DEFENDANTS' RESPONSE BRIEF

Kenneth Frank Irek, *Plaintiff*

v.

New Jersey Lawyers' Fund
For Client Protection, *Defendant*

and

The Supreme Court of New Jersey, *Defendant*

From:
Superior Court of New Jersey
Mercer County
Law Division
Docket No. MER-L-002022-20
Appeal Docket No. A-001384-20
Filed August 13, 2021

KENNETH FRANK IREK, Plaintiff-Appellant, v. NEW JERSEY LAWYERS' FUND FOR CLIENT PROTECTION and THE SUPREME COURT OF NEW JERSEY, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1384-20T **CIVIL ACTION** On Appeal from a Final Order Granting Defendants New Jersey Lawyers' Fund for Client Protection and the Supreme Court of New Jersey's Cross-Motion to Dismiss and Denying Plaintiff Kenneth Frank Irek's Motion for Injunctive Relief in the Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-2022-20 Sat Below: Hon. Douglas H. Hurd, P.J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS NEW JERSEY LAWYERS' FUND FOR CLIENT PROTECTION AND THE SUPREME COURT OF NEW JERSEY

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PRELIMINARY STATEMENT

In 1993, the Supreme Court of New Jersey disbarred Plaintiff-Appellant, Kenneth Frank Irek, after he absconded with a $5000 deposit that a couple had entrusted him to hold in escrow. The couple filed a disciplinary complaint and also submitted a claim to the New Jersey Lawyers' Fund for Client Protection ("the Fund") to recover the lost deposit. The Fund granted their claim and filed an action against Irek to recover the $5000 it had paid on his behalf. In 1995, it obtained a default judgment against Irek and has since then made continuing efforts to collect the approximately $2500 that remains outstanding.

In 2020, over twenty-five years after he was disbarred, Irek filed a six-count verified complaint in Superior Court asserting a myriad of tort claims against the Fund and the Supreme Court. It sought, among other things, relief vacating the default judgment and injunctive relief enjoining the Fund's ongoing attempts to enforce its judgment.

The trial court dismissed the complaint with prejudice, finding it lacked subject matter jurisdiction to revisit the initial disbarment order and the ensuing default judgment. His arguments on appeal all begin with the same general premise that he was disbarred in error because he was not the couple's attorney. With that as his starting point, he next claims that the $5000 claim should have been deemed ineligible from the outset, and that

because the $5000 should have never been granted there was no basis for the entry of default.

The trial court correctly found that it lacked subject matter jurisdiction and properly rejected Irek's thinly veiled attempt to re-litigate his disbarment. Therefore, this court should affirm.

STATEMENT OF FACTS

Irek's disbarment stemmed from a real estate transaction involving Zontan Szatmary and Cathleen D. Szatmary ("the Szatmarys"), in which Irek acted as their escrow agent. (Pa197).[1]

In May 1990, Irek advertised the sale of a vacant construction lot in Jackson, New Jersey. (Pa7). Kirex Development Company, Inc. ("Kirex"), owned the vacant lot, and Irek was Kirex's sole shareholder, president, secretary, treasurer, and director. (Pa7). The Szatmarys expressed interest in the real estate and retained the legal services of Dennis D. Poane, Esq., to complete the transaction. (Pa7).

Between May 29, 1990 and June 6, 1990, the Szatmarys and Kirex – through its agent, Irek – executed a contract for the sale of the lot. (Pa7). Ms. Szatmary issued a check dated May 29, 1990 in the amount of $5000 to Kirex as an initial deposit for the lot's $35,000 sale price. (Pa8). In August 1990, Irek "became

[1] "Pa" refers to Irek's appendix; and "Pb" refers to Irek's appellate brief.

unavailable and the closing never took place." (Pa8). The Szatmarys never received a return of their $5000 deposit. (Pa197).

On November 14, 1990, Mr. Poane sent a letter to Ronald Troppoli, Director of the Special Prosecutions Unit at the Monmouth County Prosecutor's Office, detailing that Irek "may have absconded with the funds given in trust by [the Szatmarys]" and requesting that the prosecutor's office "review[] this matter with regard to the criminal aspects of the case." (Pa163-166). On December 11, 1990, Mr. Troppoli suggested that the matter should be "brought to the attention of both the Office of Attorney Ethics, as well as the Client's Security Fund."[2] (Pa191-192).

On April 12, 1991, the Szatmarys completed a Statement of Claim through the New Jersey Lawyers' Fund for Client Protection, stating that Irek had breached his fiduciary duty as an escrow agent when he misappropriated the $5000 deposit. (Pa8; Pa197-204). The Szatmarys also filed an attorney grievance form against Irek with the New Jersey District Ethics Committee, District IX, for (1) taking their money in a capacity as an attorney for Kirex; (2) intentionally failing to sell the vacant lot or return their money; and (3) disappearing without returning their money. (Pa194-195).

[2] The New Jersey Lawyers' Fund for Client Protection is formerly known as the Client's Security Fund. See Clients' Sec. Fund v. Sec. Title & Guar. Co., 257 N.J. Super. 18, 24 (App. Div. 1992), aff'd, 134 N.J. 358 (1993).

On December 28, 1992, the Disciplinary Review Board issued its decision and recommendation to the Supreme Court of New Jersey that Irek be disbarred for unethical behavior, namely receiving money in a fiduciary capacity and absconding with same. (Pa126-28). Irek neither appeared nor otherwise defended himself at the disciplinary proceedings.[3] (Pa126-128). On May 13, 1993, Irek was disbarred "for the knowing misappropriation of escrow funds in violation of RPC 1.15(b) and RPC 8.4(c)."[4] In re Irek, 132 N.J. 203, 204 (1993).

On November 26, 1993, the Fund determined that the Szatmarys' claim was eligible for compensation and paid them in the amount of $5000. (Pa8; Pa235-236).

On December 29, 1994, Michael T. McCormick, Deputy Counsel for the Fund, filed a complaint in the Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-5664-94, demanding that Irek reimburse the Fund the $5000 paid to the

[3] Irek now seeks to re-litigate this long-decided issue. (Pb24-31). The Disciplinary Review Board indicated that Irek "was served with notice of the Board hearing by publication in the New Jersey Law Journal, the Asbury Park Press and the New Jersey Lawyers," (Pa126), but nevertheless "did not appear at either the [District Ethics Committee] or the Board hearing, despite notice by publication in several periodicals," (Pa127-128). R. 1:20-15 ("All recommendations for discipline received by the Board . . . shall be promptly heard de novo on the record on notice to all parties.").

[4] See also In re Disbarment of Irek, 508 U.S. 935, 935 (1993) (indicating that Irek was also disbarred from the practice of law by the United States Supreme Court and North Carolina bars).

Szatmarys. (Pa8; Pa152-157). Inter alia, Deputy Counsel McCormick advised the court that Irek "embezzled, misapplied and converted to his own use the sum of $5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction." (Pa8; Pa153). Irek never answered the complaint. (Pa161).

On March 22, 1995, the Honorable Neil H. Shuster, J.S.C., entered a default judgment against Irek in the amount of $5000, plus interest and costs of suit. (Pa8; Pa161).

Since then, the Fund has worked to recover the lien amount from Irek. (Pa9). From 1995-2017, the Fund issued fifteen information subpoenas to Irek. (Pa9). From 2000-2017, Irek was served with eleven summonses to appear at an enforcement hearing at the Mercer County Civil Courthouse. (Pa9).

On November 5, 2004 and March 23, 2015, bench warrants were issued for Irek's arrest after he failed to appear at a contempt of court hearing in accordance with the Comprehensive Enforcement Program Fund, see N.J.S.A. 2B:19-3. (Pa9; Pa297; Pa306-307). The March 23, 2015 bench warrant was later forwarded to the Sheriff of Los Angeles County, California, for execution. (Pa9). To secure his compliance, the Fund also requested that the California Department of Motor Vehicles suspend and/or refuse renewal of Irek's driver's license. (Pa9; Pa137-140; Pa142-147; Pa159).

Over approximately twenty-six years, Irek has made some payments toward satisfying the default judgment's outstanding balance, but still owes $2500. (Pa9; Pa20; Pa315-318).

PROCEDURAL HISTORY

On November 9, 2020, Irek filed a six-count verified complaint in the Superior Court of New Jersey, Law Division, Civil Part, Mercer County. (Pa1-26). The verified complaint sought relief in law and equity. (Pa11).

First, Irek contended that the Mercer County Superior Court lacked subject matter jurisdiction to issue the March 1995 default judgment. (Pa11-13). He argued that subject matter jurisdiction did not exist because neither an attorney-client nor fiduciary relationship was established between Irek and the Szatmarys, thereby divesting the Fund of its jurisdiction to bring a claim against Irek. (Pa13). Irek maintained that he entered into the real estate agreement as Kirex's President and said conduct was not subject to the Supreme Court or Fund's jurisdiction. (Pa13).

Second, Irek averred that the Mercer County Superior Court entered the March 1995 default judgment without personal jurisdiction over him. (Pa13-14).

Third, Irek asserted that the Fund lacked jurisdiction over him and erroneously paid the $5000 claim to the Szatmarys because the Supreme Court's May 1993 disbarment order is null and void.

(Pa14-17). Although the Disciplinary Review Board concluded on December 28, 1992 that Irek "was also acting as an attorney" on Kirex's behalf when he vanished with the Szatmarys' funds, Irek argued that he "had no client-lawyer relationship with the Szatmarys, did not hold himself out as an attorney, and was acting only as an individual and President of his solely owned New Jersey corporation." (Pa15-16). Over twenty-five years later, Irek insisted that he "was not subject to the New Jersey Rules of Professional Conduct," and "[t]he New Jersey Supreme Court did not have jurisdiction over [him] while acting as President and Secretary of his solely-owned New Jersey corporation." (Pa16).

Fourth, Irek alleged that the Fund was liable for common law fraud. (Pa17-18). He stated that on December 29, 1994, Deputy Counsel McCormick knowingly made material misrepresentations regarding the Szatmarys' legal representation status during the underlying real estate transaction. (Pa17).

Fifth, Irek alleged that the Fund was liable for "intentional infliction of mental duress." (Pa18-20). He cited to the Fund's "various activities to compel [him] to reimburse the [Fund] for the $5,000 claim [it] had paid to the Szatmarys," proclaiming that "[t]hese activities . . . are still continuing." (Pa18). Specifically, Irek alleged that from 2000-2017, the Fund sent "at least 39 letters" regarding its attempt to recover the $5000 judgment. (Pa18). He referenced: (1) a July 28, 2006 order to

suspend his driver's license; (2) an August 14, 2006 letter in which the Fund advised Irek that it would seek a suspension of his California driver's license if he did not satisfy the outstanding judgment; (3) an October 6, 2006 letter in which the Fund requested the California Department of Motor Vehicles to suspend or refuse to renew Irek's driver's license for failure to pay his financial arrears; and (4) a March 30, 2015 letter in which the Fund advised Irek of a bench warrant and a final request to enter a consent order for repayment before the prosecution of the bench warrant. (Pa18-19; Pa137-140; Pa142-147; Pa149-150).

Sixth, Irek brought a "libel-defamation" claim against the Fund. (Pa20-21). He stated that the Fund "published written statements containing disparaging and defamatory statements that were intended to libel and defame [him]." (Pa21). He supported the claim on alleged publications dated December 29, 1994, October 22, 2004, and October 6, 2006; indeed, the genesis of this claim is Irek's contention that he did not misappropriate the Szatmarys' initial deposit money in a fiduciary capacity. (Pa21).

Irek requested the following relief in the verified complaint: (1) an order declaring the March 1995 default judgment void ab initio; (2) injunctive relief enjoining the Fund from compelling his payment of the default judgment; (3) an order cancelling all bench warrants; (4) an order restoring his New Jersey and California driving privileges; (5) injunctive relief

enjoining the Fund from publishing defamatory and malicious statements about Irek regarding his misappropriation of funds; (6) an order declaring the May 11, 1993 disbarment order void ab initio; (7) the reinstatement of his New Jersey bar license; (8) repayment of $2500 that was previously remitted to the Fund; (9) compensatory damages; and (10) punitive damages. (Pa22-25).

On November 28, 2020, Irek filed a "Notice of Motion for Injunctive Relief Temporary Restraints." (Pa319-326). He argued that injunctive relief was warranted because of "immediate and irreparable damage" that would be incurred prior to a final adjudication on the merits. (Pa322). He sought an injunction enjoining the Fund from:

> A. Continuing to engage in conduct related to compelling Plaintiff to reimburse the NJLFCP for the $5,000 claim they had paid to the claimants (Szatmarys);
>
> B. Intentionally threatening the arrest of Plaintiff;
>
> C. Intentionally inducing others to unlawfully cancel remove or not renew any privileges or rights of Plaintiff;
>
> D. Enforcing, continuing in effect or re-issuing all Bench Warrants related to the facts herein stated, in the State of California;
>
> E. Enforcing, continuing in effect or re-issuing all Bench Warrants related to the facts herein stated, in the State of New Jersey;
>
> F. Enforcing, continuing in effect or re-issuing all Bench Warrants related to the

facts herein stated, in any other State where they may have sent them;

G. Enforcing, continuing in effect or re-issuing New Jersey Driver's License Forfeiture;

H. Defendants and other persons acting in concert with them and at their direction, from publishing, republishing, distributing and redistributing false, disparaging, defamatory and malicious statements, including but not limited to, that Plaintiff engaged in dishonest conduct, misappropriated money; and embezzled, misapplied and converted to his own use the sum of $5,000.00;

I. Granting such other relief as the court deems equitable and just.

[Pa322-323.]

On December 9, 2020, the Fund cross-moved to dismiss the verified complaint with prejudice under Rules 4:6-2(a) and 4:6-2(e) and opposed Irek's motion for injunctive relief. (Pa327-328). The cross-motion asserted two grounds for dismissal: (1) the trial court lacked subject matter jurisdiction over Irek's claims; (2) Irek's claims were time-barred under the Tort Claims Act's two-year statute of limitations and defamation's one-year statute of limitations; (3) the Fund and its personnel were absolutely immune in law and equity; and (4) Irek did not demonstrate clear and convincing proof that he was entitled to injunctive relief. (Pa331-359).

On December 21, 2020, in an oral decision, the trial court denied Irek's motion for injunctive relief and granted the Fund's

cross-motion to dismiss the verified complaint with prejudice, concluding that "[a]fter a thorough reading of all the motion papers, it is clear that [the Fund's] motion must be granted and that the request for injunctive relief therefore must be denied." (Pa372-373; 1T4:23-5:1).[5]

The trial court found it "lack[ed] subject matter jurisdiction over [Irek's] claim because the [New Jersey] Constitution unequivocally provides the Supreme Court with exclusive authority over the State Bar, and under this authority[,] the Supreme Court established the New Jersey Lawyers' Fund for Client Protection." (1T5:1-7). It held that the Fund properly relied on GE Capital Mortgage Services, Inc. v. New Jersey Title Insurance Co., 333 N.J. Super. 1 (App. Div. 2000), wherein the Appellate Division ruled that a plaintiff cannot "use the Court system to establish a viable and enforcement claim against the Fund." (1T5:7-13). The trial judge ruled that Irek "attempt[ed] to pursue a collateral approach that is prohibited under the Constitution and court rules." (1T5:22-24). He further adjudged that the "Law Division cannot encroach upon matters vested in the Fund through the Supreme Court" and "has no jurisdictional power to review the Fund's discretion in awarding the Szatmarys $5,000

[5] "1T" refers to the motion hearing transcript before the Honorable Douglas H. Hurd, P.J.S.C., dated December 21, 2020.

or in the Fund's decision to seek and obtain default judgment and then collect." (1T5:24-6:5). Further, the trial court also found that it possessed no authority over Irek's request for the reinstatement of his law license, as "the Supreme Court governs exclusively the regulation of the practice of law in New Jersey." (1T6:6-9).

Next, the trial court held that Irek's common law fraud, intentional infliction of mental distress, and libel-defamation claims were time-barred pursuant to the applicable statute of limitations. (1T6:10-15).

Lastly, the trial court determined that the Fund was absolutely immune from suit in law and equity under Rule 1:28-1(f), finding that "the immunity afforded to the trustees and deputy counsel for conduct in the performing of their official duties extends to the public entities they represent" under N.J.S.A. 59:2-2b. (1T6:16-7:1).

This appeal followed on January 7, 2021. (Pa375-376).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED THE VERIFIED COMPLAINT WITH PREJUDICE BECAUSE THE LAW DIVISION LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE MATTERS SOLELY VESTED WITHIN THE SUPREME COURT. (RESPONDING TO IREK'S POINTS I, II, AND III)

The trial court correctly found that it lacks subject matter jurisdiction because Irek's claims concern matters over which the Supreme Court has plenary authority.

Prior to filing an answer to a complaint, a party may move to dismiss on the basis that the court lacks jurisdiction over the subject matter. R. 4:6-2(a). Jurisdiction is a threshold issue, and a reviewing court should dismiss an action if it finds that subject matter jurisdiction is lacking. Royster v. N.J. State Police, 439 N.J. Super. 554, 568 (App. Div. 2015), aff'd in part and modified in part by, 227 N.J. 482 (2017). Because subject matter jurisdiction is a purely legal issue, an appellate court will review the trial court's determination de novo. Santiago v. N.Y. & N.J. Port Auth., 429 N.J. Super. 150, 156 (App. Div. 2012) (citation omitted). As such, the trial judge's "interpretation of the law . . . [is] not entitled to any special deference." Ibid. (citation omitted).

Under the New Jersey Constitution, the Supreme Court of New Jersey is vested with original and exclusive jurisdiction over

matters involving the admission, practice, and discipline of New Jersey attorneys:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.
>
> [N.J. Const. art. VI, § II, ¶ 3.]

Indeed, the Supreme Court has noted that it has "plenary, exclusive, and almost unchallenged power over the practice of law." In re Li Volsi, 85 N.J. 576, 585 (1981) (emphasis added); see also R. 1:20-1(a) ("Every attorney and business entity authorized to practice law in the State of New Jersey . . . shall be subject to the disciplinary jurisdiction of the Supreme Court."). New Jersey courts have long recognized "that the power to control admissions to the bar and to discipline members of the bar is inherent in the judiciary." In re Baker, 8 N.J. 321, 334 (1951).

Pursuant to its constitutional authority, the Supreme Court established the New Jersey Lawyers' Fund for Client Protection "for the express purpose of reimbursing, to a certain extent, the losses caused by the dishonest conduct of members of the New Jersey bar." GE Capital Mortg. Servs., Inc. v. N.J. Title Ins. Co., 333 N.J. Super. 1, 5 (App. Div. 2000). The Supreme Court appoints seven trustees to administer and operate the Fund. R. 1:28-1(a). "No claimant or any other person or organization shall have any

right in the Fund as beneficiary or otherwise." R. 1:28-3(d). Rather, the Fund's seven trustees are conferred with "sole discretion" in "determin[ing] which eligible claims merit reimbursement from the Fund and the amount, time, manner, conditions and order of payment of reimbursement."[6] R. 1:28-3(b) (emphasis added).

In GE Capital, the plaintiff filed a claim with the Fund and sought reimbursement of monies in the amount of $694,146.75 that were misappropriated by a New Jersey attorney during a real estate transaction. 333 N.J. Super. at 3-4. The Fund advised the plaintiff that it would not consider the claim because an attorney-client relationship did not exist and there was a "strong possibility" that the plaintiff could recoup its loss in full from collateral sources. Id. at 4. The plaintiff filed suit against the Fund and the parties to the underlying real estate transaction in the Superior Court of New Jersey, Chancery Division. Ibid. The plaintiff argued that it suffered a loss as a result of the attorney's "dishonest conduct and demanded that it be declared a proper claimant against the Fund and that the Fund be ordered to

[6] The Court Rules also state that the Fund "may require as a condition to payment that the claimant execute such instruments, take such action or enter into such agreements as the trustees require, including assignments, subrogation agreements, trust agreements, and promises to cooperate with the trustees in making or prosecuting claims or charges against any person." R. 1:28-3(e).

recognize and pay its claim." Ibid. The Fund moved to dismiss the action, citing to a want of subject matter jurisdiction. Ibid. The trial court agreed and dismissed the complaint against the Fund. Ibid.

On appeal, the Appellate Division affirmed, rejecting the plaintiff's argument that "it should be permitted to utilize the court system to establish a viable and enforceable claim against the Fund[] . . . directly violate[s] the procedure established by our Supreme Court for the processing of such claims." Id. at 6-7. Citing to "the novel jurisdictional and public policy implications of permitting direct claims against the Fund," it held that permitting a claim against the Fund to proceed in Superior Court "would intrude improperly on matters clearly vested in the Fund by the Supreme Court." Ibid.

Here, akin to the plaintiff in GE Capital, Irek employed a collateral approach to circumvent the explicit Court Rules and invited the Superior Court to encroach upon matters vested in the Fund through the Supreme Court. He unequivocally challenges (1) the Fund's discretionary determination to award the Szatmarys $5000 in November 1993; and (2) the Fund's decision to recoup the November 1993 loss by seeking and obtaining a $5000 default judgment against him. (Pa10). Specifically, he argues that the Fund failed to establish "the elements required by Rule 1:28-3 to

acquire subject matter jurisdiction" and declare the Szatmarys' claim eligible. (Pb13).

As our case law unambiguously instructs, however, the Fund is a creature of the Supreme Court; hence, any claim deriving from the Fund's discretionary authority must be petitioned directly before that Court, the sole judicial body to which the Fund is answerable to. See GE Capital, 333 N.J. Super. at 6 ("[T]he mere fact that R. 1:28-2(f) specifically grants immunity from suit to the Fund's trustees and personnel will not be interpreted as an inferential endorsement by the Supreme Court of direct claims against the Fund in the trial divisions."). Neither a disappointed claimant nor a disgruntled former attorney may bring suit against the Fund in Superior Court and challenge its discretionary eligibility determinations. Notably, Irek's merits brief does not point to a single case where the Fund was a named defendant and the plaintiff prevailed against the Fund. Such an omission is unsurprising because GE Capital decidedly eliminated the relief that Irek seeks.

To that end, the trial court properly held that it "cannot encroach upon matters vested in the Fund through the Supreme Court" and "has no jurisdictional power to review the Fund's discretion in awarding the Szatmarys $5,000 or in the Fund's decision to seek and obtain default judgment and then collect." (1T5:24-6:5). Accordingly, Irek is barred from pursuing any claims against the

Fund in Superior Court because it lacks authority to supplant the trustees' decision-making authority.

Likewise, the trial court correctly denied Irek's request for reinstatement of his New Jersey law license.[7] The Court's May 13, 1993 disbarment order directed that Irek "be disbarred and that his name be stricken from the roll of attorneys of this State," as well as "permanently restrained and enjoined from practicing law" in New Jersey. In re Irek, 132 N.J. at 204.

Irek argues that the Supreme Court lacked subject matter jurisdiction over him because he was "engaged in a personal business transaction." (Pb22-23). However, Irek overlooks the precept that once an attorney is admitted to the New Jersey State Bar, he submits to the Supreme Court's jurisdiction, and his character and fitness to practice law are constantly subject to the Court's review, irrespective of whether the conduct at issue

[7] On appeal, Irek suggests – for the first time – that New Jersey's disbarment procedure is somehow "[c]onstitutionally flawed because it allows for the deprivation of important property rights by non-judicial, untrained volunteer Ethics Committee members." (Pb37). Because this issue was raised for the first time on appeal and Irek had an opportunity to raise it before the trial court, this court should decline to rule on it. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (citation omitted). Even assuming the question is properly before this Court, Irek conveniently and heedlessly ignores the fact that his bar license was not revoked by "non-judicial untrained volunteer Ethics Committee members," but rather, the Supreme Court. See In re Irek, 132 N.J. at 204. As demonstrated by the various exhibits affixed to the verified complaint, Irek was afforded ample due process, but did nothing until decades later.

is related to the practice of law or not. See In re Witherspoon, 203 N.J. 343, 357 (2010) (discussing instances where an attorney was disbarred for conduct unrelated to the practice of law); see also In re Yaccarino, 117 N.J. 175, 200 (1989) ("Acts of dishonesty, venality or greed will clearly implicate professional fitness."); RPC 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."). Thus, the Supreme Court, not the Superior Court, retains sole authority over attorney discipline. See Robertelli v. N.J. Office of Att'y Ethics, 224 N.J. 470, 481-82 (2016) (affirming the concept that the Supreme Court possesses exclusive jurisdiction over attorney discipline and "the Superior Court lacks jurisdiction over the regulation of the Bar and matters that intrude on the disciplinary process"). Accordingly, the trial court appropriately ruled that because "the Supreme Court governs exclusively the regulation of the practice of law in New Jersey," it did not have the authority to reinstate Irek's law license. (1T6:6-9).

Therefore, the Law Division's decision to dismiss Irek's verified complaint on jurisdictional grounds should be affirmed.

POINT II

THE TRIAL COURT PROPERLY DISMISSED THE VERIFIED COMPLAINT WITH PREJUDICE BECAUSE IREK'S TORT CLAIMS WERE TIME-BARRED UNDER THE APPLICABLE STATUTES OF LIMITATIONS. (RESPONDING TO IREK'S POINT III)

An appellate court employs a plenary review of a motion to dismiss for failure to state a claim upon which relief can be granted. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011); see also Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014) (stating that a trial court's decision to dismiss a complaint under Rule 4:6-2(e) is subject to de novo review). On appeal, a court need not afford any deference to the trial court's conclusions of law. Rezem, 423 N.J. Super. at 114.

In reviewing a motion to dismiss under Rule 4:6-2(e), the court must examine the legal sufficiency of the complaint's factual allegations and determine whether the complaint suggests a cause of action. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). It must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). The plaintiff is provided "every reasonable inference of fact," and the court's finding should not be based on whether the plaintiff will ultimately prevail on his claims. Ibid. Where a complaint

states no legal basis for relief, however, dismissal is the appropriate remedy. Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001).

The Tort Claims Act ("TCA") is a comprehensive statutory scheme that establishes the parameters for tort claims against the State and its entities like the Supreme Court, and sets forth the substantive rules pertaining to the State's immunity from suit. See N.J.S.A. 59:1-1, et seq. It modified traditional sovereign immunity and established the limited circumstances in which tort claims may be brought. Feinberg v. N.J. Dep't of Envtl. Prot., 137 N.J. 126, 133 (1994).

Under the TCA, "immunity from tort liability is the general rule and liability is the exception." Coyne v. State, 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)). Consequently, it "imposes strict requirements upon litigants seeking to file claims against public entities," see McDade v. Siazon, 208 N.J. 463, 468 (2011), including several statutes of limitations, see, e.g., N.J.S.A. 59:8-8 (90-day statute of limitations to present a notice of claim to a public entity); N.J.S.A. 59:8-8b (two-year statute of limitations to file suit against a public entity); N.J.S.A. 59:8-9 (one-year statute of limitations to present a late notice of claim motion to the appropriate court).

Statutes of limitations are equitable in nature and promote timely and efficient litigation, penalize dilatoriness, and serve as measures of repose. Montells v. Haynes, 133 N.J. 282, 292-93 (1993). In a TCA action, a plaintiff will be "forever barred" from recovery unless suit is filed within two years of a claim's accrual. N.J.S.A. 59:8-8b; see also Velez v. City of Jersey City, 180 N.J. 284, 290 (2004) (stating that a tort claim against a public entity must be brought "within two years after the claim's accrual") (citing N.J.S.A. 59:8-8b). Further, defamation actions are controlled by a more stringent one-year statute of limitations. See N.J.S.A. 2A:14-3; Patel v. Soriano, 369 N.J. Super. 192, 247 (App. Div. 2004).

A cause of action accrues on the date when "the right to institute and maintain a suit" first arises. Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 98 (1996) (quoting Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968)); see also Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 273 (App. Div. 1997) (stating that "a tort claim accrues when a person is injured due to another person's fault"). Stated differently, a tort claim accrues when a plaintiff knows that he is injured, and a public entity is responsible for the alleged injuries. See Beauchamp v. Amedio, 164 N.J. 111, 118-19 (2000); see also N.J.S.A. 59:8-1 (stating that "[a]ccrual shall mean the date on which the claim accrued"). In defamation action, a claim accrues on "the date of

publication of the alleged libel or slander." Churchill v. State, 378 N.J. Super. 471, 478 (App. Div. 2005).

Here, the trial judge aptly found that Irek's common law fraud, "intentional infliction of mental duress," and "libel-defamation" claims were time-barred under the applicable statutes of limitations. This case stems from multiple judicial proceedings that occurred approximately three decades ago and illustrates the necessity for statutes of limitations. See Smith v. Datla, 451 N.J. Super. 82, 92 (App. Div. 2017) (indicating that statutes of limitations spare courts from litigating stale claims).

As for the common law fraud claim, the complained of conduct transpired on December 29, 1994, the date in which Deputy Counsel McCormick filed a complaint against Irek to collect the $5000 that Irek owed the Fund. (Pa152-157). On that date or soon thereafter, Irek would have reasonably known that he had a potential claim against a public entity or employee. However, he allowed over twenty-six years to elapse, which is well outside the TCA's two-year statute of limitations, and has provided no explanation for his delay. As such, dismissal was the appropriate remedy.

Similarly, the trial court properly ruled that Irek's "intentional infliction of mental duress" cause of action suffered from the same fatal deficiency. Irek's claim was premised upon correspondence that the Fund purportedly sent to him to collect the monies he owed. (Pa18; Pa290). However, even based on the

purported date of the last communication – March 30, 2015 – his emotional distress claim was filed well beyond the TCA's two-year window. Irek's unsupported assertion that he "continues to suffer[] extreme emotional distress," (Pa20), is irrelevant because it is inconsequential to the accrual of his claim and the limitations period. See Russo Farms, 144 N.J. at 114 (concluding that "a wrongful act with consequential continuing damages is not a continuing tort" and does not lengthen the statute of limitations) (quoting Ricottilli v. Summersville Mem'l Hosp., 425 S.E.2d 629, 632 (W. Va. 1992)). Because this claim was not timely pursued, it was properly dismissed.

Moreover, the trial court's dismissal of Irek's "libel-defamation" claim should also be affirmed. Irek attributed this claim to alleged writings published on December 29, 1994; October 22, 2004; and October 6, 2006. (Pa21; Pa142-147; Pa151-157; Pa159). Irek's bald contention that "[t]he intentional wrongful conduct . . . is[] continuing and ongoing" does not negate the undisputable fact that, at the latest, the complained of publications were made available in 2006, and any defamation claim arising therefrom is outside the statute of limitations period.[8] See Churchill, 378 N.J. Super. at 478 (holding that a defamation

[8] Irek's defamation claim is also barred by the common law defense of truth, see G.D. v. Kenny, 205 N.J. 275, 293-94 (2011), because Irek's misappropriation of the Szatmarys' initial deposit actually occurred. (Pa197).

claim's one-year statute of limitations "runs from the date of publication of the alleged libel or slander"). Therefore, the trial court correctly dismissed the "libel-defamation" claim.

Irek acknowledges that the statute of limitations on his claims has run, but insists that his claims are not time-barred because "each cause of action contains the requisite elements and are viable on their face." (Pb37). However, he is unable to identify any legal authority justifying his delay. Cf. Rosario v. Marco Constr. & Mgmt., Inc., 443 N.J. Super. 345, 352 (App. Div. 2016) (denying a motion to amend the complaint because the statute of limitations expired and any amendment would have been futile as a matter of law).

Therefore, the trial court's decision to dismiss the verified complaint on statute of limitations grounds should be affirmed.

POINT III

THE TRIAL COURT PROPERLY DISMISSED THE VERIFIED COMPLAINT WITH PREJUDICE BECAUSE THE FUND IS IMMUNE FROM SUIT IN LAW AND EQUITY. (RESPONDING TO IREK'S POINT III)

As stated above, the Supreme Court regulates the Fund's operation and administration. N.J. Lawyers' Fund for Client Prot. v. Pace, 186 N.J. 123, 126 (2006). The Court has observed that the bar's reputation is sullied when a lawyer acts unethically, but sustained when the Fund's trustees determine that the Fund

should cover an eligible claim. Ibid. As a result, it confers the Fund with broad discretion in determining whether a claim merits reimbursement. N.J. Lawyers' Fund for Client Prot. v. First Fidelity Bank, N.A., 303 N.J. Super. 208, 210-11 (App. Div. 1997). To shield the Fund and its employees from liability for actions taken within their discretionary capacities, the Court Rules provide that "[t]he Board of Trustees, Director and Counsel, Deputy Counsel, and Secretary and all staff personnel shall be absolutely immune from suit, whether legal or equitable in nature, for any conduct in the performance of their official duties." R. 1:28-1(f) (emphasis added). The TCA further provides that "[a] public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." N.J.S.A. 59:2-2b.

Here, the absolute immunity expounded in Rule 1:28-1(f) was properly applied to the Fund and warranted dismissal of Irek's claims in law and equity. Contrary to Irek's factually unsupported allegations, the complained of conduct falls squarely within the Fund's trustees and deputy counsel's official responsibilities, namely their decision to award the Szatmarys $5000 and attempts to pursue and recover an outstanding default judgment that was obtained against (and unopposed by) Irek. None of the purported conduct occurred outside the trustees and deputy counsel's scope of employment. Consequently, the trustees and deputy counsel enjoy

absolute immunity in law and equity. Because the Fund's employees are entitled to absolute immunity, the Fund, a public entity, is equally entitled to share in the immunity. See N.J.S.A. 59:2-2b.

Therefore, the trial court properly dismissed Irek's verified complaint with prejudice on absolute immunity grounds.

POINT IV

THE TRIAL COURT PROPERLY DENIED IREK'S APPLICATION FOR INJUNCTIVE RELIEF BECAUSE HE DID NOT DEMONSTRATE CLEAR AND CONVINCING PROOF THAT HE WAS ENTITLED TO THE EXTRAORDINARY RELIEF REQUESTED. (RESPONDING TO IREK'S POINT IV)

"The authority to issue injunctive relief falls well within the discretion of a court of equity." Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) (citations omitted). Appellate review of a trial court's decision to grant or deny injunctive relief is evaluated on an abuse of discretion standard. Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utils. Auth., 433 N.J. Super. 445, 454 (App. Div. 2013). This standard "defies precise definition," an abuse of discretion arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)). Stated otherwise, an abuse of

discretion is present when the trial court's decision fails to consider all relevant factors, considers irrelevant or inappropriate factors, or amounts to a clear error in judgment. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (citation omitted).

The long recognized standard for granting injunctive relief was announced by our Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982). In determining whether injunctive relief is warranted, a reviewing court should analyze the following factors: (1) such relief is necessary to prevent irreparable harm; (2) there is a settled underlying claim and a showing of reasonable probability of success on the merits; and (3) the relative hardship to the parties in granting or denying relief. Id. at 132-34. An injunction may be granted only when the application is supported with "clear and convincing proof." Dolan v. De Capua, 16 N.J. 599, 614 (1954). When reviewing an injunctive relief application, a court must undertake "the most sensitive exercise of judicial discretion." Crowe, 90 N.J. at 132.

As to the first Crowe factor, injunctive relief "should not be entered except when necessary to prevent substantial, immediate and irreparable harm." Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). For harm to be irreparable, an applicant must have no adequate remedy at law. Ibid.

Next, the applicant must identify a legally-settled right and demonstrate a likelihood of success on the merits. Crowe, 90 N.J. at 133. To prevail, the claim must be premised upon rights or causes of action that are cognizable under the law. Plotnick v. DeLuccia, 434 N.J. Super. 597, 618 (Ch. Div. 2013). Moreover, a preliminary injunction should not be granted when all material facts are controverted. Crowe, 90 N.J. at 133.

Lastly, the final Crowe factor summons a balancing test of the parties' respective hardships if relief is granted or denied. Id. at 134. In making this balance, a court must determine whether the equities favor maintaining or disturbing the status quo pending the ultimate resolution of the case. Id. at 134-35.

Guided by the above principles, Irek's application for injunctive relief is meritless. As to the irreparable harm factor, Irek faces no harm via an ongoing violation of his rights. Despite Irek's conclusory allegations to the contrary, he has not demonstrated that the default judgment was improperly procured. The judgment exists only because Irek did not defend his position when the Fund brought suit against him in 1994 after it awarded the Szatmarys $5000 for Irek's misappropriation of their funds in that exact amount. The mere fact that he was not the Szatmarys' attorney at the time of the underlying real estate transaction does not negate the obvious that their initial deposit was held in escrow and Irek was the designated escrow agent when he absconded

with the money. The Disciplinary Review Board and Supreme Court found this conduct to be in violation of the Rules of Professional Conduct, which warranted disbarment and the Szatmarys' entitlement to an award from the Fund.

Moreover, over two decades have elapsed since the default judgment was entered, and, despite being duly notified, Irek failed to contest the judgment's validity on numerous occasions. To argue that he would suffer an "immediate and irreparable damage" before the resolution of this matter is nothing short of disingenuous. Irek was provided ample opportunities to challenge the judgment, but elected to ignore the notices, (Pa9), and ultimately resulted in the Fund needing to pursue alternative and appropriate enforcement measures (i.e., the Supreme Court's Comprehensive Enforcement Program Fund). Irek's quibbles that he may be subject to "arrest and incarceration," (Pb40), are not irreparable harm, as the bench warrants were lawfully issued because of his non-appearance at contempt of court hearings (not because he refuses to remit payment on the outstanding judgment). See N.J.S.A. 2B:19-2f. A bench warrant would not be issued if he simply appeared in court as ordered. In short, Irek is not subject to any immediate or irreparable harm because the alleged "harm" stems from Irek's own clear defiance of judicial authority and court orders. Therefore, the first Crowe factor is not met.

Second, as discussed at length in Points I, II, and III of this brief, Irek does not state a cognizable claim against the Fund. To recap, (1) his claims are barred because the Superior Court lacks subject matter jurisdiction; (2) his claims are time-barred under the applicable statutes of limitations; and (3) the Fund is entitled to absolute immunity. Accordingly, no viable cause of action can be gleaned from the verified complaint and its supporting documents, and there is no likelihood of success on the merits. Therefore, the second Crowe factor weighs in favor of denying the injunction.

Finally, Irek would suffer no hardship if the injunction was denied. The default judgment was entered in 1995, and the Fund has attempted to recover the judgment since that time. He has effectively discounted any and all subsequent notices that the Fund has sent him insofar that he could be heard on the matter. Now, years later, Irek baselessly claims that this judgment and the notices/enforcement measures stemming from that judgment have somehow caused him some hardship. His threadbare recitals of hardship fail to vault the clear and convincing standard needed to warrant an injunction. Further, the Fund would incur a substantial hardship if an injunction was granted because it would be precluded from enforcing its rights as a litigant, namely satisfying the judgment that was lawfully obtained. Hence, the equities

necessitate a maintenance of the status quo pending resolution of this case. Therefore, the third Crowe factor is not satisfied.

Accordingly, the trial court considered all relevant and appropriate factors when it denied Irek's motion for injunctive relief, and its decision did not amount to a clear error in judgment.

POINT V

THE TRIAL COURT PROPERLY DISMISSED THE VERIFIED COMPLAINT BEFORE AN ANSWER WAS FILED. (RESPONDING TO IREK'S POINT V)

Irek asserts that the trial court erred when it dismissed the verified complaint before the Fund filed an answer. (Pb48-52). He is mistaken. A pre-answer motion to dismiss is plainly allowed under the Court Rules and meets the requirement that a defendant "plead or otherwise defend" within thirty-five days of being served with a summons and complaint. Midland Funding LLC v. Albern, 433 N.J. Super. 494, 498-99 (App. Div. 2013); see also R. 4:6-1(b) (altering the time to file an answer to a complaint when a motion to dismiss is presented under Rule 4:6). Therefore, the trial judge properly ruled on and granted with prejudice the Fund's dispositive pre-answer cross-motion to dismiss the verified complaint.

CONCLUSION

For these reasons, the trial court's decisions to deny Irek's application for injunctive relief and dismiss the verified complaint with prejudice should be affirmed.

Respectfully submitted,

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