Corinne Pandelo, Plaintiff, v. The Governing Body of Jehovah's Witnesses, Fairlawn Congregation of Jehovah's Witnesses, Watchtower Bible and Tract Society of New York, Inc., Hackensack Congregation of Jehovah's Witnesses, and John and Jane Does 1-100, whose identities are presently unknown to Plaintiff, in their official and individual capacities, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-5508-21 Civil Action

DEFENDANTS WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC. AND EAST HACKENSACK CONGREGATION OF JEHOVAH'S WITNESSES' BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
E: Anthony.LaRocco@klgates.com
E: Dana.Parker@klgates.com
E: Reymond.Yammine@klgates.com
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Anthony P. La Rocco (023491982)
Dana B. Parker (041682003)
Reymond E. Yammine (306962019)
Of Counsel and on the brief

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PRELIMINARY STATEMENT

This is a dispute involving alleged reprehensible acts of abuse by Clement Pandelo against his granddaughter Plaintiff Corinne Pandelo between 1979 and 1988. Between 1994 and 2001, Plaintiff successfully litigated claims against Clement Pandelo, her grandmother, and her parents,[1] and was awarded more than $2 million in compensatory and punitive damages as a result of her grandfather's alleged abuse.[2] ("1994 litigation"). More specifically, Plaintiff alleged that her family who, "by reason of the special familial relationship that existed, and by reason of the care assumed" caused the following:[3]

> As a result of the said sexual abuse, as proximate result of which the plaintiff was severely injured, disabled and permanently impaired, disfigured and deformed, suffered and will suffer great pain and torment, both mental and physical, was and will be compelled to spend large and diverse sums of money for medical care; and was and will be unable to attend her usual duties and obligations in the future.

Now, more than 28 years later, Plaintiff puts at issue the very same conduct, for which she was already awarded more than $2 million, and repurposes her allegations as a vehicle to entangle newly-named religious entities[4] in the alleged actions of her grandfather. Whether under New Jersey's entire controversy doctrine or pursuant to judicial estoppel, this lawsuit must be dismissed for violating principles of fairness to the parties and for a complete lack of judicial efficiency.

To be clear, it cannot be disputed that Plaintiff's current action is virtually identical to the 1994 litigation. As this Court held, the allegations raised in the 1994 litigation "are based on very

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[1] The record shows that Plaintiff ultimately dismissed the claims against her parents. Certification of Dana B. Parker filed in support of Defendants' Motion for Summary Judgment, filed on July 20, 2022, (Trans. ID LCV20222677645) ("Parker Cert. Mov. Br."), **Exhibit D.**

[2] The value of Plaintiff's recovery is even higher when accounting for inflation.

[3] Parker Cert. Mov. Br., **Exhibit C**, First Count ¶¶ 4-7.

[4] Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") the East Hackensack Congregation of Jehovah's Witnesses (improperly named Hackensack Congregation of Jehovah's Witnesses) (the "East Hackensack Congregation") and Fairlawn Congregation of Jehovah's Witnesses (together, "Defendants").

similar or the same underlying wrongful acts alleged in this litigation . . . . Both matters involve the same plaintiff and involve similar underlying wrongful allegations as are claimed in this case." Similarly, Plaintiff seeks the very same damages here that she was already awarded in the 1994 Litigation. It is undisputed that Plaintiff could have, and indeed should have, brought her claims against the Defendants during the 1994 litigation. Although Plaintiff claims that the New Jersey Charitable Immunity Act (N.J.S.A. 2A:53A-7) would have precluded her from suing the Defendants, a simple reading of the Act as set forth below shows otherwise.

Plaintiff's grandfather, Clement Pandelo, the individual who is alleged to have committed atrocities against Plaintiff, has since passed. If Defendants are forced to litigate this case without this key witness, Defendants will be unable to cross-examine Mr. Pandelo and elicit critical, and potentially exculpatory testimony, from the only witness who is alleged to have directly committed the wrongdoing. Similarly Defendants are precluded from exercising any rights for contribution against Mr. Pandelo. These are rights enshrined by principles of basic fairness and rights that Defendants would have been able to exercise but for Plaintiff's informed decision to sit on her claims for more than 28 years. The Court must preclude Plaintiff from having a second bite at the apple.

ARGUMENT

I. Defendants' hypothetical defenses to the 1994 litigation did not excuse Plaintiff from joining Defendants.

Plaintiff asks the Court to engage in a futile exercise of hypotheticals and speculation to excuse her conscious failure to include Defendants from participating in the 1994 litigation. More specifically, Plaintiff contends that she was excused from naming Defendants in the 1994 litigation, and thus providing Defendants with a fair opportunity to defend the case, because

Defendants *may have* raised certain defenses to that litigation. Pl. Opp. Br. at 11-13. This is incorrect.

As an initial matter, Plaintiff cites no law to even support the position that the existence of a hypothetical defense, to a 28-year old action, excused her from joining Defendants in the 1994 litigation. That is because there are none. The reality is that Defendants could have raised a myriad of defenses to that litigation. Defendants could have challenged service of the complaint, personal jurisdiction, or the sufficiency of Plaintiff's pleadings, among many others. Speculation of what Defendants *could have, should have,* or *would have* done is irrelevant to what Plaintiff was required to do - mandatorily join the Defendants.

Here, Plaintiff claims that she was excused from joining Defendants to the 1994 Litigation based on Plaintiff's speculation that the New Jersey Charitable Immunity Act (the "CIA") would have precluded her from doing so.[5] Pl. Opp. Br. at 12-13. Even a basic analysis of Plaintiff's claimed "excusable conduct" shows it is meritless.

The CIA, as it existed at the time, provided charitable organizations with immunity relating to negligent acts only. *See* N.J.S.A. 2A:53A-7(a). As part of her opposition, Plaintiff fails to acknowledge that a large number of her causes of action are rooted in claims for *intentional conduct* and not mere negligence. For example, Plaintiff seeks damages against Defendants for intentional infliction of emotional distress and sexual abuse and battery. *See* Complaint, Counts V and VII. Plaintiff fails to cite to any evidence that Plaintiff would have been precluded from asserting these extremely serious causes of action against Defendants in 1994. Because there is none. *See, e.g.*, *Hardwicke v. Am. Boychoir Sch.*, 188 N.J. 69, 102 (2006).

[5] *See* N.J.S.A. 2A:53A-7(a).

And while the 1994 litigation was pending, and a year before Plaintiff filed her Second Amended Complaint, the CIA was amended.[6] As amended, the CIA did not grant immunity for acts relating to allegations of "willful, wanton or grossly negligent act of commission or omission, including sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . or sexual abuse . . . ."[7] As such, Plaintiff had the full opportunity to litigate a number of her present causes of action against Defendants in the 1994 litigation including additional claims sounding in gross negligence. *See Hardwicke*, 188 N.J. at 97.

II. **Plaintiff's claims are barred by the Entire Controversy Doctrine**

In the 1994 litigation, Plaintiff had a full and complete opportunity to litigate her claims against her grandfather and other family members in connection with the alleged abuse that she suffered. The record shows that Plaintiff was represented by counsel in the 1994 litigation and on appeal. By not naming Defendants in the 1994 litigation, Defendants have been forever precluded from obtaining the testimony of the key witness who is alleged to have committed the wrongdoing. Similarly, Defendants are forever precluded from raising any claims, cross-claims, or claims for contributions against the party already deemed 100% responsible for Plaintiff's harm.

As a result of the unquestionable prejudice to Defendants, the entire controversy doctrine bars Plaintiff's current attempt of repurposing the very same allegations against them.

A. **Whether under Rule 4:30A or Rule 4:5-1(b)(2), Plaintiff's claims should be dismissed**

Contrary to Plaintiff's argument, the entire controversy doctrine does not focus solely on mandatory joinder of claims. It applies to joinder of parties as well. At the time that Plaintiff filed the 1994 Litigation, mandatory joinder of claims and parties were required. ("Non-joinder of claim

[6] Plaintiff filed her Second Amended Complaint in June 1996. *See* Parker Cert. Mov. Br., Exhibit C.
[7] The CIA, Section (c); *see also* L. 1995, c. 183, § 1.

or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine"). After the amendment of Rule 4:30A, a successive action was to be dismissed if the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified prior. R. 4:5-1(b)(2). As Defendants argued in their moving brief and as set forth here, Plaintiff's claims here are barred under either version of the rule.

Indeed, the entire controversy doctrine bars claims, such as Plaintiff's claims, "where distinct claims are aspects of a single larger controversy because they arise from interrelated facts." *DiTrolio v. Antiles,* 142 N.J. 253, 271 (1995). The rules governing the doctrine—Rule 4:30A and Rule 4:5-1(b)(2)—"advance the same underlying purposes. As it relates to claims and to parties, they express a strong preference for achieving fairness and economy by avoiding piecemeal or duplicative litigation." *Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co.*, 207 N.J. 428, 446 (2011) (affirming dismissal of some claims). New Jersey courts will bar a successive action pursuant to the entire controversy doctrine where it is clear that the successive action will result in double recovery for plaintiffs. *1707 Realty, LLC v. Revolution Architecture, LLC*, A-1370-20, 2022 WL 2812740, at *11 (N.J. Super. Ct. App. Div. July 19, 2022). Where plaintiffs seek two attempts at recovery via two actions with overlapping damages, New Jersey courts will dismiss the subsequent action with prejudice. *Id.*

New Jersey courts consider "the loss of witnesses, the loss of evidence, fading memories and the like" to constitute substantial prejudice. *1707 Realty, LLC*, 2022 WL 2812740 at *10; *Kent Motor Cars, Inc.*, *Co*., 207 N.J. at 446; *see also Mocco v. Frumento*, 710 Fed. App'x 535,

544 (3d Cir. 2017) (concluding that the death of a witness that had been deposed in a separate action nonetheless constituted substantial prejudice in a "successive action").

Here, Plaintiff had no justification to omit Defendants from the 1994 litigation. It is clear that Plaintiff asserts the **same** allegations of abuse by the same person—her now-deceased grandfather—in both actions. SUMF, ¶ 5, 1994 Litigation Amended Complaint, First Count, ¶ 5; SUMF, ¶ 5, 2021 Amended Complaint, ¶ 38. Similarly, in both complaints, Plaintiff claims the exact same physical, psychological, and emotional harm or damage. SUMF ¶ 7, 1994 Litigation Amended Complaint, First Count, ¶ 6; SUMF ¶ 18, 2021 Amended Complaint, ¶ 242. Finally, both complaints assert the identical basis for damages: large "sums of money" for Plaintiff's medical care and treatment. SUMF ¶ 8, 1994 Litigation Amended Complaint, Second Count, ¶ 3; SUMF ¶ 19, 2021 Amended Complaint, ¶ 243. Even more, Plaintiff's 1994 Litigation Amended Complaint specifies damages for plaintiff's psychiatric care "in the future[.]" SUMF ¶ 8, 1994 Litigation Amended Complaint, Second Count, ¶ 3. Plaintiff's claims do not just arise from "interrelated facts," but from the identical facts.

Plaintiff claims that despite her unjustified failure to join Defendants to her 1994 litigation, Defendants suffered no prejudice. Pl. Opp. Br. at 14-15. As it relates to the death of Mr. Pandelo, a critical witness to the litigation, Plaintiff contends that any prejudice to Defendants has been diminished because Mr. Pandelo was deposed in the 1994 litigation. Pl. Opp. Br. at 16. Plaintiff fails to explain how a deposition conducted by parties with interests that were, at best, unaligned with that of Defendants' interests and, at worst, entirely adverse, mitigates the undue prejudice against Defendants. Because it does not. In fact, the Third Circuit in *Mocco* rejected an almost identical argument. *See Mocco*, 710 Fed. App'x at 544.[8]

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[8] As the court explained, a witness' prior deposition testimony in a successive action cannot alleviate the substantial prejudice following that witness' passing. *Id.*

Here, the prejudice is unmistakable. Plaintiff, who was represented by counsel, made the conscious decision to omit Defendants from the 1994 litigation. Plaintiff now seeks to bring the exact same action decades later. Defendants are left in the dark as to any potential exculpatory evidence that may have once existed decades ago but is now lost. Critically, after the death of the only witness who is alleged to have directly committed the wrongdoing, Plaintiff's grandfather, Defendants are further forever precluded from eliciting critical, and potentially exculpatory testimony, in defense of their case. New Jersey courts make it clear, however, that "the loss of witnesses, the loss of evidence, fading memories and the like" constitute substantial prejudice. *1707 Realty, LLC*, 2022 WL 2812740 at *10. And even worse here, Defendants are unable to raise any claims, cross-claims, or claims for contributions against the party already deemed responsible for Plaintiff's harm.

III. **Judicial Estoppel requires dismissal of Plaintiff's claims**

In 1994, the Court found that as a result of her grandfather's "sexual abuse," Plaintiff was "severely injured, disabled and permanently impaired, disfigured and deformed, suffered and will suffer great pain and torment, both mental and physical, was and will be compelled to spend large and diverse sums of money for medical care; and was and will be unable to attend her usual duties and obligations in the future." Parker Cert. Mov. Br., **Exhibit C**, First Count ¶¶ 4-7. The Court also found that as a result of the alleged abuse, Plaintiff would need to "expend vast sums of money for psychiatric care." *Id.*, Seventh Count ¶ 2. Despite representing to the Court that the totality of her harm arose as a result of the actions of her family, Plaintiff now contends, 28 years later, that she suffered additional damages not identified in 1994, but arising out of the exact same allegations. Pl. Opp. Br. at 22-24. This cannot stand.

Plaintiff cannot now argue that Defendants are responsible for any of her harm when 28 years earlier Plaintiff successfully litigated the position that her family, and more specifically her grandfather, was the complete source of her injury. *Terranova v. Gen. Elec. Pension Tr.*, 457 N.J. Super. 404, 415 (App. Div. 2019). In fact, Plaintiff now pleads the same damages it did in the 1994 litigation. *See* Supra Section 2A. Principles of judicial estoppel demand that Plaintiff be bound by her earlier representations—that the Defendants from the 1994 litigation are the cause of her alleged injuries, not the Defendants here. Plaintiff cannot recover for her injuries against her alleged abuser, and then "shoot[] a second line toward others, seeking contribution for" the same injuries. *Id.* at 415–16.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' motion for summary judgment.

Dated: September 19, 2022

Respectfully submitted,

By: /s/ Anthony P. La Rocco

Anthony P. La Rocco
Dana B. Parker
Reymond E. Yammine
K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Anthony P. La Rocco (Attorney ID 023491982)
Dana B. Parker (Attorney ID 041682003)
Reymond E. Yammine (Attorney ID 306962019)
K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Corinne Pandelo, Plaintiff, v. The Governing Body of Jehovah's Witnesses, Fairlawn Congregation of Jehovah's Witnesses, Watchtower Bible and Tract Society of New York, Inc., Hackensack Congregation of Jehovah's Witnesses, and John and Jane Does 1-100, whose identities are presently unknown to Plaintiff, in their official and individual capacities, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO: BER-L-5508-21 **<u>Oral Argument is Requested</u>** **CERTIFICATION OF DANA B. PARKER IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, Dana B. Parker, hereby certify as follows:

1. I am an attorney-at-law of the State of New Jersey and counsel at K&L Gates LLP, attorneys for Defendants Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") and the East Hackensack Congregation of Jehovah's Witnesses (improperly named Hackensack Congregation of Jehovah's Witnesses) (the "East Hackensack Congregation") (together,

"Defendants"). I make this certification in further support of Defendants' Motion for Summary Judgment pursuant to New Jersey Court Rule 4:46-2(a).

2. Attached hereto as **Exhibit H** is a true and correct copy of L. 1995, c. 183.

3. Attached hereto as **Exhibit I** is a true and correct copy of the Appellate Division's unpublished opinion in *1707 Realty, LLC v. Revolution Architecture, LLC*, A-1370-20, 2022 WL 2812740 (N.J. Super. Ct. App. Div. July 19, 2022). No contrary unpublished opinions are known to counsel.

4. Attached hereto as **Exhibit J** is a true and correct copy of the Third Circuit's unpublished opinion in *Mocco v. Frumento*, 710 Fed. App'x 535 (3d Cir. 2017). No contrary unpublished opinions are known to counsel.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 19, 2022

/s/ Dana B. Parker

Dana B. Parker
K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

EXHIBIT H

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CHAPTER 183

AN ACT concerning immunity from liability in certain instances and amending P.L.1959, c.90.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P.L.1959, c.90 (C.2A:53A-7) is amended to read as follows:

C.2A:53A-7 Immunity from liability for negligence.

1. a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.

Nothing in this subsection shall be deemed to grant immunity to any health care provider, in the practice of his profession, who is a compensated employee, agent or servant of any nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes.

b. No nonprofit corporation, society or association organized exclusively for hospital purposes or its trustees, directors, officers or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association; but nothing herein

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contained shall be deemed to exempt the agent, employee or servant individually from their liability for any such negligence.

c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature; (2) any trustee, director, officer, employee, agent, servant or volunteer causing damage as the result of the negligent operation of a motor vehicle; or (3) an independent contractor of a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes.

2. This act shall take effect immediately and shall apply to all causes of action arising on or after the effective date.

Approved July 24, 1995.

CHAPTER 184

AN ACT to eliminate the sales and use tax on advertising space in telecommunications user or provider directories or indexes distributed in this State, and amending P.L.1966, c.30.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 2 of P.L.1966, c.30 (C.54:32B-2) is amended to read as follows:

C.54:32B-2 Definitions.

2. Unless the context in which they occur requires otherwise, the following terms when used in this act shall mean:

(a) Person. Person includes an individual, partnership, society, association, joint stock company, corporation, public corporation or public authority, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) Purchase at retail. A purchase by any person at a retail sale.

(c) Purchaser. A person who purchases property or who receives services.

EXHIBIT I

2022 WL 2812740
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

1707 REALTY, LLC, Plaintiff-Appellant,
v.
REVOLUTION ARCHITECTURE, LLC,
Conrad Roncati, R.A., Architectura, Inc.,
Johnson Soils Company, Lisa V. Mahle-Greco,
P.E., Bertin Engineering Associates, Inc., and
Calsisto Bertin, P.E., Defendants-Respondents.
Revolution Architecture, LLC, Conrad Roncati, R.A.,
and Architectura, Inc., Defendants/Third-Party Plaintiffs,
v.
Ultra General Contracting Corp., Ultra General
Contracting, Inc., d/b/a Ultra General Contracting
Enterprises, Inc., and Ultra Enterprises, LLC,
d/b/a Ultra General Construction Enterprises,
Inc., Third-Party Defendants-Respondents,
and
Stalwart Construction, LLC, Stalwart Construction,
Inc., Stalwart Construction Group, Inc., and
Gregory Fassano, LLC, Third-Party Defendants.
Johnson Soils Company, Lisa V. Mahle-Greco, and
Calsisto Bertin, P.E., Defendants/Third-Party Plaintiffs,
v.
Stalwart Construction, LLC, Stalwart Construction,
Inc., Stalwart Construction Group, Inc., Ultra General
Contracting Corp., Ultra General Contracting, Inc., d/
b/a Ultra General Contracting Enterprises, Inc., Ultra
Enterprises, LLC, d/b/a Ultra General Construction
Enterprises, Inc., Greenfield Construction Group,
Gregory Fassano, LLC, March Associates, Inc.,
and Petillo Incorporated, Third-Party Defendants,
and
Roy Rock, LLC, Third-Party Defendant-Respondent.
Bertin Engineering Associates, Inc., and Calisto
Bertin, P.E., Defendants/Third-Party Plaintiffs,
v.
Stalwart Construction, LLC, Stalwart Construction
Group, Inc., individually and d/b/a Stalwart
Construction, LLC, Ultra General Contracting
Corp., Ultra General Contracting Inc., d/b/
a Ultra General Contracting Enterprises, Inc.,
Ultra Enterprises LLC, d/b/a Ultra General
Construction Enterprises, Inc., Third-Party Defendants.

DOCKET NO. A-1370-20
|
Argued February 9, 2022
|
Decided July 19, 2022

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2202-17.

Attorneys and Law Firms

Leonard E. Seaman argued the cause for appellant 1707 Realty, LLC (The Law Offices of Richard Malagiere, PC, attorneys; Richard Malagiere, of counsel; Leonard E. Seaman, of counsel and on the briefs).

Robyn S. Rubin argued the cause for respondents Revolution Architecture, LLC, Conrad Roncati, R.A. and Architectura, Inc. (Milber Markris Plousadis & Seiden, LLP, attorneys; Robyn S. Rubin, on the brief).

Jill A. Mucerino argued the cause for respondents Johnson Soils Company, Lisa V. Mahle-Greco, P.E., and Calisto Bertin, P.E., i/p/a Calsisto Bertin, P.E. (Wood Smith Henning & Berman, LLP, attorneys; Jill A. Mucerino, on the brief).

Michael J. Jubanyik argued the cause for respondents Bertin Engineering Associates, Inc., and Calisto Bertin, P.E. (Reilly, McDevitt & Henrich, PC, attorneys; Michael J. Jubanyik and Christine J. Viggiano, on the brief).

Before Judges Hoffman, Whipple, and Geiger.

Opinion

PER CURIAM

***1** Plaintiff 1707 Realty, LLC (1707 Realty) appeals from November 20, 2020 Law Division orders dismissing with prejudice its complaint against defendants on the basis of the entire controversy doctrine and Rule 4:5-1(b)(2). Plaintiff also appeals from a January 12, 2021 order denying reconsideration. For the reasons that follow, we affirm.

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I.

We ascertain the following facts from the record. Plaintiff, a New Jersey limited liability company, was established by its principals, Moshe Winer and Martin Taub, to develop the Fairfield Marriott Inn Hotel (the Project) in North Bergen. Tal Winer is 1707 Realty's Vice President.

As the result of construction defects at the Project, on March 24, 2017, plaintiff filed its complaint in the matter under review, naming the following parties as defendants: JSC, a New Jersey corporation that performs geotechnical and special inspection services, including third-party inspections of concrete and rebar; Lisa V. Mahle-Greco, P.E., a professional engineer in the State of New Jersey and employee of JSC; Calisto Bertin, P.E., a professional engineer in the State of New Jersey and principal of JSC and Bertin Engineering Associates, Inc.; Bertin Engineering Associates, Inc., a New Jersey corporation that provides civil engineering services; and Conrad Roncati, R.A., a registered architect in the State of New Jersey and principal of defendants Revolution Architecture LLC and Architectura, Inc.

Despite initiating this action for construction defects, plaintiff did not name its initial general contractor, Stalwart Construction LLC (Stalwart), or its owner and president, Vincent DiGregorio, as defendants. Both Stalwart and its subcontractor, Ultra General Contracting Corp. (Ultra), are named as third-party defendants in the matter under review; however, only Ultra appeared as Stalwart defaulted.

The Project

In April 2014, plaintiff entered into an agreement with Stalwart, as general contractor, to perform site work at the Project. Shortly thereafter, Stalwart commenced work. In September 2014, JSC began performing inspections of Stalwart's work.

On September 12, 2014, plaintiff entered into an agreement with Stalwart for the construction of a seven-story, 100-room hotel structure (the Tower) at the Project. Stalwart began work on the Tower on December 17, 2014.

In April 2015, plaintiff retained Bryan Sullivan of PTC Consultants to serve as the owner's representative for the Project. Sullivan was responsible for the day-to-day management of the Project. Sullivan oversaw the progress of the Project and the status of its completion.

In May 2015, Sullivan assessed the quality of the work and alerted plaintiff regarding defects in the construction of the Project. The defects identified by Sullivan related to both site work and work on the Tower. Around the same time, plaintiff became aware of alleged deficiencies with respect to JSC's inspections.

Sullivan was the person most knowledgeable about the defects at the Project. According to plaintiff, Sullivan was the primary individual responsible for noting and documenting the allegedly defective conditions. Although unsure of its existence, plaintiff's principal, Moshe Winer, testified to never seeing a formal report prepared by Sullivan regarding the defective conditions.

***2** By May 2015, Sullivan determined that Stalwart was not acting in compliance with its contracts. As a result, on May 22, 2015, plaintiff issued a Notice of Non-Compliance [w]ith Contract to Stalwart. The notice stated, in part, that Stalwart failed to provide “standard protocol for Code[-]required controlled inspections, scheduling, and on-site or office inspection,” which was central to JSC's involvement with the Project. Thereafter, Stalwart began performing remedial work under the supervision and guidance of Sullivan.

On September 28, 2015, plaintiff issued a Notice of Default to Stalwart on the Tower contract. The Notice of Default stated that Stalwart failed “to construct the project in accordance with industry standards[,] including but not limited to[,] local building codes, in particular numerous failure[s] in the placement of rebar and the pouring of concrete which required and continues to require extensive remediation.” Shortly thereafter, on October 7, 2015, plaintiff terminated Stalwart's contracts for cause. At the time of Stalwart's termination, the Project was partially completed, up to the second floor.

After Stalwart's termination in October 2015, March Associates Construction, Inc. (March) replaced Stalwart at the Project. Sullivan prepared March's scopes of work for both remedial work and for remaining and incomplete work. According to plaintiff, no remedial work was done without Sullivan's knowledge.

By August 15, 2017, the Project had been remediated and the North Bergen Building Department issued a certificate of occupancy. Plaintiff credits Sullivan with having “saved

the project." Notably, plaintiff failed to put the defendants on notice of its claims against them prior to March remediating and completing the Project.

One day later, on August 16, plaintiff issued summonses to defendants in this matter. After receiving a copy of the complaint, defendant Calisto Bertin left the following voicemail for Sullivan:

> Bryan this is Calisto. You've probably getting a call from Conrad too, but I got a gift which I f**king didn't expect, and I have never done this before, but I am going to f**k this job as best I can. I am gonna go down, and I am going to use all my influence to f**k this job. Maybe if someone wants to call me and explain what all this about, we can do something about it, but right now.... Not you, your employer created a f**kin' enemy. Bye.

Claims Based on Sullivan's Work Product

Plaintiff's allegations as to both the claimed defects and damages are based upon information supplied by Sullivan. Specifically, plaintiff's identification of defects, remedial work, and its calculation of damages are based upon information included in a "change order log" prepared by Sullivan. Moreover, plaintiff admitted that its calculation of damages is not based upon the personal knowledge of its principals or its own documents, but rather, upon the records of Bryan Sullivan.

The following exchange occurred at the deposition of Tal Winer:

Q: Okay. Could you tell me, as you sit here today, where those numbers come from and what work is reflected and included in the remediation costs and the change orders for remediation work?

A: Yes. I believe all of Mr. Sullivan's records were provided in -- in -- at the site. The paper records, I believe we provided as whatever digital records we had of his. And I remember, this was from -- he would keep meticulous spreadsheets of all the change orders. He would have his notes, he had many columns of notes. He would label them and categorize them with the values. So I mean, I am sure you have seen his records and we produce a lot of records.

***3** Q: So what I am asking you, though, is there a document where Mr. Sullivan identified $340,295 for change orders for additional remediation work? Where did the number come from, I guess, is what I would like to know?

A: So I believe he had -- he had at least a couple of spreadsheets for change orders, one for the site work, one for the tower contract, huge spreadsheets where he labeled the change order based on the proposed change order number, the -- ... And he would say whether or not it was remedial in nature and he would describe what the change order was about. So that's where we got those numbers.

Since Winer did not personally create the document, he testified regarding his review of the change order log, stating, "[T]o the best of my abilities, in good faith, I tried to figure out what was remedial in nature."

The claimed defects were not identified with specificity until June 18, 2020, at which time plaintiff produced its expert witness reports authored by Thornton Tomasetti, Inc. and Christopher Ling, AIA. Both Ling and Tomasetti opined as to defects pertaining to concrete and rebar installed by Stalwart. Plaintiff's experts did not undertake first-hand observations of work progress, the defective conditions, or the remedial efforts.

In addition to opining as to Stalwart's defective work, both Ling and Tomasetti offered opinions as to the approval of payment applications for "work that either was not completed at all or was incomplete." Plaintiff specifically claims it suffered damages due to the improper approval of incomplete work for payment, as set forth in Payment Application Requisition No. 8. This claim is based upon an analysis undertaken by Sullivan.

Claimed Damages

In addition to establishing liability, the damages claimed by plaintiff are also based upon information supplied by Sullivan, which plaintiff's experts used in calculating plaintiff's damages totaling $4,005,731, including costs caused by delay of construction, overpayment, and

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remediating defective construction. In support of the damages sought in this litigation, plaintiff retained Robert Valentin Consulting (Valentin) as an expert, which issued a report dated February 17, 2020 (the Valentin Report). Plaintiff submitted the Valentin Report to support the recovery of "costs incurred due to overpayments, deficient installation[,] and delays," which allegedly total $1,653,754.46. The Valentin Report opines defendants are responsible for the claimed costs due to their failure to identify Stalwart's deficient installation for which Stalwart was overpaid.

Engineered Devices Litigation

On November 13, 2015, while the Project was ongoing, Engineered Devices Corporation initiated a legal action against 1707 Realty and Stalwart in the Superior Court of New Jersey, Hudson County to recover on a construction lien claim. Engineered Devices Corporation v. 1707 Realty LLC, No. L-4673-15 (the Engineered Devices Litigation). On February 11, 2016, plaintiff filed crossclaims against Stalwart and DiGregorio.

The Facts Common to All Counts, as stated in plaintiff's crossclaim, provided, in pertinent part:

> (2) Stalwart failed to supply sufficient properly skilled workers or proper materials or equipment to complete the project ...
>
> ***4** (3) By letter dated September 28, 2015, 1707 provided Stalwart with a Notice of Default and opportunity to cure.
>
> ....
>
> (6) As a result of Stalwart's failure to cure the default, on or about October 8, 2015, 1707 terminated the Contract for cause ...
>
> (7) Prior to termination of the Contract, Stalwart submitted, on a periodic basis, Application and Certification for Payment ("Payment Applications") to 1707 signed by DiGregorio as a condition to get progress payments.
>
> (8) DiGregorio certified to 1707 in the Payment Applications that the work ... was completed in accordance with the Contract Documents ...
>
> (9) At the time DiGregorio made these certifications ... the work ... was not completed in accordance with the Contract Documents.

Count One of plaintiff's crossclaim was against DiGregorio for fraud relating to payment applications submitted for the Project, in his capacity as Stalwart's representative. Count Three was against Stalwart for breach of contract for its failure and refusal to provide plaintiff sufficient properly skilled workers or proper materials at the Project. Relevant to the matter under review, plaintiff alleged defective work product and "numerous construction defects" against Stalwart.

In accordance with the Rule 4:5-1, plaintiff's attorney filed a certification with plaintiff's crossclaim, stating:

> I further certify pursuant to [Rule] 4:5-1 that the matter in controversy is not the subject matter of any other action pending in any Court or of a pending arbitration proceeding ... I further certify that to the best of my knowledge, information and belief, no other party should be joined in this action.

On May 19, 2016, plaintiff filed a motion for leave to file a third-party complaint against Ultra and Gregory Fassano, LLC d/b/a "Global Group" (Global) in the Engineered Devices Litigation. In a supporting certification, plaintiff's attorney stated that "1707 [Realty] seeks to recover from Global and Ultra for damage to the property." He further certified that "1707 [Realty's] claims against Global and Ultra should be included as part of the matters in controversy to allow a full and complete resolution of all claims in one forum."

After receiving leave of court, plaintiff filed a third-party complaint against Ultra and Global in the Engineered Devices Litigation in June 2016. Plaintiff alleged that Ultra and Global each entered into a subcontract with Stalwart to provide labor and materials within the concrete scope of work in the construction of the Project. Plaintiff further alleged that Ultra and Global each "failed to construct the project in accordance with industry standards[,] including but not limited to[,] local building codes" and that their failure "required and continue to require extensive remediation by 1707 to portions of the project." Moreover, plaintiff alleged that "[t]he negligence, carelessness, or recklessness" of Ultra and Global were the "proximate cause of damages suffered by 1707." Plaintiff's

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attorney filed a certification attached to plaintiff's third-party complaint, stating:

> I certify pursuant to [Rule] 4:5-1 that the matter in controversy is not the subject matter of any other action pending in any Court or of a pending arbitration proceeding ... I further certify that to the best of my knowledge, information and belief, no other party should be joined in this action.

Judgment in the Engineered Devices Litigation

***5** On January 25, 2017, an Order for Final Judgment (the DiGregorio Judgment) was entered against Vincent DiGregorio as to plaintiff's crossclaim for fraud in the amount of $681,506 in the Engineered Devices Litigation. Plaintiff's calculation of the DiGregorio Judgment included consideration of overpayment made to Stalwart, as well as damages incurred by plaintiff with respect to remedial work at the Project.

Plaintiff's representative, Moshe Winer, testified at deposition in this matter as follows:

Q: Why did you decide that your options were better pursuing the design professionals in this litigation for at least some of the same damages that you already have a judgment for in another litigation?

A: That's what you call double dipping, that's what you --

Q: No, I am not. I am asking you why you made that determination, to pursue a judgment on the same grounds, at least in part, against design professionals in this litigation when you already had a judgment for those damages in another litigation?

A: Look, I ... hired professionals and I have to take responsibility for who I hired. I believe I hired ... a good team and that's the advice I got and that's what I did .... We chose not to sue Stalwart for negligence or for breach of contract, because we realized it's a sham and there's nothing there, there's no asset to recover ... from Stalwart. Again, it was a business decision.

The Present Action

Before the Project had been completed and fully remediated, plaintiff initiated the matter under review by filing a complaint in Bergen County on March 24, 2017. However, plaintiff did not serve the complaint until August 22, 2017, after the certificate of occupancy for the Project was issued; as a result, defendants were unaware of the claims pending against them until that time. In its complaint, plaintiff alleged that JSC entered into an agreement to provide construction testing and monitoring of certain aspects of the Project, including testing and monitoring of cast-in-place concrete, masonry, and structural steel installations at the Project, and further, that they are liable for defects in the construction of the Project because they “failed to observe and/or failed to require the general contractor to correct various deficiencies in the project.” The complaint and subsequent iterations, filed in the form of first, second and third amended complaints, alleged defects in the construction of the footings, stairs, columns, foundation, and use of unacceptable fill.

In October 2017, defendant JSC filed an answer, at which time it asserted an affirmative defense stating: “This claim is barred by the entire controversy doctrine.” Defendant Revolution filed an answer to the initial complaint on October 24, 2017, and thereafter filed answers to the first, second and third amended complaints on January 24, 2018, May 24, 2018, and October 30, 2019, respectively. Revolution denied all allegations, including all allegations grounded in negligence, fraud, corruption, or any other intentional tort, and asserted affirmative defenses denying the same.

In November 2017, defendants served discovery demands on plaintiff. Defendant Revolution filed a third-party complaint against Stalwart on January 3, 2018, and thereafter on third-party defendant Ultra. Third-party complaints were also filed by defendants JSC, Lisa V. Mahle-Greco, Calisto Bertin, and Bertin Engineering against Ultra and other subcontractors. Of the named third-party defendants, only Ultra appeared. The named third-party defendants worked as subcontractors under Stalwart, and were alleged to have performed, in part, the defective and deficient work for which plaintiff claimed damages.

***6** Plaintiff did not serve its answers to interrogatories until May 17, 2018, at which time Sullivan was identified for the first time as a person with knowledge of facts relevant to this case. By that time, he had been deceased for over two months. It was not until two years later – on June 18, 2020

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– that plaintiff produced a liability expert report identifying with specificity its claims against defendants.

On September 9, 2020, JSC moved for dismissal of plaintiff's third-amended complaint based upon the entire controversy doctrine and plaintiff's failure to comply with Rule 4:5-1. In sum, the motion sought dismissal of the complaint with prejudice based upon plaintiff's failure to identify or join defendants in the Engineered Devices Litigation. The other co-defendants filed cross-motions to dismiss on the same grounds. On October 6, 2020, plaintiff filed an omnibus opposition to defendants' motions.

On November 20, 2020, the motion judge granted defendants' motions and issued orders dismissing plaintiff's complaint with prejudice based on the entire controversy doctrine and violations of Rule 4:5-1. Plaintiff filed a motion for reconsideration, which the motion judge denied on January 12, 2021.

This appeal followed, with plaintiff raising the following arguments:

I. THE STANDARD OF REVIEW

II. THE BERGEN TRIAL COURT ABUSED ITS DISCRETION IN APPLICATION OF RULE 4:5-1.

A. THE COURT ERRED BY FAILING TO CONSIDER THE REASON FOR DELAY IN BRINGING THIS LITIGATION.

B. THE BERGEN COURT ERRED IN FINDING THAT DEFENDANTS WERE "SUBSTANTIALLY PREJUDICED."

C. THE BERGEN TRIAL COURT ERRED IN FAILING TO CONSIDER WHETHER ANY LESSER SANCTION WAS APPROPRIATE.

III. THE BERGEN TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT APPLIED RULE 4:5-1 TO THE ESTABLISHED FACTS.

A. THIS IS NOT A "SUBSEQUENT" ACTION.

B. 1707 COMPLIED WITH RULE 4:5-1.

IV. THE BERGEN TRIAL COURT ERRED IN FINDING THAT THE DIGREGORIO JUDGMENT PRECLUDES RECOVERY FROM DEFENDANTS HERE.

V. THE BERGEN TRIAL COURT ERRED IN FAILING TO CONSIDER THE MATERIALS SUPPLIED WITH THE MOTION FOR RECONSIDERATION.

II.

We review the grant or denial of a motion to dismiss under the same standards as the trial court. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). Where the decision being appealed is based on equitable principles, we review the trial court's findings under an abuse of discretion standard. BOC Group, Inc. v. Chevron Chem. Co., 359 N.J. Super. 135, 145 (App. Div. 2003) (citing Paradise Enters. Ltd. v. Sapir, 356 N.J. Super. 96, 102 (App. Div. 2002)).

Moreover, it is well settled that "[t]he entire controversy doctrine is an equitable principle and its application is left to judicial discretion." 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011) (citing Allstate N.J. Ins. Co. v. Cherry Hill Pain & Rehab. Inst., 389 N.J. Super. 130, 141 (App. Div. 2006)). The doctrine's "application is left to judicial discretion based on the factual circumstances of individual cases." Dimitrakopoulos v. Borrus, 237 N.J. 91, 114 (2019) (quoting Highland Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123, 125 (2009)). When reviewing the trial court's exercise of such discretion, we will reverse the trial court's decision only if it was clearly erroneous. State v. Simon, 161 N.J. 416, 444 (App. Div. 1999).

Plaintiff argues that we should conduct de novo review based on the Court's decision in Dimitrakopoulos, 237 N.J. at 108. There, in a case involving the entire controversy doctrine, the Supreme Court expressed that "[a]n appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e). Ibid. However, Dimitrakopoulos is distinguishable in that it involved application of the entire controversy doctrine to a legal malpractice claim. The Court wrote, "[t]he entire controversy doctrine raises special concerns when invoked in the setting of legal malpractice." Id. at 109 (citing Olds v. Donnelly, 150 N.J. 424, 446 (1997)). As such, the exercise of de novo review in Dimitrakopoulos was a result of the narrow facts concerning legal malpractice; the case does not stand for the proposition that all entire controversy claims should be reviewed de novo.

A.

***7** The two goals of the entire controversy doctrine are "ensuring fairness to parties and achieving economy of judicial resources." Kent Motor Cars, Inc. v. Reynolds & Reynolds, 207 N.J. 428, 443 (2011). Our Supreme Court has accomplished these goals by requiring joinder of claims, Rule 4:30A, and by requiring the parties to identify in their first pleadings "the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts." R. 4:5-1(b)(2). The parties to an action have a continuing obligation to amend the initial disclosure if there is a change in the facts stated in the original certification, and "the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed[.]" Ibid.

When a trial court is presented with a motion to dismiss based on the entire controversy doctrine,

> [it] must first determine whether a Rule 4:5–1(b)(2) disclosure should have been made in a prior action because a non-party was subject to joinder pursuant to Rule 4:28 or Rule 4:29-1(b). If so, the court must then determine whether (1) the actions are "successive actions," (2) the opposing party's failure to make the disclosure in the prior action was "inexcusable," and (3) "the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action." R. 4:5-1(b)(2). If those elements have been established, the trial court may decide to impose an appropriate sanction. Dismissal is a sanction of last resort.
>
> [700 Highway 33 LLC, 421 N.J. Super. at 236-37.]

Notably, the primary inquiry concerns whether both actions "arise from related facts or the same transactions or series of transactions." Dimitrakopoulos, 237 N.J. at 109 (quoting DiTrolio v. Antiles, 142 N.J. 253, 267 (1995)). "The doctrine does not mandate that successive claims share common legal issues in order for the doctrine to bar a subsequent action." Ibid. (citing Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591,605 (2015) and Ditrolio, 142 N.J. at 271). Rather, we must determine whether the separate claims are part of a "single larger controversy because they arise from interrelated facts." Ibid. (quoting DiTrolio, 142 N.J. at 271).

Application of the entire controversy doctrine is meant to "prevent a party from voluntarily electing to hold back a related component of the controversy in the first proceeding by precluding it from being raised in a subsequent proceeding thereafter." Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 240-41 (App. Div. 2002) (quoting Oltremare v. ESR Custom Rugs, Inc., 330 N.J. Super. 310, 315 (App. Div. 2000)). Moreover, while the "entire controversy doctrine is not intended to be a trap for the unwary[,]" we must also be aware of the "possibility that a party has purposely withheld claims from an earlier suit for strategic reasons or to obtain "two bites at the apple." Id. at 241.

Here, the motion judge properly exercised his discretion in determining that Rule 4:5-1(b)(2) applies in the present matter. Namely, the judge properly found that a Rule 4:5-1(b)(2) disclosure should have been made in the Hudson County Engineered Devices Litigation.

A Rule 4:5-1(b)(2) disclosure was required because the present action and the Engineered Devices Litigation arose out of the same transactional facts. The basis of plaintiff's claims in both matters involved Stalwart's defective workmanship during the course of construction at the Project and the fraudulent representations made regarding the quality of the workmanship. In the Engineered Devices Litigation, plaintiff's crossclaim for breach of contract against Stalwart claimed defective workmanship and construction defects. In the present matter, plaintiff is seeking recovery for damages originally caused by Stalwart's defective construction, such as defects in "concrete footings, stairs, columns, foundations, and use of unacceptable fill," and specifically for defendants' failure to inspect, identify and correct such defects that ultimately resulted in remediation.

***8** Additionally, plaintiff's third-party complaint against Ultra in the Engineered Devices Litigation alleged that Ultra was liable for defective work and damages. The complaint further alleged that Ultra entered into contracts with Stalwart to provide labor and materials. Plaintiff alleged that Ultra failed to adhere to industry standards, including local building codes, resulting in extensive remediation by plaintiff. In the present matter, plaintiff's allegations regarding defects and remedial costs similarly derive from defective workmanship on the Project.

Moreover, plaintiff's claims against DiGregorio in the Engineered Devices Litigation were for fraudulent payment requisitions, or fraud relating to misrepresentations made in

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payment applications regarding the quality and status of the project. In the present matter, plaintiff alleges that defendants Revolution, Roncati, and Architectura "improperly certified various contractor payment applications certifying that the general contractor performed work that it had not done." The facts giving rise to plaintiff's claim in the present matter, namely fraud allegations against defendants Revolution, Roncati, and Architectura, are the exact same as those offered in support of plaintiff's fraud claims against DiGregorio in the Engineered Devices Litigation.

In sum, plaintiff's claims and the damages sought in both actions relate to Stalwart's defective performance and fraudulent representations made regarding the quality and status of the work. Accordingly, the same set of interrelated transactional facts form the basis for both the present action and the Engineered Devices Litigation; as a result, we find no abuse of discretion in the motion judge's finding that Rule 4:5-1(b)(2) applies to the present matter.

We next address plaintiff's contention that the present matter is not subject to the entire controversy doctrine because it is not a successive action, but rather a concurrent action. Plaintiff argues that the complaint in this action was filed March 24, 2017, and that plaintiff filed an amended certification in the Engineered Devices Litigation two weeks later on April 5, 2017. Therefore, plaintiff submits that on March 24, 2017, both matters were concurrently pending.

Plaintiff relies on Alpha Beauty v. Winn-Dixie Stores, 425 N.J. Super. 94, 101 (App. Div. 2012), in support of its argument that the present action was pending at the same time as the Engineered Devices Litigation, and therefore not "successive" for purposes of Rule 4:5-1(b)(2). In Alpha Beauty, the court provided an example as to what constitutes a successive action:

> The most obvious example of this would be an action where A sues B for personal injury damages, and then, later, after A v. B is concluded, A brings a claim against C for having caused the same injuries. A v. C would be a "successive action" within the intendment of the Rule and, in certain circumstances, the Rule authorizes dismissal of the successive suit against C.
>
> [425 N.J. Super at 101.]

The present facts sufficiently mirror the above hypothetical posited in Alpha Beauty. The motion judge found that, on January 25, 2017, an Order of Final Judgment was entered in the Engineered Devices Litigation against DiGregorio on plaintiff's crossclaim in the amount of $681,506. It was not until March 24, 2017, that plaintiff filed its complaint in the matter under review. Despite plaintiff's filing of an amended certification on April 5, 2017, January 25, 2017 marks the date where any further litigation would be considered successive, as this is the date when the court entered judgment. Accordingly, we discern no abuse of discretion in the judge's finding that the present matter constitutes a successive action.

***9** Furthermore, the record clearly supports the motion judge's finding that plaintiff did not comply with Rule 4:5-1(b)(2). As noted, parties to an action are "obligated to reveal the existence of any non-party who should be joined or might have 'potential liability to any party on the basis of the same transactional facts.' " Kent Motor Cars, Inc., 207 N.J. at 444 (quoting R. 4:5-1(b)(2)). Furthermore, a party has a continuing obligation to identify potentially liable parties throughout the course of the litigation. R. 4:5-1(b)(2). This requirement is meant to provide notice to all potentially liable parties, and intends to provide for a "reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of 'piecemeal decisions.' " 700 Highway 33 LLC, 421 N.J. Super. at 235 (quoting Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989)).

In the deposition of plaintiff's principal, Moshe Winer, he testified that as early as May 2015, plaintiff was aware that inspections performed by defendant JSC were inadequate. However, plaintiff did not list any defendant in the matter under review in its Rule 4:5-1(b)(2) certifications in the Engineered Devices Litigation. Similarly, when plaintiff filed its third-party complaint in the Engineered Devices Litigation, plaintiff did not disclose defendants as potentially liable parties.

Despite plaintiff's contention that it complied with Rule 4:5-1(b)(2) by identifying the existence of the Engineered Devices Litigation in the present action, this does not negate the fact that plaintiff failed to identify defendants in the Engineered Devices Litigation, at which time plaintiff knew defendants were potentially liable. Therefore, we discern no abuse of discretion in the motion judge's determination that plaintiff did not comply with Rule 4:5-1(b)(2).

We now turn to plaintiff's contention that the motion judge "erred by failing to consider the reason for delay in bringing this litigation" and that he instead "simply conflated engaging

in piecemeal litigation with inexcusable conduct." In the judge's written decision granting defendants' motion to dismiss, he stated that "[d]efendants were clearly prejudiced and deprived of vital discovery, which [p]laintiff had an affirmative obligation to identify to the [d]efendants including as to potentially liable parties in the Engineered Devices Litigation, but inexcusably failed to do so." Moreover, in the judge's written decision denying plaintiff's motion for reconsideration, he wrote, "It was clear that this [c]ourt found the [p]laintiff's piecemeal litigation inexcusable as the [c]ourt specifically stated such in its written opinion."

Here, plaintiff submits that it delayed this action so that plaintiff could receive a certification of occupancy and ultimately complete the project before defendants could sabotage it. Although carefully elucidating his reasons as to why he found that defendants would be substantially prejudiced, the motion judge did not set forth his specific findings as to why plaintiff's conduct was inexcusable.

Nevertheless, we do not find this omission constitutes an abuse of discretion. The judge, in his otherwise comprehensive written opinion, looked to the record evidence before him, heard oral argument, and concluded that plaintiff's noncompliance was inexcusable. Significantly, during oral argument held on November 12, 2020, plaintiff's counsel explained,

> And our concerns were that the design professionals would stand in the way of my client getting those (indiscernible) for this project. Our concerns were borne out because ... when we did serve the complaint, the first thing that [defendant] did ... was pick up the phone and leave a voicemail for Bryan Sullivan .... He called Mr. Sullivan, and he left a profanity-laced voicemail promising to, as he said, f**k with the job. Use all of his ability and all of his political power in the North Bergen Building Department to screw up our job.

***10** Thus, it is clear that the motion judge was well aware of plaintiff's excuse, and found it inadequate under the circumstances, particularly in light of the substantial prejudice suffered by defendants.

As to the substance of plaintiff's excuse, the motion judge did not abuse his discretion in finding that it fell short of the mark. Plaintiff's reason for delaying suit was a tactical strategy based on its claimed fear that defendants would retaliate. Plaintiff's fears were based on nothing more than a 2017 correspondence with defendant Roncati over issues regarding payment for Roncati's services, where Roncati wrote, "If I were you[,] I would be here tomorrow morning to discuss the billing. Your project still hangs in the balance and you seem to have lost perspective on who your friends are and who has always been there to help." This payment dispute, accompanied by what can be viewed as hard-bargaining tactics, hardly renders plaintiff's noncompliance with Rule 4:5-1(b)(2) excusable.

Plaintiff next contends that the motion judge erred in finding that plaintiff's failure to comply with Rule 4:5-1(b)(2) resulted in substantial prejudice to defendants. We disagree.

Indeed, if "the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action," sanctions are appropriate. R. 4:5-1(b)(2). In considering substantial prejudice, courts look to whether the party's "ability to mount a defense ... [is] unfairly hampered." Hobart Bros. Co., 354 N.J. Super. 229, 243. Courts have said that "[s]ubstantial prejudice in th[e] context [of Rule 4:5–1(b)(2)] means substantial prejudice in maintaining one's defense. Generally, that implies the loss of witnesses, the loss of evidence, fading memories, and the like." Mitchell v. Procini, 331 N.J. Super. 445, 454 (App. Div. 2000) (citation omitted); see also Kent Motor Cars, 207 N.J. at 446.

First, defendants were deprived of an opportunity to examine and investigate the worksite defects. Before the project had been fully remediated, plaintiff initiated this action by filing the complaint on March 24, 2017. However, plaintiff did not serve process until August 22, 2017, after the certificate of occupancy was issued, and, as such, defendants were unaware of the claims pending against them until such time. Therefore, defendants had no knowledge of plaintiff's allegations against them until after remediation efforts concluded.

Although defendants were still involved in the project throughout the remediation period, they lacked notice that they would be subject to claims regarding defective construction. Because of this, defendants made no attempt to

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collect evidence, investigate and evaluate the claimed defects, or do anything for purposes of mounting a defense. Had plaintiffs notified defendants of the suit in accordance with Rule 4:5-1(b)(2), they would have been able to adequately prepare a defense.

Second, the trial judge properly found that defendants were also deprived of an opportunity to "preserve and collect evidence by a key witness, Bryan Sullivan." Sullivan was responsible for day-to-day project management and was most knowledgeable about the defects. Sullivan had first-hand knowledge regarding the defects, discovered the defective conditions, and coordinated and supervised the remediation efforts. As a key witness, Sullivan would have been available during the Engineered Devices Litigation, however, he passed away on March 5, 2018. Plaintiff did not identify him until May 17, 2018, and therefore defendants had no opportunity to obtain testimony from Sullivan regarding his first-hand observations and opinions.

***11** In addition, the record suggests that Sullivan did not prepare a formal report, and that his observations were only recorded in notes and pictures. Such observations were relied upon by plaintiff and plaintiff's expert, as they relied on Sullivan's notes to identify the defects, the remedial work, and calculation of damages. Moreover, plaintiff's experts relied on Sullivan's identification of defects in support of their opinions as to defects attributable to defendants. As noted by the judge, Sullivan's unavailability directly impacts defendants' ability to mount a defense in response to allegations based on Sullivan's notes.

In sum, the motion judge acted well within his discretion in finding that defendants would be substantially prejudiced by the absence of a key witness, where the loss of vital discovery would impair defendants' ability to mount a defense.

We next address plaintiff's argument that the trial court's failure to apply a lesser sanction constitutes an abuse of discretion. This argument lacks merit.

"Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Abtrax Pharma., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995). As it relates to the entire controversy doctrine, "in the limited circumstances where a lesser sanction is not sufficient to remedy the problem caused by an inexcusable delay in providing the required notice, thereby resulting in substantial prejudice to the non-disclosed party's ability to mount an adequate defense[,]" dismissal with prejudice is a viable option. Mitchell, 331 N.J. Super at 453-54.

After finding that plaintiff's noncompliance with Rule 4:5-1(b)(2) was inexcusable and resulted in substantial prejudice to defendants, the motion judge properly found that no lesser sanction would suffice. The judge ultimately found that, since the prejudice cannot be corrected, dismissal is warranted. Defendants' inability to examine crucial evidence and the key witness, Sullivan, cannot be undone; for these reasons, dismissal was warranted, and we find no abuse of discretion.

B.

Plaintiff contends that the motion judge erred in finding that the DiGregorio Judgment, from the Engineered Devices Litigation, precludes recovery from defendants in the present matter. Plaintiff disputes that this would result in double recovery, and argues that damages that made up the DiGregorio judgment do not overlap with the damages sought in the present action.

The motion judge did not err in finding that the complaint should be dismissed to prevent double recovery. It is undisputed that at least some of the damages would overlap; the DiGregorio judgment was for fraudulent payment requisitions, while plaintiff in the matter under review alleged that defendants Revolution, Roncati, and Architectura "improperly certified various contractor payment applications certifying that the general contractor performed work that it had not done." Therefore, the damages asserted in the present action are duplicative of damages for which plaintiff obtained in the prior litigation. Because the entire controversy doctrine is designed to prevent this from occurring, the judge did not abuse his discretion in finding that dismissal is warranted to prevent double recovery.

Lastly, plaintiff argues that the trial court erred in failing to consider the materials supplied with the motion for reconsideration. This argument also fails.

Motions for reconsideration are governed by Rule 4:49-2. "Reconsideration is a matter to be exercised in the trial court's sound discretion." Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). Reconsideration should be employed only "for those cases

which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

***12** "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, [Rule] 1:7-4, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." Asterbadi, 398 N.J. Super. at 310 (citing Cummings, 295 N.J. Super. at 384). "Reconsideration cannot be used to expand the record and reargue a motion." Ibid. "[T]he motion is properly denied if based on unraised facts known to the movant prior to entry of judgment." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022) (citing Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010); and Del Vecchio v. Hemberger, 388 N.J. Super. 179, 188-89 (App. Div. 2006)). However, if the new evidence "dovetail[s] and amplifie[s] the evidence already in the record," it should be considered. Capital Fin. Co. of Del. Valley, Inc., 398 N.J. Super. at 311.

Here, the motion judge properly exercised his discretion in finding that additional documents and arguments regarding plaintiff's inexcusable noncompliance should not be considered on reconsideration. All of the documents were readily available to plaintiff when defendants filed their motions to dismiss. Because the documents were not newly discovered evidence that was previously unavailable, the judge's refusal to consider such evidence was not clearly erroneous and therefore should not be disturbed.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 2812740

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EXHIBIT J

710 Fed.Appx. 535
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

Peter MOCCO; Lorraine Mocco; First Connecticut Holding Group LLC, IV, Appellants
v.
Aegis FRUMENTO; Chicago Title Insurance Company

No. 17-1153
|
Submitted Pursuant to Third Circuit L.A.R. 34.1(a) September 11, 2017
|
(Filed: September 25, 2017)

Synopsis
Background: Holding company and its owners filed state court suit claiming that attorney and title company engaged in conspiracy by assisting in transfer of title to real estate assets from holding company to third parties. Following removal, the United States District Court for the District of New Jersey, (No. 2-12-cv-01458), Dennis M. Cavanaugh, J., 2012 WL 5989457, dismissed complaint as barred by New Jersey's entire controversy doctrine (ECD). Plaintiffs appealed. The Court of Appeals, 564 Fed.Appx. 668, vacated and remanded with instructions. On remand, the District Court, Esther Salas, J., 2016 WL 8679253, modifying report and recommendation by Joseph A. Dickson, United States Magistrate Judge, granted defendants' motions to dismiss pursuant to ECD. Plaintiffs appealed.

The Court of Appeals, Chagares, Circuit Judge, held that complaint was barred as sanction under New Jersey's ECD.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***536** On appeal from the United States District Court for the District of New Jersey, (No. 2-12-cv-01458), District Judge: Honorable Esther Salas

Attorneys and Law Firms

John B. Nance, Esq., James A. Scarpone, Esq., Bruce D. Vargo, Esq., Scarpone & Vargo, Newark, NJ, for Plaintiffs-Appellants

James J. DiGiulio, Esq., Joseph P. LaSala, Esq., William F. O'Connor, Jr., Esq., McElroy Deutsch Mulvaney & Carpenter, Morristown, NJ, for Defendant-Appellee Aegis J. Frumento

Derrick R. Freijomil, Esq., Michael R. O'Donnell, Esq., Riker Danzig Scherer Hyland & Perretti, Morristown, NJ, for Defendant-Appellee Chicago Title Insurance Co

Before: CHAGARES, JORDAN, and NYGAARD, Circuit Judges.

OPINION [*]

CHAGARES, Circuit Judge.

***537** This case is about whether the appellants' lawsuit against the appellees violated the New Jersey entire controversy doctrine ("ECD") and merits dismissal. The District Court concluded that dismissal was warranted pursuant to the ECD. We will affirm.

I.

We write solely for the parties' benefit and thus recite only the facts necessary to our disposition. Because this case has already been before this Court in another posture, we summarize the facts as discussed in Mocco v. Frumento, 564 Fed.Appx. 668 (3d Cir. 2014) where appropriate.

The Moccos [1] are engaged in a protracted litigation in the Superior Court of New Jersey (the "State Court Action") which was first filed in 1998 and comprises myriad parties and claims. That case involves a dispute between the Moccos and James and Cynthia Licata regarding ownership of real estate in northern New Jersey. Appellee Aegis Frumento was an attorney who represented the Licatas in some aspects of that litigation. Appellee Chicago Title issued title insurance

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policies to entities involved in some of the disputed real estate transactions.

The Moccos' instant claims against Frumento and Chicago Title relate to a real estate transaction in May 2006, in which the Licatas allegedly effected the sale of real estate to another entity in violation of a state court order forbidding the Licatas and other parties from transferring the property. The Moccos claim that Frumento and Chicago Title aided the Licatas with this scheme. [2]

In June 2011, the Moccos filed a motion for leave to amend their claims in the State Court Action to add Frumento and Chicago Title as defendants. "That attempt was the first time that the Moccos sought to add Frumento as a defendant, although they previously had twice added and twice dismissed Chicago Title as part of a quiet-title claim." [3] Mocco, 564 Fed.Appx. at 669. The Moccos assert that it was not until several years after 2006 that the facts pointing to Frumento and Chicago Title's liability in that transaction surfaced.

The Superior Court denied the motion on August 5, 2011. "At an in-person hearing on the motion to amend, the state court denied the motion primarily on the basis of delay, reasoning that, " 'at the ***538** very least, [the Moccos] had a year' to obtain 'the basic information that would give rise to at least [their] theory of liability,' and that 'bring[ing] in new parties and apply[ing] new theories on litigation that started back in 1998' would further postpone an already-delayed trial." Mocco, 564 Fed.Appx. at 669. The Superior Court remarked that "what seems to be clear is that this information [regarding Chicago Title's liability] was known at least a year ago," when the Moccos took the relevant depositions. Joint Appendix ("J.A.") 391-92. The court concluded, "at some point you need to know the framework of the case that's going to trial, and today's the day." J.A. 403. The Moccos did not appeal this decision. The State Court Action proceeded to the first of three trials. The first trial regarding ownership issues resulted in a disposition in part unfavorable to the Moccos. J.A. 3042-64. That decision is now on appeal.

On January 25, 2012, the Moccos filed the instant action in state court. Frumento and Chicago Title removed the case to the United States District Court for the District of New Jersey. The defendants then moved to dismiss the case on ECD grounds and for failure to state a claim. The District Court granted the motion on ECD grounds. The Moccos appealed, and this Court vacated and remanded to the District Court, noting that the District Court "applied a claim-joinder analysis instead of a party-joinder one" and on remand should do the latter "when reviewing the sufficiency of the Complaint." Mocco, 564 Fed.Appx. at 671.

After the case was remanded, Chicago Title and Frumento each filed motions to dismiss pursuant to the ECD. [4] On April 14, 2016, the Magistrate Judge issued his Report and Recommendation ("R&R") that the matter should be dismissed pursuant to the ECD. The Magistrate Judge concluded that the Moccos "violated New Jersey Court Rule 4:5-1(b)(2) by failing to timely identify Defendants Frumento and Chicago Title as potentially necessary parties in the State Court Matters." J.A. 39. The Magistrate Judge further determined that this failure was inexcusable because it was unreasonable under the circumstances, significant judicial resources had been expended, the defendants would be substantially prejudiced, and that the delay may have been strategic. The Magistrate Judge then outlined the forms of substantial prejudice to Frumento and Chicago Title, and determined that the action was "successive" because it was filed after the State Court Action was filed. The Magistrate Judge then concluded that in any event, the action would become "successive" to the State Court Action under the ECD when the State Court Action concluded, and therefore recommended administratively terminating this action pending the resolution of the ***539** State Court Action, at which point this action would be dismissed with prejudice.

The Moccos filed their objections to the R&R on April 28, 2016, challenging the Magistrate Judge's findings regarding inexcusable delay and substantial prejudice, and asserting that the interpretation of "successive" action under the ECD was incorrect. (D. Ct. Dkt. No. 93.) On December 23, 2016, the District Court adopted the R&R in all respects except for the analysis regarding successive action, concluding that the action became successive when the Superior Court denied the motion to amend. The District Court thus granted the motions to dismiss in full. The Moccos timely appealed.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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A threshold issue in this case, which we address infra, is whether the District Court's opinion employed a motion to dismiss standard or a summary judgment standard. Our court's review over either disposition is plenary. Allen v. DeBello, 861 F.3d 433, 437-38 (3d Cir. 2017);[5] Thomas v. Cumberland Cty., 749 F.3d 217, 222 (3d Cir. 2014); see also Bennun v. Rutgers State Univ., 941 F.2d 154, 163 (3d Cir. 1991) ("Our review of the district court's conclusion that [the] present action was not barred by New Jersey's entire controversy doctrine is plenary.").

III.

A.

New Jersey's entire controversy doctrine dictates that "a party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action." Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 137 (3d Cir. 1999). The doctrine is an affirmative defense and "applies in federal courts when there was a previous state-court action involving the same transaction." Ricketti v. Barry, 775 F.3d 611, 613 (3d Cir. 2015) (quoting Bennun, 941 F.2d at 163). The doctrine's purposes are: "(1) complete and final disposition of cases through avoidance of piecemeal decisions; (2) fairness to parties to an action and to others with a material interest in it; and (3) efficiency and avoidance of waste and delay." Paramount Aviation, 178 F.3d at 137.

While the ECD initially only applied to joinder of claims, it now applies to joinder of parties as well. See Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 560 A.2d 1169, 1178 (1989). The ECD, now codified as Rule 4:5-1(b)(2) of the New Jersey Rules of Court, requires the following:

> [E]ach party shall disclose in the certification the names of any non-party who should be joined in the action ... because ***540** of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification.
>
> If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

N.J. Ct. R. 4:5-1(b)(2). Thus, the rule provides that failure to disclose alone does not require dismissal. Rather, a court imposing dismissal as a sanction must conclude three requirements are met: "(1) the action is a 'successive action;' (2) the failure to provide notice of other potentially liable parties was 'inexcusable;' and (3) the undisclosed party's right to defend the successive action has been 'substantially prejudiced' by that failure." Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 25 A.3d 1027, 1034 (2011).

At its core, the ECD is "an equitable doctrine, its application [ ] flexible, with a case-by-case appreciation for fairness to the parties." Paramount Aviation, 178 F.3d at 137. Indeed, it is "New Jersey's 'specific, and idiosyncratic, application of traditional res judicata principles.' " Fornarotto v. Am. Waterworks Co., 144 F.3d 276, 278 (3d Cir. 1998) (quoting Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997)). Although judges are afforded discretion in shaping the remedy for a violation of Rule 4:5-1(b)(2), "in considering whether dismissal is appropriate, the court must comply with the language of [Rule 4:5-1(b)(2)] that further defines the circumstances in which that sanction is permitted." Kent Motor Cars, 25 A.3d at 1037 (emphasis added).

B.

As a threshold matter, the Moccos contend that the District Court failed to apply the summary judgment standard and instead "placed the burden of proof on the Moccos and resolved all factual conflicts (and granted all inferences) in favor of Chicago Title and Frumento." Mocco Br. 19. While the ECD can be asserted as grounds for a motion to dismiss, when the merits of the argument are "not apparent on the face of the complaint," it should be resolved as a motion for summary judgment.[6] Rycoline, 109 F.3d at 886 (quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978)). In this case, while many of the facts the District

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Court ***541** relied upon are matters of judicial notice, [7] we do recognize that some issues referenced in its opinion were not, and were outside the scope of the complaint. See, e.g., J.A. 18 (referencing a fact witness who passed away); J.A. 17 (evaluating plaintiff's argument that Frumento was not a party to contracts and did not lose any money in the transactions at issue). Therefore, the proper vehicle for evaluating the ECD claim was under a summary judgment standard.

However, the District Court's opinion does not allude to whether it employed a summary judgment standard. We are cognizant of the Moccos' argument the District Court may not have viewed every factual issue in the light most favorable to the Moccos in rendering its decision. [8] Nevertheless, we may affirm on any basis supported by the record. Davis v. Wells Fargo, 824 F.3d 333, 350 (3d Cir. 2016). Therefore, we examine the three requirements under Rule 4:5-1(b)(2) to determine whether dismissal based on the ECD is warranted in this case.

IV.

A.

The first requirement for dismissing a case under the ECD is whether the case is a successive action. On this issue, the parties' dispute is purely an issue of law.

As a threshold matter, we reject one interpretation advanced by the Moccos: that "successive action" means an action that was filed after the completion of the initial action. As the District Court noted, such an interpretation means "this case can never become 'successive' because it was filed during the pendency of the State Court matters." J.A. 22. There is no support in the caselaw for such a narrow position. Although the Moccos cite to Alpha Beauty Distributors, Inc. v. Winn-Dixie Stores, Inc., 425 N.J.Super. 94, 39 A.3d 937, 942 (App.Div.2012), the court in that case did not so conclude. Rather, the court in Alpha Beauty only noted that an "obvious example" of a successive action is one filed after the initial action concluded. Id. Limiting the concept of successive action to only this "obvious example" would be illogical since that would mean a party could always avoid triggering grounds for dismissal under Rule 4:5-1(b)(2) by filing the second action before the earlier-filed action reached disposition. See Archbrook Laguna, LLC v. Marsh, 414 N.J.Super. 97, 997 A.2d 1035, 1041 (App.Div.2010) (holding that such a position would "encourage the type of forum shopping and fragmentation of controversies the entire controversy doctrine was intended to preclude").

***542** The Alpha Beauty decision does suggest, however, that a later-filed action would not be considered "successive" if the earlier-filed action had not yet reached disposition. The Appellate Division concluded that a later-filed action in state court was not successive to an earlier-filed federal action that was set for, but had not proceeded, to trial. 39 A.3d at 942. In Archbrook Laguna, the Appellate Division clarified that "the entire controversy doctrine could be applied once the first action was concluded depending upon how the first action ended." 997 A.2d at 1041.

The question before us is whether the State Court Action has "concluded" in relevant respects, thus making the instant action a successive one. The Magistrate Judge suggested that the conclusion of a state court proceeding occurs when that court issues a judgment on the merits, but added that allowing the instant action to proceed while waiting for the state court judgment would be a waste of time and resources in contravention of the ECD's principles. J.A. 51-52. Therefore, the Magistrate Judge recommended administratively terminating the instant action pending the result of the State Court Action.

The District Court took a different approach and instead reasoned that the "end" has already occurred, since "once the Superior Court barred Plaintiffs from asserting the civil conspiracy and aiding-and-abetting claims against Defendants in the State Court Matters, Plaintiffs were foreclosed from asserting those claims against Defendants in any subsequent litigation." J.A. 25. Therefore, the Court dismissed the action rather than waiting until the conclusion of the State Court Action.

We agree with the District Court's reasoning on this particular record, where the Superior Court's denial of the motion to amend (which was not appealed) was the death knell for Mocco's claims against Frumento and Chicago Title in the State Court Action. Even if the Moccos' appeal of the State Court Action's first trial were to result in their favor, and regardless of what happens in the second and third trials in that action, their claims against Frumento and Chicago Title could not be revived in the State Court Action. Given the underpinnings of the ECD — that is, avoidance of piecemeal litigation, fairness, and efficiency, Paramount Aviation, 178 F.3d at 137 — we must conclude that in this particular

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situation, the instant action was successive to the State Court Action.

B.

We next examine whether the Moccos' failure to effect timely notice of Frumento and Chicago Title as potentially liable parties under Rule 4:5-1(b)(2) was inexcusable. In Hobart Bros. Co. v. National Union Fire Insurance Co., 354 N.J.Super. 229, 806 A.2d 810, 818-19 (App.Div.2002), the court provided a non-exhaustive list of factors to consider to make this determination. Relying on Hobart Bros., the District Court determined that the relevant factors in the instant case are: 1) whether the Moccos' delay in filing the motion to amend was reasonable, 2) to what extent judicial resources had been expended in the meantime, 3) whether Frumento and Chicago Title would be substantially prejudiced, and 4) whether delay was potentially strategic.

As to the element of reasonableness of the delay, the Moccos contend that the District Court should have considered "the state court's findings of discovery obstructionism by Chicago Title, which, among other things, hindered the Moccos' ability to learn the facts giving rise to their claims." Mocco Br. 26.

We agree with the District Court that this does not constitute a legitimate excuse ***543** for the delay in this case.[9] Construing all facts in favor of the Moccos, and accepting for the purposes of this motion that discovery obstacles delayed their ability to identify Frumento and Chicago Title, there is no genuine factual dispute that the Moccos had knowledge of the claims underlying the instant case as of mid-2010. The Moccos acknowledge that by February 2010, they were taking depositions in order to confirm "whether [they] should assert claims directly against Chicago Title." Mocco Br. 20 (citing J.A. 2096). The Moccos also note that an April 2010 deposition of a Chicago Title representative revealed that an agent of Chicago Title issued title insurance in a sum far above the policy's limit. See Mocco Br. at 11-12 (citing J.A. 2118-23). This is precisely what the Moccos assert in their complaint in the instant case. J.A. 119 ("Because Chicago Title failed to enforce its own rules and procedures, its 'rogue agent[ ]' Horizon ... w[as] able to issue over $40 mil. of Lender title insurance which ... was essential to consummation of the frauds that were committed against the Moccos and others."). Similarly, the Moccos acknowledge that "through a review of the parties' email" from 2010 Chicago Title productions, it was able to identify "the substantial role of Mr. Frumento in counseling and persuading the participants in the May 2006 closing." Mocco Br. 21.

Although the Moccos make much of the assertion that Chicago Title delayed discovery and that the statute of limitations on their claims in this case have not expired, those issues were not pertinent to the question before the District Court:[10] whether the one-year delay in alerting the Superior Court that Chicago Title and Frumento should be added was unreasonable. Based on the undisputed facts, we agree with the District Court and the Superior Court that it was.

The Moccos do not contest the District Court's conclusion that the State Court Action has commanded substantial judicial resources.

The third factor the District Court considered is substantial prejudice. Substantial prejudice is both a factor for considering inexcusable delay as well as a consideration under Rule 4:5-1(b)(2). See Hobart Bros., 806 A.2d at 819. We explore that issue infra, and for similar reasons conclude that Frumento and Chicago Title suffered substantial prejudice.

Finally, while the Moccos emphasize the District Court's statements regarding "the possibility that Plaintiffs could have strategically delayed to add Defendants in the State Court Matters," J.A. 13, we conclude that a determination as to whether there was strategic delay is unnecessary to the determination of inexcusable delay in this case. Even if there was no intentional conduct by Mocco to postpone asserting claims against Frumento and Chicago Title, we would still determine that the delay was inexcusable.

C.

Dismissal under Rule 4:5-1(b)(2) requires a showing of substantial prejudice, ***544** which "in this context means substantial prejudice in maintaining one's defense. Generally, that implies the loss of witnesses, the loss of evidence, fading memories, and the like." Mitchell v. Charles P. Procini, D.D.S., P.A., 331 N.J.Super. 445, 752 A.2d 349, 354 (App.Div.2000); cf. Kent Motor Cars, 25 A.3d at 1038. The District Court concluded that the substantial prejudice to Frumento and Chicago Title took three forms: first, that they would be unable to influence the outcome of the State Court Action; second, that they would be time-barred from asserting

any contract or tort claims in the State Court Action; and third, that they would lack the benefit of certain discovery evidence as a result of the delay. The Moccos challenge each of these conclusions.

As to Frumento's inability to participate in the State Court Action and to assert counter- or cross-claims, the Moccos advance no meritorious challenge on appeal. Since the alleged misconduct took place in 2006, Frumento is time-barred from asserting contract or tort claims against alleged co-conspirators. Excluded from the State Court Action, Frumento also could not cross-examine witnesses regarding potentially damaging testimony about him. Considering both facts together, we conclude that Frumento would suffer substantial prejudice to his defense.

As to Chicago Title, the parties disagree as to whether Chicago Title was able to participate in the State Court Action. We recognize the Moccos' argument that Chicago Title is involved in the State Court Action in its capacity as subrogee, and we note that there is lack of clarity as to whether its role is sufficient to alleviate any prejudice. We need not resolve that issue, however, because we agree with the District Court that Chicago Title has been deprived of the ability to assert claims against third parties, such as the Licatas, arising from the 2006 closing. We also agree that the death of Kenneth Williams, who was lead counsel for an entity which made a claim under a title policy issued by Chicago Title regarding the properties at issue in this case, constitutes prejudice to Chicago Title. Even considering the fact that Williams was deposed in June 2007, [11] by the Moccos' own admission, at that time there was no allegation that Chicago Title aided a civil conspiracy through negligent supervision and through other tortious acts — the claims against Chicago Title at issue today. Thus, we conclude that Chicago Title also incurred substantial prejudice.

D.

The Moccos contend that the District Court should have imposed a lesser sanction than dismissal. Its entire analysis focused on offsetting the loss of Williams's testimony. Mocco Br. 40-43. While dismissal is a "last resort," the R&R noted that "[n]o sanction could alter Defendants' inability to participate in the State Court matters, revive Defendants' lost claims or restore witnesses' dulled memories." J.A. ***545** 47. Thus, the Magistrate Judge and the District Court concluded that dismissal was the only appropriate sanction in this case. On this record, that conclusion was properly drawn.

V.

For the foregoing reasons, we will affirm the judgment of the District Court.

All Citations

710 Fed.Appx. 535

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 Although First Connecticut Holding Group LLC, IV is also an appellant, for ease of reference, we will refer to the appellants in this case as "the Moccos."

2 The Moccos allege that Frumento: 1) aided and abetted trespass to land, 2) conspired to slander title, and 3) conspired to perpetrate a wild deed scam. They allege that Chicago Title: 1) aided a civil conspiracy through negligent supervision, and 2) aided a civil conspiracy and the commission of a tort. Joint Appendix ("J.A.") 113-21.

3 In 2007, as a part of a broader pleading relating to the 2006 closing, the Moccos asserted a quiet action claim against Chicago Title. J.A. 1860. This claim was voluntarily dismissed without prejudice soon thereafter, J.A.

1872-73, and re-asserted in another pleading in 2009, J.A. 1943. The Moccos agreed to dismiss this claim four months later. J.A. 1956-58.

4 Although the motions were styled as motions to dismiss, they included information beyond the face of the complaint. Chicago Title's motion included a memorandum of law, certification by an attorney with hundreds of pages of exhibits, and a Statement of Undisputed Material Facts. J.A. 61. Frumento's motion included a memorandum of law, and a notation that it will rely on "the papers previously filed with the Court in support of Defendant Frumento's initial motion to dismiss." D. Ct. Dkt. No. 65 (Frumento Mot. Aug. 27, 2014), at 2. Frumento's initial motion included a certification by an attorney with hundreds of pages of exhibits. D. Ct. Dkt. No. 14 (Frumento Mot. Apr. 27, 2012). The Moccos' opposition papers to both the Chicago Title and Frumento renewed motions also included certifications and numerous exhibits. The same was true for the reply filings. J.A. 62-63. The District Court issued an order acknowledging the Moccos' motion to strike the Rule 56.1 statement and instructing that "Plaintiffs may incorporate their objections to the 56.1 statement in their brief opposing Chicago Title's Motion to Dismiss." J.A. 60.

5 Summary judgment is appropriate "if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Young v. Martin, 801 F.3d 172, 177 (3d Cir. 2015) (quotation marks and alterations omitted); see also Fed. R. Civ. P. 56(a). In evaluating an appeal from a grant of a motion to dismiss pursuant to Rule 12(b)(6), we "take as true all the factual allegations of the ... Complaint and the reasonable inferences that can be drawn from them, but we disregard legal conclusions [and] ... mere conclusory statements." Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010) (internal citations and quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id.

6 The Moccos do not argue that they were unaware that the District Court was treating the motion dismiss as one for summary judgment. We note that the Moccos were on notice throughout the pendency of the District Court proceedings that materials outside the scope of the complaint would be used to resolve the ECD issue, since all parties appended exhibits to their filings and the District Court ordered that the Moccos may respond to any Rule 56.1 statements by Chicago Title. See Hilfirty v. Shipman, 91 F.3d 573, 578–79 (3d Cir. 1996) (finding no error when the appellant had adequate notice of the court's intention to review the motion as one for summary judgment and was given an opportunity to respond).

7 A court may take judicial notice of other courts' proceedings "not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd., 181 F.3d 410, 426 (3d Cir. 1999).

8 We requested supplemental briefing from the parties on the question of whether the Moccos had forfeited this particular challenge. We are satisfied with the Moccos' showing that, in their objections to the R&R, they argued that the Magistrate Judge's conclusions were incorrectly drawn, because doing so necessarily meant they asserted that the Magistrate Judge did not follow the summary judgment standard of drawing factual conclusions in the non-movant's favor. See, e.g., D. Ct. Dkt. No. 93 (Objections to R&R, Apr. 28, 2016), at 1-3 (arguing the Magistrate Judge made improper "implicit conclusion[s]" in favor of the defendants), 4 (arguing that the Magistrate Judge overlooked facts in the Moccos' favor), 26 (challenging the R&R's conclusions as failing to identify specific claims that are time-barred), 28 (arguing that the Magistrate Judge overlooked evidence relating to an unavailable fact witness).

9 Although in the following analysis we consider all of the facts proffered and evaluate the District Court's decision de novo and do not afford any preclusive effect to the Superior Court's factual findings, we

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nevertheless note that the Moccos are taking a second bite at the apple after receiving an unfavorable decision from the Superior Court on essentially the same issue.

10 Moreover, we also agree with the District Court that the relevant issue is not whether the Moccos needed time to draft pleadings and sort through their materials. Under Rule 4:5-1(b)(2), the Moccos needed only to file and serve a simple notice.

11 We note that before the District Court, the Moccos argued that Williams's law partner Todd Galante could testify as to the same issues. See D. Ct. Dkt. No. 93 (Mocco Objections to R&R, Apr. 28, 2016), at 29. The District Court rejected that argument, concluding that it could not "replace Mr. Williams's lost testimony by virtue of the fact that [Galante] was Mr. Williams's law partner." J.A. 20. It noted that Galante was a bankruptcy attorney and was not in constant communication with the Moccos' counsel, as Williams was. J.A. 19-20. Now, the Moccos apparently assert that a number of other people could testify in Williams's stead. Mocco Br. 41. This argument was forfeited and we will not consider it on appeal. See DIRECTV Inc. v. Seijas, 508 F.3d 123, 125 n.1 (3d Cir. 2007).

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Corinne Pandelo, Plaintiff, v. The Governing Body of Jehovah's Witnesses, Fairlawn Congregation of Jehovah's Witnesses, Watchtower Bible and Tract Society of New York, Inc., Hackensack Congregation of Jehovah's Witnesses, and John and Jane Does 1-100, whose identities are presently unknown to Plaintiff, in their official and individual capacities, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-5508-21 Civil Action

OPPOSITION TO PLAINTIFF'S COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS

K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
E: Anthony.LaRocco@klgates.com
E: Dana.Parker@klgates.com
E: Reymond.Yammine@klgates.com
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Anthony P. La Rocco (023491982)
Dana B. Parker (041682003)
Reymond E. Yammine (306962019)
Of Counsel and on the brief

Defendants Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") and the East Hackensack Congregation of Jehovah's Witnesses ("the East Hackensack Congregation") (collectively "Defendants") submit this Opposition to Plaintiff's Counter-Statement of Undisputed Material Facts ("Opposition SUMF") in further support of their Motion for Summary Judgment pursuant to New Jersey Court Rule 4:46-2. The sources of the following facts include documents and other written discovery produced in this action, pleadings, deposition testimony, and publicly-available materials. In addition, this Opposition SUMF draws upon the Statement of Material Facts filed by Watchtower and the East Hackensack Congregation on July 20, 2022 (Transaction ID LCV20222677645) ("SUMF").

1. Disputed. Plaintiff has failed to support the statements in this Paragraph with the necessary citation to specific exhibits as required under Rule 4:46-2(a). Plaintiff further fail to cite to any admissible evidence to support the position that Clement Pandelo was an agent of Defendants, which Defendants unequivocally dispute.
2. Defendants dispute Plaintiff's characterization of the Amended Complaint, which speaks for itself.
3. Defendants dispute Plaintiff's characterization of the Amended Complaint, which speaks for itself.
4. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. By way of further answer, Defendants dispute the allegations in Plaintiff's complaint as being wholly unsupported by any evidence. Defendants further dispute the characterization that Plaintiff was "jointly" authorized by the Watchtower Defendant and the Governing Body of Jehovah's Witnesses to serve as a ministerial

servant. Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.

5. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.
6. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.
7. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.
8. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.
9. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts. Defendants further state that Plaintiff provides no citations to support that Defendants ever received contemporaneous notice of the alleged abuse.
10. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts. Defendants further state that Plaintiff

provides no citations to support that Defendants ever received contemporaneous notice of the alleged abuse.

11. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts. Defendants further state that Plaintiff provides no citations to support that Defendants ever received contemporaneous notice of the alleged abuse.
12. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts. Defendants further state that Plaintiff provides no citations to support that Defendants ever received contemporaneous notice of the alleged abuse.
13. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts.
14. Defendants dispute Plaintiff's characterization of the cited exhibit, which speaks for itself. Defendants further state that Plaintiff does not cite to any evidence to support the complaint's mischaracterization of the facts. Defendants further state that Plaintiff provides no citations to support that Defendants ever received contemporaneous notice of the alleged abuse.
15. Disputed. Plaintiff's alleged injuries in the current complaint and the 1994 litigation pleadings are almost completely identical, if not the same.

Dated: September 19, 2022

Respectfully submitted,

By: */s/ Anthony P. La Rocco*

K&L GATES LLP
Anthony P. La Rocco
Dana B. Parker
Reymond E. Yammine
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Anthony P. La Rocco (Attorney ID 023491982)
Dana B. Parker (Attorney ID 041682003)
Reymond E. Yammine (Attorney ID 306962019)
K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
Attorneys for Defendants Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)

Corinne Pandelo, Plaintiff, v. The Governing Body of Jehovah's Witnesses, Fairlawn Congregation of Jehovah's Witnesses, Watchtower Bible and Tract Society of New York, Inc., Hackensack Congregation of Jehovah's Witnesses, and John and Jane Does 1-100, whose identities are presently unknown to Plaintiff, in their official and individual capacities, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-5508-21 Civil Action **PROOF OF SERVICE**

I, Dana B. Parker, hereby certify as follows:

1. I am an attorney-at-law of the State of New Jersey and counsel at K&L Gates LLP, attorneys for Defendants Watchtower Bible and Tract Society of New York, Inc. and the East Hackensack Congregation of Jehovah's Witnesses (improperly named Hackensack Congregation of Jehovah's Witnesses) (together, "Defendants").

2. On September 19, 2022, I caused to be served on all counsel of record copies of the following via electronic filing through NJ eCourts: (1) Defendants' Brief in Further Support of their Motion for Summary Judgment; (2) the Certification of Dana B. Parker in Further Support of Defendants' Motion for Summary Judgment, with corresponding exhibits; (3) Defendants' Opposition to Plaintiff's Counter-Statement of Undisputed Material Facts; and (4) this Proof of Service.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 19, 2022

By: /s/ Dana B. Parker

Anthony P. La Rocco
Dana B. Parker
Reymond E. Yammine
K&L GATES LLP
One Newark Center, 10th Floor
Newark, New Jersey 07102
P: (973) 848-4000
F: (973) 848-4001
Attorneys for Defendants Watchtower Bible and Tract Society of New York, Inc. and East Hackensack Congregation of Jehovah's Witnesses (improperly named as Hackensack Congregation of Jehovah's witnesses)