

**Prepared by the Court**

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Batch Cash LLC &  
Horizon Forty5 LLC

Plaintiff,

v.

Kenneth Deiner,  
Capriccio By the Sea 2 LLC,  
Capriccio Ristorante at Killington  
LLC, Sherman Hospitality  
LLC, Paola Pascarella, Kim A.  
Pascarella, & K.A.P. Properties  
Inc.

Defendants,  
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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION

OCEAN COUNTY

CIVIL ACTION

DOCKET # OCN-L-2362-18

**Opinion of the Court**

This matter comes before the Court by way of Plaintiff's Motion for Summary Judgment under *Rule 4:46-2*, as well as Defendant's Cross Motion for Summary Judgment also under *Rule 4:46-2*. After listening to oral argument, the Court hereby issues the following decisions on this, the 25th day of June 2021.

**Factual Background**

This litigation began in September of 2018, when Plaintiffs filed suit in the Superior Court of Ocean County, Law Division. At that time, Plaintiffs drew upon a series of events that began with a 2014 Joint Venture Agreement, between Kenneth Deiner ("Mr. Deiner"), Kim Pascarella ("Mr. Pascarella"), and Sherman Avenue Hospitality Inc. That agreement was accompanied by several more, including Mr. Deiner's agreement to renovate Capriccio by the Sea, an Italian restaurant operating in Ortley Beach. Mr. Deiner is a developer with an ownership interest in the liquor license held by the owners of Capriccio by the Sea, the Pascarellas. Mr. Deiner does not own any of the businesses involved in this litigation.

Following the renovation agreement came a promissory note from Mr. Deiner to Mr. Pascarella for \$100,000, as well as an agreement by the Defendants to renovate and repair Gabriella's Restaurant.

Finally, Batch Cash and Capriccio by the Sea entered into a merchant financing agreement. Included was a guarantee from Mr. Deiner that he would personally take responsibility for any debt incurred by Capriccio by the Sea.

Plaintiffs claim that several invoices have gone unpaid by the Defendants. First, there was a March 2015 invoice for \$7,341.22, issued by Horizon Forty5 LLC. Batch Cash claims that \$88,805.65 was provided to the named Defendants in April of 2016. Plaintiffs assert that the 10% late fee on these unpaid invoices would bring the total amount owed to \$104,700.77.

In September of 2017, Capriccio by the Sea filed for Chapter 7 Bankruptcy. This later became Chapter 11 Bankruptcy. Plaintiffs claimed that at some time following the bankruptcy filing, Mr. Deiner and Paola Pascarella (“Mr. Pascarella”) reopened Capriccio by the Sea, under the name Capriccio by the Sea2. Plaintiffs claim that the amount owed was never paid, that the Defendants defrauded them, and that this fraudulent behavior was the result of a conspiracy that occurred sometime after Batch Cash’s issuance of the money to Capriccio by the Sea.

At the core of Plaintiffs’ case lays a simple assertion: they ask the court to find that this is a case about successor liability and fraudulent transfer. Thus, Plaintiffs claim that the Defendants, namely the Pascarella Defendants, were unjustly enriched by either intentional and deliberate conspiratorial acts, or simply their own negligence in the managing of the finances of their business entities. Plaintiffs asked the Court to find that the re-opening of Capriccio by the Sea, albeit under the same name with a “2” added to the end of it, was part of a conspiracy by the Defendants to defraud both the bankruptcy court, as well as their creditors.

### **Procedural Background**

Plaintiffs’ original complaint alleges 27 counts against the Defendants. These claims include Fraud, Conspiracy to Commit Fraud, Breach of the Covenant of Good Faith and Fair Dealing, Bankrupt’s Void Transfer of Property, Fraud in the Inducement, and Equitable Fraud. Defendants denied the allegations in full.

In December of 2018, Defendants Sherman Hospitality, K.A.P. Properties, and both Kim and Paola Pascarella filed for dismissal, under *Rule* 4:6-2(e), for failure to state a claim against them upon which relief may be granted. The Court heard argument on this motion in February of 2020. At that time, Defendants noted that despite the length of the Plaintiffs complaint, there was no piece of evidence demonstrating that the Defendants communicated with each other to form a conspiracy, and that there was an absence of actual fraud in the pleadings. Plaintiffs cited checks that had been issued, and persuaded the Court to let discovery move forward in the case. The parties then proceeded to file answers, and deal with bankruptcy proceedings and arbitration.

At the conclusion of discovery both parties filed competing motions for summary judgment. Plaintiffs moved for summary judgment on May 20th, 2021. On June 10th, Defendants filed a Cross Notice of Summary Judgment.

At oral argument on the R.4:46-2 motion, Plaintiffs requested that the Court grant summary judgment against both Mr. Deiner and the Pascarella Defendants. Plaintiffs in the alternative specifically requested summary judgment against only the Pascarella Defendants, seeking \$27,341.22 in damages for unpaid invoices. Plaintiffs claimed that Batch Cash sent two payments that were cashed by K.A.P. Properties or Sherman Hospitality, that Horizon Forty5 LLC performed the renovations in accordance with an agreement between the parties, and that Horizon Forty5 was subsequently not paid for that work. The Court rules as follows.

**The Motion for Summary Judgment Against the Pascarella Defendants by the Plaintiff is Denied**

This analysis begins with an earlier motion that could have ended this litigation back in December of 2018. At that time, Defendants filed a R.4:6-2(e) motion to dismiss the case for failure to state a claim upon which relief could be granted. Plaintiffs survived the Defendants 4:6-2(e) motion to dismiss, by coming before the Court with checks that had been issued. Plaintiffs alleged fraudulent action by the Defendants as it related to the acquisition and utilization of the money given to them to renovate Capriccio by the Sea. Given the nature of the Plaintiffs' claims, this Court did not dismiss the case preemptively. Longstanding principles of fairness demand that litigants receive the opportunity to be

heard when they allege a legal wrong. *See* Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31, 34 (N.J. 1989) (citing Independent Dairy Workers Union v. Milk Drivers Local 680, 127 A.2d 869, 871 (N.J. 1956)) (“For purposes of analysis plaintiffs are entitled to every reasonable inference of fact.”). The Supreme Court of New Jersey has blessed this “indulgent” approach to 4:6-2 rulings. *See* Green v. Morgan Props., 73 A.3d 478, 485 (N.J. 2013). Since, “[t]he test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts.” Velantzas v. Colgate-Palmolive Co., 536 A.2d 237, 238 (N.J. 1988). The defendants R.4:6-2(e) motion to dismiss was denied on February 14th, 2020. The Court permitted discovery to proceed in order to determine whether there was sufficient evidence to support the claims alleged in the Plaintiffs’ complaint.

The Court is disappointed that this litigation continued for three years. Batch Cash sent \$20,000 to Kim Pascarella at the direction of Mr. Deiner. The money was due and owing for rental payments pursuant to a contractual agreement between the parties. There is nothing in the record to suggest that there was any form of conspiracy between the parties to defraud Batch Cash prior to the issuance of the check. There is no evidence in the record to suggest that the Pascarella Defendants, nor any of the entities affiliated with them, promised to pay Batch Cash back the money that they had lent to Capriccio by the Sea or to Mr. Deiner personally.

Batch Catch never informed the Pascarella Defendants that they would seek to hold the defendants liable for the money owed by Mr. Deiner. Batch Cash could have required the defendants to execute a guarantee for the loan if Mr. Deiner defaulted. However, they chose not to do so. The Pascarella Defendants were not unjustly enriched by the money they received directly from Batch Cash. The money that the defendants received from Batch Cash was payment for the obligation incurred by Mr. Deiner. Although, the Pascarella Defendants may have benefitted from the renovations made to their property, such a benefit is insufficient to hold them liable for monies paid to them by Batch Cash on behalf of Mr. Deiner.

Plaintiffs cite Morgan v. Union Cnty. Bd. Of Chosen Freeholders to support the proposition that even if the Pascarella Defendants did not conspire directly with Mr. Deiner, the mere fact that they

provided the successor business to Capriccio by the Sea (in the form of “Capriccio by the Sea 2”) was sufficient to allow creditors to bring a claim against them. 633 A.2d 985, 999 (Super. Ct. App. Div. 1993) (“To establish a conspiracy, "it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'" (citations omitted). The principal question in Morgan was if the defendants “entered into an unlawful conspiracy to deprive Morgan of his civil rights.” *Id.* at 998. Here, the Pascarella Defendants received money from Batch Cash that was owed to them by Mr. Deiner. There is nothing in the record to suggest that the acceptance of this money was unlawful. There is nothing in the record to suggest that the Pascarella Defendants had the goal of defrauding anyone, nor that they perpetrated any means of fraud.

This Court gave the Plaintiffs ample time to proceed with discovery. That discovery failed to yield any evidence of unlawful behavior by the Pascarella Defendants, be it in the form of fraud or a conspiracy to commit fraud. Plaintiffs have moved for summary judgment against the Pascarella defendants under *Rule 4:46-2*. The motion will be denied only if the party resisting the motion can point to a genuine issue of material fact. *See Brill v. The Guardian Life Ins. Co. of Am.*, 666 A.2d 146, 150 (N.J. 1995) (“By its plain language, *Rule 4:46-2* dictates that a court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged.""). Additionally, the factfinder must determine if the party moving for summary judgment is entitled to decision in their favor as a matter of law. *See id.* at 152. As *Rule 4:46-2* has been interpreted by the Supreme Court of New Jersey, the Court must review the evidence in the light most favorable the non-moving party. *See id.* at 156.

After reviewing the evidence in the light most favorable to the Defendants, the Court finds that Plaintiffs are not “entitled to a judgment or order as a matter of law.” *R.4:46-2*. The Plaintiffs Motion for Summary Judgment is denied. It is so ordered.

### **The Cross-Motion for Summary Judgment by the Pascarella Defendants is Granted**

This opinion outlines at some length what the allegations by Plaintiffs are, as it relates to the conduct of the Pascarella Defendants. As was noted in the above section, there is no evidence of any

wrongdoing by the Pascarella Defendants. There is no evidence that the Pascarella Defendants A) promised to pay Batch Cash back for any funds given to Capriccio by the Sea or to Mr. Deiner personally, or B) conspired with Mr. Deiner to defraud Batch Cash.

Here, the Court balances the right to give all litigants deserving of a trial their time in Court, against the need to avoid prolonging already lengthy litigation that would only serve to harass the Defendants unjustly. *See Judson v. Peoples Bank & Trust Co. of Westfield*, 110 A.2d 24, 29 (N.J. 1954). In that light, the R.4:46-2 Cross Motion for Summary Judgment by the Pascarella Defendants is granted. The complaint against them is dismissed.

### **The Motion for Summary Judgment Against Mr. Deiner is Granted**

Mr. Deiner did not take a position on the motion. The record indicates that Mr. Deiner assumed responsibility for any debt taken on by Capriccio by the Sea. The record also indicates that the \$20,000 check from Batch Cash to Kim Pascarella was to pay down the balance of moneys owed by Mr. Deiner to the Pascarellas.

As a result of the facts outlined above, the R.4:46-2 Motion by Plaintiffs for Summary Judgment against Mr. Deiner personally, is granted.

### **Summation**

For the reasons expressed above, this Court finds that the defendants are entitled to summary judgment and plaintiffs' claims against the Pascarella Defendants are dismissed with prejudice. Plaintiff's cross-motion for summary judgment against Defendant Deiner, personally, is granted.

It is FURTHER ORDERED that a copy of this order shall be served upon all parties within seven (7) days.

WRITTEN DECISION RENDERED  
July 2, 2021

  
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HON. CRAIG L. WELLERSON, P.J.CV.