upon submission of a revised invoice. (Pa 59) Defendant's representative specifically stated "I will follow thru the system." Id. There was no other obstacle to payment.

There is also no question Plaintiff submitted a revised invoice (Pa 10, Pa 58) for payment in accordance with the parties' resolution. Defendant did not make payment. Therefore, the within lawsuit was proper.

Plaintiff argues the failure of the Law Division to consider the substantive evidence (with firsthand knowledge) of Plaintiff constitutes plain error which led to an erroneous decision for dismissal of the lawsuit. Therefore, the order under review should be reversed.

This Court reviews a trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law. See, Santana v. Smile Direct Club LLC, 475 N.J. Super. 279, 285 (App. Div. 2023) [additional citations omitted]. Accordingly, the reviewing court need not give deference to the analysis by the trial court. See, Goffe v. Foulke Management Corp., 238 N.J. 191, 207 (2019). The arbitration provision is reviewed with fresh eyes. Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016).

For the reasons set forth above, it is submitted the arbitration (or mediation) clause referenced in Defendant's motion to dismiss was inapplicable to the facts of the case. There is no question Plaintiff undertook extended efforts to resolve the dispute through e-mail exchanges between the parties. (Pa59-81)

Section 4.14 of Defendant's purchase order addresses governing law and dispute resolution. (Pa 45) The section specifically states when a dispute or other matter in controversy arises concerning services or the agreement, a representative from management of both parties shall meet and endeavor to resolve the claim.

The provision continues with a clause no proceeding shall be filed in the judicial forum prior to a dispute notice and/or mediation. In this case, it is evident the parties undertook significant efforts to resolve the dispute through e-mail exchanges regarding release of retainage and payment of Plaintiff's claim.

The result was a credit from the original invoice (retainage) amount of $201,611.61 (Pa 57 and 58) to a revised invoice statement balance showing the credit, upon which suit is premised for $198,066.38 (Pa 10 and 11) Thus, there was no need to mediate or participate in another formal dispute resolution proceeding.

By any measure, Plaintiff fulfilled its obligations under the purchase order agreement. (Pa 45) Defendant agreed to the revised payment. (Pa 59) All of the e-mail exchanges occurred before the within lawsuit was filed. (Pa 59 to 81)

More importantly, the July 20, 2023 e-mail between the parties (Pa59) clearly reflects a resolution which was shown on the updated statement of account (Pa 10) Thus, there was nothing further to mediate or arbitrate.

Defendant's continued refusal to make payment following agreement for the revised invoice/credit does not constitute a basis to "re-mediate." Rather, it was proper to bring the within lawsuit and seek relief from the court to compel payment. Not dismissal.

Plaintiff submits a de novo review of the pleadings before the trial court clearly demonstrates efforts to resolve the matter prior to filing a lawsuit. The last e-mail exchange confirms resolution. The lawsuit makes evident Defendant failed to pay. The mediation clause at issue is not applicable. Therefore, the Law Division committed plain error and the order under review should be reversed.

Assuming this Court concludes, on de novo review, the Law Division erred in dismissing the lawsuit, any award for attorney's fees is negated. Further, Defendant did not properly seek an award of attorney's fees and the "bulk" request for unspecified fees does not comply, in any way, with requirements for fee applications. R. 4:42-9. There are also serious questions raised about the propriety of the fee and whether it is reasonable. R.P.C. 1.5; Rendine v. Pantzer, 141 N.J. 292 (1995).

CONCLUSION

The Law Division committed plain error by dismissing a lawsuit without findings of fact or conclusions of law which were correlated to the pleadings. Although the Law Division insisted there was no amount of argument which would change the court's decision, Plaintiff provided substantive evidence demonstrating compliance the parties' prior agreement and recent resolution of their disagreement. Thus, there was no basis to dismiss the lawsuit in favor of mediation or arbitration. Plaintiff is entitled to its day in court, and likely summary disposition in its favor based on the agreement and revised invoice.

There was also no legal basis to make an award of attorney's fees in an unspecified amount or without court review.

For the foregoing reasons, the orders under review should be reversed and Plaintiff's complaint reinstated for prompt disposition. This Court may also consider re-assignment to a different judge in the Law Division since a definitive opinion on Plaintiff's position was expressed.

Respectfully submitted,

Andrew Turner

ANDREW R. TURNER

Superior Court of New Jersey

Appellate Division

Docket No. A-003241-23

FOLEY INCORPORATED,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM AN
Plaintiff-Appellant,	:	ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	MIDDLESEX COUNTY
	:	
AMERESCO, INC.,	:	DOCKET NO. MID-L-5205-23
	:	
	:	Sat Below:
Defendant-Respondent.	:	
	:	HON. JOSEPH L. REA, J.S.C.

BRIEF ON BEHALF OF DEFENEDANT-RESPONDENT

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PRELIMINARY STATEMENT

This appeal presents a simple question of contract interpretation, which the trial court clearly and correctly answered. In the trial court's amended order (the "Order") granting Ameresco, Inc.'s ("Ameresco") motion to dismiss (the "Motion") plaintiff-appellant Foley, Incorporated's ("Foley") complaint (the Complaint"), the Honorable Joseph L. Rea found that the written contract (the "Purchase Order"), agreed to by the parties, contained a clear and unambiguous mandatory dispute resolution provision, which required the parties to mediate any dispute before commencing a lawsuit. Judge Rea concluded that because Foley did not attempt (and does not allege that it attempted) to mediate the instant dispute before initiating this action, the court lacked subject matter jurisdiction and so dismissed the Complaint without prejudice. Judge Rea further found that under the plain terms of the Purchase Order, Ameresco was entitled to its fees and costs because Foley ignored the mandatory dispute resolution provision, and he ordered the same. Based on the unambiguous language of the Purchase Order's dispute resolution provision, this Court should reach the same result and affirm the Order.

Foley challenges the Order on two principal fronts. Neither warrants reversal. *First*, Foley incredibly contends that the Purchase Order underlying the Complaint is hearsay documentary evidence and so it was improper for the

trial court to rely on that agreement in dismissing the Company. As with much of its appellate submission, this argument is raised improperly for the first time on appeal, and so Foley's belated objection is of no moment. Moreover, the Purchase Order is integral to the Complaint as it is the agreement forming the basis of its claim, and so the trial court properly considered the Purchase Order on Ameresco's motion to dismiss. Finally, Foley's argument fails on the merits because its own Executive Vice President *admitted* in his certification that the Purchase Order was the operative agreement. Accordingly, even if the Purchase Order was inadmissible hearsay (and it clearly was not), any error by the trial court should be disregarded based on Foley's admission that the Purchase Order is the operative and enforceable agreement between the parties.

Second, Foley argues that the mandatory dispute resolution provision is inapplicable because the dispute was resolved informally before it commenced litigation. Like Foley's hearsay objection, this argument is also devised and advanced for the first time on appeal and should be rejected accordingly. Had Foley believed the parties informally resolved the dispute such that the mandatory dispute resolution provision did not apply, it would have alleged the same in the Complaint. But the Complaint is deafeningly silent on that score. Even if it is considered by this Court, Foley's position is nonsensical. Clearly,

the dispute was live if Foley felt it needed to commence litigation. The existence of a dispute, in turn, required mediation that Foley never alleges to have pursued.

Finally, Foley implicitly concedes that if it circumvented the Purchase Order by prematurely filing this action, Ameresco is entitled to its fees and costs. On appeal, Foley makes much of the fact that Ameresco initially sent correspondence to Foley requesting payment of the fees. That correspondence was sent as a courtesy in an effort to resolve the fee issue. Foley did not respond to the letter and instead filed the appeal, staying the lower court proceedings. Upon this Court's affirmance of the Order, Ameresco respectfully requests that the case be remanded for the determination of the fees and costs to which Ameresco is rightfully entitled.

PROCEDURAL HISTORY

Foley filed its Complaint against Ameresco on September 15, 2023, asserting a single book account claim for $198,066.38. (Pa6-11.) Ameresco moved to dismiss the Complaint on November 3, 2023, for lack of subject matter jurisdiction based on Foley's failure to comply with the Purchase Order's dispute resolution provision. (Pa13-14.) Foley filed its opposition to the Motion on December 5, 2023. (Pa53-56, Da1.) Ameresco filed its reply brief on December 11, 2023, and the Motion was set to be heard on December 15, 2023. (Pa 84.)

The trial court, *sua sponte*, carried the Motion until May 24, 2024, when it dismissed the Complaint without prejudice and awarded Ameresco its reasonable costs and attorneys' fees incurred in connection with the action. (Pa1-2.) By letter to Foley's counsel dated June 3, 2024, Ameresco requested its reasonable attorneys' fees and costs incurred in connection with the Motion. (Pa82-83.)[1] On June 20, 2024, Foley filed its Notice of Appeal. (Pa85-87.)

[1] Foley's appendix includes the June 3, 2024 letter from Ameresco's counsel to Foley's counsel. (Pa82-83.) Under Appellate Rule 2:5-4(a), the record on appeal "shall consist of all papers on file in the court or courts or agencies below. . . ." The June 3 letter was never filed with the trial court, and therefore, should not be considered as part of the record on appeal. *See Harris v. Middlesex Cnty. Coll.*, 353 N.J. Super. 31, 48 (App. Div. 2002) (citing Appellate Rule 2:5-4(a) and concluding "[a]ppellate [c]ourt[s] will not consider evidentiary material which was not part of a record below").

After the Notice of Appeal was filed, Judge Rea filed the Order, which included a statement of reasons, on June 25, 2024. (Pa3-5.) On July 23, 2024, Foley filed its Amended Notice of Appeal and Amended Case Information Statement to account for Judge Rea's statement of reasons issued with the Order. (Pa93-102.)

STATEMENT OF FACTS[2]

Ameresco is a Massachusetts-based company "engaged in the construction business." (Pa6.) Foley is a Caterpillar dealer in New Jersey, which sells "business construction" equipment, including generators. (Pa6.) In September 2019, Ameresco was engaged in a construction project for Trinitas Hospital in New Jersey (the "Project"). (Pa7.) Around the same time, Ameresco sought from Foley a quotation for the sale, delivery, and installation of a commercial generator for the Project. (Pa7.)

Foley and Ameresco agreed on a price and delivery schedule for the generator, the terms of which were governed by the Purchase Order, dated September 11, 2019. (Pa7, 19-52.) The Purchase Order sets out broad, detailed, and clear mandatory and escalating dispute resolution procedures for any

[2] For the purposes of the Motion and this appeal only, Ameresco, as it must, accepts the allegations in the Complaint as true. *See Santiago v. New York & New Jersey Port Auth.*, 429 N.J. Super. 150, 154-55 (App. Div. 2012).

"claim, dispute or other matter in controversy" arising from the services provided under the Purchase Order or the Purchase Order itself. (Pa45-46.) In particular, the mandatory dispute resolution provision requires that any dispute be mediated before "resort[ing] to litigation." (Pa46.)

According to the Complaint, Foley proceeded with the delivery and installation of the generator, and Ameresco paid Foley a portion of the contract price. (Pa7.) After the generator was delivered and fully installed, Foley alleges that Ameresco wrongfully withheld $198,066.38 in retainage (the remaining balance on the contract price). Foley alleges that it made "numerous attempts to obtain payment without result." (Pa8.) Without attempting to first mediate the dispute, as it was required to do, Foley instead initiated this action, asserting its single book account cause of action. (Pa7-9.)

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT (Pa5)

A. Standard of Review

"Whether subject matter jurisdiction exists presents a purely legal issue," which is reviewed de novo. *See Santiago v. New York & New Jersey Port Auth.*, 429 N.J. Super. 156 (App. Div. 2012). The same de novo standard applies in construing dispute resolution provisions in a contract. *See Atalese v. U.S. Legal*

Servs. Grp., L.P., 219 N.J. 430, 446 (2014). For purposes of a motion to dismiss for lack of subject matter jurisdiction, the Court "assume[s] that the allegations in the pleadings are true and afford[s] the pleader all reasonable inferences." *Matullo v. Sky Zone Trampoline Park*, 472 N.J. Super 220, 223 (App. Div. 2022) (quoting *Sparroween, LLC v. Twp. of W. Caldwell*, 452 N.J. Super. 329 (App. Div. 2017)).

B. The Trial Court Properly Considered the Purchase Order (Pa5)

Foley first claims the trial court relied on inadmissible hearsay evidence when it considered the Purchase Order attached as an exhibit to the undersigned's certification in support of the Motion. That argument is raised for the first time on appeal and therefore should not be considered by this Court. (Da1-3.)[3] "It is well-settled that appellate courts will generally 'decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available,' unless the issues relate to jurisdiction or substantially implicate public interest." *Tractenberg v. Township of West Orange*, 416 N.J. Super. 354, 377 (App. Div. 2010) (quoting *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973)).

Even if the Court were to consider Foley's improper argument, it fails as

[3] Foley's brief in opposition to the Motion is properly included in Ameresco's Appendix because Foley's opening brief advances arguments that were not raised before the trial court, and, therefore, it is germane to this appeal. *See* N.J. R. App. P. 2:6-1(2).

a matter of New Jersey law because the Purchase Order, which is the very document that forms the basis of Foley's claim, is referenced in the Complaint. (*See* Pa7 ("The parties agreed on pricing and delivery . . . [d]elivery proceeded as scheduled and Ameresco paid a portion of the overall purchase price.").) It is well established that on a motion to dismiss, a trial court may "consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of the claim." *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 482 (App. Div. 2015) (quoting *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005)) (affirming dismissal where trial court considered multiple documents referenced, but not described, in the complaint). Accordingly, the Purchase Order was properly considered by the trial court, and this Court should affirm the Order.

Finally, Foley's untimely hearsay objections fails on the merits: The Purchase Order is not hearsay and Foley's contention to the contrary is belied by its own submissions below. In Foley's certification in opposition to the Motion, Mr. Amabile admitted that the Purchase Order introduced by Ameresco was the agreement between the parties. (Pa54 ("[Ameresco]'s motion contains a copy of the purchase order specifications.").) Thus, not only did Foley fail to object to the introduction of the Purchase Order, it conceded—on personal knowledge—that the Purchase Order attached to the Motion was the operative

contract governing the parties' dealings. Because there is no dispute that the Purchase Order was binding on the parties, in the unlikely event the Court finds the undisputed governing contract between the parties is hearsay evidence, the Order should still be affirmed. *See* Appellate Rule 2:10-2 ("[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result").

For all of these reasons, Foley's hearsay argument falls flat, and the trial court's Order should be affirmed.

C. The Dispute Was Not Previously Resolved (Argument not presented to the trial court)

Foley next argues, again for the first time on appeal, that "the e-mail exchange between Plaintiff and Defendant on July 23, 2023 demonstrates resolution of the dispute." (Pb9.) That position, which was plainly contrived after the Motion was decided, is belied by the Complaint, Mr. Amabile's Certification, and Foley's arguments before the trial court.

As an initial matter, Foley's novel (and meritless) argument that the parties previously resolved the dispute should be rejected because it was never advanced before the trial court. *See North Haledon Fire Co. No. 1 v. Borough of North Haledon*, 425 N.J. Super 615, 631 (App. Div. 2012) ("An issue not raised below will not be considered for the first time on appeal.")

Foley's position should also be rejected on the merits. The Complaint sets forth a single book account cause of action and alleges that Foley "made numerous attempts to obtain payment without result." (Pa8.) The Complaint does not allege that at any point the parties resolved the dispute. It also does not assert a cause of action for breach of contract in connection with a purported agreement to resolve the dispute. Nor does it allege that the mandatory dispute resolution provision is inoperative based on a purported resolution of the dispute. To the contrary, what the Complaint makes plain is that there was a live dispute between Foley and Ameresco concerning the outstanding retainage.

Similarly, Mr. Amabile's Certification in opposition to the Motion provides that Foley was "actively engaged in correspondence" with Ameresco, but that Ameresco "still refused payment." (Pa55.) Mr. Amabile goes on: "This case should not be dismissed as [Ameresco] demonstrated its objection to payment or voluntary resolution over a year of email exchanges and discussions." (Pa55.) Mr. Amabile's Certification does not suggest that the parties ever resolved the dispute; rather, it states the opposite, that Ameresco steadfastly objected to paying the claimed retainage amount. (Pa53-56.)

Foley's brief in opposition to the Motion also undercuts its position on appeal. Nowhere in its opposition did Foley suggest that there was some previous resolution of the dispute. (*See* Da1-3.) To the contrary, Foley argued:

"[Mr. Amabile's] efforts occurred over a nearly one year period and [Ameresco] declined payment at each opportunity." (Da1-3.)

Even assuming Foley had managed to argue below (without amending the Complaint) that the parties had previously reached a resolution, the outcome would be the same. Clearly, Ameresco's nonpayment under the Purchase Order following any purported resolution engendered a dispute concerning the Purchase Order. And to resolve that non-payment dispute, Foley was still required to mediate that dispute before initiating litigation. (*See* Pa45-46.) It did not, and so its Complaint was properly dismissed.

D. The Record Is Sufficiently Developed (Pa6-11, 19-52)

Recognizing its precarious position substantively, Foley resorts to taking potshots at Judge Rea's Order (and his handling of the case, in general) in an attempt to flout the plain language of the Purchase Order. For example, Foley complains that "[t]here is very little development in the record of this case." (Pb6.) But grievances about an underdeveloped record are of no concern given the pre-answer, motion to dismiss posture of the case. A motion to dismiss for lack of subject matter jurisdiction is a pure question of law. The trial court only had two questions to answer: Did the Purchase Order require Foley to mediate the dispute before filing a lawsuit, and, if so, did Foley mediate the dispute? Judge Rea had everything that he needed to make an informed decision—the

Complaint and the Purchase Order. *See Hoffman v. Supplements Togo Management, LLC*, 419 N.J. Super 596, 611 n.7 (App. Div. 2011) (on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider materials outside the pleadings without converting the motion to a motion for summary judgment).

E. The Trial Court Did Not Err in Forgoing Oral Argument (Pa5.)

Next, Foley attempts to cast doubt on the Order because Judge Rea did not entertain oral argument on the Motion.[4] (Pb8.) While Rule 1:6-2(d) provides that where oral argument is requested, it shall be granted as of right, a court may deny the request, provided the reason for denial is set forth in the record. *Raspantini v. Arocho*, 364 N.J. Super. 528, 531–32 (App. Div. 2003). That is exactly what the trial court did here. Recognizing the straightforward question of contract interpretation presented, Judge Rea explained that "[Foley] offered nothing substantive in its papers such that the court could view [Foley]'s position as constituting a meritorious opposition." (Pa5.) The Purchase Order is not unclear or ambiguous—and Foley does not suggest otherwise.

[4] Foley's Brief asserts that "[t]he Law Division acknowledged [Foley] requested oral argument." (Pb8.) However, Judge Rea's Order plainly provides: "Only the moving party requested oral argument, not [Foley]'s counsel." (Pa5.)

F. The Order Is Sufficient To Permit Appellate Review and Should Be Affirmed (Pa5.)

Finally, Foley takes issue with the fact that Judge Rea did not initially provide written findings of fact or conclusions of law. (Pb8.) While Rule 1:7-4 requires courts to state its findings of fact and conclusions of law on every motion decided by a written order that is appealable as of right, Judge Rea provided a statement of reasons on June 25, 2024. (Pa5.) Thus, any potential error in connection with the trial court's May 24, 2024 order is now moot. (*See* Pa1-5.)

The Order plainly sets out that the dispute resolution provision was mandatory. (Pa5 ("The contract is unambiguous and repeatedly uses the word 'shall', not the word "may", in the context of the requirement that any dispute arising out of the contract go to mediation before a lawsuit is filed.") It also explains that Foley did not offer anything that could constitute a meritorious opposition (*i.e.*, that the dispute was mediated before Foley commenced this action). (*Id.*) Accordingly, Judge Rea's Order interpreting the clear and unambiguous dispute resolution provision should be affirmed. *See Curtis v. Cellco P'ship*, 413 N.J. Super. 26, 33 (App. Div. 2010).

II. THE TRIAL COURT PROPERLY AWARDED AMERESCO ITS FEES AND COSTS (Pa5)

The Purchase Order provides: "A party's failure to comply with this

Section shall entitle the other Party to recover its costs and reasonable attorney's fees in any judicial proceedings that circumvent this dispute resolution provisions [*sic*]." (Pa46.) Upon finding that Foley failed to mediate the dispute before initiating litigation, the trial court properly awarded Ameresco its "fees and costs incurred" due to Foley's violation of the dispute resolution provision. (Pa5.)

On appeal, Foley contests the trial court's award of fees and costs on the basis that the Motion was incorrectly decided. (Pb12.) For all the reasons set forth above, the Motion was properly granted and Judge Rea's determination that Ameresco is entitled to fees and costs, therefore, should be affirmed on appeal.

Furthermore, insofar as Foley takes issue with Ameresco's good faith effort to resolve the fee issue informally through correspondence between counsel, Ameresco is prepared to submit a formal application to the trial court for its fees and costs and Foley will have an opportunity to address that application in the court below.

Accordingly, upon affirmance of Ameresco's motion to dismiss, this Court should also affirm Judge Rea's award of Ameresco's fees and costs and remand the case to the trial court to determine the amount of Ameresco's fees and costs—including those incurred in connection with this appeal.

CONCLUSION

For the foregoing reasons, the trial court's Order granting Ameresco's Motion and awarding Ameresco's its fees and costs should be affirmed, and the matter should be remanded to the trial court to determine the amount of fees and costs to which Ameresco is entitled.

Dated: December 16, 2024

Respectfully submitted,

YANKWITT LLP

By: */s/* Russell M. Yankwitt
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December 30, 2024

Honorable Judges of the Appellate Division
Superior Court of New Jersey
25 West Market Street
Trenton, New Jersey 08625

Re: Foley, incorporated
Vs: Ameresco, Inc.
Case No. A-003241-23T04

Dear Honorable Judges:

Our firm represents Plaintiff/Appellant in the above matter. Kindly accept this very short reply in further support of the relief requested to vacate the Law Division's order of dismissal in favor of mediation and reinstate this case. The pre-lawsuit resolution between the parties should be enforced. (Pa 59)

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REPLY ARGUMENT

Defendant's opposition brief supports Plaintiff's position asserted on appeal. That is largely because the facts are

undisputed. De novo review on appeal confirms the Plaintiff' complaint was properly filed and dismissal was plain error.

Defendant contends issues were not raised below. (Db 7-9) The assertion is not correct. The certification of Plaintiff's representative submitted in opposition before the Law Division contained the e-mails which are also before the Appellate Division. (Pa 53 to Pa 81) The Law Division filing imprint appears on the documents. Respondent's suggestion of first arguing issues before the Appellate Division is simply not supported by the record.

Respondent includes Plaintiff's letter-brief to the Law Division. (Da 1) This document also supports Plaintiff's contention as the informal dispute resolution is set forth at page 2 of the letter brief. (Da 2)

Certainly, it would have been beneficial to have argument before the Law Division to the extent any arguments were not crystalized.

There is no question the Law Division declined to hear oral argument, notwithstanding the request. (Pa 5, Pa 14) This issue was raised in Plaintiff's merits brief. (Pb 3) Respondent requested oral argument in the motion before the Law Division so long as the motion was timely opposed. (Pa 14) Plaintiff timely opposed the motion and was entitled to rely on the request for

argument for the dispositive motion. Once requested, argument is granted as of right. See, R. 1:6-2(d).

The request for argument was not withdrawn. The right to argument was declined by the Law Division as the Judge determined no amount of argument would have change the decision. (Pa 5)

Respondent's brief confirms there was no proper application for attorney's fees. The letter to counsel (Pa 82) does not constitute a proper application. There is no question Respondent did not move to amend the order of dismissal or submit a proper application for attorney's fees. R. 442-9; R. 1:7-4(b).

Defendant did not file a cross-appeal for affirmative relief. Therefore, Defendant's request for remand to award fees is misplaced. (Db14) Arguably, Plaintiff will be entitled to fees once it is determined Defendant failed to honor the negotiated payment thus necessitating this lawsuit. (Pa 46) Regardless, the fee claimed by Defendant is not reasonable or properly supported. (Pa 82)

CONCLUSION

For all of the reasons set forth in Plaintiff's merits brief, Respondent's brief and this letter, and the orders under review

should be vacated and Plaintiff's complaint reinstated for relief in accordance with the parties' underlying agreement. (Pa 59)

Respectfully submitted,

Andrew R Turner

ANDREW R. TURNER

ART:a