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| CYPRESS POINT CONDOMINIUM ASSOCIATION<br><br>Plaintiff,<br><br>vs.<br><br>SELECTIVE WAY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF AMERICA, ALVARO FERREIRA, and NUNO FERREIRA<br><br>Defendants. | : SUPERIOR COURT OF NEW JERSEY<br>:<br>: HUDSON COUNTY: LAW DIVISION<br>: DOCKET NO. HUD-L-936-14<br>:<br>: **Civil Action**<br>:<br>: **OPINION** |



**Date of Oral Argument:** March 20, 2015

**Date of Decision:** March 30, 2015

**SARKISIAN, J.S.C.**

**HOWARTH & ASSOCIATES, LLC**
Attorney for Defendant Selective Way Insurance Company i/p/a Selective Way Insurance Company and Selective Insurance Company of America
(Jerald J. Howarth, Esq. appearing)

**Ansell Grimm & Aaron P.C.**
Attorney for Plaintiff Cypress Point Condominium Association, Inc.
(Breanne M. DeRaps, Esq. appearing)

Presently before the Court are (1) Defendant Selective Way Insurance Company's ("Defendant") motion for reconsideration of the Court's December 5, 2014 Order denying Defendant's motion summary judgment pursuant to R. 4:49-2 and R. 4:46-2 and (1) Plaintiff Cypress Condominium Association's ("Plaintiff") cross-motion for summary judgment pursuant to R. 4:46-2 under the docket number L-936-14, filed in March of last year.

This Court, on December 5, 2014, considered similar motions for summary judgment and denied both motions. Although Defendant has secured new counsel who posited additional arguments for the Court to consider, the Court will treat Defendant's

and Plaintiff's present motions as motions for reconsideration pursuant to R. 4:49-2 of this Court's December 5, 2014 Orders denying summary judgment.

The present motions for reconsideration arise from a Complaint filed Plaintiff Cypress Point Condominium Association ("Plaintiff") seeking a declaratory judgment against Defendant compelling it to indemnify MDNA Framing, a former insured from August 27, 2012 for a period of one year until August 27, 2013 and an entity Plaintiff obtained a default judgment against under the docket number L-2260-11, for providing and installing defective windows at Plaintiff's condominium complex. Cypress Point Condominium Association is a Plaintiff in both cases, but Selective Way Insurance's insured, MDNA Framing, was brought into the 2011 case through Cypress Point Condominium Association's Fifth Amended Complaint on or about June 15, 2012. Before that, many other contractors were named in the Complaint after it was amended several times.

The construction project of Plaintiff's condominium complex began in 2002 and was substantially completed in 2004, 8 years before Selective Insurance's coverage began. After the unit owners moved in to Plaintiff's building, they began to experience problems with water infiltration at the interior window jambs and sills.

MDNA Framing was contracted to frame the condominium building and install windows. Ronald Fermano, Plaintiff's liability expert, issued two expert reports, dated June 30, 2012 and February 8, 2013, and one certification, dated February 2, 2014, specifying the water damage that accrued as a result of MDNA Framing's negligence. Ronald Fermano, among other things, found that Plaintiff's building suffered from water damage, because window units were never flashed to the wall system; there was no continuous water management system behind the brick veneer; the installed weeps were not functional; and the windows located in the brick and EIFS veneers lacked proper sealant joint.

In between the time when Plaintiff filed its Fifth Amended Complaint adding MDNA Framing as a direct defendant on June 15, 2012 and when Plaintiff served MDNA Framing with the Complaint on August 27, 2012, MDNA Framing secured an insurance policy with Defendant for the time period from August 27, 2012 until August 27, 2013. Plaintiff's policy, however, was terminated for non-payment of premiums 2 ½ months later on November 9, 2012. The insurance policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

MDNA Framing did not file an Answer to Plaintiff's Fifth Amended Complaint and subsequently went into default. On December 7, 2012, Judge Santiago entered a

default judgment against MDNA Framing with the amount of damages to be determined at a scheduled proof hearing.

On September 27, 2013, Plaintiff's Counsel notified Defendant of its pending proof hearing against MDNA and forwarded the Complaint and Default Judgment against MDNA Framing. Defendant, however, notified Plaintiff on January 7, 2014 that it would not defend or indemnify MDNA Framing because an "occurrence" had not occurred pursuant to MDNA's insurance policy.

A proof hearing was scheduled for February 18, 2014 with Judge Rodriguez. On February 14, 2014, Plaintiff submitted to the Court a certification from Ronald Fermano, an architect, stating (1) MDNA Framing was 44% responsible for Plaintiff's damages, totaling $957,403, and (2) the damage incurred by Plaintiff is continuous in nature from the time of the installation of the façade and will continue until the façade is removed and replaced. Judge Rodriguez issued a final Order, determining (1) Plaintiff sustained damage beginning in 2004 and continuously until the present, and (2) MDNA Framing was 44% responsible for Plaintiff's damages, totaling $957,493, plus $42,687 in pre-judgment interest and post-judgment interest. While no transcript was provided of Judge Rodriguez's proof hearing, clearly, the insurance coverage issue presented to this Court was not before Judge Rodriguez.

On March 4, 2014, Plaintiff filed the within Complaint seeking a Declaratory Judgment that Defendant is obligated to indemnify MDNA under MDNA's insurance policy issued by Defendant.

Relevant to the Defendant's and Plaintiff's motions for reconsideration pursuant to R. 4:49-2 are the Court's December 5, 2014 Orders and bench decision denying Defendant's and Plaintiff's motions for summary judgment pursuant to R. 4:46-2. On December 5, 2014, the Court denied (1) Defendant's motion for summary judgment and (2) Plaintiff's motion for partial summary judgment to allow the parties to engage in further discovery and to depose MDNA's principals to determine if they had notice of Plaintiff's building's defective condition prior MDNA's Insurance Policy of August 27, 2012 went into effect. Defendant's attorney indicated at oral argument on March 20, 2015, that the discovery did not take place because MDNA's principals whereabouts are still unknown.

At the time the Court issued its Orders and bench decision, the Court had serious reservations about applying the "continuing-trigger" theory to a construction defect case. The Court reasoned that cases, including Owens-Illinois v. United Insurance Co. 138 N.J. 437 (1994) and its progeny, applied the "continuous-trigger" theory to determine when an insurance company is obligated indemnify an insured for damage that had accrued during an operative insurance policy period, but had not yet manifested with

damages to property or person, which generally involve toxic environmental tort-cases, not your prototypical action involving a condominium association suing for direct and consequential damages from construction defects.

Now, the Defendant and Plaintiff have re-filed motions for summary judgment and ask the Court to reconsider the Court's December 5, 2014 Orders denying summary judgment pursuant to R. 4:49-2.

In support of summary judgment, Defendant argues (1) Plaintiff is not entitled to coverage under the "continuing-trigger" theory because Plaintiff's injury initially manifested prior to MDNA Framing's insurance policy went into effect (2) Plaintiff lacks standing to sue Defendant for coverage under the Uniform Declaratory Judgment, N.J.S.A. 2A:16-50, et seq., because Plaintiff is not a "party of interest" or a third-party beneficiary under MDNA Framing's insurance policy; (3) Plaintiff is not entitled to coverage pursuant to the "known loss doctrine;" and (4) Plaintiff hasn't suffered consequential damages compensable under MDNA Framing's insurance policy.

In opposition to Defendant's motion for summary judgment and in support of its cross-motion for summary judgment, Plaintiff argues (1) it has standing under the Uniform Declaratory Judgment Act to sue Defendant for coverage because it has a default judgment against MDNA Framing, Defendant's former insured, for property damage resulting from faulty workmanship in a construction project; (2) the insurance policy's definition of "occurrence" provides Plaintiff with coverage for the time period MDNA's insurance policy with Defendant was in effect; and (3) it is entitled to coverage from Defendant under the "continuing-trigger theory" because property damage continuously accrued when MDNA's insurance policy with Defendant was in effect.

For the reasons that follow, the Court **GRANTS** Defendant's motion for reconsideration and summary judgment pursuant to R. 4:49-1 and R. 4:46-2 and **DENIES** Plaintiff's motion for reconsideration and summary judgment pursuant to R. 4:49-1 and R. 4:46-2. Plaintiff's Complaint seeking a Declaratory Judgment is hereby dismissed with prejudice.

## Applicable Law

### I. Motion for Reconsideration Standard

R. 4:49-2 is the New Jersey Court rule that provides the standard for how the Court may revisit a previous Order. R. 4:49-2 states:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or

> order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

R. 4:49-2

Under R. 4:49-2, "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citing D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990) (internal quotations omitted)). Reconsideration should be granted only when the court has based its decision on a "palpably incorrect or irrational basis" or when it is clear that the court failed to consider or appreciate significant evidence. Cummings, 295 N.J. Super. at 384. Moreover, if a party wishes to bring new evidence to the court's attention, which it could not have provided on the first motion, the court should consider the evidence. Cummings v. Bahr, 295 N.J. Super. at 384

However, the time prescription of R. 4:49-2 applies only to final judgments and final orders. See, e.g., Sharp v. Sharp, 336 N.J. Super. 492, 499 (App. Div. 2001). Furthermore, "the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders *at any time* prior to the entry of final judgment." Lombardi v. Masso, 207 N.J. 517, 534 (2011) (affirming a Law Division Judge's *sua spante* decision to revisit his previous Order granting summary judgment to multiple defendants after he solicited testimony at a proof hearing for a defaulted defendant and doubted the accuracy of his previous Order).

## II. **Motion for Summary Judgment Standard**

Summary Judgment is appropriate when "the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2; see also Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 528-29 (1995). "All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1955).

Judicial review of a summary judgment motion requires a discriminating search of the record to determine whether there exists a genuine dispute of material fact. Millison v. El. Du Pont Nemours & Co., 101 N.J. 161, 167 (1985). A genuine dispute of

fact exists when the evidential materials considered "in the light most favorable to the non-moving party ... are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "Mere assertions in the pleadings are not sufficient to defeat a motion for summary judgment." Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J.Super. 369, 383 (App. Div. 1960).

## III. **Analysis**

In support of its motion for summary judgment, Defendant argues an "occurrence" has not occurred pursuant to MDNA Framing's insurance policy because the "occurrence," or the defective installation of framing and windows, manifested before MDNA Framing and Defendant's insurance policy went into effect on August 27, 2012.

Plaintiff, on the other hand, argues (1) the insurance contract's definition of "occurrence" allows for Plaintiff to seek indemnification for damage arising continuously during the policy period, and (2) the continuous-trigger theory allows Plaintiff to recover damages during the policy period despite the initial water damage from the defective installation of windows manifested itself before Selective Insurance's policy took effect.

First, the Court must determine whether the "continuous-trigger" theory applies to the present coverage dispute. Plaintiff's Complaint is seeking coverage under a subcontractor's insurance policy that was issued by Defendant. Plaintiff, therefore, is not a direct party to MDNA Insurance's insurance contract and has initiated a third-party Complaint for insurance coverage. The Appellate Division has held the "manifest trigger" theory applies to first-party insurance actions and the "continuous-trigger" theory applies to third-party insurance actions. See Winding Hills Condominium Ass'n v. North American Specialty Ins. Co., 332 N.J. Super. 85, 92-93 (App. Div. 2000) ("Our adherence to the manifest-trigger rule in first-party insurance cases while applying the continuous-trigger rule in third-party coverage cases comports, moreover, with the choice made by the courts of sister states that have considered this precise question.") Accordingly, because this matter is a third-party insurance action, the Court finds the continuous-trigger theory does apply to the present action.

Second, the Court must determine whether an occurrence occurred under the "continuous-trigger" theory. The "continuous-trigger" theory holds that an occurrence occurs under an insurance policy each time damage accrues over a continuous period of time, from "exposure to manifestation," for toxic torts, environmental contamination, and delay manifestation property damage claims. Owens-Illinois, Inc., supra, 138 N.J. at 450-51. The "conceptual underpinning . . . is that injury occurs during each phase of environmental contamination -- exposure, exposure in residence (defined as further

progression of injury even after exposure has ceased), and manifestation of disease." Owens-Illinois, Inc., supra, 138 N.J. at 451. The public policy behind the "continuous-trigger" theory is to maximize insurance coverage for victims of toxic torts, environmental contamination, and property damage. See Selective Way Ins. Co. v. Ogren, 2010 N.J. Super. Unpub. LEXIS 2979 at *7-8 (App. Div. Dec. 13, 2010) ("The continuous-trigger theory affords 'the greatest ultimate redress, and is well suited to cases such as environmental contamination and asbestos-related disease because of the slow and uncertain progression from exposure to the manifestation of injury.).

Unlike the "exposure" theory, which holds an occurrence occurs at the date of exposure, or the "manifestation" theory, which holds an occurrence occurs at the date of manifestation, the "continuous-trigger" theory states

> when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy.

Owens-Illinois, Inc., 138 N.J. at 478-79; see also Owens-Illinois, Inc., supra, 138 N.J. at 450-51 ("Courts have set the time of occurrence in three ways: at the date of exposure, at the date of manifestation, and over the continuous period from exposure to manifestation")

However, the "continuous-trigger" theory stops providing coverage upon "the initial manifestation of a . . . personal injury." Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 267-68. The Appellate Division referred to this event as "the last pull of the trigger," or the instance when accrued damage is no longer an "occurrence" for coverage purposes. Polarome Int'l, Inc., 404 N.J. Super. at 267. The Appellate Division reasoned "[u]pon initial manifestation, the scientific uncertainties that led to adoption of the continuous-trigger approach no longer exist" and "[it] is only the undetectable injuries at and after exposure and prior to initial manifestation that are progressive and indivisible such that the occurrence of an injury cannot be known." Polarome Int'l, Inc., 404 N.J. Super. at 268. Accordingly, "the time when damage is manifested remains a critical factor in determining if there has been an "occurrence" in a given policy period." Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at *8

In this case, there are undisputed material facts that allow the Court, as a matter of law, to determine Plaintiff's water damage initially manifested itself prior to when MDNA Framing secured an insurance policy with Defendant. It is undisputed that after the condominium project was substantially completed in 2004 and Plaintiff and its condominium unit owners began to experience water infiltration at the interior window jambs and sills after the unit owners moved in to Plaintiff's building. It is further undisputed that Ronald Fermano, Plaintiff's expert, found substantial water damage not

later than June 30, 2012 when he authored his first expert report. The date Plaintiff filed its Fifth Amended Complaint under the 2011 docket number (June 15, 2012, approximately a month prior to MDNA Framing's insurance policy with Defendant going into effect) further underscores that Plaintiff's injury had manifested prior to MDNA securing the insurance policy with Defendant.

The Court's decision to grant summary judgment to Defendant is further supported by the Appellate Division's holding in Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at *7-8 (App. Div. Dec. 13, 2010). In Ogren, supra, Selective Way Insurance filed a Complaint that sought a declaratory judgment that it was not required to indemnify its insured, Arthur J. Ogren, Inc., for water damage that arose from Orgren's defective construction of the Cumberland County Courthouse. Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at *1. It was undisputed in the record that the water damage manifested two years prior to when Ogren's Selective insurance policy went into effect. Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at 1, 3-4. The Law Division, however, denied Selective Insurance's motion for summary judgment, determining that the "continuous-trigger" theory applied and an "occurrence" may have occurred when the insurance policy was in effect. Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at *4-5.

On appeal, the Appellate Division reversed the Law Division and granted summary judgment for Selective Insurance. The Appellate Division did not make a determination on whether the "continuous-trigger" theory applied, but determined "even if the continuous-trigger theory applied . . . , the undisputed fact that the damage was manifest approximately two years before Selective' s initial policy period precludes a determination that Selective is obligated to provide a defense or indemnification under the Policy." Ogren, 2010 N.J. Super. Unpub. LEXIS 2979 at *9. In support of its holding, the Appellate Division cited to Polarome Int'l, Inc, supra, 404 N.J. Super. 241 and held once personal injury is initially manifest, subsequent insurance policies are not triggered by the "continuous-trigger" theory. Ogren, 2010 N.J. Super. Unpub. LEXIS 2979 at *9

The Court finds the facts in Ogren, supra, are directly on point with the present situation. Like the situation Ogren, supra, where the water damage that Ogren caused initially manifested two years prior to Ogren's insurance policy with Selective Insurance going into effect, here, Plaintiff suffered water damage as a result of MDNA Framing's negligence approximately 8 years prior MDNA's insurance policy with Defendant going into effect. Accordingly, the Court finds MDNA Framing's insurance policy with Defendant was not triggered by the "continuous-trigger" theory

The Court is also not persuaded by Plaintiff's arguments in opposition to Defendant's motion for summary judgment and in support of its motion for summary judgment.

First, Plaintiff argues the insurance policy's definition of "occurrence" unambiguously provides that Defendant shall indemnify MDNA Framing for continuously accruing damages throughout the MDNA's insurance policy period. The Court, however, is not persuaded by this argument because an "occurrence" was defined the same way when the Appellate Division granted summary judgment for Selective Insurance in Ogren, supra. See Ogren, supra, 2010 N.J. Super. Unpub. LEXIS 2979 at *2 (defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions.")

Second, Plaintiff cites to Potomac Ins. Co. of Illinos v. Pennsylvania Manufacturers' Assoc. Ins. Co., 215 N.J. 409 (2013) in support of the proposition that an "occurrence" occurred under the "continuous-trigger" theory and MDNA Framing's insurance policy with Defendant. Plaintiff's argument, however, is not persuasive.

In Potomac Ins. Co., supra, OneBeacon Insurance and Selective Way Insurance sued Royal Insurance Co. and Pennsylvania Manufacturer's Association for indemnification of defense expenses that accrued while One Beacon Insurance Company and Selective Way Insurance Company defended Aristone, an insured contractor, in a separate lawsuit seeking damages for Aristone's construction of a defective roof in 1993. Potomac Ins. Co., supra, 215 N.J. at 417. The contractor had multiple insurance policies from different insurance companies in different years:

1. From July 1, 1993 through July 1, 1995, the contractor was insured by Pennsylvania Manufacturer's Association ("PMA").
2. From July 1, 1995 to July 1, 1996, the contractor was insured by Newark Insurance Co ('Newark").
3. From July 1, 1996 to July 1, 1997, the contractor was insured by Royal Insurance Co of America ("Royal").
4. From July 1, 1997 to July 1, 1998, the contractor was insured by OneBeacon
5. From July 1, 1998 to July 1, 20003, the contractor was insured by Selective Way Insurance ("Selective").

In the separate lawsuit against Aristone, Selective and OneBeacon paid Aristone's legal fees. Potomac Ins. Co., supra, 215 N.J. at 415. PMA and Royal, however, disclaimed any obligation to indemnify or defend Aristone, citing language in their respective policies. Potomac Ins. Co., supra, 215 N.J. at 415.

Aristone filed a Complaint against PMA and Royal seeking coverage and a defense and the matter was submitted to arbitration. Potomac Ins. Co., supra, 215 N.J. at 415-16. The Arbitrator found that PMA had a duty to cover Aristone and share in Aristone's litigation costs. Potomac Ins. Co., supra, 215 N.J. at 415-16. After the arbitrator issued his decision, Aristone and PMA settled the matter and PMA agreed to pay Aristone $150,000. Potomac Ins. Co., supra, 215 N.J. at 416. Thereafter, Aristone settled its pending lawsuit for negligent construction "for a total of $700,000" with "$150,000 contributed by PMA on Evesham's behalf, OneBeacon paid $150,000, Selective paid $260,000 and Royal paid $140,000." Potomac Ins. Co., supra, 215 N.J. at 416.

Aristone's settlement, however, left unresolved the issue of defense costs incurred by Selective and OneBeacon in defending Aristone. Potomac Ins. Co., supra, 215 N.J. at 416. OneBeacon Insurance and Selective Way Insurance sued Royal and PMA for indemnification of defense expenses that accrued while One Beacon Insurance Company and Selective Way Insurance Company defended Aristone. Potomac Ins. Co., supra, 215 N.J. at 417. Despite the defective construction of the roof occurring before the policies went into effect, the Supreme Court in Potomac Insurance Co., supra, applied the "continuous-trigger" theory to hold Plaintiffs could allocate defenses to costs and have PMA and Royal pay their share of the insured's defense expenses because water damage accrued during PMA's and Royal's insurance policy periods. Potomac Ins. Co., supra, 215 N.J. at 425-26. To reach its decision, the Court relied on Owens-Illinois v. United Insurance Co. 138 N.J. 437 (1994), which applied the "continuous-trigger" theory to determine an insurer had to indemnify an insured's civil liability for damages that resulted from the insured's customers inhalation of asbestos (despite the customer being exposed to the asbestos prior to the insurance policy's effect). Potomac Ins. Co., supra, 215 N.J. at 425-26.

The Court finds Potomac Ins. Co., supra, is distinguishable from the present situation in two important ways. First, the question of whether an occurrence had occurred in Potomac Ins. Co., supra, was initially decided by an arbitrator and later determined by the parties and their insurance companies when they entered into a settlement agreement. The Court does not know and cannot be asked to speculate what the arbitrator's and parties' reasoning were when they determined that an occurrence had occurred under the applicable insurance policies. Second, the Supreme Court's holding in Potomac Ins. Co., supra, was narrow and it only answered the question of how insurance companies were to allocate insurance carrier's defense costs. Potomac Ins. Co., supra, 215 N.J. at 411 ("In this insurance coverage litigation, arising from a construction dispute, we address the allocation of defense costs incurred by the common insured of several carriers."). Accordingly, the Court finds Potomac Ins. Co., supra, is distinguishable from the present circumstance, doesn't address the

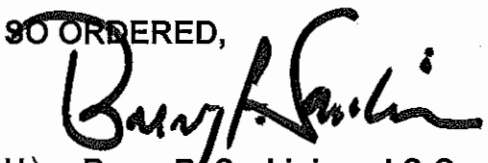
question of whether an occurrence occurred under MDNA's insurance policy with Defendant, and does not bind the Court or abrogate Ogren, supra or Polarome Int'l, Inc, supra.

Because the Court finds that an occurrence has not occurred under MDNA Framing's insurance policy, the Court does not have to address Defendant's arguments that (1) Plaintiff lacks standing, and (2) Plaintiff hasn't suffered consequential damages compensable under MDNA Framing's insurance policy.

**Conclusion**

For the reasons just described, the Court **GRANTS** Defendant's motion for reconsideration and summary judgment pursuant to R. 4:49-1 and R. 4:46-2 and **DENIES** Plaintiff's motion for reconsideration and summary judgment pursuant to R. 4:49-1 and R. 4:46-2. Plaintiff's Complaint seeking a Declaratory Judgment is hereby dismissed with prejudice.

**SO ORDERED,**



**Hon. Barry P. Sarkisian, J.S.C.**