SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
❖ ❖ ❖
Docket No. A-003461-23-T2

SANTANDER BANK, N.A.,	**CIVIL ACTION**
Plaintiff-Respondent,	ON APPEAL FROM THE CERTIFIED JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY
v.	
STERN THOMASSON LLP, ANDREW THOMASSON,	
Defendants,	Trial Court Docket No. MER-L-000537-22
and	Sat Below: HON. R. BRIAN McLAUGHLIN, JSC
PHIL STERN,	
Defendant-Appellant.	

BRIEF
ON BEHALF OF DEFENDANT-APPELLANT

Philip D. Stern, Defendant-Appellant [ID#045921984]
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SUBMITTED: March 7, 2025

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PRELIMINARY STATEMENT

The Amended Complaint asserts claims against Philip D. Stern as a guarantor of an allegedly defaulted line-of-credit provided by Santander Bank, N.A. to a law firm formerly known as Stern Thomasson LLP ("Firm"). Stern and Andrew Thomasson are the Firm's two equal partners. The Amended Complaint alleges two events of default: (1) the Firm made an assignment for the benefit of creditors and (2) the Firm ceased to be a "going concern" under the loan documents. There never was an assignment and there is a genuine dispute as to whether the Firm was a "going concern." Nevertheless, the motion court granted summary judgment against Stern.

The Firm *never* made an assignment for the benefit of creditors. Following a partnership dispute litigated in the Chancery Division and then settled, Thomasson executed a Deed of Assignment which appeared to be on behalf of the Firm but he lacked the authority to do so. Hence, there was no assignment.

More than a year before Santander commenced this action and while the Firm was controlled by a court-appointed custodial receiver *pendente lite* in the partnership litigation, Santander confirmed that, notwithstanding the receiver's winding up of the Firm's affairs and separation of the partners' practices, the Firm was not in default because (*i*) it did not formally dissolve,

(*ii*) it continued to receive revenue, and (*iii*) it did not default on any payment. Indeed, the Firm continued to make payments for months after Santander commenced this action—and, when it did stop, Stern offered to make the payments to avoid a payment default but Santander refused.

Furthermore, the summary judgment motion was fatally defective because it failed to prove that Santander assigned its rights to Gulf Coast Bank & Trust Company. Alleging an assignment, Gulf Coast was substituted for Santander as the Plaintiff. Under *New Century Fin. Servs., Inc. v. Oughla*, 437 N.J. Super. 299 (App. Div. 2014), it is the assignee's burden to prove each assignment and, in the absence of such evidence, it cannot obtain summary judgment. Furthermore, because discovery had closed, Stern was deprived of the opportunity to conduct discovery as to the alleged assignment.

Ignoring Stern's plea to deny the motion without prejudice and allow a reasonable period for discovery, the motion court granted the motion and certified the judgment as final. Stern appeals and asks that the judgment be vacated and the matter remanded with instructions to allow discovery.

PROCEDURAL HISTORY

On March 25, 2022, Santander Bank, N.A. filed a Complaint against two defendants, Philip D. Stern and Andrew T. Thomasson. Pa1.

On May 19, 2022, Thomasson filed his Answer to the Complaint. Pa6.

On May 31, 2022, Stern filed a motion to extend his time to answer the Complaint. Pa133.

On June 10, 2022, Santander moved to amend the Complaint. Pa170.

On June 20, 2022, Thomasson filed a Notice of Suggestion of Bankruptcy after having filed his petition for bankruptcy three days earlier in the Western District of Texas. Pa186; Pa192 at ¶¶9, 10; Pa200 at Item #1; Pa313-Pa380.

On October 27, 2022, the lower court denied Sandander's motion to amend and Stern's motion to extend. Pa169; Pa184.

On November 2, 2022, Santander moved to reconsider the denial of its motion to amend the Complaint. Pa188. On November 23, 2022, the lower court granted the motion. Pa210. On November 29, 2022, Santander filed its First Amended Complaint. Pa14.

On December 30, 2022, Stern filed his Answer to the First Amended Complaint. Pa20.

On February 15, 2023, Stern filed a motion to extend the March 15, 2023

discovery end date. Pa217.

On February 17, 2023, Santander filed a motion for partial summary judgment against Stern. Pa255.

On March 29, 2023, Stern filed his Third-Party Complaint against Morris S. Bauer, Esq., Joseph L. Schwartz, Esq., and Mitchell J. Malzberg, Esq. (the "Assignment Defendants"), and Thomasson PLLC. Pa45.

On June 6, 2023, the lower court entered a consent order for a briefing schedule on the Assignment Defendants' motions to dismiss. Pa232. The same day, the lower court denied Stern's DED extension motion. Pa231.

On January 2, 2024, the lower court entered interlocutory orders granting the Assignment Defendants' motions to dismiss. Pa245.

On February 28, 2024, the lower court entered a consent order substituting Gulf Coast as Santander's alleged assignee. Pa243.

On March 28, 2024, the lower court conducted a motion hearing on the motion for partial summary judgment. 1T[1]. On May 17, 2024, the lower court conducted a hearing to settle the form of order and, later that day, entered an Order granting the motion for partial summary judgment. 2T[1]; Pa121.

On July 1, 2024, Stern filed his Notice of Appeal. Pa124.

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[1] Pursuant to *R.* 2:6-8, "1T" designates the transcript of the March 28, 2024 motion hearing and "2T" designates the transcript of the May 17, 2024 motion hearing. The transcriber filed both 1T and 2T on August 13, 2024.

STATEMENT OF FACTS

On August 25, 2017, Philip D. Stern and Andrew T. Thomasson, as the two equal partners in Stern Thomasson LLP ("Firm"), signed a Business Loan Agreement (Pa151) in which the Firm is named as the "Borrower" and Santander Bank, N.A. is named as the "Lender." At the same time, they signed a Promissory Note (Pa156) on behalf of the Firm in the amount of $56,000 with the same Borrower and Lender designations, and they each signed a Commercial Guaranty (Pa160 and Pa164).

On January 18, 2019, Stern and Thomasson, on behalf of the Firm and as guarantors, signed a First Modification Agreement (Pa266) with Santander. Darcy Lowe signed that Agreement on behalf of Santander. Pa269. Those loan documents concerned a line of credit extended to the Firm. After January 18, 2019, Ms. Lowe was Santander's representative who dealt with the Firm concerning the line of credit. Pa458 at ¶¶48-50.

In November 2020, Thomasson drained the Firm's operating accounts and informed the accountant who managed the Firm's payroll that (*i*) there would be no payroll going forward and (*ii*) Thomasson was closing the Firm. Stern promptly commenced an action, *Stern v. Thomasson, et al.*, in the Chancery Division in Union County. Pa459 at ¶¶52-53. The Honorable Robert J. Mega, P.J.Ch., presided and initially appointed Gary Roth, Esq. of the

Javerbaum Wurgaft law firm as the Firm's special fiscal agent but later designated Roth as the Firm's custodial receiver *pendente lite*. *Id.* at ¶53.

By January 2021, Roth permitted Stern and Thomasson to practice law at other law firms. Roth oversaw the transfer to other lawyers of the Firm's active contingency fee cases in which the Firm represented consumers asserting claims under fee-shifting statutes. Pa459 at ¶54. The overwhelming majority of those cases—approximately eighty—went to Thomasson's new firm, Thomasson PLLC. *Id.* In his subsequent bankruptcy petition filed on June 17, 2022, Thomasson would assert owning 100% of Thomasson PLLC. Pa324 at #10.

Concerned over whether the changes in the Firm could affect the status of the line of credit with Santander, Stern reached out to Lowe to advise her on the litigation and Roth's appointment. Pa459-Pa460 at ¶¶55-60. Stern confirmed with Lowe that Santander would not consider the Firm to be in default if it had not been dissolved, money was still coming in, and there was no payment default. Pa460 at ¶58. Stern reported the substance of his call with Lowe to Roth so that Roth, as the Firm's receiver, could oversee and manage payments to the Firm's creditors. Consequently, the Firm continued to make its monthly payments of interest on the line of credit in accordance with the loan documents without concern that Santander might declare a default or

accelerate the loan. *See*, the Santander's payment ledger (Pa274-Pa278).

On September 2, 2021, the Firm, Stern, Thomasson, and Thomasson's wife entered into a written Settlement Agreement. Pa31. Pursuant to the Settlement Agreement, Thomasson remained as the Firm's managing partner. Thomasson agreed, among other things, to promptly change the Firm's name and to indemnify and defend Stern from certain claims including the obligation to Santander. Thomasson promptly changed the name to "ThomassonLLP LLP." Pa397. Among other things, Stern agreed to relinquish his 50% partnership interest in the Firm after certain conditions were met (Pa32 at ¶2) but those conditions were never satisfied and Stern continues to retain his 50% interest (Pa456 at ¶43).

On January 4, 2022, Thomasson appears to have signed a Deed of Assignment for the Benefit of Creditors on behalf of the Firm. Pa80. The Deed named the Assignor as "STLLP Limited Liability Partnership f/k/a Stern Thomasson LLP" and was drafted by Morris S. Bauer, Esq. Pa81. The Deed named Mitchell J. Malzberg, Esq. as the Assignee. *Id.* In or attached to the Deed, Thomasson made false statements as to him having the authority of the Firm to execute the Deed and being its "majority owner." *See*, Pa86, Pa87.

On January 27, 2022, Joseph L. Schwartz, Esq., as counsel for Malzberg, signed a Verified Complaint seeking to proceed pursuant to N.J.S.A. 2A:17-1

et seq. to obtain judicial oversight to the Assignee's marshalling and distribution of the Firm's assets. The action is referred to as *In re STLLP*, which was commenced in the Probate Part in Union County and presided over by Judge Mega. Schwartz then notified the Firm's creditors, including Santander, of the proceedings. Pa415-Pa425.

Stern, as a partner in the Firm owning a 50% interest and having never consented to the Firm's execution of a Deed of Assignment, moved to dismiss *In re STLLP*. Schwartz and Malzberg filed opposition but, on June 3, 2022, Judge Mega granted the motion. Pa181.

By letter dated March 17, 2022, Santander's counsel, Michael Kahme, Esq. wrote to Stern and Thomasson. Pa286. The first paragraph of the letter states that it is a "Notice of Default and Demand for Payment." *Id.* The sole basis for default was set forth in the letter's third full paragraph on its second page (Pa287), which states:

> The Borrower is in default under the Loan Agreement and Note as a result of its January 4, 2022 execution of a deed of assignment pursuant to N.J.S.A. 2A:19-1, et. [sic] seq. which proceeding is currently pending in the Superior Court of New Jersey, Chancery Division, Probate Part, Union County under Docket No. S3023 (the "ASB Proceeding"). The ASB Proceeding was filed as a result of the "wind down" of the Borrower's business as stated in the Verified Complaint filed therein.

Although Stern denies receipt of that letter (for the reasons explained in Pa295

at ¶¶6-8)[2], a review of the entire letter reflects that no other basis for default was asserted. Consequently, on March 25, 2022, Santander commenced the instant action by filing a Complaint (Pa1) against only Stern and Thomasson. Consistent with counsel's March 17 letter, the Complaint, at Pa3, alleged the following default:

> 17. The Borrower is in default under the Loan Agreement and Note as a result of its January 4, 2022 execution of a deed of assignment pursuant to N.J.S.A. 2A:19-l, et. [sic] seq. which proceeding is currently pending in the Superior Court of New Jersey, Chancery Division, Probate Part, Union County under Docket No. S3023 (the "ASB Proceeding").

To allow Stern time to arrange for Thomasson to indemnify and defend Stern against Santander's claims pursuant to the Settlement Agreement (Pa31 at ¶3), Stern obtained consent from Santander's counsel to extend Stern's time to respond until May 31. Pa136 at ¶17; Pa147 at ¶¶8-9. Stern had made demand on Thomasson but Thomasson failed to respond. Pa135 at ¶13. Therefore, Stern filed a motion before Judge Mega to enforce Thomasson's obligation. *Id.* On May 13, 2022, Judge Mega granted Stern's motion. Pa136 at ¶14. A copy of Judge Mega's Order appears at Pa139-Pa145. Six days later,

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[2] In its Reply certification, Pa464, Santander's counsel attached delivery information from the U.S. Postal Service. The signature is clearly not Stern's. Compare the signature on Pa472 with those of Stern on the loan documents (Pa154, Pa158, Pa163, Pa269) and on the Notice of Appeal (Pa126).

Thomasson filed his Answer (Pa6) to the Complaint but he filed nothing on Stern's behalf.

On May 31, 2022, Stern filed a motion in the present action to extend the time for his response so that he could return to Judge Mega to compel Thomasson's compliance with the Settlement Agreement and the May 13 Order. Pa136 at ¶20 (stating Stern's intent to return to Judge Mega).[3] Santander opposed the Motion. Pa146.

In *In re STLLP*, Judge Mega granted Stern's motion to dismiss on June 3, 2022. Pa181. As a result, on June 10, 2022, Santander moved for leave to file its First Amended Complaint. Pa170. If granted, the amended pleading would, among other things, add the Firm as a defendant.

Thus, when Thomasson filed his Notice of Suggestion of Bankruptcy[4] (Pa186) on June 20, 2022, there were two motions pending before the lower court: Stern's May 31 motion to extend time to respond to the Complaint; and Santander's June 10 motion for leave to file its First Amended Complaint.

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[3] The jacket in *Stern v. Thomasson, et al.* reflects that Stern filed a subsequent motion on June 14, 2022 but, on July 7, 2022, the motion was denied without prejudice based on Thomasson's bankruptcy.

[4] Thomasson filed a Voluntary Petition under Chapter 7 on June 17, 2022 in the United States Bankruptcy Court for the Western District of Texas, which is the District in which he resided at the time. A copy of his Petition appears at Pa313-Pa380.

On October 27, 2022, the lower court denied both motions. Pa169, Pa184. The lower court reasoned that the automatic bankruptcy stay required the entire case to be stayed. *Id.*

On November 2, 2022, Santander moved for reconsideration. Pa188. On November 23, 2022, the lower court granted the motion reasoning that the automatic bankruptcy stay only stayed claims against Thomasson. On November 29, 2022, Santander filed its First Amended Complaint (Pa14) which rendered moot Stern's prior motion to extend the time to respond to the original Complaint.

The First Amended Complaint, at Pa16, alleged the following default:

> 18. The Firm is in default under the Loan Agreement and Note as a result of its execution of a deed of assignment on January 4, 2022 pursuant to N.J.S.A. 2A:19-1, et. [sic] seq., in the Superior Court of New Jersey, Chancery Division, Probate Part, Union County under Docket No. S3023 (the "ASB Proceeding") and its termination as a going concern.

Thus, in addition to the alleged making of the Deed of Assignment—a fact which Santander knew to be false from Judge Mega's June 3, 2022 Order which was based on the fact that Thomasson lacked the authority to execute such a Deed on behalf of the Firm—Santander now also alleged that the Firm was not a "going concern."

On December 30, 2022, Stern filed a timely response to the First

Amended Complaint. Pa20. Unfortunately, by that time, there were only 75 days left before March 15, 2023, the original discovery end date ("DED"). Therefore, on February 15, 2023, Stern moved to extend the DED.

Two days later, Santander filed its motion for partial summary judgment against Stern. Pa255. In opposition, Stern set forth the facts showing the Firm never made a Deed of Assignment and continued to be a "going concern." As Judge Mega adjudicated, the Firm never made a Deed of Assignment because Thomasson never had authority to execute the Deed on the Firm's behalf. Moreover, "going concern" is a term which is not defined in loan documents and, based on Stern's conversation with Lowe, Santander's authorized representative, Santander did not consider the Firm to be in default if it had not been dissolved, was continuing to have revenues, and had not defaulted on any payment. Indeed, the Firm has never been dissolved, continued to receive money as its contingent fee cases were settled by successor firms, and the Firm continued to make its monthly installments even after Santander commenced this action.[5] Thus, while there can be a legitimate debate over the meaning of

[5] Although neither the Complaint nor the First Amended Complaint alleged a payment default, Stern's opposition to the summary judgment motion also addressed any argument that there had been a payment default. Pa296-Pa298 at ¶¶13-17. Stern explained that, according to Santander's records, Pa274-Pa278, installments were current through May 2022. As Thomasson had assumed all of the Firm's liabilities pursuant to the Settlement Agreement, Stern was

"going concern," it is nevertheless an ambiguous term. And Santander, after being informed that there had been a court-appointed receiver who was, at the time, overseeing the separation of the Firm's attorneys and succession of counsel to handle the Firm's pending cases and remit the Firm's share of fees, informed the Firm that those facts would not trigger a default unless the Firm were dissolved.

On March 27, 2023, Santander filed its Reply on its Motion for partial summary judgment. Pa464.

Then, on March 29, 2023 (which was within the period allowed under *R*. 4:8-1(a)), Stern filed a Third-Party Complaint. Pa45. He asserted claims against Bauer, Malzberg, and Schwartz (the "Assignment Defendants") alleging they knew or should have known that Thomasson lacked the authority to execute the Deed of Assignment for the Firm but nevertheless proceeded with commencing and litigating *In re STLLP*. He also asserted post-petition claims against Thomasson for failure to act to preserve the Firm's attorney's liens and sought an accounting from Thomasson and Thomasson PLLC[6] for the eighty or so former Firm cases which Thomasson PLLC took over.

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unaware of what payments he had made. Nevertheless, Stern proffered to cure any payment default.

[6] In his Petition, Thomasson asserted that he owned 100% of Thomasson PLLC. Pa324 at #19.

The Assignment Defendants desired to file motions to dismiss the claims against them. They met-and-conferred with Stern and, together, they agreed on a briefing schedule. Then, a confirmatory Consent Order was submitted.

By moving to extend the DED, Stern sought to conduct discovery on the "going concern" issue including deposing a Santander representative as well as Ms. Lowe. Stern also sought discovery on issues raised in Thomasson's answer to the Complaint for which Stern had no personal knowledge. And, Stern anticipated the need for discovery on his then yet-to-be filed Third Party Complaint. Pa218-Pa220.

On June 6, 2023, the lower court entered the Consent Order for the briefing schedule on the Assignment Defendants' motions to dismiss. Pa232.

Later the same day, the lower court denied Stern's motion to extend the DED. Pa231. The court's statement of reasons consisted of one sentence:

> The within motion is denied as moot in light of the entry of the June 6, 2023 Consent Order Extending Time to Answer and Setting Briefing Schedule.

The Assignment Defendants then proceeded to file their motions. See entries on June 28-30, 2023 (eCourts' Trans IDs LCV20231917599, LCV20231977989, and LCV20231983745) at Pa248-Pa249. Stern filed opposition. See entry on August 15, 2023 (Trans ID: LCV20232349628) at Pa249. The Assignment Defendants replied. See entries dated September 8,

2023 (Trans IDs: LCV20232560502, LCV20232566054, and LCV20232567065) at Pa249. On January 2, 2024, the lower court entered interlocutory orders granting the Assignment Defendants' motions. *See*, Pa238.

In February 2024, Santander's counsel reached out to Stern claiming Santander had assigned its rights to Gulf Coast, that Gulf Coast had retained his firm to represent it, and solicited Stern's consent to an Order substituting Gulf Coast for Santander. Stern consented and, on February 28, 2024, the lower court entered the Order. Pa243.

On March 28, 2024—367 days after briefing on the partial summary judgment motion had closed—the lower court conducted a motion hearing.

At the hearing, Gulf Coast's counsel made clear that "[t]his is a motion for partial summary judgment ***by Gulf Coast Bank***." 1T5-10 (emphasis added). He also explained that "this is a note suit." 1T5-18. He then proceeded to argue that the Firm is not a going concern. 1T6.

Stern argued the motion was no longer ripe. 1T9-16. He explained that, by virtue of the amendment to the pleadings occasioned by the February 28, 2024 Consent Order, proof of the alleged assignment to Gulf Coast had become a necessary element of Gulf Coast's case and there was no evidence presented proving any assignment. 1T9-15 to -22. In addition, because the alleged assignment was not asserted until after discovery had closed, Stern had

no opportunity to conduct discovery with respect to the alleged assignment. 1T9-23 to 1T10-2. Therefore, Stern requested the motion be denied without prejudice, discovery be reopened, and the parties be directed to confer and report back to the court as to a timetable for discovery. 1T16-13 to 1T17-3.

Notwithstanding those arguments and Stern's arguments about the genuine issues of fact as to whether a default occurred either based on the Deed of Assignment or whether the Firm was an "going concern," the lower court granted Gulf Coast summary judgment.

LEGAL ARGUMENT

POINT I. THE STANDARD OF REVIEW. (Not Addressed By the Court Below)

The summary judgment standard is well-established.

An appellate court's review of a summary judgment order is *de novo* such that "the trial court rulings are not entitled to any special deference." *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 330 (2010) (internal quotation marks omitted). Thus, reviewing courts "'employ the same standard [of review] that governs the trial court.'" *Id.* (quoting *Busciglio v. DellaFave*, 366 N.J.Super. 135, 139 (App.Div.2004)).

Rule 4:46-2(c) permits the granting of summary judgment only when the evidential materials "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." "[W]hether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995)

POINT II. SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THERE IS NO EVIDENCE IN THE RECORD OF THE ALLEGED ASSIGNMENT FROM SANTANDER TO GULF COAST. (1T31-20 to 1T32-1)

Here, the evidential materials submitted in support of Gulf Coast's summary judgment motion failed to establish its right to enforce the Firm's note to Santander or Stern's guaranty of that note. If the motion's evidential materials were Gulf Coast's proofs at trial, Stern would be entitled to dismissal because Gulf Coast would have failed to prove its claimed right to enforce an obligation which the Firm and Stern made to Santander and not to Gulf Coast.

In *New Century Fin. Servs., Inc. v. Oughla*, 437 N.J. Super. 299 (App. Div. 2014), the Appellate Division, using *R.* 6:6-3 as a guide, concluded an assignee who seeks summary judgment must present competent evidence as to the full chain of assignment. *Id.* at 317. Consequently, the court reversed the motion court's entry of summary judgment because the assignee's motion contained "no document evidencing the first link in New Century's assignment chain." *Id.*, 437 N.J. Super. at 320. This Court should do the same here because Gulf Coast moved for summary judgment but failed to provide any evidence that the note and the underlying debt was properly transferred by the original creditor, Santander, to the alleged assignee, Gulf Coast.

Similarly, in *Wells Fargo Bank, N.A. v. Ford*, 418 N.J. Super. 592 (App.

Div. 2011), the court reversed summary judgment which the motion court had entered in favor of Wells Fargo due to lack of competent evidence that Wells Fargo had the right to enforce the defaulted debt. Like Gulf Coast's claimed assignment from Santander, Wells Fargo claimed to be the assignee of Argent who originally owned the promissory note. The court articulated the three categories of people who, under N.J.S.A. 12A:3-301 of the Uniform Commercial Code, can enforce a note. *Id.* at 597-599. Concluding the documents Wells Fargo submitted would establish its right to enforce the note, the court nevertheless reversed summary judgment because those documents were not properly authenticated. *Oughla*, citing to *Ford* at 599-600, explained, "An affiant must aver that the facts presented are on personal knowledge, identify the source of such knowledge, and must properly authenticate any certified copies of documents referred to therein and attached to the affidavit or certification." *Oughla* at 317-18. Here, Gulf Coast failed to identify, authenticate, or provide any documents tending to prove the alleged assignment from Santander.

This appeal presents an easier case than *Ford* because Gulf Coast proffered no documents or other evidence of any assignment or otherwise proved its right to enforce the Firm's note or Stern's guaranty of the note. Thus, based on *Oughla* and *Ford*, Gulf Coast's motion failed to establish its

prima facie entitlement to summary judgment and the May 17, 2024 Order should be reversed.

POINT III. SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE STERN WAS NOT PERMITTED TO CONDUCT DISCOVERY. (Not Addressed By the Court Below)

"Generally, summary judgment is inappropriate prior to the completion of discovery." *Wellington v. Estate of Wellington*, 359 N.J. Super. 484, 496 (App. Div. 2003) (citing *Velantzas v. Colgate-Palmolive Co., Inc.*, 109 N.J. 189, 193 (1988)). But, a "motion for summary judgment is not premature merely because discovery has not been completed, unless plaintiff is able to 'demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 N.J. 544, 555 (2015) (quoting *Wellington* at 496).

Here, the motion court denied Stern any reasonable opportunity to conduct discovery. During the first half of 2022, after Stern was served with process, he was seeking to enforce Thomasson's duty to indemnify and defend Stern. When Thomasson failed to comply, Stern sought additional time to compel Thomasson and expressed concern that, if Stern defended the action while seeking to compel Thomasson to provide a defense, Thomasson might assert that Stern had mishandled the defense and, therefore, Thomasson need

not supply one. Pa136 at ¶¶18-19.

While Stern's motion for an extension of time was pending, he pursued enforcement of Thomasson's duty to defend. Around the same time, Santander moved for leave to file its First Amended Complaint. While those motions were pending, Thomasson filed for bankruptcy. In response, the court below denied Stern's motion to extend time and Santander's motion to amend because of Thomasson's bankruptcy and stayed the entire case. The case remained stayed until November 23, 2022 when the lower court granted Santander's motion to reconsider the court's prior denial of Santander's motion for leave to amend. Six days later, Santander filed its First Amended Complaint and Stern timely filed his Answer on December 30, 2022, leaving only 75 of the 300-day discovery period remaining.

Stern timely filed a motion to extend the DED. Three months later, on June 6, 2023, the lower court denied the motion asserting that it was moot because the court had entered a consent order setting a briefing schedule for the Assignment Defendants' motions to dismiss Stern's Third-Party Complaint. But nothing in the briefing schedule mooted Stern's motion—particularly with respect to issues between Stern and Santander.

Furthermore, in February of 2024, counsel for Gulf Coast first made Stern aware that, in December 2023 (1T20-25 to 1T21-1), there had been an

assignment. The unextended DED had expired nine months earlier leaving Stern unable to conduct any discovery on the assignment issue. In *Ford*, where Wells Fargo submitted documents showing the note had been transferred but the documents were not properly authenticated, the Appellate Division not only reversed but directed that, after remand, "defendant may conduct appropriate discovery, including taking the deposition of Baxley and the person who purported to assign the mortgage and note to Wells Fargo on behalf of Argent." *Ford* at 600.

Like in *Ford*, Stern should be permitted discovery on all relevant topics including evidence as to the ambiguous term "going concern" and the alleged assignment transaction. Therefore, the 300-day discovery period should start from when this case is remanded.

POINT IV. SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THERE EXIST GENUINE ISSUES OF MATERIAL FACT AS TO THE FIRM'S DEFAULT. (1T29-22 to 1T31-19, 1T32-2 to 1T33-2)

Stern's conversation with Santander's representative, Lowe, establishes facts which, under the summary judgment standard, should be accepted as creating a genuine issue over whether the Firm was a going concern. The Firm was not dissolved, it continued to receive money from its contingency fee cases, and it continued to pay the monthly installments of its loan from

Santander.

The term "going concern" was drafted by Santander and, therefore, should be construed against it. Moreover, the evidential material should be "viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard." *Brill* at 523.

Here, the Firm relied on Lowe's description of what would constitute a default after she was made aware that there was court-appointed receiver who was winding down the Firm. Lowe was Santander's representative who signed the First Modification Agreement for Santander. Pa269. Under the summary judgment standard, Gulf Coast or Santander is not entitled to an inference that "going concern" required the Firm to be accepting new business. There is no clear definition of "going concern" and, therefore, it is susceptible to at least two reasonable interpretations and, to determine the parties' intent, "the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." *Nester v. O'Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997). Stern should have been permitted a reasonable opportunity to conduct discovery on those, and all other, relevant issues.

CONCLUSION

For the foregoing reasons, Defendant Philip D. Stern respectfully requests this Court reverses the May 17, 2024 Order which entered summary judgment against him.

Respectfully submitted,

/s/ Philip D. Stern
Philip D. Stern
Pro se

Dated: March 7, 2025

Superior Court of New Jersey
Appellate Division

Docket No. A-003461-23-T2

SANTANDER BANK N.A., *Plaintiff-Respondent,* vs. STERN THOMASSON LLP, ANDREW THOMASSON, *Defendants,* and PHIL STERN, *Defendant-Appellant.*	CIVIL ACTION ON APPEAL FROM THE CERTIFIED JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY DOCKET NO.: MER-L-00537-22 Sat Below: Honorable R. Brian McLaughlin, J.S.C.

AMENDED BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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Rules

PRELIMINARY STATEMENT

The Trial Court below correctly granted partial summary judgment in favor of plaintiff, Gulf Coast Bank & Trust Co., as assignee of Santander Bank N.A. ("Gulf Coast"), against defendant, Philip D. Stern ("Stern"), an attorney, appearing pro se herein, for money damages, certifying the judgment as final pursuant to Rule 4:42-2, and conforming Phil Stern's name to be Philip D. Stern pursuant to Rule 4:46-2 (the "Partial SJ").

The undisputed record before the Trial Court below establishes that Stern and his former law firm, STFirm, breached the loan documents at issue because the STFirm ceased being a "going concern" after Stern and his former partner, defendant, Andrew Thomasson ("Thomasson", and with Stern and the STFirm collectively referred to as the "Defendants"), ceased their affiliation with each other, Thomasson moved to Texas to start a new law firm, their then current cases were divided, and Stern went to work for another law firm as an attorney.

The evidence presented to the Trial Court below also established additional events of default which Stern ignores. In addition to proving that Defendants were in default, Gulf Coast's standing to prosecute the matter was not, and is not, truly in dispute, as Stern consented to the substitution of Gulf Coast in the place of the original plaintiff, Santander Bank N.A. ("Santander") by the execution of a Consent Order substituting Gulf Coast. Stern consented to

the substitution after having been provided with the assignment evidencing the transfer of the subject loan from Santander to Gulf Coast and, as a matter of law, has no standing to challenge the assignment of the subject loan which occurred between Gulf Coast and Santander.

Notwithstanding these undisputed facts, Stern, who is an experienced litigator despite his *pro se* status in this matter, has brought this appeal without a supportable factual or legal basis. As will be set forth in more detail below, no amount of discovery sought by Stern would have changed the outcome in this matter as there is no doubt the STFirm was no longer operating and the STFirm and Stern defaulted on their agreements at issue.

Procedurally, Stern sat on his rights during the litigation below and affirmatively chose to refrain from engaging in discovery in the matter knowing he had over two and one-half months before discovery ceased. Stern deflects the fact that while he had the opportunity to conduct discovery for months, he did nothing. Stern had more than sufficient time to seek discovery but, for reasons unknown, chose to delay serving discovery while he engaged in fruitless motion practice on several issues below. While the outcome would not have changed, the responsibility for any failure to obtain discovery in this case falls squarely with Stern and not with the decisions of the Trial Court.

This is especially true with respect to the alleged discovery needed regarding the substitution of Gulf Coast for Santander, as Stern executed a Consent Order with the Court allowing the substitution after he received evidence of the assignment. It was only at oral argument when Stern claimed he needed more discovery on the transfer issue, notwithstanding his execution of a Consent Order substituting Gulf Coast for Santander.

Legally, Stern's arguments on appeal are directly contrary to the well-established law of this State which holds that, absent any ambiguity, contracts must be enforced as written with the terms therein being given their plain and ordinary meaning. To avoid the application of settled law to the undisputed facts of this matter, Stern attempts to dispute facts which he previously admitted on the record (unsuccessfully), misinterprets easily definable contractual terms, and seeks to divert the Court's attention away from his own dereliction in the completion of discovery. The record reflects that there is no reason to disturb the Trial Court's ruling and Stern's arguments on appeal should be dismissed in their entirety.

For the foregoing reasons, which are set forth in detail below, the partial summary judgment at issue in this appeal was properly entered, the decision should be affirmed, this appeal should be dismissed, and the Trial Court's rulings affirmed in all respects.

COUNTER-STATEMENT OF FACTS

The Statement of Facts and Procedural History in Stern's initial brief provides a generally correct recitation of the procedural history of the proceedings below. However, it contains a significant, and improper, amount of argument, conclusory statements, and commentary. These arguments, conclusory statements, and commentaries should be seen by this Court for what they are – a transparent attempt to interject Stern's opinion as to the evidence presented below rather than an actual factual recitation of the evidence presented.

The instances of inaccuracy shall not be addressed individually here, are all disputed, and to the extent necessary are addressed in more detail in the Legal Argument Section of this Brief. In order to avoid an unnecessarily lengthy recitation of the evidence that Gulf Coast presented to the Trial Court below, Gulf Coast is only addressing in this Counter-Statement of Facts the salient facts which support Gulf Coast's position and/or refute the material inaccuracies included in Stern's Statement of Facts and Procedural History.

A. THE UNDERLYING LOAN AT ISSUE

On or about August 25, 2017, the STFirm executed and entered into a Business Loan Agreement (the "Loan Agreement") with Santander, which set forth the terms and conditions for a business line of credit to be made by

Santander to the STFirm in the original principal amount of up to $56,000.00 (the "Loan"). See Pa151 to Pa154. The Loan Agreement provides that the following constitute an event of default:

> **…**
>
> **Other Defaults**. [The STFirm] fails to comply with any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents.
>
> …
>
> **Death or Insolvency**. The dissolution or termination of [the STFirm's] existence as a going business or the death of any partner, the insolvency of Borrower, the appointment of a receiver for any part of [the STFirm's] property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against [the STFirm].
>
> …

See Pa153. (emphasis in underlying added, bold in original). The Loan Agreement also contains a Negative Covenant provision, "Continuity of Operations"), under which the STFirm agreed that it would not, without the prior written consent of Santander, engage in business activities substantially different from those it was engaged in at the time of execution, cease operations, change its name, or make any distribution with respect to any capital account. See Pa152.

In order to memorialize, in part, the STFirm's obligations under the Loan Agreement, on August 25, 2017, the STFirm executed and delivered to

Santander a Promissory Note in the original principal amount of up to $56,000.00 (the "Note"). See Pa156 to Pa158. It is an event of default under the Note if any payment is not made when due and if any payment is not made within fifteen (15) days of the date it is due, a late charge of the greater of $25.00 or 5.0% of the regularly scheduled payment amount is be assessed. See Pa156. The Note also provides in the "Other Defaults." section for an event of default for a failure to comply with any other term, condition, or covenant contained in any other document evidencing the Loan and also includes the same "Death or Insolvency" clause as set forth in the Loan Agreement. See Pa157.

The partners of the STFirm at the time of the execution of the Loan Agreement and Note were Thomasson and Stern (collectively referred to herein as the "Partners"). See Pa294 at ¶3. To ensure payment under the Loan Agreement and Note, the Partners each executed and delivered a separate Commercial Guaranty (a "Guaranty" and collectively referred to as the "Guaranties") to Santander, wherein they each agreed to pay Santander all obligations owed by the STFirm on the Loan. See Pa160 to Pa167.

On January 18, 2019, Santander, the STFirm, Thomasson, and Stern executed and entered into a First Modification Agreement (the "Modification", and together with the Loan Agreement, Note, and Guaranties, collectively referred to as the "Loan Documents"), which in part increased the line of credit

amount to $113,000.00 and modified the interest rate to Santander's Prime Rate plus 2.50% per annum. See Pa266 to Pa271.

B. THE DEFAULTS

In July 2020, Thomasson informed Stern that he was leaving the STFirm at the end of the year and taking the STFirm's four (4) employees with him. See Pa306 at ¶52. After the announcement of his exit, in November 2020, Thomasson allegedly "drained" the STFirm's operating accounts and informed the STFirm's accountant that there would be no further payroll as he was closing the STFirm. Id. In response to Thomasson's exit, on November 19, 2020, Stern commenced an action against the STFirm and Thomasson captioned Stern v. Thomasson, et al, Docket No. UNN-C-106-20 (the "Partner Litigation"). Id. at ¶ 53 and Pa47 at ¶11. In that case, the Court appointed Gary Roth, Esq., as the Special Fiscal Agent, and later as the Custodial Receiver, for the STFirm. See Pa31. As Custodial Receiver, Roth acted to "wind down and collect [the STFirm's] outstanding receivables and resolve outstanding liabilities" See Pa407 at ¶10.

On January 22, 2021, Stern and Thomasson separated their law practices, whereafter Stern began practicing at the Kim Law Firm LLC and Thomasson began practicing at Thomasson PLLC. See Pa31. On September 2, 2021, Stern and Thomasson entered into a Settlement Agreement to, in part, resolve disputes

over the separation of the STFirm's finances. Id. Among Stern's obligations under the Settlement Agreement was his obligation to "remove himself from, and his access to, all of the STFirm's financial accounts." See Pa35 at ¶4. At the same time, Thomasson took full managerial control of the STFirm and "promptly undertook efforts to begin winding up its affairs and pay creditors so it could be officially dissolved." See Pa469 at ¶4. Later in September 2021, Thomasson changed the STFirm's name to "Thomasson LLP," and subsequently, in or around January 2022, to "STLLP Limited Liability Partnership." See Pa45 at ¶16.

On January 4, 2022, Thomasson purportedly exercised his managerial authority of the STFirm and executed an Assignment for the Benefit of Creditors (the "ABC"), thereby granting and assigning to Mitchell J. Malzberg, Esq., "all and singular leasehold interests, goods and chattels, bonds, notes, books and accounts, contract rights and credits … in trust to sell, collect and disburse and dispose of the same for the equal benefit of creditors … and distribute the net proceeds to said creditors in proportion to their several just demands…". See Pa83 at ¶2. On January 27, 2022, Malzberg filed a Complaint in Support of an Order to Show Cause in the Superior Court of New Jersey, Union County, Chancery Division, Probate Part (the "ABC Proceeding"). See Pa68. The ABC

proceeding was dismissed on February 3, 2022, on jurisdictional grounds. See Pa173 at ¶5.

In response to the commencement of the ABC Proceeding and its failure to continue as a going concern, on March 17, 2022, Santander demanded payment of all amounts due and owing from Stern and the STFirm pursuant the Loan Agreement, Note and Guaranties. See Pa287 at ¶5. Despite the demand, neither Stern nor the STFirm remitted payment under the Note and no payments were made on the Loan since May 25, 2022. See Pa260 at ¶20. As of February 6, 2023, the sum of $98,902.23, exclusive of attorney's fees and costs, was due and owing from Stern to Santander under the Note, and interest at the per diem rate of $26.47 was accruing on the amount due. Id. at ¶¶ 25 and 26.

C. THE PARTNER LITIGATION

On April 19, 2022, Stern filed a Motion to Enforce Indemnification and Defense Agreement in the Partner Litigation. See Pa142. The Motion to Enforce Indemnification was granted, in part, on May 13, 2022. See Pa139. Thereafter, on June 14, 2022, Stern filed a Motion to Enforce prior orders in the Partner Litigation seeking to compel Thomasson to obtain a dismissal from the present action on his behalf. See Stern's Brief at Pg. 10, Footnote 3. Stern's Motion to Enforce Prior Orders was denied without prejudice on July 7, 2022. Id.

Thomasson has since filed bankruptcy and been dismissed from this action. See Pa313; Stern's Brief at Pg. 11.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On March 25, 2022, Santander filed its initial complaint (the "Complaint") initiating the present action against Stern and Thomasson. See Pa1. After being served with process, Stern spoke with the attorney for Santander, Michael Kahme, Esq. ("Kahme"), who consented to allow Stern to file his response by May 31, 2022. See Pa136 at ¶17. Instead of filing an answer to the Complaint during that additional time, on May 31, 2022, Stern filed a Motion to Extend Time to Answer. See Pa133. Stern's Motion to Extend Time to Answer was denied on October 27, 2022. See Pa169.

On November 29, 2022, Santander filed a First Amended Complaint to join the STFirm as the ABC proceeding had been dismissed. See Pa14. Stern filed his Answer to the First Amended Complaint on December 30, 2022. See Pa20. Thereafter, Stern did not engage in discovery, but instead, on February 15, 2023 – forty-seven (47) days after filing his Answer – filed a Motion to Extend the Time for Discovery (the "Discovery Extension Motion"). See Pa217; Pa223 at ¶16.

On February 17, 2023, Santander filed its Motion for Partial Summary Judgment (the "Motion for Partial SJ"). See Pa255. On March 15, 2023, more

than three months after Stern filed his Answer, the period for discovery expired without Stern serving Santander with a single interrogatory, request for admission, document demand, or subpoena for taking depositions, notwithstanding that he was aware of the close of discovery and that none had been served yet. Id*;* Pa219 at ¶14. On March 22, 2023, Stern filed his opposition to the Motion for Partial SJ, arguing, in part, that despite his failure to take any action in the months prior, he needed additional time to conduct discovery. See Pa294 and 1T:13-10 to 1T:13-18.

On June 6, 2023, the Trial Court denied the Discovery Extension Motion. See Pa217 and Pa231. Stern failed to file for reconsideration of the denial of the Discovery Extension Motion or otherwise take any further action to obtain his sought-after discovery. See Pa246-251. As such, the period for discovery expired without Stern serving Santander with a single discovery demand. Id.

On February 28, 2024, the Trial Court entered a Consent Order, signed by Stern, which provided that "Gulf Coast Bank & Trust Co. is hereby substituted as Plaintiff by the consent and with the signature of Stern in this action in place of 'Santander Bank, N.A.' in all respects" (the "Consent Order"). See Pa243.

On March 28, 2024, the Trial Court held oral argument on the Motion for Partial SJ. See 1T:4-19 to 1T:4-22. At the hearing, Kahme informed the Trial Court that prior to Stern's execution of the Consent Order, he had sent Stern a

copy of the assignment by which Santander transferred to Gulf Coast all of its right, title, and interest in and to the $93,000.00 debt owed to it by the STFirm under the Loan Agreement (the "Assignment"). See 1T:18-4 to 1T:18-19. Stern did not dispute his receipt and review of the assignment or his execution of the Consent Order. See 1T:20-6 to 1T:21-6.

On May 17, 2024, the Trial Court entered Default Judgment for Money Damages Pursuant to Rule 4:46-2, et seq. against the STFirm, and Certifying the Default Judgment as Final Pursuant to Rule 4:42-2 for $98,902.23 together with interest of $26.47 per day from February 6, 2023 until the entry of Default Judgment and post-judgment interest thereafter pursuant to Rule 4:42-11. See R001. On the same day, May 17, 2024, the Trial Court entered an Order granting the Motion for Partial SJ, finding Stern had failed to demonstrate the existence of a genuine issue of material fact in dispute that Stern signed the Guaranty, the STFirm is no longer a going concern, and, based on the Consent Order, the Loan had been validly assigned to Gulf Coast. See Pa121; See also 1T:29-22 to 1T:33-4. It is the Trial Court's decision in granting the Motion for Partial SJ which is the subject of the present appeal. See Pa121.

STANDARD OF REVIEW

The standard of review with respect to the summary judgment entered below is the *de novo* standard, in which this Court applies the same legal

standard as the trial court below. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Summary judgment is appropriate when viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated there are no genuine disputes as to any material facts, and the moving party is entitled to judgment as a matter of law. Id. at 406; R. 4:46-2I; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "When no issue of fact exists, and only a question of law remains, this Court affords no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citation omitted). The Court in Brill explained:

> if the opposing party [in a summary judgment motion] offers ... only facts which are immaterial or of an insubstantial nature, a mere scintilla, "fanciful, frivolous, gauzy or merely suspicious," he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

Brill, at 529-30 (*citing* Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)).

When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Id. (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). By its plain language, R. 4:46-2 dictates that the court should deny a summary

judgment motion only where the opposing party has come forward with evidence that creates a genuine issue as to any material fact challenged. See Brill, 142 N.J. at 529. This means that the non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute. Id. at 529. In fact, summary judgment is not to be denied if other evidence pertinent to the motion demonstrates palpably the absence of any issue of material fact, even if the allegations of the pleadings standing alone may raise such an issue. See Rankin v. Sowinski, 119 N.J. Super. 393, 399-400 (App. Div. 1972).

Interpretation of a contract is a purely legal question suitable for decision on a motion for summary judgment. See CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 119 (App. Div. 2009). Where, as here, the outcome of the dispute turns on the construction of a clear and unambiguous agreement, resorting to extrinsic evidence is not necessary as there are no material issues of fact in dispute. See Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003).

While it is true, generally, that summary judgment is inappropriate prior to the completion of discovery – which did not occur here as discovery closed on March 15, 2023– the fact that discovery is incomplete is not an absolute bar to the entry of summary judgment. See United Sav. Bank v. State, 360 N.J. Super. 520, 525 (App. Div. 2003). Indeed, discovery need not be completed

before the court entertains summary judgment in cases "where it is readily apparent that continued discovery would not produce any additional facts necessary to a proper disposition of the motion." DepoLink Court Reporting & Litigation Services v. Rochman, 430 N.J. Super. 325, 341 (App. Div. 2013); see also Wellington, 359 N.J. Super. at 496 (App. Div. 2003); Young v. Hobart West Group, 385 N.J. Super. 448, 469-470 (App. Div. 2005) ("The law is clear that discovery need not be undertaken [before entering summary judgment] when it will not alter the outcome.").

In fact, the burden is on the party opposing a motion for summary judgment on the grounds that discovery is incomplete to "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." See Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529, 541 (App. Div. 2019), *aff'd as modified*, 244 N.J. 567 (2021). Following logically, courts should only deny the entry of summary judgment prior to the close of discovery where the opposing party can prove they are unable to "file fully responsive supporting papers because critical facts are particularly within the moving party's knowledge." See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 499 (App. Div. 2012) (*citing* Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963)).

LEGAL ARGUMENT

At the time the Trial Court entered the Partial SJ in Gulf Coast's favor, the record was devoid of any genuine issue of material fact in dispute. In considering the Motion for Partial SJ then, the Trial Court could properly review and rule on the legal issues presented as a matter of law – and did so correctly based upon the undisputed facts of the case. There is no legal or factual basis for Stern to upend the entry of the Partial SJ on the issues before the trial court at that time.

POINT I

SUMMARY JUDGMENT WAS PROPERLY ENTERED BECAUSE OF THE NUMEROUS DEFAULTS RELATING TO THE STFIRM'S CESSATION OF OPERATIONS

Initially, the Trial Court was correct when it determined that there are no genuine issues of material fact as to Defendants' defaults under the Loan Agreement. It is well-settled law in New Jersey that contracts are given their plain and ordinary meaning. See M.J. Paquet, Inc. v. N.J. Dept. of Transp., 171 N.J. 378, 396 (2002) (citation omitted). As a result, when the terms of a contract are clear and unambiguous a court must enforce them as written – as the contract evidences the parties' intention and agreement. See County of Morris v. Fauver, 153 N.J. 80, 103 (1998) (citation omitted); see also Statewide Realty Company v. Fidelity Management and Research Company, Inc., 259 N.J. Super. 59, 68 (App. Div. 1992) ("It is fundamental that a contract must be enforced in

accordance with the express written terms of the contract itself, which evidences the parties' intention and agreement.") (citations omitted).

Consistent with these well-established rules of contract law, it is not the court's function to make a contract for the parties or to supply terms that the parties have not agreed upon. See Schenck v. Hji Assocs., 295 N.J. Super. 445, 450 (App. Div.), *certif. denied*, 149 N.J. 35 (1996). Stated otherwise, "it is the function of the court to enforce [the contract] as written and not to make a better contract for either party." Id. (*quoting* U.S. Pipe & Foundry Co. v. American Arbitration Ass'n., 67 N.J. Super. 384, 393 (App. Div. 1961)). Indeed, the "decision of the parties' at the time of contracting should not be lightly disturbed." Middlesex County Sewerage Authority v. Borough of Middlesex, 74 N.J. Super. 591, 608 (Law Div. 1962).

Here, the STFirm was terminated as a going concern – a default under the plain language of the Loan Documents. As stated above, the Loan Agreement provides that it shall be an event of default upon "the dissolution or termination of [the STFirm's] existence as a going business or the death of any partner." See Pa153. The term "going business," also known as "going concern," is defined as "a commercial enterprise actively engaging in business with the expectation of indefinite continuance." Going Concern Definition, Black's Law Dictionary (12th ed. 2024), available at Westlaw (emphasis added).

The history of the STFirm leading up to the filing of the Complaint reflects it was riddled with financial and legal turmoil, that culminated in the STFirm's inability to service clients, compensate employees, or make payment on its debts – resulting in it ceasing to exist as an ongoing business. The evidence of the STFirm's cessation of operations, beginning in November 2020, is undisputed and admitted by Stern as the STFirm withdrew all funds from its operating accounts and ceased all payroll, including its 401k and Profit-Sharing plans. See Pa31. Shortly thereafter, litigation commenced between the STFirm's Partners and a Special Fiscal Agent was appointed for the STFirm, who was later converted to a custodial receiver with the objective of winding down the STFirm, collecting the STFirm's outstanding receivables and resolving outstanding liabilities. See Pa407 at ¶10. Under the receiver's supervision, Thomasson and Stern ceased working together – ending the partnership of the STFirm – at which time the STFirm's employees were no longer employed, the STFirm's existing cases were transferred to different law firms, and Thomasson moved to Texas to start a new practice in that State. See Pa466 at ¶¶52-54 and Pa48 at ¶18 to Pa49 at ¶23.

Months later, the Partners resolved their litigation by entering into a settlement agreement, whereupon Stern was barred from accessing the STFirm's financial accounts and Thomasson "officially took full managerial control of

[the STFirm] and promptly undertook efforts to begin winding up its affairs and pay creditors so it could be officially dissolved." See Pa35 at ¶4 and Pa469 at ¶4. Thus, to the extent the STFirm existed after November 2020, it was nothing but a shell, an entity in a name only, as it had no employees, no operations, and no new business being generated.

The STFirm's dissolution is further evidenced by the fact that Thomasson – purportedly exercising his managerial authority within the STFirm – executed the Deed for the ABC Proceeding for the purpose of disposing of the STFirm's assets and distributing the proceeds to its creditors. See Pa83 at ¶2. Such drastic action demonstrates the STFirm's inability to pay its debts, which was confirmed when Santander demanded payment of all amounts due and owing under the Loan Agreement and Guaranties, and the STFirm failed to remit payment under same. See Pa260 at ¶20.

Based on these facts, it is disingenuous for Stern to assert that the STFirm was actively engaged in business with any possible expectation of indefinite continuance from November 2020 onward. Stern's subjective interpretation of what constitutes a "going concern" is incongruous with the undisputed facts in the record and the commonsense understanding of a "going concern." Stern's subjective belief as to the fact that the STFirm continues to be a "going concern" fails to create any ambiguity in the Loan Documents and is wholly insufficient

to defeat a motion for summary judgment. See Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) ("The plain language of the contract is the cornerstone of the interpretive inquiry"); *see also* Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001) (holding that interpretation of a contractual term should be decided on summary judgment "unless the meaning is both unclear and dependent on conflicting testimony.")

As these facts clearly demonstrate, individually and cumulatively, Defendants defaulted under the loan documents, failed to make payment and the loan amount is still due and owing. These facts were disclosed to the Trial Court and served as the basis for its decision that the STFirm was no longer a going concern. Stern cannot dispute the fact that he is liable for the obligations of the STFirm under the Loan Documents, as he has not challenged the validity of the Loan Agreement, nor has he challenged the validity of the Guaranty which he, an attorney with substantial experience "representing consumers who were subject to debt collection," personally executed. See Pa160 to Pa167; Pa298 at ¶22.

Default judgment has been entered against the STFirm for all amounts due and owing to Gulf Coast, and Stern, as guarantor, had the obligation to make payment of those amounts, which he failed to do. See R001**;** See Pa260 at ¶20. Stern has failed to identify a single, genuine issue of material fact to challenge

the existence of STFirm's defaults or his non-payment, he offered only his subjective opinion on the definition of "going concern" – an opinion which was not supported by fact or law. Accordingly, the Trial Court correctly granted Gulf Coast's Motion for Partial SJ and Defendant's argument on this point should be rejected by the Court.

POINT II

THE CONSENT ORDER SUBSTITUTING GULF COAST AS THE PLAINTIFF IS NOT APPEALABLE

Stern's futile attempt to challenge the rulings of the Trial Court are highlighted by his effort to avoid being bound by the terms of the Consent Order to which he agreed and executed. Stern knowingly and voluntarily entered into the Consent Order, after having reviewed the assignment, but now has the temerity to challenge Gulf Coast's standing and the binding nature of the Consent Order – such a position is wholly without merit and cannot be countenanced even if the well-established law of New Jersey permitted such challenges.

Initially and respectfully, the Court cannot consider this argument on appeal, as it is well established law in New Jersey that once a party enters a consent order, they are precluded from appealing its terms. See Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009) ("An order ...

consented to by the attorneys for each party ... is ... not appealable.") (*quoting* Winberry v. Salisbury, 5. N.J. 240, 255 cert. denied, 340 US 877 (1950); Jacobs v. Mark Lindsay and Son Plumbing & Heating, Inc., 458 N.J. Super. 194, 205 (App. Div. 2019). To the extent a consent order is appealable, such an order operates as a contract between the parties that has been approved by the court and must be construed using the principles of contract interpretation. See Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 292-93 (App. Div. 2014). As noted above, a court's obligation when interpreting a contract is, first and foremost, to "examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances." Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 115-16 (2006) (*citing* State Troopers Fraternal Ass'n v. New Jersey, 149 N.J. 38, 47 (1997)).

Here, the Consent Order expressly provides that "Gulf Coast Bank & Trust Co. is hereby substituted as Plaintiff in this action in place of 'Santander Bank, N.A.' in all respects." See Pa243. The Trial Court entered the Consent Order, signed by both parties, on February 28, 2024. Id. If the Court were to consider the validity of the Consent Order, its express terms unambiguously demonstrate that Gulf Coast is a "real party in interest" entitled to enforce the terms of the

Loan Documents. See Zurcher v. Mod. Plastic Mach. Corp., 24 N.J. Super. 158, 163, (App. Div. 1952), *aff'd*, 12 N.J. 465 (1953).

Stern's arguments to the invalidity of the underlying assignment are also moot and/or waived based on his voluntary execution of the Consent Order after having reviewed the assignment. See 1T:18-4 to 1T:18-19 and 1T:20-6 to 1T:21-6. For reasons unknown, after consenting to the substitution of Gulf Coast, Stern obviously had a change of heart as to the assignment when he objected to Gulf Coast's standing – one (1) month after executing the Consent Order – but that change of heart does nothing to invalidate the effectiveness and binding nature of the Consent Order. This is especially true when Stern has no standing to challenge the validity of any assignment between Santander and Gulf Coast. See Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum's Est., 84 N.J. 137, 144 (1980) ("Ordinarily, a litigant may not claim standing to assert the rights of a third party."); See Giles v. Phelan, Hallinan & Schmieg, L.L.P., 901 F. Supp. 2d 509, 532 (D.N.J. 2012) (holding that plaintiffs may not challenge any assignments to which they were not a party).

Based on the foregoing, Gulf Coast is the proper plaintiff in this case, has the right to enforce the Loan Documents, and was entitled to summary judgment in this matter. Further, remanding this matter to the Trial Court on grounds that Gulf Coast is not the proper party to enforce the Partial SJ would be futile and

a waste of judicial economy as Stern already reviewed and confirmed the existence of the assignment to Gulf Coast and the record is devoid of any attempt by Santander to continue to assert a right to enforce the Loan Documents. Therefore, the Court should reject Stern's argument on this point and affirm the Trial Court's entry of the Partial SJ in all respects.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ENTERING SUMMARY JUDGMENT WHERE STERN FAILED TO ENGAGE IN DISCOVERY OR PROVE THE DISCOVERY SOUGHT WOULD ALTER THE OUTCOME OF SUMMARY JUDGMENT

Finally, the Trial Court was correct when it denied the Discovery Extension Motion and that denial did not affect the outcome on the Motion for Partial SJ. Generally, when reviewing trial courts' decisions relating to matters of discovery – including decisions related to the extension of time therefor – appellate courts apply an abuse of discretion standard. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (*citing* Bender v. Adelson, 187 N.J. 411, 428 (2006). Under the abuse of discretion standard, appellate courts are not to intervene in matters of discovery but instead will defer to the trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law. See Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017). Accordingly, a trial

court's discovery order will not be disturbed unless it is "an arbitrary, capricious, whimsical, or manifestly unreasonable judgement." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (*citation omitted*).

To overturn a decision regarding discovery matters, the decision must have been "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Wear v. Selective Ins. Co., 455 N.J. Super. 440, 459 (App. Div. 2018) (*quoting* Flagg, 171 N.J. at 571). In the absence of a fixed arbitration or trial date, a party's motion to extend the time for discovery will be granted only "on restoration of a pleading dismissed pursuant to Rule 1:13-7 or Rule 4:23-5(a)(1) or if good cause is otherwise shown." R. 4:24-1(c). The term "good cause shown" is flexible and its meaning is not fixed and definite. Leitner v. Toms River Reg'l Sch., 392 N.J. Super. 80, 87 (App. Div. 2007) (*citing* Tholander v. Tholander, 34 N.J. Super. 150, 152 (Ch. Div. 1955).

Thus, courts consider several factors to determine whether sufficient "good cause" for an extension of discovery has been shown, including:

> (1) movant's reasons for requested extension; (2) movant's diligence in earlier pursuing discovery; (3) type and nature of case; (4) prejudice which would inure to individual movant if extension is denied; (5) whether granting application would be consistent with goals and aims of "Best Practices"; (6) age of case and whether arbitration date or trial date has been established; (7) type and extent of discovery that remains to be completed; (8) prejudice which may inure to non-moving party

> if extension is granted; and (9) what motions have been heard and decided by court to date.

Id; Tynes v. St. Peter's University Medical Center, 408 N.J. Super. 159, 169 (App. Div. 2009), *cert. denied*, 200 N.J. 502 (2009). It is only after reviewing all of these factors that the appellate court can reach a determination as to whether the trial court's discretion was properly exercised with respect to the moving party's application to extend discovery. Id.

Here, the denial of the extension of time for discovery by the Trial Court was not arbitrary, capricious, whimsical, or manifestly unreasonable as to amount to an abuse of discretion. Stern simply fell short of establishing "good cause" as to entitle him to additional time to conduct discovery – which would not have produced anything other than that which is already in the existing record.

Applying the first factor, the reasons cited by Stern for requesting an extension of discovery were to uncover evidence regarding the STFirm's status as a "going concern" and the validity of the Assignment from Santander to Gulf Coast. See Stern's Brief at Pg. 22. Stern specifically sought discovery regarding his purported conversations in 2021 with Darcy Lowe, an employee of Santander, about whether the STFirm would be considered in default based upon the ABC Proceeding. See Stern's Brief at Pg. 14**;** Pa307 at 55. While Stern claims that an extension of discovery is necessary to obtain this evidence, his

pursuit of such evidence is nothing more than a pretext to delay the inevitable enforcement of Gulf Coast's contractual rights.

Considering the second and fourth factors, Stern was not prejudiced by the Trial Court's denial of his Motion, as a prolonged period of additional discovery would not create a genuine dispute of material fact as to reverse the entry of Summary Judgment. Stern clearly recognized this fact from the outset of the litigation as he failed to serve any discovery or otherwise take any meaningful action to move the case forward. See Pa223 at ¶16. As stated above, Santander filed the Complaint on March 25, 2022. See Pa1. Stern filed his Motion to Extend the Time to Answer on May 31, 2022. See Pa133. From May 31, 2022, Stern still had nearly ten (10) months to obtain the information he now claims is necessary to defeat Gulf Coast's enforcement of its contractual rights. Despite emphasizing the need for such information on this appeal, the record clearly shows the extent to which Stern neglected his right to serve discovery on Gulf Coast through the expiration of the March 15, 2023 discovery deadline. See Pa223 at ¶16.

Instead of conducting discovery to raise a proper defense to Gulf Coast's claims, Stern prioritized his fruitless attempts to have Thomasson indemnify and defend him from same. On April 19, 2022, after he had already been served by Gulf Coast, Stern filed a Motion to Enforce Indemnification and Defense

Agreement in the Partner Litigation. See Pa141. In the same case, on June 14, 2022, Stern filed a Motion to Enforce prior orders and compel Thomasson to obtain a dismissal on his behalf. See Stern's Brief at Pg. 10, Footnote 3.

Even after Stern filed his Answer on December 30, 2022, he inexplicably took no action to engage in discovery. Having actual knowledge of the claims against him for no less than eight (8) months by this time, Stern – a practicing attorney – apparently spent no time preparing discovery as he easily could have served discovery with his Answer. Additionally, even after filing the Answer Stern had seventy-five (75) days to engage in discovery through March 15, 2023, more than enough time to serve and receive responses to interrogatories and document demands, as well as take depositions. Yet again, however, Stern inexplicably failed to take any action on discovery and chose to do nothing until February 15, 2023 when he filed the Discovery Extension Motion. See Pa217.

Stern has provided no justification for his decision to proceed with motion practice in a separate matter and ignore the present case below, despite knowing full well that the clock was running on his time to conduct discovery in the present action. Indeed, Stern has such familiarity with the relevant issues in this action that it would have taken no time at all for him to prepare a simple set of interrogatories or document demands to serve on Santander and/or Gulf Coast. There is similarly no excuse for Stern's failure to serve a notice of deposition on

Mrs. Lowe, who he knew was a potential witness since at least March 25, 2022 – the date the initial Complaint was filed– and whose testimony is barred under the Parol Evidence Rule, as explained below. See Pa305 at ¶49; Pa266. Based on the above, the record is clear that Stern failed to act diligently in obtaining the discovery he sought, and the Trial Court correctly recognized that no prejudice would inure to Stern if his Discovery Extension Motion were denied.

Regarding the third factor, this case is not of the type and nature to require extensive discovery. As stated above, this is a simple matter of contract interpretation, the resolution of which Stern has attempted to delay by filing unnecessary motions and making arguments without factual support. As explained above, there is no dispute that the STFirm executed the Loan Agreement and Note, and that Stern guaranteed the amounts due thereunder. See Pa151 to Pa167. Further, there is no factual basis to dispute that the STFirm defaulted under the Loan Agreement and Note when it ceased to operate as a going concern, and that both the STFirm and Stern failed to make payment upon due demand by Santander. See Pa260 at ¶20. Despite Stern's attempts to obfuscate the issues in this matter by challenging the clear language of the Loan Documents and Consent Order which he signed, the trial court recognized the straightforward, undisputed facts of this case and correctly denied Stern's attempt to impede its resolution by arbitrarily extending discovery.

Regarding the fifth, sixth, and eighth factors, for the Trial Court to have countenanced Stern's dilatory tactics and delayed a resolution would contradict the goals of Best Practices to "[ratchet] down on the needless delays in the completion of discovery [and eliminate] the easy availability of discovery extensions." See Ponden v. Ponden, 374 N.J. Super. 1, 8 (App. Div. 2004). This case has been pending since March 2022, with no arbitration or trial date set. See Pa1. Stern had ample time to conduct discovery but failed to act. Indeed, Stern was well aware of the timelines in this case, and he made a conscious decision on how to proceed. Granting the extension when Stern has taken no meaningful steps to actually engage in discovery would only prejudice Gulf Coast by delaying the enforcement of its contractual rights and prolonging this litigation without justification.

Regarding the seventh factor, no further discovery was needed for the trial court to enter Partial SJ in Gulf Coast's favor. Stern, as a former partner in the STFirm, personally possessed all necessary information as to the status of the STFirm to fully meet the claim that the STFirm was no longer a going concern. See Pa454 at ¶¶ 18-47. Stern had personal knowledge of the operations of the STFirm before November 2020 and thereafter – the majority of which was derived from his own involvement in the STFirm's internal disputes which resulted in the business's termination as a going concern. Id**.** As Stern admits in

his own brief, in November 2020 the STFirm's operating accounts were emptied, its accountant was advised there would be no more payroll going forward, and Thomasson was closing the STFirm. See Pa459 at ¶52; see also Stern's Brief at Pg. 5. Thereafter, Stern sued Thomasson and the former partners agreed to cease practicing law together, moved to separate firms while taking any active cases with them to their new firms, and sought and obtained the appointment of a receiver to oversee the winding down of the STFirm. See Pa31; Pa453 at ¶¶31-32. As a direct participant in these events, Stern needed no discovery from third parties to establish these facts – the very same facts upon which his argument that the STFirm continued to exist as a "going concern" rely.

Further, an extension of discovery for Stern to depose Ms. Lowe would amount to a waste of judicial resources as any statements by Mrs. Lowe regarding her conversations with Stern would be barred under the Parol Evidence Rule and cannot alter or modify the unambiguous language in the Loan Agreement, Note and Guaranty and whether there was a default under those documents. See Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006) ("[parol] evidence is adducible only for the purpose of interpreting the writing – not for the purpose of modifying or enlarging or curtailing its terms."); See Korb v. Spray Beach Hotel Co., 24 N.J. Super. 151, 157 (App. Div. 1952)

(holding that where the intention of the parties is unmistakable, parol evidence is not admissible to explain, alter, or vary the contract's terms.).

Similarly, Stern's request for additional discovery on the validity of the assignment to Gulf Coast would not have altered the outcome of the summary judgment motion. As explained in detail above, Stern acknowledged the validity of the assignment when he executed the Consent Order substituting Gulf Coast as the Plaintiff. See Pa243. He is not challenging that it was voluntary act, only that he now has additional thoughts, all of no matter based upon the entry of the Consent Order. Id.

As to the ninth factor, the trial court heard and decided several motions which demonstrate the time Stern has had to conduct discovery in this matter and the lack of necessity for further discovery in same. On May 31, 2022, Stern, after having already received additional time to respond with the consent of Kahme, filed a Motion to Extend Time to Answer. See Pa133; Pa136 at ¶17. Stern's Motion to Extend Time to Answer was denied on October 27, 2022. See Pa169; Pa136 at ¶17. On February 15, 2023, Stern filed his Discovery Extension Motion. See Pa217; Pa223 at ¶16. The Discovery Extension Motion was denied by the Trial Court on June 6, 2023. See Pa217 and Pa231. While Stern challenges the trial court's denial of the Discovery Extension Motion on this appeal, he has provided no justification for his failure to complete any discovery below. Indeed,

after knowingly failing to obtain any discovery in this case for nine (9) months, Stern cannot now use lack of discovery as an excuse to delay the resolution of this matter any further.

In light of these factors, Stern not only failed to demonstrate "good cause" for extending the time for discovery in this matter, but he failed to show how any of the discovery sought would have altered the outcome on the Motion for Partial SJ. He failed in this respect, because there was nothing that could alter the outcome of the Motion for Partial SJ given the terms of the Loan Documents and the undisputed facts establishing the numerous defaults thereunder. Thus, the Trial Court's denial of the Discovery Extension Motion was not an abuse of discretion, nor was its decision to rule on the Motion for Partial SJ thereafter. Accordingly, Defendant's arguments as to discovery are without merit and the Trial Court's decisions should be affirmed in all respects.

CONCLUSION

For the reasons set forth above, there is no basis to overturn the Trial Court's decisions to deny the Discovery Extension Motion and enter the Partial SJ in Gulf Coast's favor. To the contrary, because there were no questions of material fact regarding the Defendants' defaults or the Consent Order, the Trial Court below applied well established contract law to find the Defendants in default under the Loan Documents and Stern liable to Gulf Coast under the

Guaranty. In doing so, the Trial Court did not abuse its discretion in determining no additional discovery was necessary before reaching its decision on the Partial SJ.

The discovery sought by Stern would not have changed the outcome on the Partial SJ because the defaults were irrefutable and the Loan Agreement clear in its language, as well as the fact that Stern cannot withdraw or challenge his own consent to substituting Gulf Coast as the proper plaintiff in this case. As the

record clearly shows – and Gulf Coast has demonstrated on this appeal – the appeal should be denied and the Trial Court's rulings should be affirmed in all respects.

Respectfully Submitted,
Hill Wallack LLP
Attorneys for Respondent-Plaintiff, Gulf Coast Bank & Trust Co., as assignee of Santander Bank N.A.

/s/ Michael Kahme
Michael Kahme

Dated: April 14, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
❖ ❖ ❖
Docket No. A-003461-23-T2

SANTANDER BANK, N.A.,	**CIVIL ACTION**
Plaintiff-Respondent,	ON APPEAL FROM THE CERTIFIED JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY
v.	
STERN THOMASSON LLP, ANDREW THOMASSON,	
Defendants,	Trial Court Docket No. MER-L-000537-22
and	Sat Below: HON. R. BRIAN McLAUGHLIN, JSC
PHIL STERN,	
Defendant-Appellant.	

REPLY BRIEF
ON BEHALF OF DEFENDANT-APPELLANT

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SUBMITTED: May 14, 2025

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PRELIMINARY STATEMENT

The Respondent's Brief filed by Gulf Coast fails to demonstrate its *prima facie* entitlement to summary judgment and does not refute the evidence Stern submitted which establishes genuine issues of material fact.

Gulf Coast does not dispute or excuse its failure to submit any evidence that the claim against Stern was assigned to it. Stern's consent to allow the pleadings and the caption to be amended to assert Gulf Coast as Santander's assignee is no substitute for satisfying its burden to prove the assignment. Moreover, because the alleged assignment occurred after discovery closed, Stern was denied the opportunity to conduct discovery as to the assignment.

Gulf Coast asserts that default occurred because the Firm's existence as a "going business" terminated. But Gulf Coast ignores evidence of the parties' expressed understanding of the term "going business" and the evidence showing the Firm continues as a going business.

Finally, in addition to being prohibited from pursuing discovery relevant to the alleged assignment, Stern was denied a reasonable opportunity to pursue discovery as to (*i*) the event of default and (*ii*) the defenses raised in co-defendant Thomasson's Answer.

LEGAL ARGUMENT

POINT I. BY REFUSING TO PROVE THE ALLEGED ASSIGNMENT OF SANTANDER'S RIGHTS, GULF COAST DID NOT PRESENT EVIDENCE SUFFICIENT TO DEMONSTRATE ITS *PRIMA FACIE* RIGHT TO SUMMARY JUDGMENT. THEREFORE, THE MOTION SHOULD HAVE BEEN DENIED WITHOUT REQUIRING STERN TO DEMONSTRATE THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

Gulf Coast does not dispute that *New Century Fin. Servs., Inc. v. Oughla*, 437 N.J. Super. 299 (App. Div. 2014), a binding decision from this Court, requires denial of an assignee's motion for summary judgment when, like here, the assignee fails to present evidence as to the full chain of assignment. *Oughla* at 317.

Underpinning *Oughla*'s rationale is that, under *R.* 4:46 and *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995), a party like Gulf Coast must present evidence which, if submitted at trial, would be sufficient to survive a *R.* 4:37 motion to dismiss. Hence, *Oughla* confirms that an assignee of a contract claim has the burden of proving all assignments from the party in privity with the defendant. After all, an assignee can have no greater rights than that of the original assignor who contracted with the defendant.

Here, it is undisputed that Santander Bank, N.A. is the original creditor in privity with the Defendants—the Firm, Stern, and Thomasson. And it is patently obvious that Gulf Coast never presented any evidence of any

assignment. *See* Pa296-Pa300 (Gulf Coast's *R.* 4:46-2(a) Statement of Material Facts which is devoid any fact relevant to any assignment(s) from Santander to Gulf Coast).

Although there is no evidence of any assignment, there is a February 28, 2024 Consent Order which substituted Gulf Coast as the Plaintiff and amended the pleadings and the case caption accordingly. Pa243-Pa244. Gulf Coast alleged that Santander has assigned its rights in mid-December 2023, about nine months *after* the motion was fully briefed. The motion hearing was held on March 28, 2024 yet, during the 3½ months following the alleged assignment, Gulf Coast did not seek to amend or supplement the motion. And, when Stern pointed out the deficiency at the hearing, Gulf Coast doubled down rather than resubmit its motion with proof of the alleged assignment.

Having presented no evidence of any assignment, Gulf Coast's motion should have been denied because it failed to satisfy its threshold burden of demonstrating that it "is entitled to a judgment or order as a matter of law" "considering the burden of persuasion at trial." *R.* 4:46-2(c). It was unnecessary to turn to Stern's opposition because Gulf Coast failed to present *prima facie* evidence which, if uncontroverted, could have satisfied its burden of persuasion.

Seeking to excuse its failure to present any evidence of its alleged

assignment, Gulf Coast points to Stern's consent to the entry of an Order [Pa250-Pa251] which amended the pleadings and the caption to substitute Gulf Coast as the plaintiff. Stern consented to the amendment. (1T12-23) "There was no reason [for him] to object to" (1T12-24) a pleading amendment and force the court to expend resources considering a motion for leave to amend when leave is "freely given in the interest of justice." *R.* 4:9-1. But Stern's consent to amend the pleadings and caption *never* stipulated to the fact of the alleged assignment.

Indeed, if Stern's approval of a Consent Order which amended the pleadings bars him from contesting the amended allegations, then litigants are ill-advised to ever consent to an order which amends an opponent's pleadings because doing so might be deemed a stipulation to the alleged facts. But there is nothing in the record suggesting that Stern stipulated to the alleged assignment or admitted the fact of the alleged assignment. On the contrary, Stern sought discovery as to the alleged assignment.

At oral argument, Stern confirmed that, prior to consenting to the consent order, Gulf Coast's counsel had provided "a couple of documents" relevant to the assignment but, Stern explained, "it's very clear from those documents that there's a lot more." 1T12-25 to 1T13-3. Prior to the hearing, Stern asked Gulf Coast to produce all assignment documents, and he advised

that, if necessary to facilitate their production, he'd consent to the entry of a discovery confidentiality order; but Gulf Coast never responded. 1T13-4 to -9. Thus, Stern asked the motion court to deny Gulf Coast's motion without prejudice, direct the parties to meet-and-confer about a discovery schedule, and to hold a case management conference to set such a schedule. 1T16-13 to 1T17-2. Stern's request obviously fell on deaf ears.

Because the motion record contains no evidence of any assignment proving the alleged assignment from Santander to Gulf Coast (1T9-21, 1T12-19), the summary judgment motion should have been denied without requiring Stern to come forward with evidence of a genuine issue of material fact. *Oughla*, *supra*.

Even if the burden shifted to Stern with respect to the alleged assignment, the motion court should not have granted the motion until Stern was given a reasonable opportunity to conduct discovery relevant to the assignment. But Stern was never allowed an opportunity to conduct discovery relevant to the assignment. 1T9-25 to 1T10-2.

Just as the summary judgment was reversed in *Oughla* because there was "no document evidencing the first link in New Century's assignment chain" (*Id.*, 437 N.J. Super. at 320), the summary judgment here should be reversed because there is no evidence of any assignment.

POINT II. GULF COAST'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED BECAUSE THE EVIDENTIAL RECORD DEMONSTRATES GENUINE ISSUES OF MATERIAL FACT RELEVANT TO THE ALLEGED EVENT OF DEFAULT.

The motion's failure to include proof of the alleged assignment should end the inquiry and result in reversing the entry of summary judgment as well as vacating any findings made regarding any other issues because the burden never shifted to Stern to come forward with evidence demonstrating a genuine issue of material fact.

If this Court were to consider other issues, it should conclude that there are genuine issues of material fact as to whether an event of default occurred.

The original complaint (Pa3 at ¶17) alleged the Firm's purported execution of a Deed of Assignment for the Benefit of Creditors as the only event of default. But, on June 3, 2022, in the proceeding brought as a result of that Deed in which Santander was a party (Pa417), the court adjudged that the Firm had not made the Deed and dismissed the action (Pa180). Nevertheless, when Santander filed its First Amended Complaint on November 29, 2022, it continued to allege the making of the Deed as an event of default. Pa16 at ¶18. But the First Amended Complaint added a second event of default. *Id.*

The loan documents define an event of default to include the "dissolution or termination of Borrower's existence as a going *business*."

Pa153 (Business Loan Agreement); Pa157 (Promissory Note) (emphasis added). The First Amended Complaint (Pa14) alleged "[t]he Firm is in default under the Loan Agreement and Note as a result of…its termination as a going *concern*." Pa16 at ¶18 (emphasis added).

Gulf Coast's Brief asserts that there was a failure to make any payment. That issue is irrelevant and should not be entertained. Default by nonpayment default was never pled as an event of default. The February 17, 2023 summary judgment motion papers include Santander's records reflects three monthly installments made and accepted *after* Santander commenced this action, the last of which was on May 25, 2022. Pa277. The First Amended Complaint fails to allege nonpayment as a basis for default despite being filed six months after the alleged last payment. Pa292 at ¶18. Furthermore, Stern was unaware of the payment history until he was served with the summary judgment motion in February 2023 but, in January 2023, Stern, who was "out of the loop on the Firm's finances" and unaware as to the status of the monthly installments, offered to cure any payment default and continue making the Firm's payments. Pa296-Pa298 at ¶¶13-17. Santander never accepted or rejected Stern's offer to cure. *Id.* Santander obviously knew the status of payments when it filed the First Amended Complaint but never alleged the fact of nonpayment as an event of default. Viewed under the summary judgment standard, the choice to omit

alleging nonpayment as a basis for default should bar Gulf Coast from relying on it.

Consequently, by not alleging any payment default and unable to prove the Firm executed the Deed of Assignment, the focus is on whether there are genuine issues of material fact relevant to the "dissolution or termination of Borrower's existence as a going business." Pa153; Pa157.

Gulf Coast's rumor of the Firm's "dissolution" (Rb19) is false. There is no record or proof of any dissolution. And that's not the only material fact Gulf Coast got wrong. It falsely asserts Stern and Thomasson are "former" partners. Rb1, Rb30, Rb31. Consistent with the evidential record, Stern and Thomasson remain the Firm's two equal partners. Pa298 at ¶20, Pa304 at ¶43. And a further indication of Gulf Coast's misunderstanding of the factual record is its false statement, at Rb1 and Rb18, that, in 2021, Thomasson moved to Texas to start his new law practice. Nothing in the record supports Thomasson having moved. Rather, the record shows Thomasson has continuously lived in San Antonio, Texas since at least 2006, which is before Thomasson was licensed to practice law. Pa298 at ¶21.

We are then left with the dispute fact as to whether there was the "termination of Borrower's existence as a going business" within the meaning of the loan documents. Gulf Coast offers no authority that the term "going

business" is clear or unambiguous. It offers the Black's Law Dictionary definition of "going concern." There is no dispute that Santander drafted the loan documents which invokes the canon of construction to construe ambiguous terms against the drafter. No explanation was provided as to why it chose to use "going business" instead of the more recognized "going concern." But, whatever "going business" means (and even if it means "going concern"), the event of default requires "termination" of the "existence" as a going business. Therefore, the event has not occurred until the going business is terminated and no longer exists. Termination and nonexistence do not exist so long as the business exists and continues to transact business, receive revenues, and pay bills—even if it is in the process of winding up its affairs. Gulf Coast fails to identify evidence of either termination or nonexistence. On the contrary, the motion record reflects that the Firm continues to exist and has not terminated all business transactions.

Assuming for argument's sake that the definition of "going concern" informs the meaning of the contractual term of "going business," Gulf Coast overlooks the more common, non-legalese definition in the Meriam Webster Dictionary. There, "going concern" is defined as "a business that is making a profit." Meriam Webster Dictionary, https://www.merriam-webster.com/dictionary/going%20concern (accessed May 10, 2025).

The evidence suggests that the Firm continues to make a profit. Moreover, that definition is consistent with the understanding expressed by Santander's authorized representative, Darcy Lowe, concerning the changes to the Firm in 2021 including the two partners' withdrawal from practicing law through the Firm and the transfer of the Firm's active cases.

In early 2021 after the appointment of Gary Roth, Esq. as the Firm's custodial receiver *pendente lite*, Stern spoke with Santander's officer, Darcy Lowe. Pa305-Pa309 at ¶¶48-66 (detailing conversation). Ms. Lowe was the authorized Santander officer who, on January 18, 2019, signed the First Modification Agreement with the Firm. Pa269. Stern explained to Lowe the Firm's recent change in circumstances which included the then-pending litigation between the two 50/50 partners, the Firm stopped representing clients, and the Firm was not taking on new cases. Pa305-Pa309 at ¶¶48-66. With knowledge of the situation, Ms. Lowe confirmed that Santander would *not* consider the Firm to be in default of the loan so long as the Firm was (*i*) not dissolved, (*ii*) continued to receive revenue, and (*iii*) had not defaulted on any payment. *Id.*

As discussed above, the Firm has never been dissolved. Pa308 at ¶60.

As of June 2022—about a year and half after Stern spoke with Lowe, and three months after Santander commenced the instant action—Thomasson

personally filed for bankruptcy and certified that the Firm's value, net of liabilities, was $112,157 (Pa308 at ¶62; Pa324) and, as was later revealed when Santander filed the summary judgment motion, the Firm had continued to make all required monthly installments through May 25, 2022. *See* Pa277. Given that, as of 2022, the Firm had little or no ongoing expenses and its revenues were its share of fees recovered in consumer fee-shifting cases primarily handled by Thomasson PLLC, the Firm continued to make a profit.

Gulf Coast does not dispute that Lowe was an authorized Santander representative. It does not dispute what she said to Stern. And it does not dispute she accurately described Santander's understanding that the Firm's condition was not an event of default. Furthermore, based on that conversation, the Firm, then under the supervision of Gary Roth, Esq. and, later, under Thomasson's control, continued to pay the monthly installments relying on Santander's position that the loan was not in default—and Santander continued to accept them for more than a year (from January 2021 when Stern spoke with Lowe through May 25, 2022) without objection despite being fully aware of the Firm's circumstances. Rather, it was not until after it became apparent that the event of default alleged in the original complaint (*i.e.*, the Firm's alleged making of the Deed of Assignment) never happened before Santander conjured up the "going business" theory of default which it alleged in the First

Amended Complaint.

Gulf Coast also argues that the meaning of the "termination of Borrower's existence as a going business" must be determined as a mater of law without considering any extrinsic or parol evidence. Gulf Coast advances Professor Williston's restrictive view of such evidence but that view was expressly rejected by our Supreme Court. In *Conway v. 287 Corporate Center Associates*, 187 N.J. 259, 269 (2006), the Court adopted Professor Corbin's view and that reflect in the Restatement. Consequently, "[w]e consider all of the relevant evidence that will assist in determining the intent and meaning of the contract." *Id.* That means "[e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." *Id.* (quoting *Atl. N. Airlines v. Schwimmer,* 12 N.J. 293, 302 (1953)).

Contrary to Gulf Coast's argument, the extrinsic evidence is offered "only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the

meaning of what has been said." *Id.* (quoting *Schwimmer*).

POINT III. THE MOTION COURT DENIED STERN A REASONABLE OPPORTUNITY TO CONDUCT DISCOVERY AND NONSENSICALLY DENIED STERN'S MOTION TO EXTEND DISCOVERY.

Gulf Coast contests Stern's position that he was denied any reasonable opportunity for discovery.

For starters, Gulf Coast allegedly took an assignment of Santander's rights nine months after discovery had closed and more than eight months after completion of the briefing on the summary judgment motion. At the very least, Stern should have been permitted to conduct discovery relevant to the alleged assignment.

From the time he was served with process in March 2022 and until Thomasson's bankruptcy in June 2022, Stern sought to enforce Thomasson's contractual duty to defend and indemnify Stern. And, after Thomasson ignored the first court order compelling him to do so, Stern moved to enforce that order and, in this case, moved to extend the time for him to respond to the original complaint. But, when Thomasson filed for bankruptcy, the motion judge mistakenly assumed the automatic stay applied to the entire case and denied that motion along with the motion for leave to file the First Amended Complaint. Although the motions were filed before Thomasson's bankruptcy

in June 2022, the motion court did not decide to deny them until October 2022.

Santander then successfully moved for reconsideration and was granted leave to amend. The filing of the First Amended Complaint mooted the need to extend Stern's time to respond to the original Complaint. Stern then filed his Answer to the First Amended Complaint on December 30, 2022. Pa20. At that time, there were just 75 days left in the original 300-day discovery period and Stern filed his motion to extend discovery on February 15, 2023, returnable on March 3, 2023. Pa217.

Meanwhile, Stern timely filed his Third-Party Complaint. When three of the third-party defendants and Stern agreed on a briefing schedule for their motions to dismiss, they submitted a consent order memorializing that schedule. The motion court first entered the consent order (Pa232) and, later the same day (being some four months after it was filed), entered an order (Pa231) denying Stern's motion to extend discovery stating that the consent order mooted his motion. Pa248 (reflecting the sequence in which those orders were entered).

It is true that Stern could have served written discovery when he filed his Answer to First Amended Complaint. But, with 60 days to respond to interrogatories (*R.* 4:17-4(b)), it was highly unlikely that discovery (including party and witness depositions, the potential need for expert discovery, and

resolution of discovery disputes) could have been completed by March 15, 2023. In addition to facts and documents relevant to the alleged assignment, Stern would have sought discovery from Santander regarding the "going business" language including any written policies or procedures for determining when a borrower has terminated its existence as a going business. Stern would have also sought discovery relevant to defenses raised in Thomasson's Answer (Pa6) because he was the Firm's managing partner who, at the time, controlled the Firm's finances. Therefore, the narrow window within which discovery requests could have been served was not reasonably insufficient to complete discovery after discovery was delayed (1) while attempting to enforce Thomasson's duty to defend and indemnify him and (2) by the motion court's mistaken five-month stay of the entire case following Thomasson's bankruptcy filing.

CONCLUSION

For the foregoing reasons along with those set forth in Appellants' Brief, Defendant Philip D. Stern respectfully requests this Court reverses the May 17, 2024 Order which entered summary judgment against him.

Respectfully submitted,

/s/ Philip D. Stern
Philip D. Stern
Pro se

Dated: May 14, 2025