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OF THE COMMITTEE ON OPINIONS

SPENCER SAVINGS BANK, S.L.A.,

Plaintiff,

v.

ARTHUR WEIN and LAWRENCE B. SEIDMAN,

Defendant/Third Party Plaintiffs,

v.

JOSE B. GUERRERO, NICHOLAS LORUSSO, THOMAS DUCH, ADA MCGUINNESS, PETER HAYES and BARRY MINKIN,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. BER-C-129-22

OPINION

Decided: August 30, 2024

Appearances: Pashman Stein Walder Hayden, P.C. (Sean Mack, Esq., and Timothy P. Malone, Esq., appearing) for Plaintiff/Third-Party Defendants.

Bray & Bray, L.L.C. (Peter R. Bray, Esq., appearing) for Defendants/Third-Party Plaintiffs.

HON. EDWARD A. JEREJIAN, P.J.Ch.

PROCEDURAL HISTORY

This matter has been opened to the Court by way of Verified Complaint and Order to Show Cause, pursuant to the requirement of R. 4:67-1, et seq., filed on July 11, 2022, by Pashman Stein

Walder Hayden, P.C., attorneys for Plaintiff Spencer Savings Bank S.L.A.[1] and Third-Party Defendants[2] Jose B. Guerrero, Nicholas LoRusso, Thomas Duch, Ada McGuiness, Peter Hayes[3], and Barry Minkin[4] and requesting the matter be determined summarily pursuant to R. 4:67-1 and seeking the filing under seal of Exhibits C and D to the Verified Complaint.

Defendants Arthur Wein ("Wein") and Lawrence B. Seidman ("Seidman") (collectively, "Defendants"), by and through their attorneys Bray & Bray, L.L.C., filed opposition to the Order to Show Cause and a Motion to Dismiss or for alternative relief on August 8, 2022.

This Court having considered the submissions and arguments of the parties, issued an Order on August 31, 2022, permitting Plaintiff to file under seal Exhibits C and D to the Verified Complaint, denying the remaining of relief sought Plaintiff's Order to Show Cause was denied, and denying Defendants' Motion to Dismiss.

Defendants filed a contesting Answer and Counterclaims to the Verified Complaint on September 6, 2022. Defendants filed a Third-Party Complaint against the Third-Party Defendants on October 3, 2022.

Plaintiff filed a contesting Answer to the Defendants' Counterclaim on October 11, 2022. Plaintiff and Third-Party Defendants filed a contesting Answer to the Third-Party Complaint on November 10, 2022.

Throughout the pendency of this action, the parties engaged in significant motion practice. On August 8, 2022, Defendants filed a motion seeking to dismiss Plaintiff's Complaint under R.

[1] Hereinafter referred to as "Plaintiff" or the "Bank".

[2] Third-Party Defendants are collectively referred to as "Third-Party Defendant Directors" or "Spencer Savings Board".

[3] Peter Hayes passed away during the pendency of this case.

[4] Spencer Savings Bank and the Spencer Savings Board will be collectively referred to as "Spencer Savings".

4:6-2(e) or, in the alternative, transfer venue or stay this action pending the conclusion of several appeals involving these parties. This motion was denied in its entirety on August 31, 2022.

Thereafter, on November 28, 2022, Defendants filed a motion to compel discovery to which Plaintiff filed a cross-motion seeking a protective order on December 8, 2022. The Court disposed of these motions on January 24, 2023, as follows: Defendants' motion was granted in part requiring Plaintiff to produce certain responses and documents requested by Defendants and denied in part as to compelling certain responses to interrogatories and document requests; and the Court granted Plaintiff's cross-motion for a Protective Order.

On February 15, 2023, Defendants then filed a motion asserting spoliation of evidence and seeking another stay of these proceedings pending the conclusion two matters on appeal, one of which involved Spencer Savings and Seidman. On March 17, 2023, this motion was denied in its entirety.

Subsequently, on June 7, 2023, Plaintiff filed a motion *in limine* seeking to preclude reliance on certain expert reports and the testimonies of Defendants' experts. On that same date, Plaintiff also filed a motion to seal. Prior to a ruling on these motions, numerous other pre-trial motions were filed. On August 23, 2023, Plaintiff filed a motion to quash multiple subpoenas, as well as four motions *in limine*, three of which sought to bar certain testimony and the other which sought to seal certain trial exhibits. On that same date, Defendants filed a motion *in limine* seeking a determination that the compensation received by the Third-Party Defendant Directors, that the lobbying against a proposed bill in the New Jersey legislature is admissible evidence, and that evidence concerning the alleged spoliation by Plaintiff is admissible.

Ultimately, on September 14, 2023, Plaintiff's motion to seal was resolved via consent order submitted by the parties. Furthermore, the Court entered an Omnibus Order resolving all

pretrial motions.

After trial, on November 28, 2023, Defendants filed a motion seeking to re-open and supplement the trial record due to newly discovered germane evidence. On December 7, 2023, Plaintiff, in response, filed a cross-motion also seeking to re-open the trial record. The Court subsequently granted both motions on January 2, 2024. Thereafter, on January 12, 2024, the Court re-opened the trial record to hear additional testimony.

BACKGROUND

In order to understand the current state of the Seidman-Spencer Savings litigation, the highly relevant history between these parties must be detailed.[5]

Spencer Savings is the last remaining New Jersey chartered mutual savings and loan association ("MSLA") established pursuant to the New Jersey Savings and Loan Act (the "Act"), N.J.S.A. 17:12B-1 to -319. Traditionally, MSLAs, like Spencer Savings, existed for the primary purpose to provide residential-related financing.

Additionally, being chartered as an MSLA subjects Spencer Savings Bank to a federal regulatory constraint known as the Qualified Thrift Lender ("QTL") test. This requires Spencer Savings Bank to maintain a portfolio consisting of at least 65% "qualified thrift investments," which is largely comprised of residential mortgages. Whereas a state-chartered mutual savings

[5] Pursuant to N.J.R.E. 201, which permits New Jersey courts to take judicial notice of, *inter alia*, publicly available documents including court documents, the Court takes judicial notice of the following cases involving Seidman and certain Savings and Loan Associations, namely, Spencer Savings Bank, S.L.A.: Seidman v. Spencer Sav. Bank, No. A-3899-04 (App. Div. Mar. 23, 2006) ("Seidman I"); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. Nov. 9, 2009) ("Seidman II"); Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07 (App. Div. July 27, 2010), cert. den'd, 204 N.J. 42 (2020) ("Seidman III"); Seidman v. Spencer Sav. Bank, No. A-3836-12 (App. Div. Apr. 30, 2015) ("Seidman IV"); Seidman v. Spencer Sav. Bank, Nos. A-2039-17, A-4739-17 (App. Div. 2019), cert. den'd, 241 N.J. 144 (2020) ("Seidman V"); Seidman v. Spencer Sav. Bank, S.L.A., No. A-2649-20 (App. Div. May 11, 2022) ("Seidman VI"); Seidman and Wein v. Spencer Sav. Bank, No. A-2947-20 (App. Div. Nov. 29, 2022) ("Seidman VII"); Seidman v. Clifton Sav. Bank S.L.A., 205 N.J 150 (2011); In re Seidman, 37 F. 3d 911 (3d Cir. 1994); Spencer Bank v. Seidman, 528 F. Supp. 2d 494 (D.N.J. 2008).

bank is not subjected to this federal constraint.

According to Plaintiff, the banking industry of today and that of the late 1980s, when the QTL was implemented, are manifestly different. 2T80-82. Specifically, since that time, there have been significant changes in terms of the pertinent legislation, economic conditions, "the rise of non-banks, what major mortgage banks and insurance companies were competing in that space" and increased costs of regulatory compliance. 2T82:21-25; 2T83:8-18. Due to these changes and the widespread consolidation among smaller financial institutions with the larger banks dominating the industry, Spencer Savings purports to be facing exceptional challenges in competing as a smaller, community-oriented MSLA. 2T82:15-20; 2T83:8-13; D-61.

Plaintiff claims that as a result of these aforementioned changes in the banking industry, it has been examining and employing strategic plans over the past twenty years in an effort to shift its portfolio from residential mortgages toward the commercial lending market, similar to other MSLAs in the industry, thereby ensuring their "long-term viability".

According to the testimony presented at trial, commercial lending generates higher yields because the loans carry higher interest rates with decreased risk based on shortened loan cycles and provides the ability to attract non-interest-bearing demand deposit accounts, or "core" deposits, which are low-cost deposits that serve as a "highly profitable" and "highly stable" source of funding for the bank. 1T28:12-17; 1T81:18-23; 2T86:1-5.

Spencer Savings Bank began multi-family commercial real estate lending, which is asserted to be "more profitable than 1-4 family residential loans. Because these types of loans constitute a qualified thrift asset, multi-family lending allows spencer to maintain QTL compliance." Commercial loans are more profitable than multi-family, but they do not qualify under the QTL. 1T30:17-22; 1T34:10-17.

Pursuant to the Act, an MSLA is to be governed by a board of directors, and as such, Spencer Savings Bank is governed by its board of directors comprising of Jose B. Guerrero (CEO and Chairman), Nicholas LoRusso, Thomas Duch, Ada McGuinness, Peter Hayes, and Barry Minkin.

As an MSLA, Spencer Savings Bank does not have shareholders. Instead, its depositors and borrowers make up its membership, who in turn elect the board of directors. N.J.S.A. 17:12B-74 (defining "members" as "those in whose names accounts are established either as savings members or as borrowing members").

Defendant Lawrence B. Seidman is an attorney and money manager, who is in the business of buying and selling publicly traded bank stocks. Seidman II, supra 2009 N.J. Super. Unpub. LEXIS 2802 at *4. He opened an account at Spencer Savings Bank in 1988 and has since remained a member.

In 2004, Seidman commenced an action in the Passaic County Chancery Division in an effort to prevent the Spencer Savings Board from disenfranchising the voting rights of its members, thereby entrenching the directors. In that litigation, Seidman challenged, *inter alia*, the amendment of Article 31 of the Bank's by-laws ("By-Law 31")[6] as a breach of fiduciary duty as it increased the threshold required from the Bank's members to run for election to the Board of Directors from ten percent to twenty percent of the membership.

Prior to the conclusion of the trial in the 2004 action, the Appellate Division entertained an appeal by Spencer Savings in which the Bank contended "that the judge erred by: (1) concluding that the Chancery Division was the proper forum for an action challenging an administrative action

[6] By-Law 31 relates to nominations for a director's position. A nomination to the Board requires a nomination in writing either by a majority of the Board or by ten percent or more of the votes entitled to be cast by members of Spencer Savings.

such as approval of the by-law amendments; and (2) declining to dismiss the waste claim." Seidman v. Spencer Sav. Bank, No. A-3899-04, at *5 (App. Div. Mar. 23, 2006). The Seidman I appellate court affirmed the trial judge's decisions and remanded certain issues back to the trial court and to the Commissioner of Banking and Insurance, respectively.

On April 13, 2007, the trial court invalidated the amendment to By-Law 31 concluding that the "amendment [bore] absolutely no rational relationship to any of the issues involving bank governance or operation." Seidman v. Spencer Sav. Bank, PAS-C-190-04. The trial court found "most troubling" that many members, if not most, of the Spencer Savings Board could not proffer the reason or need for the increase in the percentage of signatures. See id.

On appeal, the Seidman II appellate court had remanded certain issues to the Commissioner of Banking and Insurance to amplify the Department's reasoning behind the approval of an amendment which sought to set a fifteen percent threshold required from Spencer Savings Bank's members to run for election to the Board of Directors. Seidman v. Spencer Sav. Bank, Nos. A-0167-07, A-1036-07, A-1343-07, at *30-31 (App. Div. Nov. 9, 2009).

In a separate appellate decision also dealing with issues in Seidman v. Spencer Sav. Bank, PAS-C-190-04, the Seidman III appellate court affirmed the trial court's decision in all respects. Specifically, the appellate court stated, "[w]e recognize that there appear to be two prongs to the court's ultimate remedy to have Spencer's Board engage in a do-over: 1) the utter lack of understanding by many board members of the purpose and effect of amended By-Law 31 and (2) the entrenchment of its incumbent directors." Seidman v. Spencer Sav. Bank, S.L.A., Nos. A-0167-07, A-1036-07, A-1343-07, 2010 N.J. Super. Unpub. LEXIS 1783 (App. Div. July 27, 2010) ("Seidman III"). In affirming the trial court, the Seidman III court held, "[W]e are satisfied that the trial judge's findings of fact are supported by adequate, substantial, and credible evidence." Id.

After Seidman III, in accordance with the court's instructions, Spencer Savings reevaluated the ten percent threshold. Thereafter, Spencer Savings approved a second amendment which increased the member-initiated nomination threshold to fifteen percent. Seidman challenged this amendment as well, resulting in a second round of litigation in September 2010. The trial court held in that matter that the increased fifteen percent threshold should be invalidated. While the trial court found that the Spencer Board utilized the advice of highly qualified individuals in fashioning the new threshold, it was clear to the trial court that the Spencer Board "continue[d] to fail to do the basic leg work that [was] necessary to determine the extent of the risk and impact to its members." In fact, the trial court found that the Spencer Board was not aware that the fifteen percent threshold had the exact same prohibitive effect as the twenty percent threshold due to the increase in Spencer Savings Bank's members. Consequently, on July 16, 2012, the fifteen percent threshold was voided.

On April 30, 2015, the Appellate Division again affirmed the trial court. There, the appellate court accorded the trial judge great deference in her "well-informed assessment" since she had sat with this litigation for over five-years. In doing so, the appellate court determined that "while the record substantiate[d] that defendants' concern over the loss of mutuality was genuine and reasonable, they failed to present a sufficient reasonable justification for the adoption of the 15% barrier." Seidman v. Spencer Sav. Bank, S.L.A., No. A-3836-12, 2015 N.J. Super. Unpub. LEXIS 999 (App. Div. April 30, 2015) ("Seidman IV").

Several months after Seidman IV, Seidman once again filed suit in the Passaic County Chancery Division, this time seeking the invalidation of Spencer Savings' the then-existing ten percent member-initiated nomination threshold contained in a former version of the bylaw. Seidman was also seeking the reinstatement of his and his family members' Spencer Savings

accounts due to Spencer Savings pretextual closure of same. During the pendency of that litigation, Spencer Savings closed the accounts of Seidman and his family members. With respect to the ten percent threshold, the trial court held "there are no legitimate reasons to keep the present threshold which would justify the negative impact it has on the average member." In addition to invalidating the ten percent threshold, the court imposed a new threshold requiring a member seeking a member-initiated nomination to the Board to obtain signatures from the lesser of 500 signatures or one percent of Spencer Savings' membership. Regarding Spencer Savings' closure of the various Seidman-related accounts, the trial court found the reasons for such action to be pretextual and "to eliminate Seidman's membership, disenfranchise him and deprive him of standing." As a result, the accounts were reinstated.

On October 3, 2019, the trial court was affirmed on appeal in a published decision. See Seidman v. Spencer Sav. Bank, Nos. A-2039-17, A-4739-17 (App. Div. 2019), cert. den'd, 241 N.J. 144 (2020) ("Seidman V"). The Appellate Division was satisfied with the trial court's findings that the then-existing ten percent threshold was too onerous and unreasonable. Moreover, the Appellate Division found that the trial court's decision was supported by adequate, substantial, and credible evidence. Conversely, the Appellate Division concluded that the trial court exceeded its authority in establishing the new threshold and left the approval of the proposed threshold to the New Jersey Department of Banking and Insurance. Similar to the decision to uphold the invalidation of the ten percent threshold, the Appellate Division held that the trial judge articulated sound reasoning based on ample evidence to reinstate Seidman's and his family members' accounts.

During the pendency of Seidman V, the Spencer Savings Board approved a new conversion plan to convert to a New Jersey mutual savings bank (the "2019 Conversion Resolution"). After

adopting the 2019 Conversion Resolution, the Spencer Savings Board commenced proxy solicitation from the Spencer Savings Bank members by mailing proxy materials giving notice of the vote to convert. As a result of these actions, Defendants Seidman and Wein sued Spencer Savings Bank and five of the existing directors[7] again in Passaic County seeking an opportunity to join the Spencer Savings Board. Defendants Seidman and Wein claimed that (1) the proposed proxy materials were false and misleading; (2) if any vote were to take place, then each member should be permitted one vote; (3) the 2019 Conversion Resolution was yet another attempt to entrench the Spencer Savings Board; and (4) the directors should not have been permitted to continue in their respective positions.

After the commencement of that action, the trial court enjoined Spencer Savings from moving forward with a vote on the 2019 Conversion Resolution. As a result of the injunction placed on Spencer Savings' efforts to move forward with the 2019 Conversion Resolution, Spencer Savings withdrew the proxy materials. This ultimately left the trial court to rule on the question of whether "the directors pretextually [sought converting to a New Jersey mutual savings bank] to entrench themselves[.]" Seidman v. Spencer Savings Bank, SLA, Docket No. PAS-C-25-19, at 38-39.

On July 31, 2020, the trial court found that

> The voted-upon resolution by the Board of the directors, while not the ideal outcome, it [is] not without foundation and business necessity. However, taking into account the history of Spencer and the relationship between Spencer and the plaintiffs, this court is satisfied that Spencer was motivated to change its banking charter to eliminate voting and thus eliminate the Seidman threat.

Id. at 22-23. Ultimately, the trial court's decision was two-fold: (1) the primary purpose behind

[7] Seidman v. Spencer Savings Bank, SLA, Docket No. PAS-C-25-19, which was tried before the Honorable Frank Covello, J.S.C.

the 2019 Conversion Resolution "was pretextual and was primarily aimed at entrenching the board of directors and ending the Seidman problem" and (2) there were legitimate and valid business reasons behind the 2019 Conversion Resolution. In so ruling, the trial court stated that it "cannot enjoin any future efforts at conversion, because [it found] that there [was] a legitimate business reason for such a conversion." Id. at 43.

In December 2020, in the midst of the Passaic County Conversion action, Seidman filed a lawsuit (1) seeking to temporarily enjoin Spencer Savings' January 2021 annual meeting, in order for him to have more time to seek the necessary signatures to support his nomination for a seat on the Spencer Savings Board; and (2) to enjoin Spencer Savings from lobbying against a bill that had been introduced in the legislature and to find that the Spencer Savings directors had breached their fiduciary duties in lobbying against said bill. Seidman v. Spencer Savings Bank, SLA, Docket No. PAS-C-111-20 (hereinafter, the "Lobbying Action"). In the Lobbying Action, on April 29, 2021, the trial court declined to enjoin the meeting or lobbying and dismissed the lawsuit. It was ultimately held that Spencer Savings' lobbying was constitutionally protected and thus could not, as a matter of law, give rise to a claim for breach of fiduciary duty or corporate waste.

In Seidman VI, the Appellate Division affirmed the trial court's lobbying decision, finding that "[t]he critical, indisputable fact is that the Directors had a right to oppose the Proposed Bill. . . . The Directors' and the Bank's effort to lobby against the Proposed Bill becoming law was an exercise of their First Amendment rights to petition the government." Thereafter, the Supreme Court denied Seidman's petition for certification.

On April 29, 2021, in addition to adjudicating the Lobbying Action, the trial court in the Conversion Action explained in a post-trial reconsideration ruling that "[i]f Spencer's Board at some point in the future decides for a legitimate reason that conversion is in the bank's best interest,

it will present that to the members in an appropriate manner" and if Seidman and Wein "again disagree with that decision, they would be entitled to seek judicial review of that determination, just as they did here, and continue with the seemingly unending litigation between these parties."

On June 21, 2021, the trial court entered its final judgment whereby the court (1) invalidated the 2019 Conversion Resolution; (2) invalidated the July 2018 amendment to Section 34 of Spencer Savings' bylaws; (3) declared and determined that Guerrero, Hayes, LoRusso, Minkin, and Albert Chamberlain violated their fiduciary duties to Spencer Savings and its members; (5) denied the plaintiffs' request for attorneys' fees and costs; vacated its temporary restraining order; (6) denied the plaintiffs' request for a permanent injunction enjoying Spencer Savings from converting to a mutual savings bank; and (7) dismissed all other claims with prejudice.

On July 6, 2022, the Spencer Savings Board unanimously approved another resolution to present a new plan of conversion to a New Jersey mutual savings bank to its members (the "2022 Conversion Resolution") and approved a proxy solicitation seeking the Spencer Savings Bank members' approval for conversion.

Subsequently, on July 11, 2022, Plaintiff filed this action in Bergen County. In its one count complaint, Plaintiff seeks the following relief: (1) declaration, pursuant to N.J.S.A. 2A:16-50, et seq. and 17:16M-2, that the 2022 Conversion Resolution is valid and not a breach of fiduciary duty; (2) Plaintiff is entitled to present the proxy materials to its members; (3) the proxy materials are not misleading; (4) Plaintiff is permitted to move forward with soliciting its members' votes and to hold a member vote on the 2022 Conversion Resolution; and (5) for other relief this Court deems just and equitable.

In response, Defendants Arthur Wein and Lawrence B. Seidman filed an answer and

counterclaims. The counterclaims seek to mandate Plaintiff to notify all Spencer Savings members of this litigation, invalidating the 2022 Conversion Resolution, and awarding Defendants various costs and damages.

Thereafter, on October 3, 2022, Defendants filed a four count third-party complaint in the instant action seeking the following relief: (1) enjoining the Third-Party Defendant Directors[8] from scheduling or communicating with members of Spencer Savings about the meeting to vote to convert; (2) enjoining the presentation of the 2022 Conversion Resolution, along with convening to vote on same; (3) invalidating the 2022 Conversion Resolution; and (4) awarding various damages.

On November 29, 2022, the Appellate Division affirmed the trial court in PAS-C-25-19. On appeal, Spencer Savings had argued that the trial court erred in (1) denying their motion to dismiss the case as moot; (2) concluding that the evidence established entrenchment; (3) concluding that the Spencer Savings Board's primary motivation for voting to convert was to entrench the Board's members; and (4) invalidating the 2018 change to the Spencer Savings' voting bylaw. Whereas Seidman and Wein, on cross-appeal, had argued that the trial court erred in (1) determining that they were not pursuing the action derivatively on behalf of all members; and (2) vacating the requirement for an independent attorney to review any future conversion plan.

In affirming the trial court, the Seidman VII Court found that the "key factual finding" was that the Spencer Savings Board was primarily motivated to prevent Seidman and his associates from gaining a position on the Board and in so acting, the Board was acting to entrench itself. Importantly, the Appellate Division held that the trial record contained "substantial credible

[8] The Third-Party Defendant Directors include Jose B. Guerrero, Nicholas LoRusso, Thomas Duch, Ada McGuinness, Peter Hayes, and Barry Minkin.

evidence supporting the trial court's finding of entrenchment." Seidman and Wein v. Spencer Sav. Bank, No. A-2947-20, at Page 17 (App. Div. Nov. 29, 2022).

Significantly, the Seidman VII court determined that the trial court "appropriately noted the prior litigations, but it did not make its ultimate finding of entrenchment based on those litigations." Id. at 19. In addition, the appellate court concluded that the ruling on the primary motive for the 2019 Conversion Resolution should not be forever binding and any future resolution to convert may move forward if motivated by appropriate reasons.

ANALYSIS

This matter was tried before the Court on September 13, 14, 19, and 20, of 2023.[9] The Court has given careful consideration to all of the evidence adduced at trial, including the testimony of witnesses, review of the exhibits and the arguments made by the parties.

Plaintiff and Third-Party Defendant Directors argue the evidence at trial establishes that Spencer Savings is entitled to a Declaratory Judgment to present to the members a new plan of converting its charter from a mutual savings and loan association to a mutual savings bank; that the proxy materials are sufficient and are void of material omissions and/or misleading statements; and that the Spencer Savings directors did not breach their fiduciary duty in approving the 2022 Conversion Resolution.

Defendants assert that the previously approved 2019 Conversion Resolution was invalidated after a trial on the merits, the judgment was affirmed, and the New Jersey Supreme Court refused to grant Certification. Defendants argue the 2022 Conversion Resolution is identical

[9] For reference, the trial transcripts are cited as follows:
- The September 13, 2023 transcript is hereinafter referred to as "1T";
- The September 14, 2023 transcript is hereinafter referred to as "2T";
- The September 19, 2023 transcript is hereinafter referred to as "3T"; and
- The September 20, 2023 transcript is hereinafter referred to as "4T".

to the invalidated 2019 Conversion Resolution: both provide for the conversion of Spencer Savings Bank to a mutual savings bank with the Board of Managers consisting of the existing Spencer Savings Board that approved the 2022 Conversion Resolution.

As a result, Defendants argue that the doctrine of res judicata should bar Plaintiffs' claims in this litigation since it involves the same or similar claims between the same parties as raised in the previous litigation and hence, the bar is applicable and requires the dismissal of the Complaint and the invalidation of the 2022 Conversion Resolution.

Generally, res judicata refers to the "common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). The doctrine "provides that 'a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties . . . in a new proceeding.'" Walker v. Choudhary, 425 N.J. Super. 135, 150 (App. Div. 2012) (quoting Velasquez, 123 N.J. at 505). In other words, "[w]here the second action is no more than a repetition of the first, the first lawsuit stands as a barrier to the second." Culver v. Insurance Co. of North America, 115 N.J. 451, 460 (1989).

Applying the barring effect of res judicata requires "(1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties and (4) identity of cause of action." Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 172 (App. Div. 2000); Eatough v. Bd. of Med. Exam'rs, 191 N.J. Super. 166, 173 (App. Div. 1983). A judicial decision "must be a valid and final adjudication on the merits of the claim." Velasquez, 123 N.J. at 505. "The rule precludes parties from relitigating substantially the same cause of action." Kram v. Kram, 94 N.J. Super. 539, 551 (Ch. Div.), rev'd on other grounds, 98 N.J. Super. 274 (App. Div. 1967), aff'd, 52 N.J. 545 (1968).

The Appellate Division in Seidman VII, indicated that there needed to be "a passage of time," a "change in circumstances," and "motivation by appropriate reasons." Seidman VII at 14. In other words, where Spencer Savings adopts a future resolution to convert, if it is challenged, it must be assessed based on the facts and circumstances at the time of the vote. Although, in doing so "the history of the Board's past actions is still a relevant consideration." Id. at 15.

This Court agrees and as a result, finds Res Judicata is not an appropriate remedy in the instant case. Instead, this Court will assess the validity of the Spencer Savings Board's July 2022 vote to convert based on the facts and circumstances existing at that time. Although, as a general matter, R. 1:36-3 forbids a court from citing to an unpublished case absent certain specified circumstances.[10] Nevertheless, this Court's citations to the previous action and Seidman VII are appropriate in that the use of those cases involve the same parties, provide a full understanding of the issues and are instructive in this case.

To that end, Spencer Savings argues that there has been sufficient passage of time and a change of circumstances warranting the relief they are seeking at this time. They claim the pertinent issue in the case at hand is the adequacy of Spencer Savings' proposed proxy materials and the Spencer Savings Board's motivations in approving the 2022 Conversion Resolution, both of which were not ruled upon by Judge Covello or the Seidman VII appellate court. The directors and their advisors all testified that Defendant Seidman was discussed prior to adopting the 2022 Conversion Resolution, that the Third-Party Defendant Directors received advice concerning the impact of the conversion on him, his likely challenges to it and the impact those potential challenges should have on their vote, and that while some Third-Party Defendant Directors may

[10] R. 1:36-3 states, in pertinent part, that "except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court."

have considered eliminating Defendant Seidman, it was not the primary reason driving their vote.

Spencer Savings argues several years have elapsed between the two votes seeking to convert the Bank from an MSLA to a mutual savings bank. Spencer Savings further argues that the facts and circumstances existing at the time of the Board's July 2022 vote materially differ from that of the February 2019 vote.

First, Spencer Savings states there has been a change in the makeup of the Spencer Savings Board. Specifically, Albert Chamberlain and John Sturges no longer sit as directors on the Spencer Savings Board and their positions have been filled by Ada McGuinness and Thomas Duch, both of whom who were not on the Spencer Savings Board at the time of the 2019 vote. Additionally, Barry Minkin – who participated in both the 2019 and 2022 votes to convert – is now 80 years old which means he can no longer serve as a manager of the Spencer Savings Board, if the conversion were to be completed. According to Spencer Savings, there is no rationale to conclude that Minkin could vote to entrench himself.

Second, it is argued that the Spencer Savings Board procured and thoroughly reviewed advice from consultants and other professionals prior to the July 2022 vote, including legal advice concerning their fiduciary duties, advice from a strategic planning expert, updated advice from Steven Fusco, the Bank's Chief Financial Officer, and John Duncan, the Bank's Chief Lending Officer and Executive Vice President, pertaining to the QTL's continuing impact on the bank, and updated advice from the bank's regulatory attorney.

Douglas Faucette, counsel at Locke Lord LLP, a prominent national law firm, and the Bank's outside regulatory counsel, with decades of experience in regulatory banking issues and conversions, advised the Spencer Savings Board concerning the Bank's legal options to remove the QTL. Faucette concluded that there were two viable options that existed to eliminate the QTL

requirement: (1) complete a stock conversion, which would substantially enrich the directors personally but was "incompatible" with the Bank's "commitment to mutuality" and serving the community and decrease the "shelf life" of the Bank in that would likely be acquired by a larger entity "in a span of less than seven years", 1T124:12-14,23-25; 1T128:4-12; or (2) "become, by conversion, a state chartered savings bank." 1T121:21-23.

Faucette advised the Spencer Savings Board that "one of the significant differences between a mutual savings bank and a mutual association was that savings banks . . . [are] more like charitable institutions [with] trustees that serve a constituency" and no owners, such that the "trustees" determine the board of managers, whereas "[i]n a savings bank, . . . there is no longer the concept of depositors who elect directors or in fact have any voting rights whatsoever." 1T120:20-25; 1T121:1-7. Faucette also explained to the Spencer Savings Board that his research into alternatives to conversion were unsuccessful. 1T121:16-23. Moreover, Faucette testified that as part of his presentation to the Spencer Savings Board, he examined the proposed proxy material. In doing so, he stated that Spencer Savings was "providing a significant document with substantial disclosure." 1T130:20-24.

In addition to the advice provided by Faucette, Ronald Riggins, Managing Director of R.P. Financial, L.C. and an expert in strategic planning in finance within the banking industry, presented his own evaluation of Spencer Savings' strategic plan to convert its charter and strategic alternatives to conversion.

Specifically, Riggins prepared a report for the Spencer Savings Board which focused on "the matters that Spencer is unable to continue to implement its commercial transformation strategic plan" as an MSLA "to increase its profitability [and] to enhance its competitive profile and viability." 2T76:6-11. Riggins's report further addressed the option of remaining a mutual

through conversion while relieving the Bank of the QTL impediment. 2T76:15-23. Plaintiff argues that Riggins presented to the Spencer Savings Board the consequences of violating the QTL threshold which range from limitations on the ability of the Bank to conduct business as it has been to regulatory enforcement actions.

Moreover, Spencer Savings highlights that Riggins presented several strategic options including (1) changing their strategic plan to one with a reduced focus on commercial lending; (2) continuing the current business model and acquiring "another mutual or bank or . . . credit union that would give [Spencer Savings Bank] qualifying assets for the QTL ratio"; or (3) restricting by selling "a certain portion of their commercial real estate loans and multi-family loans and reinvest in lower yielding qualifying assets." 2T101:2-102:20.

Spencer Savings argues that these strategic options pose a dramatic impact to the Bank's operations. As a result, Riggins discussed the option of converting the charter to a New Jersey mutual savings bank and how this option is essential to removing the QTL barrier. 2T103:16-17.

The Board also received advice on their fiduciary duties from Gary Stein, a retired Justice of the New Jersey Supreme Court. Justice Stein advised the Spencer Savings Board that "based on the testimony . . . from Riggins, Duncan and Fusco, that it was abundantly clear that there was good reason for the Board to convert to a savings bank because to do so would leave the bank outside the purview of the QTL limitation." 2T36:10-15. When discussing Seidman with the Spencer Savings Board, Stein advised that the directors "have a perfect right to consider" preventing Seidman from gaining a position as a director when voting to convert if, in their judgment, they determine that it is in the best interests of the Bank to do so. 2T37:17-20. Justice Stein referred to this as a "side benefit of conversion." 2T37:21-22.

All of the Directors testified that they understood and relied on the advice of executive

management, as well as the outside experts, Riggins, Faucette, and Justice Stein. Each of the Directors understood that QTL posed a real and ongoing problem for the Bank. Based on the advice they received, they understood that conversion to a mutual savings bank was their only option to avoid QTL while remaining a mutual, notwithstanding that it would make it more difficult for Seidman to get on Spencer's Board.

In relying on that advice, Spencer Savings argues that the Board acted in good faith to ensure it satisfied its fiduciary obligations.

Third, Judge Covello's decision was based primarily upon the trial court's credibility findings with respect to the Spencer Savings Board. There, based on the testimony of the Spencer Savings directors, the trial court found there could be no possibility that Seidman played no role in the approval of the conversion. Ultimately, the trial court concluded that the directors primarily acted to entrench themselves and deny Seidman a seat on the Spencer Savings Board. Spencer Savings argues that here, the directors and their advisors all testified that Seidman was discussed, that they received advice concerning the impact of the charter change on him and his likely challenges to it, and the impact that should have on their vote, and that although it may have been a consideration for some of the directors, eliminating Seidman was not the primary reason for their vote.

Consequently, according to them, the need to convert is a necessary business decision and eliminating the Seidman issue is not the primary reason for their vote.

Defendants argue that there is little to no change in circumstances and that sufficient time has not passed to conclude that the 2022 Conversion Resolution was motivated by appropriate reasons and not to entrench the Directors' positions on the Board and as a result the Board breached their fiduciary duty.

Specifically, Defendants assert that the supposed detriment of being subjected to the QTL restraint has proven illusory as the Bank has experienced an increase in profits. In other words, Defendants contend that the argument that the QTL barrier is an urgent threat to the profitability of the Bank is erroneous and misleading and hides the fact that the 2022 Conversion Resolution was again primarily motivated to eliminate the Seidman issue and member voting.

In addition, Defendants note as another example of bad faith, that in July 2020, a bill was introduced to the New Jersey legislature (the "Bill"), which, if enacted, would provide a way for the Bank to convert to a mutual savings bank, eliminate the QTL and preserve member voting rights. Defendants posit that the Board's decision to oppose the Bill unquestionably demonstrates their motivation was again to eliminate voting and with it the Seidman issue. Further, Seidman made known that he would not contest any conversion, so long as the Bill was adopted and supported, thereby preserving an avenue to protect member voting. 4T87:12-15

Defendants claim that rather than support the Bill, the Board, under the guidance and leadership of Guerrero and Faucette, actively took steps to defeat the adoption of the Bill such as having Jane Rey, Spencer Savings Bank's President, testify against the Bill at a Senate Committee Hearing, hiring a lobbyist to lobby against the Bill, and having Faucette provide testimony against the Bill at the Senate Committee Hearing.

Defendants also argue that the justifications presented for opposing the Bill are also erroneous. Specifically in support of this, Defendants point to Minkin's testimony in which he affirmed his preference to preserve member voting if this could be accomplished. 3T59:13-15.

Moreover, Defendants state that LoRusso also testified he supported the lobbying against the Bill and that he wanted to achieve a conversion as inexpensively and as quickly as possible; and he acknowledges the Bill provided an opportunity to convert and avoid a fight with Seidman.

3T23:10-16; 3T74:4-11. Defendants note that LoRusso had no explanation for opposing the Bill other than his own assumption that the Bill would not be passed at all. 3T76:19-21. Moreover, Guerrero testified that the Bank was against the enactment of the Bill, hired the lobbyist to lobby against the Bill but presented no justification for this opposition other than Spencer Savings being against the change in the law. 3T110:17-20; 3T111:14-25; 3T114:10-115:12.

Defendants also note that Faucette testified he appeared at the Committee Hearing testifying against the Bill "as the staff director of a trade group named America's Mutual bank, and on behalf of [the] members who are similarly situated as Spencer." 1T141:1-12. Defendants further argue that Faucette in fact testified for Spencer Savings, which was subsequently established by way of a document he distributed to members of his organization that stated he testified for Spencer. Exhibit D-31. Defendants suggest that Faucette should have no reason to misrepresent his role in opposing the Bill, yet, according to Defendants, Faucette intended to position himself as an independent regulatory lawyer. Defendants argue that this effort by Faucette must be an attempt to hide his role in instituting conversion as a means to eliminate Seidman.

As a result, Defendants argue that the opposition to the Bill and the unwillingness to consider alternatives or compromises to avoid future litigation, are indicative of the Board's bad faith and true motives, which is to continue to entrench themselves.

Furthermore, Defendants relied on the expertise of Gary Bronstein, an attorney of the law firm Kilpatrick & Townsend, admitted to the District of Columbia. At trial, Bronstein was qualified as an "expert in bank governance and regulatory matters", to opine as to whether Spencer Savings could eliminate the QTL requirement and preserve member voting rights. 4T16:9-10; 4T17:1-3; 4T18:1-5. Bronstein determined that Spencer Savings could do so by forming a federally chartered mutual holding company in its existing form as an SLA, and simultaneously, convert the Bank, as

a subsidiary of the holding company, to a mutual savings bank. 4T18:13-20. However, according to Bronstein, Spencer Savings would need to incorporate to a bank holding company in Pennsylvania, while simultaneously maintaining its principal office there. 4T35:4-20. This "solution" was based primarily on Bronstein's own experience in a transaction involving William Penn, a Pennsylvania bank that preserved its members voting rights when converting. 4T18:18-19:2.[11]

Defendants also contend that Third-Party Defendant Directors have breached their fiduciary duty by adopting the 2022 Conversion Resolution to perpetually entrench themselves. While it is acknowledged that the Spencer Savings Board utilized reports, presentations and opinions of counsel, Defendants argue that Third-Party Defendant Directors' actions were undertaken in bad faith and for illegitimate purposes. Defendants argue that the efforts to entrench taken up by the Spencer Savings Board are *per se* improper and therefore, a breach of their fiduciary duties. See Scheidt v. DRS Technologies, 424 N.J. Super. 188, 202 (App. Div. 2012).

In opposing Defendants' breach of fiduciary duty argument, Third-Party Defendant Directors argue that they are protected by their good faith reliance on the advice of counsel. See Francis v. United Jersey Bank, 87 N.J. 15, 37 (1981). In other words, Third-Party Defendant Directors argue that their accurate and good faith reliance on the advice of Justice Stein, Faucette and Riggins negates the existence of bad faither or negligence and even offers complete protection against a claim of breach of fiduciary duty. See Scheidt v. DRS Technologies, 424 N.J. Super. 188, 203-04 (App. Div. 2012).

Defendants have also raised spoliation of evidence occurred with the intentional

[11] The Court notes that this alternative to Spencer Savings' sought after conversion is an outlier to which Bronstein has no knowledge of other banks which have followed suit. In essence, this alternative does not pose a reasonable solution to Spencer Savings' conversion efforts.

destruction of audio tapes of the June and July 2022 meetings, at a time when litigation was contemplated. Defendants assert that the two tape recordings of the meetings were the best evidence of what was said and that they were improperly destroyed, and as a result an adverse inference should be drawn.

Spencer Savings contends that the destruction of the audio tapes was consistent with its own long-standing protocol, and that Defendants have not suffered any prejudice given the considerable evidence regarding the meetings at issue by way of meeting minutes, memos, handwritten notes, slide presentations given to the Spencer Savings Board, and outside experts/consultants and trial testimony from numerous witnesses who attended those meetings. Spencer Savings argues that there is no injury or prejudice to Defendants. As a result, it is argued that a mandatory adverse inference for the deletion of recordings of the Board meetings would be inappropriate and should in any event be rejected by the Court.

"Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition." Aetna Life and Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 364 (App. Div. 1998) (quoting Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 234 (Law. Div. 1993)). In the normal course, spoliation refers to the "destruction or concealment of evidence by one party to impede the ability of another party to litigate a case." Jerista v. Murray, 186 N.J. 175, 201 (2005).

Where a court determines that spoliation occurs, there are a number of remedies which may be employed in order to make the harmed litigant whole. Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2001). One of which is for the court to assert the "spoliation-inference" which is "a presumption that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to [them]." Id. at 402. In that same vein, "[a]n appropriate sanction is one that properly

takes into account the spoliator's level of intent, and is adequate and effective, but not excessive." Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 226 (App. Div. 2001). In order for a court to employ the spoliation inference and enforce such a remedy, the party asserting spoliation must "make a threshold showing that a [party's] recklessness caused the loss of relevant evidence." Jerista v. Murray, 185 N.J. 175, 202-03 (2005).

At trial Marizel Collazo, the Corporate Secretary of Spencer Savings Bank, testified that she attends all Board meetings and that her deletion of the recordings was done solely pursuant to her ordinary protocol for preparing the minutes of the meetings. 4T42:16-25. She elaborated that she attended and taped the June and July meetings and after she prepared the minutes from those meetings the tapes were erased. 4T48:8-11; 4T49:14-18.

She further testified that the recordings and notes are retained only until the next meeting at which the Board approves the draft minutes in the absence of differing opinions on what the minutes should include and upon approval, the recordings are deleted, and the notes destroyed. 4T47:3-21. Importantly, Collazo explained that the protocol has been in place for the decade she has served as the secretary and even prior to that. 4T48:21-49:10.

Guerrero confirmed the existence of the protocol and testified that it was adopted on the recommendation of Spencer Savings' attorney many years ago, well before this litigation, not for any nefarious purpose but rather to ensure the creation of a single comprehensive record of Board meetings upon the Board's approval of the minutes. 3T122:1-16.

Detailed written minutes were produced based on the recordings, which Collazo and every other testifying witness who attended the June and July meetings credibly testified under oath accurately reflected what was discussed at those meetings. 4T54:9-14; 4T52:19-53:6.

Collazo further testified that she did not, and indeed was never asked to omit any topic of

discussion from the minutes or make any changes that were inconsistent with her notes or recollection of the meeting.

Defendants were also provided the slide presentation given to the Board by Riggins, a written memo issued by Fusco, and handwritten notes from Justice Stein and Graham Jones, Esq., all of which were consistent with the discussion set forth in the minutes. Exhibits P-50, P-59, D-14, D-15.

As a result, the Court is satisfied that no spoilation of evidence occurred, and to the contrary, Collazo was merely following longstanding protocol. Therefore, no adverse inference will be given.

For nearly two decades, Spencer Savings Bank, S.L.A., its Chief Executive Officer and Board of Directors have been engaged in a protracted dispute with Lawrence Seidman, and more recently Arthur Wein, purportedly in an effort to keep Seidman and his associates from gaining positions on the Spencer Savings Board. There is no doubt that Plaintiff and Third-Party Defendant Directors view Siedman as a continuing problem for Spencer Savings.

Plaintiff concedes that this action was filed because "[it] can predict with certainty that, Defendants would [again] sue to enjoin Spencer from holding a special meeting for its members to vote on the conversion proposal and will claim that the proxy solicitation is misleading, regardless of the actual content of those materials." (Pl. Verified Complaint at ¶ 3.)

Although, the QTL continues to be an issue for the Bank, the detriment of being subjected to this restraint has proven elusive as Spencer Savings has experienced an increase in profits. In addition, only a brief period of time has elapsed since the most recent trial and therefore, circumstances have substantially remained the same. The Spencer Savings Board unanimously approved the new resolution only thirteen months after the Passaic County trial court entered its

final judgment.

At the time the Spencer Savings Board adopted the 2019 Conversion Resolution, the Bank's QTL Ratio sat at 71%. 1T50:21-23. However, during the period from 2017 to 2022, despite the alleged threat of the QTL threshold, profits increased. 3T48:19-22. At the time the 2022 Conversion Resolution, the QTL Ratio only decreased by .02% to 70.8%. Exhibits P-15 and P-50.

Moreover, Director LoRusso agreed, on cross-examination, that the Bank not only survived the invalidation of the 2019 Conversion Resolution, but it had also prospered, and even Guerrero concurred that the Bank was on a trend of enjoying increased profitability for the period from 2017 through 2022. 3T108:10-15. In fact, 2022 was the most profitable year ever; and Guerrero was rewarded with a $3.7 Million bonus. 3T107:13-22.[12]

In addition, attorney Ronald Riggins presented projections, similar to those presented when he supported the 2019 Conversion Resolution, that profits would be reduced for 2022 if the QTL barrier was not eliminated and testified, he was unaware that the Bank actually made record profits for 2022. 2T114:2-20; 2T115:15-116:6.

While the Court respects the Third-Party Defendant Directors' passion for the Bank and concern regarding the QTL threshold, it is clear that the Bank is more than simply surviving, it is in fact prospering. Thus, the urgent threat to the Bank's profitability is merely a façade.

In the end, the 2022 Conversion Resolution was premature and again primarily motivated to prevent Seidman and his associates from gaining a position on the Board. In doing so the Board was acting to entrench itself, thereby breaching its fiduciary duty.

Although this Court, like past courts, does not make its ultimate finding based on the prior

[12] Minkin testified he chairs the Compensation Committee and is aware of the Directors' compensation. However, he did not know that Guerrero received compensation in excess of $4.7 million. 3T44:11 to 45:9.

litigations, the history of the Board's past actions is still a relevant consideration.

This Court, however, also recognizes as have past Courts, that eliminating the QTL is a legitimate business concern. This Court's decision, as with the Appellate Court in Seidman VII, should not prevent future efforts at conversion, if with the passage of time, those efforts are motivated by appropriate circumstances.

Furthermore, the instant action was premised on this Court reviewing proxy materials, prior to member solicitation, however, those materials should be reviewed at the appropriate time and in consideration of the facts and circumstances as they exist then. Therefore, a determination of these proxy materials at this time is moot.

Additionally, Defendants also argue for the awarding of compensatory and punitive damages. In order to make a successful claim for damages, it should be noted that Defendants/Third-Party Plaintiffs must not only establish a breach of fiduciary duty, but also that performance of the directors' duty would have avoided the company's loss. Francis v. United Jersey Bank, 87 N.J. 15, at 36 (1981); see also N.J.S.A. § 14A:6-14. Here, there is no specified loss that the Bank and its members have suffered nor one that is attributable to the Spencer Savings Board's breach. In finding that the Third-Party Defendant Directors have breached their fiduciary duty, the appropriate remedy is to invalidate the 2022 Conversion Resolution, and therefore, no damages will be awarded to Defendants/Third-Party Plaintiffs.

Finally, citing the so-called "America Rule", each party will pay its own fees and costs. See Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975)).

CONCLUSION

Based on the foregoing, Judgement is entered in favor of Defendants/Third-Party Plaintiffs on the counterclaim and Third-Party Complaint invalidating the 2022 Conversion Resolution and declaring that the Spencer Savings Board breached their fiduciary duties. The remainder of the relief sought in the counterclaims and Third-Party Complaint is dismissed. Plaintiff's complaint is dismissed in its entirety. Each party will bear their own fees and costs.