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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2079-21  
A-2089-21

ALBERT WITTIK,

Plaintiff-Appellant,

v.

PNC BANK, N.A.,

Defendant-Respondent.

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ALBERT WITTIK,

Plaintiff-Appellant,

v.

HEIDI ANN LEPP,

Defendant-Respondent.

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Submitted November 30, 2022 – Decided December 8, 2022

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-5141-21 and L-5616-21.

Albert Wittik, appellant pro se.

Reed Smith LLP, attorneys for respondent PNC Bank, N.A. (David G. Murphy, of counsel; Greyson K. Van Dyke, on the brief).

Martin & Tune, LLC, attorneys for Heidi Ann Lepp (Brian J. Levine, on the brief).

#### PER CURIAM

In these two cases we scheduled back-to-back and consolidated for purposes of issuing a single opinion, we consider plaintiff Albert Wittik's challenge to an order dismissing, and awarding summary judgment to defendant Heidi Ann Lepp on, plaintiff's complaint alleging defamation and fraud against Lepp during her service as a court-appointed trustee in plaintiff's matrimonial case against his ex-spouse, Debra Wittik. We also consider plaintiff's appeal from a denial of his motion for reconsideration of an order rejecting his request in a separate proceeding to compel pre-complaint discovery from PNC Bank, N.A. of the identity of an individual who allegedly witnessed Lepp's removal of property from plaintiff's safe deposit box. Having carefully reviewed plaintiff's arguments in light of the record presented, we find no merit to plaintiff's contentions and affirm the orders in both matters.

## I.

Because the post-judgment proceedings in plaintiff's matrimonial case provides the backdrop for the orders challenged in these appeals, we briefly summarize those proceedings to provide context for our discussion of the orders under review.

### A.

In the Wittik's 2017 final judgment of divorce, the Family Part awarded Debra Wittik \$500,000 in equitable distribution and \$169,587.50 in attorney's fees. The judgment also appointed Lepp as trustee to "ensure" Debra Wittik's collection from plaintiff of the sums awarded to her. The judgment granted Lepp "plenary authority to deal with all the real and personal property in the sole name of . . . [p]laintiff," and the judgment authorized Lepp to access plaintiff's safe deposit box at "PNC Bank" and remove assets necessary to satisfy the judgment. The judgment also granted Lepp six months to transfer plaintiff's liquid assets to Debra Wittik before transferring any real property plaintiff owned, and the judgment required Lepp inventory the assets found in bank accounts and the safe deposit box.

Over the next two years, Lepp collected \$278,297.97 of the \$669,587.50 due Debra Wittik from plaintiff under the judgment of divorce. As a result of

the deficiency, Lepp transferred plaintiff's Branchburg condominium to Debra Wittik. When the court entered the judgment of divorce, the market value of the condo was \$325,000. Following the transfer of the condominium to her, Debra Wittik sold it for \$275,000.

During the matrimonial proceedings, plaintiff filed a motion for an accounting and return of certain assets recovered by Lepp. In a July 29, 2019 certification filed in opposition to the motion, Lepp detailed her actions as trustee, including her recovery of \$278,297.97 in "liquid assets" and her transfer of plaintiff's condominium to Debra Wittik to satisfy the sums due under the judgment of divorce.

Plaintiff later filed motions to vacate the judgment of divorce and for the return of all assets transferred pursuant to the judgment. The court denied the motions in an August 16, 2019 order. In orders entered on September 13 2019, and April 12, 2021, the court directed that no further papers submitted by plaintiff would be accepted for filing in the matrimonial case without prior approval of a Family Part judge. In the April 12, 2021 order, the Family Part judge also denied as "not being accepted for filing" three separate motions submitted by plaintiff, including a motion "with the caption 'Albert Wittik v.

H[ei]di A. Lepp,' seeking an accounting of assets, properties and monies confiscated from plaintiff[.]"

B.

In two separate lawsuits filed following Lepp's appointment as trustee, plaintiff made claims related to Lepp's actions. In A-2089-21, plaintiff filed a complaint against Lepp asserting causes of action for defamation, fraud against plaintiff, and fraud against the court. The complaint's sparse facts allege Lepp defamed plaintiff and defrauded plaintiff and the court by filing the July 29, 2019 certification in the matrimonial case. Plaintiff alleged the certification included "unsubstantiated and false allegations" about him. The complaint also alleged Lepp committed fraud against him "[b]y obfuscating the subject of missing [g]old coins, [d]iamond [sic], and important documents."

Lepp moved to dismiss the complaint under Rule 4:6-2(e) and for summary judgment pursuant to Rule 4:46-2. The court granted Lepp's motion, finding the defamation claim was barred under the applicable one-year statute of limitations, N.J.S.A. 2A:14-3. The court explained Lepp filed the alleged defamatory certification in July 2019, and plaintiff did not file his complaint until more than two years later, on September 21, 2021. The court also determined Lepp was immune from civil liability under the litigation privilege

for the statements in the certification.<sup>1</sup> See generally Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 579-80 (2006).

The court further granted Lepp summary judgment on the fraud claims, finding the undisputed facts established the certification's description of her actions as trustee were supported by the motion record, as well as the record in the matrimonial action, and the statements in the certification were therefore true and did not support a fraud claim. The court entered an order granting dismissal and summary judgment on plaintiff's claims against Lepp. Plaintiff appeals from the court's order in A-2089-21.

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<sup>1</sup> At oral argument on the motion, plaintiff asserted Lepp's certification was defamatory and fraudulent because she stated plaintiff acted in "bad faith" during the matrimonial action by "mov[ing] funds." Lepp's statements concerning her actions are supported by the record in the matrimonial proceeding, where the court found plaintiff "purposely transferred and moved around" marital assets in what the court characterized as "tantamount to a classic cat and mouse game." The Family Part judge further found the transfer of marital assets "perpetrated by . . . plaintiff were intended to hide assets and prevent [Debra Wittik] from receiving her fair share of equitable distribution." The court also determined "plaintiff was not candid in providing . . . information which is necessary to determine the value of certain assets"; "plaintiff's own behavior contributed to many years of litigation"; and "[it is] clear . . . plaintiff did not exercise good faith" during the matrimonial action.

C.

In A-2079-21, plaintiff initiated a separate proceeding by filing a motion to compel PNC Bank, N.A. to respond to his "inquiry" to the bank's "CEO." The inquiry to which the complaint referred is a June 8, 2021 letter plaintiff sent to the bank's CEO in which plaintiff explained Lepp was appointed as trustee "to empty the contents of [his] safe [deposit] box" at one of the bank's branches. The letter further asserted there was a discrepancy between plaintiff's list of the contents of the safe deposit box and "what the 'trustee' claims to have removed." The letter averred Lepp claimed there was a witness present — a bank employee — when she opened the box, and the letter requested the witness's name and "help locating" the individual.

In his motion, plaintiff sought an order compelling the bank to provide the identity of the purported witness. The court entered an order denying the motion, and plaintiff moved for reconsideration. The court denied the reconsideration motion, explaining plaintiff failed to demonstrate an entitlement to the relief sought because Rule 4:11-1 "was not intended to authorize pre-litigation discovery for the sole purpose of assisting a prospective plaintiff in acquiring the facts necessary to frame a complaint" (citing In re Petition of Hall

By and Through Hall, 147 N.J. 379, 391 (1997)). In A-2079-21, plaintiff appeals only from the order denying his reconsideration motion.

## II.

In his brief in support of his appeal from the order dismissing his complaint and granting Lepp summary judgment in A-2089-21, plaintiff does not provide the requisite "concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript." Rule 2:6-2(a)(5). In addition, plaintiff does not offer any legal argument. Instead, his brief consists of only five point headings, none of which is accompanied by any argument or citation to any legal authority. We observe that any legal argument not included in a party's merits brief on appeal is deemed abandoned and will not be considered by a reviewing court. See Drinker Biddle & Reath LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining an issue that is not addressed in a party's merits brief on appeal is deemed abandoned). We therefore do not consider any legal arguments that perhaps could have been asserted in support of plaintiff's appeal but were not.

To the extent plaintiff's tersely stated point headings may be construed as legal argument, they are limited to the following:



## POINT I

The [c]ourt neglected to hear [p]laintiff's motion which was filed 8 July 2021, and again re[-]filed on 21 September 2021.

## POINT II

Plaintiff has difficulty determining[] how the [c]ourt decided to hear a [m]otion filed by . . . [d]efendant six months after . . . [p]laintiff filed his [m]otion and received preferential treatment from the [c]ourt.

## POINT III

The [c]ourt's decision to place a state statute as superior to a Unites States Supreme Court [d]ecision appears to be without legal precedent.

## POINT IV

[T]he [c]ourt denied [] [p]laintiff to continue to prove fraud and libel by . . . [d]efendant against the [c]ourt and . . . [p]laintiff.

## POINT V

Reading the [t]ranscript . . . from [p]age [two] . . . thru [sic] and completely, to page [twenty-seven], [i]s necessary to completely understand the [c]ourt's interference with . . . [p]laintiff's attempt to prove [f]raud and [l]ibel, in presenting the case.

Having reviewed the record, we are convinced the proffered arguments, to the extent they may be discerned from the scant point headings, are without

sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We offer only the following additional comments.

Plaintiff appeals from the order dismissing the complaint for failure to state a claim upon which relief may be granted, R. 4:6-2(e), and granting Lepp summary judgment, R. 4:46-2. In our consideration of a "trial court's decision to dismiss a complaint under Rule 4:6-2(e), we apply the same standard but our review is de novo." Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014) (citing Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010)). The standard "requires an assumption that the allegations of the pleadings are true and affords the pleader all reasonable factual inferences." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002) (citing Indep. Dairy Workers Union v. Milk Drivers Loc. 680, 23 N.J. 85, 89 (1956)). A court must search the pleading "in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." Id. at 250 (citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)).

To avoid a dismissal for failure to state a claim, a plaintiff is not required "to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." Sickles v. Cabot Corp., 379 N.J. Super. 100,

106 (App. Div. 2005) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). "However, a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Ibid. (citation omitted); see also Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011) (citation omitted) ("A pleading should be dismissed if it states no basis for relief and discovery would not provide one.").

When reviewing an order granting or denying summary judgment, we apply the same standard as the motion court. State v. Perini Corp., 221 N.J. 412, 425 (2015) (citing Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013)); Liberty Surplus Ins. Corp. v. Nowell Amoroso, PA, 189 N.J. 436, 445-46 (2007). We "must view the facts in the light most favorable to the non-moving party, which in this case is plaintiff." Bauer v. Nesbitt, 198 N.J. 601, 605 n.1 (2009) (citing R. 4:46-2(c)); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Summary judgment is proper if the record demonstrates "'no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law.'" Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009) (quoting R. 4:46-2(c)). Issues of law are subject to the de novo standard of review, and the trial court's

determination of such issues is accorded no deference. Kaye v. Rosefelde, 223 N.J. 218, 229 (2015) (citation omitted).

Based on our review of the motion record, we are convinced the court correctly dismissed plaintiff's defamation claims, and granted summary judgment on the claims, because they are barred under the applicable one-year statute of limitations. N.J.S.A. 2A:14-3; see also Smith v. Datla, 451 N.J. Super. 82, 93 (App. Div. 2017) (explaining defamation claims are subject to the one-year statute of limitations in N.J.S.A. 2A:14-3). Plaintiff alleged Lepp defamed him in her July 2019 certification filed in the Family Part, but he did not file his defamation claim against her until more than two years later. The court did not err by determining the defamation claims are time-barred and by dismissing, and granting summary judgment to defendant on, those claims on that basis. Plaintiff offers no argument to the contrary.

The court also correctly determined the defamation claims are barred because Lepp's certification to the court falls within the immunity provided under the litigation privilege. The litigation privilege shields "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action."

Loigman, 185 N.J. at 585 (quoting Hawkins v. Harris, 141 N.J. 207, 216 (1995)). Such communications are "'absolutely privileged and wholly immune from liability.'" Loigman, 185 N.J. at 586 (citation omitted).

Plaintiff does not challenge the motion court's well-supported determination Lepp's allegedly defamatory certification, which was submitted in her role as the court-appointed trustee in the Family Part action, is covered by the litigation privilege and therefore required the dismissal and award of summary judgment on the defamation claims. See Brown v. Brown, 470 N.J. Super. 457, 464 (App. Div. 2022) (emphases in original) (explaining the litigation privilege applies to "any communication . . . made in judicial or quasi-judicial proceedings"); see also Hawkins, 141 N.J. at 215 (quoting Devlin v. Greiner, 147 N.J. Super. 446, 453 (Law Div. 1977) (noting application of the litigation privilege requires "that the defamatory matter uttered have some relation to the nature of the proceedings")). We therefore affirm the court's order dismissing, and awarding summary judgment on, the defamation claims on that basis.

We are similarly persuaded the court did not err by finding Lepp is entitled to summary judgment on her fraud claims, which were also founded on the purported false statements in the July 29, 2019 certification. Fraud may be either

actual or equitable. Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624-25 (1981). "A misrepresentation amounting to actual fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his [or her] detriment." Id. at 624. Equitable fraud consists of the same elements as actual fraud except proof of scienter — "knowledge of the falsity and an intention to obtain an undue advantage therefrom" — is not required. Id. at 625.

The motion court determined the undisputed facts presented in support of Lepp's summary judgment motion established her certification did not contain any false statements concerning plaintiff's actions during the Family Part action or otherwise. Plaintiff did not present any evidence establishing the falsity of any of Lepp's statements, and in his brief on appeal, he does not dispute the court's findings. Moreover, the record is devoid of any evidence establishing Lepp's certification included any false statements supporting plaintiff's vaguely asserted fraud claims. To the contrary, Lepp's statements in her certification appear wholly accurate and well-supported by the competent evidence presented in support of Lepp's summary judgment motion. As such, we discern no basis to reverse the court's summary judgment award on plaintiff's fraud claims.

We therefore affirm the court's order dismissing plaintiff's complaint and awarding Lepp summary judgment on the defamation and fraud claims. Plaintiff offers no legal argument supporting a contrary result, and our de novo review of the record otherwise requires the conclusion the motion court correctly entered the order challenged by plaintiff in A-2089-21.

### III.

In A-2079-21, plaintiff appeals from the order denying his motion for reconsideration of an order rejecting motion to compel PNC Bank, N.A. provide the name of the employee who allegedly witnessed Lepp's removal of the contents of plaintiff's safe deposit box.<sup>2</sup> In support of his challenge to the order denying his motion for reconsideration, plaintiff's legal argument consists of a solitary contention: he claims the court denied his alleged right to oral argument on the reconsideration motion. He does not otherwise argue the court abused its discretion by denying the motion. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (explaining a reviewing court considers a trial court's decision

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<sup>2</sup> Plaintiff's brief on appeal does not make specific reference to the order denying his motion for reconsideration, but we address that order because it is the only order identified in his notice of appeal in A-2079-21. See W.H. Indus. v. Fundicao, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review.").

on whether to grant or deny a motion for reconsideration of a final order under Rule 4:49-2 for an abuse of discretion).

Plaintiff initially moved pursuant to Rule 4:11-1 to compel PNC Bank, N.A. provide pre-litigation discovery concerning the identity of a purported witness. "[Rule] 4:11-1 is part of" our system of discovery under the Rules of Court. Johnson v. Grayce Tighe, Inc., 365 N.J. Super. 237, 240 (App. Div. 2003). Plaintiff requested oral argument on his discovery motion, but he was not entitled to it. Rule 1:6-2(d) provides that a request for oral argument on a discovery motion "shall be considered only if accompanied by a statement of reasons," and plaintiff offered none. As such, the court was not obligated to consider his request for oral argument; plaintiff was not entitled to oral argument; and the court did not err by deciding plaintiff's motion to compel under Rule 4:11-1 without oral argument. R. 1:6-2(d).<sup>3</sup>

For the same reasons, the court did not err by deciding plaintiff's motion for reconsideration without oral argument. The motion for reconsideration also

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<sup>3</sup> Although plaintiff does not appeal from the order denying his motion to compel pre-litigation discovery from PNC Bank, N.A., we observe that we would otherwise affirm the order because plaintiff's putative claim the court erred by denying the motion without oral argument is without merit because, for the reasons mentioned, he failed to comply with the prerequisites for oral argument on a discovery motion under Rule 1:6-2(d).

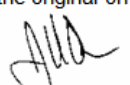


"involve[d] pretrial discovery" and was therefore subject to the requirements of Rule 1:6-2(d). And, again, plaintiff failed to provide the statement of reasons required to support a request for oral argument on a motion involving discovery, R. 1:6-2(d), and, for that reason, the court was not obligated to consider the request and did not err by deciding the motion without oral argument.

Plaintiff offers no other arguments supporting his challenge to the court's order denying his motion for reconsideration. See Drinker Biddle & Reath LLP, 421 N.J. Super. at 496 n.5. We therefore affirm the court's order denying plaintiff's motion for reconsideration in A-2079-21.

Affirmed as to A-2079-21 and A-2089-21.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION