LONG BRANCH MANOR, INC. and PURDOM, INC.,

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Plaintiffs/

DOCKET NO. A-

Appellants,

Civil Action

-vs-

ON APPEAL FROM:

229 BATH AVENUE, INC.; 69 MAPLE AVE., INC.; MARVIN BEINHORN and ERIC PANETH,

Superior Court of New Jersey Law Division: Warren County Docket No.: W-025955-89

Defendants/ Respondents.

SAT BELOW:

Honorable William R. Albrecht, J.S.C.

BRIEF AND APPENDIX IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

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PROCEDURAL HISTORY

Defendants respectfully refer the Court to the Procedural History contained in plaintiffs' letter brief [Pb1], adding only that the court below granted plaintiffs' motion for partial summary judgment on the issue of the corporate defendants' liability [Pb2].

STATEMENT OF FACTS

While plaintiffs' moving brief and its brief below, the latter before the Court as Pa[32], is largely accurate in its chronology of the underlying transactions that are the subject of this lawsuit, it is incorrect or misleading in a number of key respects.

The statement that the management of the subject nursing homes was in an "extraordinary state of affairs," and that the previous management had been "not cooperative as to financial information," [Pa[32], unnumbered p.3] fails adequately to convey the situation at these institutions. A full treatment of that situation, which by and large does not bear on this motion, is contained in the Statement of Facts from defendants' brief below [Da1].

At issue on this motion for leave to appeal is the trial court's grant of partial summary judgment to defendants as to the liability of the individual defendants. The only support for plaintiff's claim of personal liability submitted to the trial court was a Certification dated January 6, 1994 by Purita Sach, principal of the plaintiffs (the "Certification"). She alleged, inter alia, that the corporations were created

after the individuals had completed the negotiations for the transactions, not before; that the offices of the corporation[s] were divided up between the individuals as they saw fit; that the

individuals continued to make the important financial decisions for the corporations after creating them . . .

[Pbl0-17.] Judge Albrecht did not weigh the credibility of Such's statements, nor did he address her lack of competency to testify as to the majority of her allegations. He granted defendants' summary judgment motion to dismiss Messrs. Beinhorn and Paneth as parties in the case because the record, including the facts in the Certification, was insufficient to meet plaintiff's low burden of going forward [T30-8], and because the allegations were largely conclusory [Pa2].

The court below entered its order on January 21, 1994 [Pa2]. It was received by plaintiffs' counsel on January 26, 1994 [Da9-5]. Plaintiffs' motion for leave to appeal is dated February 17, 1994 [Notice of Motion for Leave to Appeal], ten days after the February 7, 1994 deadline to file these papers [Da9-6].

LEGAL ARGUMENT

POINT I

PLAINTIFFS' MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE IT WAS SUBMITTED LATE IN VIOLATION OF THE RULES AND WITHOUT GOOD CAUSE

Plaintiffs' counsel admits in his certification in support of this motion that his papers herein were filed weeks after the 15-day period following entry or service of the judgment below allowed under Rule 2:5-6(a). The stated reasons: bad weather, an unresponsive client, a secretarial vacation, a secretarial resignation, and, again, bad weather [Da-9]. No authority is cited for the proposition that any or even all of these reasonably foreseeable events may be a basis for this Court to ignore its Rules as to filing deadlines. There was no attempt by plaintiffs' counsel to communicate with the Court, the clerk of the Court, or defendants' counsel with respect to an extension of time. No extension was requested, and none was given.

Under Rule 2:4-4(b)(1), the Court is authorized to extend the time for an appeal from an interlocutory order. This rule is the one governing obvious interlocutory orders; Rule 2:4-4(b)(2), permitting motions <u>nunc protunc</u>, is meant solely to govern those cases where counsel, in good faith, mistakenly treats an interlocutory order as

final and files a "timely" notice of appeal. Pressler, N.J. Court Rules, Comment 2:4-4(b) (1994). That is not the case here, so there is no grounds for a <u>nunc pro tunc</u> leave to appeal.

Rule 2:4-4(b)(1), on the other hand, permits an extension of 15 days for an appeal on a showing of good cause. No such extension was applied for and, clearly, the Rule does not contemplate <u>nunc pro tunc</u> relief in such a situation. Thus there is no basis in the Rules to permit this motion.

In any event, the "valid excuse" standard of "good cause" for extending an appeal date -- an "extraordinary remedy" -- does not include "[m]ere negligent overlooking of the time requirements." In re Appeal of Syby, 66 N.J. Super. 460, 464 (App. Div. 1961). The failure effectively to manage one's docket is not a valid excuse. The other good-cause criterion is "a substantial and meritorious question involved in the appeal," id. at 463, and as shown below, this test is not met here either.

Ultimately, however, there is no need to evaluate good cause or prejudice. There is simply no provision in the Rules for this motion, and it should therefore be dismissed.

POINT II

PLAINTIFFS HAVE NOT DEMONSTRATED ANY REASON WHY THE MOTION FOR LEAVE TO APPEAL SHOULD BE GRANTED.

The grant of leave to appeal an interlocutory order of the trial court is highly discretionary, see Rule 2:2-4, and "is customarily exercised only sparingly."

State v. Reldan, 100 N.J. 187, 205 (1985). New Jersey law has long embraced a judicial policy that favors "an uninterrupted proceeding at the trial level with a single and complete review." In Re Pennsylvania R.R., 20 N.J. 398, 404 (1956); accord Clifford, "Civil Interlocutory Appellate Review in New Jersey," 47 Law & Contemp. Probs. 87, 97 (1904). Moreover, the denial of leave to appeal an interlocutory order "will not prejudice its further review in the event it is presented in a later appeal." Reldan, 100 N.J. at 205 (citing Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 181 (1969)).

Given the inhospitable attitude New Jersey courts have traditionally harbored toward interlocutory appeals, the present motion must be denied because, as shown below, plaintiffs have failed to demonstrate any compelling reason why they should be permitted to disrupt the flow of this litigation. Indeed, New Jersey's judicial policy disfavoring interlocutory appeals was adopted to avoid "the delay and the congestion that all too often

prevail[s] in judicial systems that freely permit piecemeal appeals and interlocutory reviews." In re

Pennsylvania R.R., 20 N.J. at 408. In a four-year-old
case whose trial dates have been adjourned several times,
granting a motion for leave to appeal would frustrate a
fundamental judicial policy in our State.

POINT III.

THE COURT BELOW CORRECTLY RULED THAT THE INDIVIDUAL DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON THE QUESTION OF THEIR PERSONAL LIABILITY

The Third and Fourth Counts of the Complaint respectively claimed that Messrs. Beinhorn and Paneth acted as "alter egos," or committed <u>ultra vires</u> acts, with respect to the corporate defendants, and that they should therefore be found personally liable for the plaintiffs' claimed damages. Yet after four years absolutely no evidence has been produced to even approach the high standard required for piercing the corporate veil. The individual defendants were thus entitled to summary judgment on these counts.

A corporation is a fundamentally separate entity from its shareholders. "Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." State of New Jersey, Dept. of Environmental Protection v. Ventron Coip., 94 N.J. 473, 500 (1983). Even where a corporation's principal is the guiding force behind it, as long as the complaining party is aware that it is dealing with a corporate entity and that the officer or shareholder is acting for and on the corporation's behalf, there is no basis to pierce the corporate veil.

New Mea Construction Corp. v. Harper, 203 N.J. Super. 486, 497 (App. Div. 1985). No evidence, or even assertion, to

the contrary appears anywhere in the record presented to the court below in opposition to the individual defendants' summary judgment motion.

Furthermore, this Court has stated:

The party seeking an exception from the fundamental principle that a corporation is a separate entity bears the burden of proof and must demonstrate misuse of the corporate form and the necessity of disregarding it in order to do equity.

Department of Labor v. Berlanti, 196 N.J. Super. 122, 127 (1984). Here plaintiffs failed to meet that burden. No evidence of fraud, misuse of the corporate form, or inequity as a result of the defendants' use of the corporation form was produced; nor were facts suggesting any of these elements alleged in the Such Certification. The causes of action against the individual defendants are a sham, and were properly dismissed as a matter of law.

Plaintiffs take the incredible position that because defendants have not themselves "discovered" the evidence supporting plaintiffs' case against the individual defendants — that is, evidence that the veil should be pierced, or the "alter ego" theory asserted — defendants have waived some kind of right to know what facts in support of a finding of personal liability the plaintiffs intend to prove [Pb8-18]. This conception of summary judgment, much less of civil litigation, is beyond comprehension.

This Court need not be reminded of what the purpose of summary judgment is. Here defendants were granted summary judgment on the counts against the individual defendants because plaintiffs could present no evidence showing a genuine issue of material fact regarding improper use of the corporate form.

In their motion papers below, and in this proceeding as well, plaintiffs have failed to meet their burden of going forward. See, Eastern Planned Communities at Lincroft, Inc. v. Middletown Township, 35 N.J. Super. 467 (Law Div. 1989) (opponent to summary judgment must come forward with specific facts to present issue for trial). After four years of discovery, not a single document was submitted to the trial court to support plaintiffs' personal liability claims. Not a single word from a single line on a single page of a deposition transcript was cited to the court below, to demonstrate that the allegations against the individual defendants have any substance. Instead, a new, January 6, 1994 Certification (the "Certification") [Pa21] was generated for execution by the plaintiffs' principal, Purita Such, tailored in an attempt to mirror the legal requirements to pierce the corporate veil, but even then containing no facts to support the allegations at issue. A motion for summary judgment cannot be defeated solely by the assertion in an affidavit of misguided subjective belief. <u>Swarts v.</u>

<u>Sherwin Williams Co.</u>, 244 N.J. Super. 170, 178 (App. Div. 1990).

A review of each of the allegations of the Such Certification submitted below demonstrates that the court was correct in dismissing the individual defendants. preliminary matter, ¶2(a) alleged that "upon my direct observation of their activities," Messrs. Paneth and Beinhorn "operated the corporate defendants as their own personal entities." First of all, Mrs. Such did not explain exactly what she "observed," vis-a-vis the operations of the corporate defendants (as opposed, theoretically, to how they may have been represented to her). there was no basis for her to make the majority of the allegations which follow. Neither was she qualified to conclude on the basis of those observations -- or otherwise -- that the individual defendants operated the corporate defendants "as their own personal entities." Similar legal conclusions abound in the Certification, and they too should be disregarded. 1

Plaintiffs' brief cites Thermo Contracting Corp. v. Bank of New Jersey. 69 N.J. 352, 364 for the bold proposition that summary judgment may be denied based on allegation by the opponent of "conclusory facts" [Pb9-6]. Notwithstanding our Supreme Court's arguably infelicitous use of that term, Thermo Contracting squarely supports the decision of the court below. The whole quote is as follows:

There was no <u>genuine</u> issue of underlying fact here, even recognizing, as we do, that ordinarily conclusory facts as well as underlying operative facts, if reasonably disputable, should be tried rather than determined by summary judgment or by (Footnote continued on next page.)

As to the "substance" of the Certification, ¶2(a) alleged that Messrs. Paneth and Beinhorn "made all the decisions and set themselves up as corporate officers as they saw fit." However, the plaintiffs did not bring to the attention of the defendants or the Court any authority to suggest that there is anything illegal, irregular, surprising, or even unadvisable about the controlling stockholders of a corporation making themselves officers and making all the decisions for the corporation "as they see fit."

Similarly, in ¶2(b) of the Such Certification, the individual defendants were accused of having chosen a corporate president and vice president "without concern for any other party or qualification." It is not clear at all what these words mean, or what other parties or

⁽Footnote continued from previous page.)
judgment as a matter of law.

^{. . . [}Plaintiff-appellant] has not suggested any possible evidence it might expect to be adduced at trial which could affect the legal significance we have determined attaches to the proofs of record. Summary judgment was therefore properly entered . . .

<u>Id</u>. (first emphasis in original; citation omitted).

qualifications should have been considered, and the court helow was therefore in no position to find a triable issue of fact on the basis thereof.

Paragraph 2(c) alleges that the individual defendants dealt with Such personally, and "then form[ed] corporate shells to fit the circumstances." As a matter of law, this is not a basis for piercing the corporate veil. No allegation is made that Such was not aware, at the time she actually entered into these transactions, that she was dealing with corporations (and indeed all the documents in the record support the exact opposite conclusion). Indeed, Judge Albrecht noted at oral argument, "I don't know of anything that says it's improper to negotiate as an individual and then form a corporation that's in place at the time that the transaction is consummated." [T29-19]

Such's allegation in ¶2(c) that "the understandings and apparent misleading by them [Paneth and Beinhorn]
was the product of their acts, and not of the corporations" was irrelevant and therefore insufficient to create
a genuine issue of fact for trial (even if that distinc
tion were valid), since there is no allegation in this
action of any "understandings and apparent misleading,"
but merely of breach of contract. There is no count for
fraud or deception.

The following paragraph of the Such Certification, $\P2(d)$, was essentially a classical attempt to impute fraudulent intent by making a conclusory allegation of a present intent not to perform in the future. Again, fraud is not alleged in this case, so these allegations were irrelevant and insufficent to generate a triable issue of fact. Furthermore, it is well established that making such allegations in an affidavit does not suffice to meet a plaintiff's obligation to present some kind of factual evidence of fraudulent intent (that is, of a present intent not to perform) on summary judgment. See, e.g., Ocean Cape Hotel Corp. v. Masefield Corp., 53 N.J. Super. 369, 382 (App. Div. 1960); Rego Industries, Inc. v. American Modern Metals Corp., 91 N.J. Super. 447, 456 (App. Div. 1966).

The allegations in ¶2(e) of the Such Certification were that the individual defendants tried to maximize their personal profit. The Certification did not explain how the supposed acts (they are not specified) would have looked different if these defendants were trying to maximize corporate profit, which is the crux of this motion.

Again, $\P2(f)$ alleged that "accounting functions" were "performed personally" by one of the individual

defendants. Of course some human being must have "personally" performed every function. By alleging that a corporate officer or employee has done a thing, one does not allege that he has done something inappropriate to the corporate form, or in other than a corporate capacity. Paragraph 2(g) of the Such Certification merely restated, conclusorily, the legal issue at bar, that is, whether the corporate veil should be pierced. Conclusory legal allegations do not generate a triable issue of fact.

The allegation was made in ¶2(h) of the Such Certification that "the individual defendants made loans to and from the corporation at will, and heedless of the rights of creditors." However, the Certification did not describe these alleged loans, or how outside creditors (also unnamed) were involved or allegedly harmed. More importantly, the allegation did not describe any improper use of the corporate form, since officers may authorize loans to and from the corporation absent a violation of

It is important to note, especially in the context of a motion aimed at imposing personal liability on corporate principals, that there was no allegation of the corporate defendants' insolvency, or of their inability to make good any judgment against them (for good reason). Thus the claim that "creditors were harmed," absent supporting details, is meaningless.

fiduciary duty. Finally, ¶3 merely restated the issue once again.

Other than the empty allegations in Such's Certification, plaintiffs came forward with no evidence to suggest that the corporate form was misused by the individual defendants. After four years of discovery, nothing in the record suggested that the high standards of veilpiercing, set out in the defendants' papers in support of this cross-motion could be met at trial. The situation was reminiscent of the one before the court in Horton v. American Institute for Mental Studies, 145 N.J. Super. 550 (Law. Div. 1976). There the defendant moved for summary judgment on the premise that the plaintiff's case did not state a claim on which relief could be granted, and after years of discovery no likelihood appeared that the plaintiff would be able to come up with any evidence against the defendant. The plaintiff there urged the court to allow more time for discovery. The court noted,

On the day this motion was argued plaintiff had been afforded 632 days to come up with some kind of case against this defendant. Common sense dictates that if he has not done so by now, he is unlikely to do so in the future. The defendant has rights which this court is bound to respect.

Id. at 554.

Here too, notwithstanding the unsupported conclusory accusations made in the plaintiffs' opposition papers, the plaintiffs have had years to come up with facts, not conclusory legal allegations, on which to rest their case against the individual defendants. The burden was on plaintiffs to show the existence of genuine issues of material fact with respect to personal liability. No such showing was made, and the court below was therefore absolutely correct in entering summary judgment in favor of the individual defendants, leaving the corporate defendants in the case to respond to plaintiffs' various claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny the Plaintiffs' motion for leave to appeal the grant of Defendants' motion for summary judgment dismissing the amended complaint as to Marvin Beinhorn and Eric Paneth.

Respectfully submitted,

LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN A Professional Corporation Attorneys for Defendants

Ву:

Richard D. Wilkinson

Dated: March 4, 1993

CERTIFICATION OF SERVICE

T hereby certify that on this day I caused two copies of the within brief and appendix in opposition to plaintiff's motion for leave to appeal, motion to strike the appendix, and supporting papers to be served on plaintiffs' counsel by regular mail.

Richard D. Wilkinson

Dated: March 4, 1994

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SUPERIOR COURT OF NEW JERSEY LAW DIVISION: WARREN COUNTY DOCKET NO. W-025955-89

LONG BRANCH MANOR, INC. and PURDOM, INC.,

:

Plaintiffs,

Civil Action

-VS-

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229 BATH AVENUE, INC.; 69 MAPLE AVE., INC.; MARVIN BEINHORN and ERIC PANETH,

:

Defendants.

......

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Of Counsel: Keith H. Ansbacher

On the Brief:
Ronald D. Coleman

STATEMENT OF FACTS

Plaintiffs' brief is largely accurate in its chronology of the underlying transactions that are the subject of this lawsuit, but is incorrect or misleading as to a number of key respects which are addressed below.1

The statement that the management of the subject nursing homes was an "extraordinary state of affairs," and that the previous management had been "not cooperative as to financial information," [Moving Brief, unnumbered p.3] is true but fails adequately to convey the situation at these institutions. As defendant Eric Paneth stated at his deposition² on July 15, 1993, the following are exemplary of the problems at one of the homes, Milford Manor ("Milford"), when defendants took it over:

There was a lack of adequate day-to day supplies from bed side-rails to gerichairs, reclining gerichairs, feeding tables to get patients out of their

Defendants' discussion of the assertions in plaintiffs' brief is not meant as a waiver of plaintiffs' requirement to submit an affidavit or authentication of the documents on which those assertions are ostensibly based. As of the date of the filing hereof, no such authentication has been received by defendants, who submit that on this basis alone the plaintiffs' motion is fatally flawed and should be denied. Even more compelling is the fact that the "expert's report" submitted with the moving papers is not authenticated, and should not be considered by the Court.

² Citations herein to the transcript of the deposition of Eric Paneth ("Paneth Dep.") are appended as Exhibit A to the Certification of Counsel ("Coleman Cert.") filed herewith.

rooms. They were very much captives of their own rooms. Wheelchairs were in short supply, both with and without elevated legs. The laundry and linen problems, including the handling of patient clothing, was in disarray, and lacking of elementary supplies needed such as cart covers, properly labeled containers for infection control purposes, and improper handling of same. [Transcript of Deposition of Eric Paneth ("Paneth Dep.") 34:25 - 35:11.]

The aides in the facility were wheeling patients backwards, pulling them on chairs, streaking down the corridors taking them in a backward direction, elementary do's and don'ts for supervision . . . [Id. at 35:25 - 36.4.]

Housekeeping and maintenance supplies were lacking. Nursing supplies, including sterile and non-sterile items were in short supply. . . . We had to put in place a tray system that was lacking, the dietary dish tray system, and a new card system identifying the appropriate diets and to whom those diets should be given so that the patients would receive their correct tray and their correct meal, and the system had to conform with Department of Health rules and regulations. . . . Cleaning materials such as ammonia were not labeled. [1d. at 36:19 - 37:25.]

Furthermore, the Milford home was informed that it was out of compliance with both state and federal regulations, not for any of the above problems, but because of the disastrous condition of its roof. [Paneth Dep. 66:3-16.] Water pouring in through the roof

³ Spelling and punctuation have been corrected without indication when quoting from deposition transcripts.

repeatedly set off fire alarms when it washed into electrical panels, where the dirty puddles also became breeding grounds for flies; water poured into the kitchen as well, interfering with meal service. [Id. at 72:5-18.]

That was just Milford. Comparable problems at Monmouth Convalescent Center ("Monmouth") were as follows:

[O]n the day after closing I walked into the facility and I was told that the kitchen was condemned, literally condemned, and there were locks on the doors and like a "Do Not Enter" sign put in by the local Department of Health, and this had been just a couple days ago, and it was very -- well, a secret that was kept from us, going in. And the facility was provided services, three meals a day from Frank's Deli, and rather very good. It was pasta three times a day. . . Here it is, beef stew, one meal, peppers with sauce, hamburger rolls. [Paneth Dep. 119:16 - 121:2.]

Addressing the reason for the closing of the kitchen, the refrigeration wasn't working properly, the floors had to be upgraded, the lighting was inappropriate. Infection control and sanitation procedures were all lacking. It was a disaster. [1d. at 121:11-16.]

And then you have the same problems with the supplies and policies and procedures and the service programs, housekeeping and maintenance problems. Great, great deal of deferred items we found in the facility with respect to maintenance and other equipment that was needed that was intentionally deferred. Just proper systems weren't in place for operating a facility. . . The safety program and just the general practices were inappropriate, and we again felt the life and safety and

welfare of the patients were jeopardized and being compromised. [<u>Id</u>. at 129:21 - 130:8.]

These and other violations at Monmouth led the State to threaten a ban on admissions to the facility, which was rescinded (due to defendants' quick action) only days before it was due to take effect. [Id. 124:23 - 128:2.] Mr. Paneth testified as well that the plaintiffs' principals were aware of but withheld information about the condemnation of the kitchen. [Id. at 122:18 - 123:3.]

There is no affidavit or evidence in the record that even tends to contradict this testimony, which is only, again, exemplary of the chaos to which the elderly clients of these homes were subjected before it was taken over by defendants.

The substantially identical Management Agreements entered into between the parties show that the parties contemplated the corporate defendants coming into the homes and "turning them around." The Management Agreement for each home provided that:

Owner [plaintiffs] will be responsible for all expenditures incurred by Manager [corporate defendants] pursuant to the preceding paragraphs hereof, and all operating expenses relating to the operation and management of Nursing Home during the term of this Agreement . . . It is intended that, notwithstanding that all payments with respect to the Nursing Home shall be made by Manager for the account of Owner, Owner shall be responsible for

all costs, expenses and charges arising out of the use, occupancy and operation of the Nursing Home.

[Management Agreement, ¶ 9 at pp. 8-9, Exhibits A and B to Second Certification of Marvin Beinhorn submitted herewith ("Beinhorn Cert.")] As defendant Marvin Beinhorn testified⁴ at his March 23, 1993 deposition, plaintiff's principal, Purita Such, "[j]ust made it very clear to us from the very first day and over and over again that she had no money to put into the facility, that our job was just to make sure that we get from point A to point B, do whatever you have to do to get from point A to point B."
[Beinhorn Dep., 80:17-22.]

The above context is crucial in understanding the plaintiffs' statement about the impossibility of "settling up" as to management-period expenses and closing adjustments. [Moving Brief, unnumbered p. 4.] This was impossible because the homes were in such physical and financial disarray. As defendant Beinhorn testified, for example:

[W]hen I first came onto the facility, payables were voluminous. Half of the receivables were just in such bad disarray, it took us months — in some cases, years — putting them together.

⁴ Citations to the transcript of the deposition of Marvin Beinhorn ("Beinhorn Dep.") are appended as Exhibit B to the Coleman Cert.

Records were just inaccurate. Like, for example, if patient Jane Doe, if it said owed 4,000, it was possible she owed \$8,000, but they misapplied somebody else's payment to per payment. Medicaid [billing forms] were not filed. [Beinhorn Dep. 69:13-25.]

* *

Fiscally, like I said to you, the payables were enormous.

There were vendors that were owed a lot of money that were not paid. Many of them were very concerned because they felt that Mrs. Such had a reputation of not paying her bills, and they were vociferously outspoken about it, and they even started to cut off some supplies. [Beinhorn Dep. 71:12-20.]

Thus, it was impossible to "settle up" in time for the closing because of the disarray of the homes' records and the volume of irregularities. [Beinhorn Cert. at ¶3.] Also, it was, even in theory, impossible to make any kind of accounting for the interim management period until some time after that period closed. Therefore, at the time of the respective closings, the parties entered into a Closing Agreement, which provided a medium for making post-closing adjustments.

As plaintiffs state, the defendants provided calculations, the first step in that process, in October, 1988. Plaintiffs correctly state that Mr. Beinhorn testified that they were prepared in accordance with American Institute of Certified Public Accountants standards, which had been specified by the plaintiffs. In

any event, the disarray of the records inherited by defendants, through no fault of their own, made it necessary to calculate the management-period adjustments on a cash-flow basis. The paucity of historical data made the preparation of comprehensive financial statements impossible. But insofar as the designation of items, and the fundamental accounting treatments required under those standards, AICPA methodology was followed. [(First) Certification of Marvin Beinhorn, filed May 21, 1990, at ¶6.]

Plaintiffs correctly note that rental payments due under the Monmouth lease and mortgage payments under the Milford mortgage ceased as a result of the plaintiffs' refusal to pay the substantial amounts claimed in the adjustments. Defendants also claim, incorrectly, that defendants continued to withhold payments after the management-period offsets were purportedly satisfied. In making that allegation, plaintiffs conveniently omit (1) accrued interest; (2) that payments to the defendants were forbidden by order of the Essex County sheriff [Beinhorn Cert. at ¶4], and (3) that, pursuant to the August 13, 1987 Lease between the parties, payments were made to the second mortgagee on the Monmouth home [Beinhorn Dep. 185:7-15].