SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5463-14T3

OAK TREE CASH & CARRY, LLC,

Plaintiff-Respondent/
Cross-Appellant,

v.

1630 OAK TREE, LLC, SAM DOSHI, HINAXI DOSHI, and JASON DOSHI,

Defendants/Third-Party
Plaintiffs-Appellants/
Cross-Respondents,

v.

HABIB AMERICAN BANK,

Third-Party Defendant-
Respondent,

and

CHIRAG BATRA,

Third-Party Defendant-
Respondent/Cross-Appellant,

and

TRILOKI BATRA,

Third-Party Defendant.

Argued March 21, 2017 – Decided April 12, 2018

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8125-12.

Spencer B. Robbins argued the cause for appellants/cross-respondents (Robbins and Robbins, LLP, attorneys; Spencer B. Robbins, on the briefs).

Joseph Cerra argued the cause for respondent Habib American Bank (LeClairRyan, attorneys; Andrew J. Karas, on the brief).

Michael Confusione argued the cause for respondents/cross-appellants Oak Tree Cash & Carry, LLC, and Chirag Batra (Hegge & Confusione, LLC and Singh Law, LLC, attorneys; Michael Confusione and Seema Singh, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Several parties appeal different aspects of the Law Division's June 29, 2015 order, entered after opening statements at a bench trial held June 11, 2015. Defendants/third-party-plaintiffs Sam Doshi, Hinaxi Doshi, and Jason Doshi (collectively "the Doshis") and 1630 Oak Tree, LLC (1630 Oak) (collectively, with the Doshis, "defendants"), appeal the dismissal with prejudice of their counterclaims against Oak Tree Cash & Carry, LLC (C&C), and their third-party complaints against the third-

party defendants Habib American Bank (Bank) and Chirag Batra.[1] C&C cross-appeals the dismissal with prejudice of its complaint against defendants. Chirag challenges the denial of his motions challenging his default.

We do not approve the trial court's dismissals after opening statements, but find the dismissed claims lacked merit. We vacate and remand regarding Chirag, but affirm the other dismissals.

I.

As this case was dismissed based on the opening statements, we summarize the June 11, 2015 opening statements, while mentioning in footnotes certain documents provided on appeal.

A.

In his opening, counsel for C&C represented as follows:

A commercial property at 1630 Oak Tree Road (the Property) in Edison was purchased by Om Namoh Shivoy LLC (ONS). ONS entered into a mortgage agreement with the Bank.

In 2009, Triloki, a principal member of ONS, entered into negotiations with his son Chirag, the owner of C&C, to lease the Property to operate a grocery store. Triloki drafted a lease

[1] Triloki Batra was also a third-party defendant, but he filed for bankruptcy and was dismissed without prejudice. As several individual parties have the same last names, we will refer to them by their first names.

agreement between ONS and C&C, which was executed October 1, 2009.[2] The lease made no provision regarding utilities, but the parties orally agreed that ONS would provide utilities.

C&C operated the grocery store until December 2010, when the Bank filed a foreclosure complaint against ONS only. On January 6, 2011, the Bank sent C&C an assignment of rents letter instructing C&C to send its rental payments directly to the Bank. On February 25, 2011, the Bank commenced an eviction action against C&C for nonpayment of rent.

On April 13, 2011, the Bank and C&C entered into a "Consent to Enter Judgment" (consent order) providing that C&C could remain on the Property and continue under the terms of the lease, and would make regular payments to the Bank as receiver.[3] At that time, C&C paid the Bank the rent for April through July. The Bank

[2] The lease covered only the first floor and basement of the Property. It had a ten-year term. It required a security deposit of $9900 and monthly rent of $3300, which included "the common area operating cost." It did not say who would pay the taxes.

[3] In the consent order, C&C also consented to the immediate entry of a judgment of possession, and agreed a warrant of removal would issue if it failed to make all required payments. The consent order stated "this agreement shall not operate as an acceptance of an attornment."

amended its foreclosure complaint to add C&C as a defendant.[4] The Bank ultimately obtained a default against C&C.

C&C had difficulty paying both the rent and the utilities. On July 18, 2011, C&C's counsel wrote the Bank asking it to provide utilities as ONS had, but the Bank refused on July 28, 2011. C&C ceased to operate the grocery store.

On January 6, 2012, the Chancery Division entered a final judgment of foreclosure against ONS and C&C, foreclosing their interests in the Property and granting the Bank possession of the Property.[5] However, ONS and C&C still believed they would redeem the Property and return to operate the grocery store.

In a July 6, 2012 sheriff's sale, the Property was sold to the Doshis, who sought it as a location for their business 1630 Oak. Triloki had a ten-day period to redeem the property for approximately $2,168,000, and he obtained a certified check in that amount. On behalf of ONS, Triloki contacted the Doshis

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[4] The amended forfeiture complaint described C&C as operating or "purportedly operating out of the Mortgaged Property," stated C&C was being added "to preserve [the bank's] ability to eject [C&C] from the Mortgaged Property at the conclusion of this Foreclosure matter and/or to modify the existing lease," and requested C&C be ejected.

[5] The final forfeiture judgment entered default against C&C and provided that ONS and C&C were "absolutely debarred and foreclosed of and from all equity of redemption" in the Property once sold. The court also issued a writ of execution.

seeking to purchase the Property for between $1.6 and $1.7 million. They reached agreement. The Doshis said their attorneys would draft a contact for Triloki's representatives to review. Based on this representation, Triloki let the ten-day period lapse. C&C understood it would be able to operate the grocery store again.

On July 24, 2012, the Doshis got the deed to the Property, changed the locks, and began to remove personalty from the Property. Chirag saw they were removing items he believed were his, such as a cash register containing cash.

On July 25, 2012, defendants' attorney sent a letter to C&C and Chirag indicating they had personalty on the Property and giving them thirty days to remove it. On or about July 31, 2012, C&C filed a complaint in the Special Civil Part and sought an order to show cause seeking the return of the personalty already removed.

In August 2012, the landlord-tenant judge (Special Civil judge) issued an order returning C&C to possession.[6] In November 2012, the defendants sought an order to show cause returning possession to them. The judge found there had been an attornment

[6] The August 20, 2012 order permitted C&C to occupy the first floor and basement of the Property "until the pending motion Return Date," required C&C to pay rent to defendants in trust, and ordered C&C to change all the utilities to its own name.

reviving the lease, ordered C&C to pay the $3300 per month rent provided in the lease and to deposit in escrow $39,600 to cover the period from August 2011 to July 2012, and transferred the matter to the Law Division to address damages.[7] C&C paid the escrow and rent. The Law Division bifurcated the case into a "possession trial" and a "damages trial."[8]

After hearing the possession trial, Judge Phillip Lewis Paley, in an April 16, 2013 written opinion, found no attornment had occurred, and restored defendants to possession, extinguishing any right of C&C to possession. Judge Paley's May 2, 2013 order gave C&C thirty days to remove its belongings.

C&C contacted defendants' counsel to arrange the removal of heavy machinery, including commercial refrigerators, freezers, and rooftop cooling condensers C&C had purchased to operate the refrigerators. Defendants' counsel gave C&C one day to do so.[9] On June 1, 2013, Chirag entered the Property and saw one of the refrigerators had a "sold" sticker on it, and Hinaxi asked if he

[7] Contrary to plaintiff's opening, the November 27, 2012 order makes no mention of an attornment or damages.

[8] The Law Division's March 1, 2013 order simply limited discovery and trial "to the issue of attornment."

[9] On May 24, 2013, C&C sought an order to show cause seeking thirty more days. On June 24, 2013, the court denied that request, stating any resulting damages could be raised in the damage trial.

was the person picking up the refrigerators. C&C's remaining personalty on the Property was sold or trashed.

B.

In his opening, defendants' counsel represented as follows:

1630 Oak is owned by Jason. Jason was interested in purchasing the Property to relocate his mortgage brokerage business. After January 6, 2012, he entered into negotiations to purchase the Property for about $1.5 million. He purchased the Property at the sheriff's sale.

Jason had not been able to enter the Property beforehand, but saw it was unoccupied. Notices posted by the Health Department and the utilities companies indicate the grocery store had been closed due to lack of utilities and had not been operating for at least a year. The electricity had been shut off in 2010. Jason was advised through the realtor and the bank that there was no tenancy or leases, and that he could occupy the Property.

On July 24, 2012, defendants used a locksmith to enter the Property, and discovered the inside was a mess, with eighteen-month-old food, mold throughout, and eighteen inches of water in the basement. Before defendants began removing things, their attorney sent a courtesy letter inviting C&C to remove its belongings before they were thrown out. Those belongings appeared

to be only a refrigerator, sections of a walk-in "box," desks, and shelving.

Defendants needed to start construction as soon as possible because it cost $12-14,000 per month to carry the building. Their construction entity, Aspen, removed some tiles, molding, carpeting, and other spoiled items from the upstairs for health reasons. Aspen did not remove any fixtures or furnishings, or anything from the first floor except food and garbage. Its contents, including the cash register holding cash, were still there in October 2012. Afterwards, the contractor removed everything and redid the Property, which was rented to another tenant.

C&C's complaint in the Special Civil Part falsely claimed that it had a lease and that defendants had wrongly ousted it from possession. C&C falsely claimed attornment of the lease, but it was a "bogus" lease between father and son. The lease charged only $3300 monthly rent inclusive of taxes, common-area maintenance, and other expenses, but the taxes were $3000 per month, common-area maintenance cost $700-$1000 per month, and Triloki's monthly mortgage payment on the Property was $17,000. There was no proof anyone paid the lease's $9900 security deposit. The lease was not presented to the Bank until after foreclosure. When the Bank refused to pay the monthly utilities of $500, C&C

refused to pay rent or operate. The lease was prepared to impose a sweetheart deal on any purchaser of the Property in foreclosure.

After the foreclosure, the Batras show further bad faith by preparing a near-identical second lease for the second floor of the Property for $750 per month, with the landlord having to pay the taxes and utilities. The Special Civil judge found it was not a valid lease.[10]

After Chirag viewed the Property on July 24, 2012, C&C never returned to the Property, did not seek to operate it, did not clean it up, and made no effort to remove its belongings, even after Judge Paley told C&C to remove them within thirty days.

Defendants were harmed because for more than eleven months they had to pay $12-14,000 per month on the mortgage, plus taxes and utilities, but could not use the Property they purchased for $1.5 million. Defendants obtained a default against Chirag.

II.

In June 2015, the "damages trial" was held before another Law Division judge (trial court). The trial court dismissed the claims of C&C and defendants based on the parties' opening statements. "Trial courts have been cautioned to be most reluctant in granting dismissals on opening statements of counsel." State v. Lynch, 79

[10] The judge's August 20, 2012 order declared "null and void" this lease between ONS and "Seven International Properties LLC."

N.J. 327, 336 (1979) (citing Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc., 32 N.J. 595, 606-07 (1960)). "This precaution exists because an opening statement should set forth only a succinct statement of what a party proposes to prove." Ibid. Moreover,

> there is little reason for the use of this kind of motion today with our pretrial procedure, discovery and summary judgment and other motion practice, which, when properly and effectively used, can clear away and settle in advance of actual trial most matters formerly sought to be raised on openings. . . . It is difficult to conceive of a case in which such a motion may now properly be granted where the same result would not have followed by the use of the more appropriate and desirable means of a motion made prior to trial for summary judgment, for judgment on the pleadings or to dismiss for failure to state a claim.
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> [Passaic Valley, 32 N.J. at 606-07.]

"Our practice does not favor such dismissals." Manzi v. Zuckerman, 157 N.J. Super. 63, 66 (App. Div. 1978); see Passaic Valley, 32 N.J. at 606. "The better trial practice is to refuse to adjudicate a case on the opening of counsel." Lynch, 79 N.J. at 336; accord State v. Turner, 310 N.J. Super. 423, 435 (App. Div. 1998). The trial court should have followed the better practice.

Nonetheless, "[i]mplicit in the Supreme Court's opinion in Lynch is the acknowledgment that trial judges may, in their

discretion, dismiss a case based on the [party's] opening." State v. Portock, 205 N.J. Super. 499, 506 (App. Div. 1985); see Lynch, 79 N.J. at 335; State v. Tilghman, 385 N.J. Super. 45, 56 n.1 (App. Div. 2006). Thus, we must examine whether the trial court abused its discretion in dismissing after each party's opening, rather than after hearing the parties' evidence.

"The test to be applied on a motion for dismissal made after the plaintiff's opening is the same as where the motion is made at the close of plaintiff's case [under Rule 4:37-2(b)]," but it is "even more liberally applied" in favor of denying dismissal. Farkas v. Bd. of Chosen Freeholders, 49 N.J. Super. 363, 367 (App. Div. 1958); see Passaic Valley, 32 N.J. at 606, 608. Such a motion "admits the truth of all the facts outlined and gives a plaintiff the benefit of every possible favorable inference which can be logically and legitimately deduced." Totten v. Gruzen, 52 N.J. 202, 205 (1968) (quoting Passaic Valley, 32 N.J. at 607). "[S]uch dismissals [may] only be granted where it was clearly evident that no cause of action could be made out[.]" Manzi, 157 N.J. Super. at 66. "An appellate court applies the same standard when it reviews a trial court's grant or denial of a Rule 4:37-2(b) motion for involuntary dismissal." ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 511 (2014).

III.

We first address C&C's cross-appeal from the trial court's dismissal of its claim for conversion of its business personalty left on the Property. "'Conversion has been defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights."'" Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div. 2009) (citations omitted).

The trial court found C&C could not prove damages from conversion. "Generally, plaintiffs have the burden of proving damages." Caldwell v. Haynes, 136 N.J. 422, 436 (1994). "[I]n an action for the conversion of chattels the rule of damages is limited to the value of the chattels converted." Tessmar v. Grosner, 23 N.J. 193, 202 (1957); see One Step Up, Ltd. v. Sam Logistic, Inc., 419 N.J. Super. 500, 512 (App. Div. 2011). "The general rule with regard to the measure of damages in conversion is to award the fair and reasonable market value of the property at the time of conversion." Chem. Bank v. Miller Yacht Sales, 173 N.J. Super. 90, 102 (App. Div. 1980).

After the openings, the trial court asked if C&C had "an expert with regard to the value of these items." C&C's counsel said he did not, and was instead going to ask Chirag, "who had

purchased the items, to identify . . . the worth of the items" using receipts. C&C's counsel suggested three ways to do so.

One way was Chirag could "testify as to what he paid for the items." However, that would overstate the value as the items were used, not new, when 1630 Oak took possession of the Property and the items in July 2012. According to C&C's opening, the items were used for many months while C&C had operated the grocery store until December 2010, and again in 2011, and then were left untended in the Property until July 2012.[11]

Second, C&C's counsel suggested Chirag could testify as to the "replacement value" of the items. To the extent this referred to the cost of buying new items at the time of conversion, it would overstate their value even more, because the items were used and several years old at the time of conversion. The court properly concluded that "replacement value" and "what you paid for it" were not "a true measure of the damages."

Third, C&C's counsel said he would show how much C&C would receive if it got the items back, offered "to sell them on the secondary market," and someone "tried to purchase them used right now." Counsel listed dollar values for various refrigerators,

[11] The trial court also cited that "the stuff was all moldy." However, as that representation was made by 1630 Oak and not by C&C, it could not be a basis for dismissal of C&C's claim.

freezers, condensers, and shelving. When the trial court asked how C&C would prove those numbers, counsel said Chirag would "testify as to invoices he had received . . . for the amounts that he would get for [the items]." The court noted that was inadmissible hearsay. Counsel said he could "speak to the individuals who prepared these invoices to come and testify on behalf of the amounts there," but the court noted the damage trial was happening "now." The court concluded there was no way "to determine how much you're entitled to . . . and you have that burden."

An owner may testify about value of personalty in some circumstances:

> Proof of damages need not be done with exactitude, particularly when dealing with household furnishings and wearing apparel. It is therefore sufficient that the plaintiff prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate.
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> In providing such evidence, the plaintiff, as owner, may give an opinion of worth although he or she is without expert knowledge. The basis for arriving at the opinion must, however, not be a matter of speculation and the witness must be required to establish the grounds for any opinion given.
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> [Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987) (citations omitted) (emphasis added).]

C&C did not provide an adequate foundation because Chirag could not establish the grounds for his opinion of the items' worth. C&C did not dispute his opinion was based on inadmissible hearsay. "[L]ay opinion based primarily on [inadmissible] hearsay statements is inadmissible." Neno v. Clinton, 167 N.J. 573, 581, 584-85 (2001). "[U]nlike expert opinions, lay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." State v. McLean, 205 N.J. 438, 460 (2011) (citing N.J.R.E. 703 (authorizing experts to rely on hearsay of the type and kind ordinarily relied upon by others in their field of expertise)); cf. N.J.R.E. 701 (requiring lay opinion testimony to be "rationally based on the perception of the witness").

In Penbara v. Straczynski, 347 N.J. Super. 155 (App. Div. 2002), we carved an exception from this principle for the Special Civil Part. We held that a landlord seeking $350 from a former tenant for a damaged carpet could testify about its value based on receipts showing it was purchased for $900 "shortly before the tenant took possession," and that it now could not be cleaned fully. Id. at 159, 162. We emphasized the small amount at stake, and that "[t]he rules of evidence may be relaxed 'to admit relevant and trustworthy evidence in the interest of justice' in actions

within the cognizance of the Small Claims Section of the Special Civil Part." Id. at 162 (quoting N.J.R.E. 101(a)(2)(A)).

However, there is no exception or rationale for relaxing the rules of evidence in commercial litigation in the Law Division. N.J.R.E. 101(a)(2). Moreover, C&C was seeking $341,251 in damages for used commercial items such as rooftop condensers, walk-in refrigerators, and other specialty equipment whose value is not within the ken of lay persons, including judges. Factfinders "should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997) (quoting Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (1996-97)).

C&C notes it is sufficient if "evidence affords a basis for estimating the damages with some reasonable degree of certainty[.]" Desai v. Bd. of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586, 595 (App. Div. 2003). However, the proposed estimate would be "based on the mere opinion of plaintiff without any factual support." Id. at 596. "'The law abhors damages based on mere speculation.'" Caldwell, 136 N.J. at 442 (citation omitted).

C&C cites the "commonlaw presumption that a property owner is competent to testify on the value of his own property."

Christopher Phelps & Assocs., LLC v. Galloway, 492 F.3d 532, 542 (4th Cir. 2007). However, the owner must have "personal knowledge" or expert qualifications. Cunningham v. Masterwear Corp., 569 F.3d 673, 676 (7th Cir. 2009). "What the owner was not allowed to do is merely repeat another person's valuation, which is what [Chirag] wanted to do." See ibid. (citation omitted).

Therefore, C&C had no admissible damage evidence available at the trial, which was fatal to its claim. Moreover, there was no reason to believe C&C could procure an expert or the persons preparing the invoices as witnesses in a reasonable period, nor any excuse for not having them ready for "the damage trial." Accordingly, the trial court did not abuse its discretion in dismissing C&C's conversion claim.[12]

IV.

Defendants appeal the trial court's dismissal of their counterclaims against C&C. Their counterclaims alleged C&C instituted a fraudulent and frivolous lawsuit based on a non-existent, sham lease, which caused them damages and legal fees.

[12] Accordingly, we need not consider whether C&C's conversion claim was also barred because C&C abandoned the Property, or failed to remove its belongings when given the opportunity to do so. See Restatement (Second) of Torts § 222A illus. 5 and 11 (Am. Law. Inst. 1965).

C&C's July 31, 2012 complaint against defendants alleged as follows. C&C "is the legal tenant" of the Property "under a written lease." Defendants, the landlords, "breached the valid lease agreements amongst the parties by effecting a self help lockout" on July 25, 2012. C&C "suffered significant damages as a result of the Defendants[']s blatant and egregious violation of the lease agreements between the parties." C&C "was deprived of their property without due process of law in violation of NJSA 2A:33-1, et seq.," the distraint statutes.[13] C&C demanded possession "pursuant to the lease agreement between the parties."

Thus, the validity of C&C's complaint, including its distraint claim, depended on whether its lease with ONS gave it rights as a tenant against 1630 Oak. C&C claimed it retained such rights because its "relationship to the mortgagee was transformed by attornment into that of landlord-tenant[.]" Guttenberg Sav. & Loan Ass'n v. Rivera, 85 N.J. 617, 630 (1981).

The trial court stated the issue was whether C&C's attornment claim was frivolous or in bad faith. The court ruled there was "no indication [of that], in fact everything runs counter to that." The court noted the Special Civil judge "thought there was enough

[13] Distraint is "a form of extra judicial self-help permitting landlords to seize the tenant's possessions in lieu of rent." Maglies v. Estate of Guy, 193 N.J. 108, 135 (2007).

. . . to continue this for a hearing" and to order C&C to pay $3300 monthly rent in escrow, and if that amount was deficient "these are damages that are created by the [Special Civil] Court."

The trial court noted that, after the possession trial, Judge Paley struck the portions of the Bank's proposed order stating that C&C was "an illegal trespasser/holdover tenant in the Property since January 6, 2012," that C&C had lost its right to possession "on January 6, 2012," and that 1630 Oak was entitled to "immediate" possession. Judge Paley May 2, 2013 order let C&C "vacate the Property and remove all of its belongings within thirty (30) days of the entry of this Order."

The trial court noted the judges did not say C&C's complaint was frivolous or in bad faith, but instead handled this "as if [C&C] had a valid claim." The court found it "clear on the face of these orders the [judges] didn't think there was bad faith."

Under the Frivolous Litigation statute, a defendant "who prevails in a civil action . . . against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or

upon judgment that a complaint . . . of the nonprevailing person was frivolous." N.J.S.A. 2A:15-59.1(a)(1).[14]

A complaint is frivolous if the judge finds that:

> (1) The complaint . . . was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
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> [N.J.S.A. 2A:15-59.1(b).]

The trial court relied on the opinions of earlier judges to find C&C's complaint was not frivolous. However, the Special Civil judge did not decide the validity of the lease or the claimed attornment, but merely issued an interim order transferring the matter to the Law Division and requiring C&C to deposit back rent "in trust until further order of the Court" and to pay current rent of $3300 per month "until further order of the Court." Such a preliminary order did not show the complaint was not frivolous or brought in good faith. Cf. United Hearts, LLC v. Zahabian, 407 N.J. Super. 379, 394 (App. Div. 2009) (finding the plaintiff

[14] Defendants also sought damages for their inability to use the Property and for the inadequate rent paid by C&C, but the statute does not authorize such damages, and they have cited no other authority permitting recovery of such damages.

"cannot be deemed to have litigated the matter in bad faith" because a court denied defendants' summary judgment motions "and ruled that plaintiff had sufficient evidence").

After the possession trial, Judge Paley's April 16, 2013 opinion found: "the conduct of [the Bank] did not constitute an attornment," but merely collected the assignment of rents; the Bank in the eviction action "did nothing to create a reasonable belief that the old lease was revived"; "neither [the Bank] nor 1630 Oak are bound by the original lease" "as a matter of law"; "the foreclosure judgment . . . terminated the interests of both parties in the leasehold"; "no new lease exists here"; "C&C has lost its right to possession of the property; [and] 1630 Oak has the right to possession."

Given these findings in Judge Paley's opinion, we do not share the trial court's view that Judge Paley's May 2, 2013 order was attributing some merit to C&C's claim by giving C&C thirty days to "vacate the Property and remove all of its belongings." Rather, the judge appeared merely to be arranging an orderly transition. Indeed, in a February 14, 2014 order, Judge Paley reaffirmed his prior findings that C&C's lease, leasehold, and right to possession "was terminated by the Judgment of Foreclosure entered on January 6, 2012," that "no attornment was ever created

between [the Bank] and [C&C]," and that C&C "abandoned the subject property prior to July 11, 2012."

Nonetheless, Judge Paley did not find C&C's lease was non-existent or a sham or fraudulent as defendants alleged. Rather, after thorough legal analysis, the judge found the Bank's actions had not extended C&C's right to possession past the judgment of foreclosure. That ruling against C&C's claim in itself was "an insufficient ground for an award of fees and costs under the Frivolous Litigation Statute." Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 411 (App. Div. 2009) (citing McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 563 (1993)). "Sanctions are not to be issued lightly; they are reserved for particular instances where a party's pleading is found to be 'completely untenable,' or where 'no rational argument can be advanced in its support[.]'" McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 499 (App. Div. 2011) (alteration in original) (quoting United Hearts, 407 N.J. Super. at 389).

Judge Paley also found C&C had abandoned the Property:

> Had C&C continued in business by operating its market, it might well argue that its understanding of the interaction of Assignment, foreclosure judgment, and eviction was confused. To the contrary: the condition in which the property was left raises no question but that C&C intended to abandon the property and acted overtly to do so. No employee had been on the premises for

> months; no utilities have been paid; perishable items were not removed; cash was left in registers and visibly within the market. . . . To the extent [Chirag] testified that he never subjectively intended an abandonment, the court ascribes no credibility to that testimony.

Judge Paley's finding on abandonment could be read to suggest C&C's complaint was brought in bad faith. However, it is unclear what legal relationship abandonment had to C&C's claim of attornment. See Guttenberg, 85 N.J. at 621 (ruling on the tenants' claim of attornment even though "the mortgagor had abandoned the property" and the tenants had been ordered "to vacate their apartments which were not in habitable condition"). Moreover, "the Legislature intended that false allegations of fact would not justify the award of counsel fees, unless they are made in bad faith, 'for the purpose of harassment, delay or malicious injury.'" McKeown-Brand, 132 N.J. at 561 (quoting N.J.S.A. 2A:15-59.1(b)(1)). The judge "did not identify any action taken by plaintiff in bad faith[.]" Ferolito, 408 N.J. Super. at 411.

In any event, we must hew to our standard of review. "The legislature intended that judicial discretion should be used in determining an award for fees pursuant to N.J.S.A. 2A:15-59.1," and be reviewed under "the abuse of discretion standard[.]" Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005); see In re Estate of Ehrlich, 427 N.J. Super. 64, 76 (App. Div. 2012). An

abuse of discretion "'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."'" Masone, 382 N.J. Super. at 193 (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)). We cannot say the trial court abused its discretion in denying an award of costs and attorney fees.[15]

We also cannot say the trial court abused its discretion in dismissing defendants' counterclaim based on the opening. When the court asked defendants how they were going to prove Chirag and C&C brought the lawsuit in bad faith, defendants' counsel replied "by their testimony and by showing the facts of the case." However, defendants gave no reason to believe Chirag or C&C would admit to bad faith, and nothing in the facts laid out by defendants' opening showed Chirag or C&C had acted in bad faith.

V.

Defendants also appeal the trial court's dismissal of their third-party complaint against the Bank. Their third-party complaint alleged that the Bank's representatives told defendants

[15] The trial court also asserted defendants should have presented their frivolous litigation claim to Judge Paley in or immediately after the possession trial. See N.J.S.A. 2A:15-59.1(c) ("A party . . . seeking an award under this section shall make application to the court which heard the matter"); but see R. 1:4-8(b)(2) ("A motion for sanctions shall be filed with the court no later than 20 days following the entry of final judgment"). We need not address that assertion.

there was no legal tenant but C&C "claimed that a valid lease existed," and that "if this lease is deemed valid then the representations by [the Bank] were false, misleading and wrong and" caused damages to defendants (emphasis added).

Shortly before the possession trial, the Bank filed a motion to dismiss defendants' third-party complaint. In opposition, Jason certified that a representative and a realtor for the Bank had told him "no lease was in effect" and "no tenancy existed."

At the possession trial, instead of making an opening statement, the Bank's counsel argued its motion to dismiss. The Bank emphasized that defendants' third-party complaint against the Bank was contingent on the validity of C&C's lease. The Bank contended defendants' counsel in opening had not made a prima facie case against the Bank, and instead had argued that "[t]here's no lease" and there "couldn't have been a lease . . . after January 6, 2012." The Bank pointed out Judge Paley's finding that C&C's lease was terminated by the January 6, 2012 final judgment of foreclosure, and his May 2, 2013 order that "no attornment was ever created between [the Bank] and [C&C]," that "[C&C] lost its right to possession of [the Property]," and that "[C&C] abandoned the Property prior to July 11, 2012."

The trial court found there was "nothing to show" that, when the Bank tendered the deed to defendants in July 2012, the Bank

"would have known, or should have known," that there would be additional litigation regarding the lease. The court rejected defendants' arguments that the Special Civil judge's decisions allowing C&C to occupy the Property and pay the $3300 rent showed the falsity of the Bank's representations that there was no tenancy, as Judge Paley ultimately determined there was no tenancy.

Defendants argue the trial court should not have ruled based on the arguments of counsel. However, the court could properly grant the motion to dismiss after hearing argument of counsel. Moreover, defendants could not show at least two of the elements of common-law fraud: "a material misrepresentation by the defendant of a presently existing fact or past fact; [and] knowledge or belief by the defendant of its falsity[.]" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175 (2006).

In any event, we find no abuse of discretion in dismissing defendants' claim after openings. On appeal, defendants contend the trial court should have allowed them to present evidence that the Bank concealed its consent order with C&C. However, defendants made no such claim before the trial court. In any case, the consent order expressly provided it "shall not operate as an acceptance of an attornment." Judge Paley relied on that provision to find that the Bank "did nothing to create a reasonable belief that the old lease was revived." Because the consent order was

evidence against C&C's claim, its alleged non-disclosure could not have been dispositive.

VI.

Defendants claim the trial court did not, "by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law." R. 1:7-4. Defendants note the court did not make findings of fact, but factual findings could not be made when dismissing after the opening statements. Rather, the court was required to assume "the truth of all the facts outlined" in defendants' opening before dismissing their claims. Passaic Valley, 32 N.J. at 607.

On June 11, 2015, after the openings, the trial court made its conclusions of law in a colloquy with counsel covering well over one hundred transcript pages. The frequent interruptions during this process made this far from an ideal method. More "clearly stated . . . conclusions of law" would have better served our appellate review. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 n.8 (2010). However, "the extended colloquy with counsel over this [lengthy] oral argument provides a sufficient basis for the award entered." Loro v. Colliano, 354 N.J. Super. 212, 220 (App. Div. 2002). We cannot say the court failed to make conclusions of law as required by Rule 1:7-4, with the exception discussed below.

VII.

The remaining claims relate to Chirag's default. Defendants' third-party complaint against Chiraq alleged that he and Triloki executed "a fraudulent lease" to interfere with defendants' possession of the Property, and that Chirag instituted a fraudulent lawsuit against them based on "a non-existent lease that was a sham." Defendants sought damages, attorney's fees, and costs.

Defendants filed a request to enter default against Chirag, which was entered on June 9, 2014. On September 19, 2014, Judge Vincent LeBlon denied C&C's motion to vacate the default, entered default judgment for defendants against Chirag, and stated a proof hearing should be scheduled. On February 3, 2015, the judge denied Chirag's motion for reconsideration. The judge supported those orders with written opinions dated October 31, 2014, and January 29, 2015, respectively.

To the extent Chirag challenges those orders, he fails to show Judge LeBlon abused his discretion in declining to vacate the default, Eileen T. Quigley, Inc. v. Miller Family Farms, Inc., 266 N.J. Super. 283, 293 (App. Div. 1993), imposing the default judgment, US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467 (2012), or denying reconsideration, Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). We

affirm those orders substantially for the reasons set forth in Judge LeBlon's opinions.

Chirag now points out he was not a named "party" in C&C's complaint against 1630 Oak. See N.J.S.A. 2A:15-59.1(a)(1). He notes defendants' notice and demand under Rule 1:4-8(b) only named C&C, and made no mention of him. See R. 1:4-8(f). However, he offers no reason why these procedural issues were not raised in his earlier motions or in a properly-filed answer.

Defendants argue the trial court ignored their default judgment against Chirag when it entered its June 29, 2015 order stating their "Third Party Complaint against . . . Third Party Defendants CHIRAG BATRA and HABIB AMERICAN BANK is hereby Dismissed with Prejudice but without fees and costs." We see nothing in the court's June 11, 2015 oral opinion which explains why the court entered that order despite Chirag's default judgment. Because the court gave no basis for voiding a default judgment, we vacate the June 29 order to the extent it dismisses defendant's third-party complaint against Chirag.

Additionally, it does not appear the Law Division has held the proof hearing ordered when the default judgment was entered against Chirag on October 31, 2014. We remand to the Law Division so it may hold such a hearing promptly.

We express no opinion on whether defendants' third-party complaint against Chirag replicates its frivolous litigation claim against C&C, or implicates the procedural issues he now raises. We leave to the discretion of the Law Division whether to consider such matters at the proof hearing or in a motion under Rule 4:50-1(f). See Siwiec v. Fin. Res., Inc., 375 N.J. Super. 212, 219-20 (App. Div. 2005) ("Where either the defendant's application to re-open the judgment or the plaintiffs' proofs presented at the proof hearing raise sufficient question as to the merits of plaintiffs' case, courts may grant the application even where defendant's proof of excusable neglect is weak."); see also R. 4:50-2.

On remand, the Law Division also should address whether the escrowed funds should be released to C&C or defendants.

Affirmed in part, vacated and remanded in part. We do not retain jurisdiction.