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Plaintiffs-Appellants,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION:

DOCKET NO. A-004546-16

ON APPEAL FROM THE LAW DIVISION, MERCER COUNTY

DOCKET NO. MER-L-2170-16

Sat Below:
Hon. Mary C. Jacobson, A.J.S.C.

CIVIL ACTION

PLAINTIFFS-APPELLANTS' BRIEF IN REPLY TO THE OPPOSITION FILED BY NEW JERSEY EDUCATION ASSOCIATION

SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark Public School District,

Defendants-Respondents,

And

NEW JERSEY EDUCATION ASSOCIATION, a New Jersey nonprofit corporation, on behalf of itself and its members,

Defendant-Intervenor-Respondent,

And

AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AFT NEW JERSEY and THE NEWARK TEACHERS UNION,

Defendants-Intervenors-Respondents.

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PRELIMINARY STATEMENT

In their opening brief, Plaintiffs set forth why the Court should reverse and remand the dismissal of the Complaint: the current and ongoing harm suffered by student Plaintiffs due to operation of the LIFO Statute,[1] including the expensive EWPS pool workaround implemented to avoid RIFs. NJEA's brief does nothing to undercut these arguments.

The LIFO Statute mandates that, in the event of a RIF, a District such as Newark lay off teachers solely based on their seniority and, should an equivalent position open following a RIF, re-hire those teachers solely based on seniority. But when the District modeled a RIF pursuant to the LIFO Statute to address its budget shortfalls and declining enrollment, it found that the teachers laid off would almost exclusively be rated as effective or highly effective. The District, therefore, spends millions of dollars on an EWPS workaround that seeks to keep unsuitable teachers out of the classroom, but recently had to force-place some EWPS teachers back into classrooms due to budget constraints. This money used to pay teachers not to teach or to force-place teachers who might otherwise be laid off back in classrooms damages their students. It also deprives students of critical funds in a resource-limited district, with

[1] Abbreviations are the same as those used in Plaintiffs' Opening Brief.

funds could otherwise be used for academic programs or simply to manage budget shortfalls.

By virtue of this workaround, Plaintiffs are deprived of their constitutional right to a thorough and efficient education, which, in a District like Newark, is determined by comparison to the education provided in more affluent districts where there may be no ineffective teachers.

Plaintiffs have linked this constitutional deprivation to the current harm they suffer through Newark's workaround of the LIFO Statute; they possess the requisite standing, their claims are ripe, and they have adequately pled those claims. Their Complaint accordingly should be reinstated.

ARGUMENT

I. PLAINTIFFS HAVE STANDING AND THE COMPLAINT IS RIPE

A. Plaintiffs' Complaint Sets Forth Their Standing

"[I]n New Jersey, unlike the federal courts, [courts] traditionally have taken a liberal approach to standing because [they] are not circumscribed by constitutional language." In re Camden Cty., 170 N.J. 439, 451 (2002). Plaintiffs possess the "sufficient stake," "real adverseness," and "substantial likelihood of some harm visited upon [them] in the event of an unfavorable decision" required for standing under New Jersey law. See, e.g., Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009).

In their opening brief, Plaintiffs detailed the harms they face due to operation of the LIFO Statute, which arise from the workarounds the District has instituted to avoid the damaging impact of a RIF and the increasing likelihood that a RIF will be necessary. See Pb12-19.

For example, as laid out in the Complaint, as Newark is faced with declining enrollment numbers, its funding has been reduced and will continue to be reduced. Pa10 (Compl. ¶ 42); see also Pa67 (Dist. Answer ¶ 42 (admitting Newark's funding was reduced due to declining enrollment numbers)). Studies have repeatedly shown the impact of teacher effectiveness not only on scholastic achievement, but also on lifetime earning potential. Pa12 (Compl. ¶¶ 51-52); Pa68 (Dist. Answer ¶ 52 (admitting in part and noting "significant impact of low performing teachers on students of color in low-income communities")). Yet, under the LIFO Statute, any RIF that Newark would institute to address decreased funding and declining enrollment could result in the loss of 300 effective teachers from the District, while almost every ineffective teacher in the District would remain. Pa16 (Compl. ¶ 74); Pa70 (Dist. Answer ¶ 74). In order to avoid this great harm, Newark has implemented policies, namely the EWPS pool, to keep ineffective teachers on payroll, but out of classrooms. Pa17 (Compl. ¶ 80); see also Pa59-60, 61-67 (Dist. Answer ¶¶ 26, 29-41).

These policies, however, continue to inflict their own harm on Newark's students, including Plaintiffs, as they force the District to cut other important educational programs and resources in order to pay the salaries of ineffective teachers. Pa10, 19 (Compl. ¶¶ 43, 94). As spending on the EWPS pool spiraled out of control, Newark placed ineffective teachers back into the classroom, given budget shortfalls and the number of teachers included in the pool. As Newark admits, "forced placement ha[s] a detrimental impact on certain students" within the District. Pa71 (Dist. Answer ¶ 86).

These harms are not speculative, but are born out by the admissions of the District above and Newark's own modeling of a RIF's impact in the classroom. The District, prior to the Complaint, was so concerned about the harm of a RIF that it sought a waiver from the State so that it could consider teacher quality, not solely seniority, in a RIF. In the model RIF pursuant to the LIFO Statute in that request, 75% of the laid-off teachers would be rated effective or highly effective, and only 4% would be rated ineffective. See Pa16 (Compl. ¶ 74); Pa70 (Dist. Answer ¶ 74); Pa94-95 (Cerf Cert. ¶ 18). That request went unanswered,[2] and the District must continue either

[2] The State, which has previously sought judicial intervention to waive the applicability of the LIFO Statute, does not intend to participate in the current appeal. See Letter from Deputy Attorney General Donna Arons to Joseph Orlando, Clerk, Appellate Division (Sept. 25, 2017).

to engage in a harmful workaround that diverts millions of dollars per year to protect the employment of ineffective teachers and avoid laying off effective teachers or, eventually, engage in a RIF that will lay off effective teachers to the detriment of their students. This is a fact pattern that mandates a determination that Plaintiffs possess the requisite standing to bring their action.

In light of these allegations, it is not necessary that Plaintiffs articulate the exact programs eliminated from the budget to maintain the EWPS pool and avoid a RIF, or to identify whether they are currently in a classroom with a teacher rated as ineffective or highly ineffective.[3] It is harm enough, for purposes of standing, that Plaintiffs are students in a District that has admitted it takes certain actions, characterized as harmful to students, in order to avoid greater harm. This harm is current, concrete, and sufficient to convey standing.

Moreover, although a RIF appears to be imminent as Newark's enrollment and funding drops, it is not necessary for standing that a RIF be announced or implemented. It would simply be an

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[3] In fact, Plaintiffs do not have access to information regarding an individual teacher's rating, as this information is shielded from public disclosure. Given this, it is impossible for children to allege that they are students in a classroom where the teacher is rated ineffective or highly ineffective. To hold that a plaintiff must do so in order to challenge the LIFO Statute would essentially foreclose any action.

additional harm imposed upon the student Plaintiffs if a RIF is announced, for example, for the 2018-19 school year.

In an effort to downplay the relevance of the EWPS pool to Plaintiffs' argument, NJEA states that "any alleged harm from the existence of the EWPS [pool] is caused by Newark's own independent decisions, not by the actual existence of the unimplemented RIF statutes. The [D]istrict cannot reasonably claim under these circumstances that the self-generated EWPS pool can serve as the basis for the particularized harm required for standing to challenge the RIF statutes. The fact that Newark decided to spend money on maintaining the pool rather than to spend money on pursuing tenure charges does not result from the RIF statutes or confer standing to challenge those statutes." NJEAb22. This argument misses the point.

First, the District is not bringing this action - Plaintiffs, students in the District, are. So the harm is not harm asserted by the District, but by the students who are in the classrooms. They do not have a voice into how the District spends its money or seeks to avoid RIFs.

Second, the constitutional claim does not belong to the District, but to the Plaintiffs pursuant to the education and equal protection clauses of the State Constitution. Newark's efforts to avoid a RIF pursuant to the LIFO Statute arise from the District's intent to lessen, but not eliminate, the harm to

children that results from the mandate that, when engaging in a RIF, the District must only consider seniority. In fact, the District has specifically admitted that there is current and ongoing harm to students in the District, including Plaintiffs, by virtue of its workaround and the existence of the LIFO Statute. See Pa59-60, 61-67 (Dist. Answer at ¶¶ 26 29-41).

Third, it is nonsensical that NJEA argues that the District's action in creating the EWPS pool was not somehow guided by operation of the LIFO Statute. See NJEAb21-22. Newark has acknowledged that it needs relief from the LIFO Statute in order to engage in a RIF because, if it does not, it will terminate primarily effective teachers. See, e.g., Pa54-55, 70 (Dist. Answer at ¶¶ 8, 74); Pa94-95 (Cerf Cert. at ¶¶ 18, 20).[4] The EWPS pool and the forced placing of teachers from that pool back into the classroom is a direct, admitted result of the District's efforts to try to keep quality teachers in the

[4] "[NPS] cannot avoid teacher layoffs any longer. . . . Current, quality-blind layoff = 75% of teachers laid off are effective or highly effective. . . . EWPS teachers are 6 times more likely to receive an Ineffective rating that teachers with full-time teaching positions. Current, quality-blind layoff = only 11% of the EWPS teachers are laid-off. Proposed, performance-based layoff = 5 times as may (53%) EWPS teachers are laid-off and permanently exit the EWPS list. . . . The equivalency is the only way NPS can address its fiscal issues with sacrificing teacher quality. Layoffs based on teacher quality lessen the impact of teacher reductions and allow us to maintain our fierce commitment to quality instruction." Newark Public School District, Overview of Equivalency Request: Protecting Our Teachers During a Fiscal Crisis (2014) ("Equivalency Request"), http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

classroom, which efforts would be significantly impacted by a RIF. The workaround devised by Newark, driven by operation of the LIFO Statute, harms Plaintiffs by keeping ineffective teachers in the schools and diverting scarce resources to the salaries of ineffective teachers in the EWPS pool when a RIF might be necessary.

Fourth, NJEA insinuates that Newark is "refusing or delaying tenure proceedings under TEACHNJ" in order to "create a constitutional issue out of whole cloth." NJEAb22; see also NJEAb22n.15. However, the District's ability to bring individual tenure charges is not a solution to the problems posed by operation of the LIFO Statute. Individual tenure charges against a single teacher do not address the issue of what Newark can and cannot consider in a RIF or the expensive measures Newark takes to avoid the devastating impact of a RIF on students like Plaintiffs.

For example, faced with a budget shortfall and declining enrollment, a typical district would engage in, or at least consider engaging in, a RIF to manage its budget. Individual tenure charges, which require additional expense to prosecute and result in months-long proceedings, would not be a part of this conversation. Tenure charges, while useful in seeking to remove one ineffective teacher, are not a replacement for a RIF

when faced with declining enrollment and budget shortfalls. If they were, then the LIFO Statute would not exist at all.

However, Newark has had to take the option of a RIF essentially off the table when addressing budget issues in order to keep effective teachers in the classroom.[5] Moreover, Newark has stated that, while it does engage in individual tenure charges pursuant to TEACHNJ, it "is a useful but inadequate tool to address declining enrollment and the budget crisis." Equivalency Request at 2.[6] "Removing teachers through a tenure charge is a time-consuming and cost-intensive process that takes at least two years," and is followed by legal proceedings that can take another year or more and cost the District more than $50,000 per terminated teacher. Pa96-97 (Cerf. Cert. ¶ 23); see also Pa72 (Dist. Answer ¶ 93 (while Newark may actively pursue tenure charges, "that process does not address the impact of quality-blind layoffs on students through the retention of low-performing teachers")). Given the multiple years associated

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[5] Contrary to NJEA's assertion, see NJEAb21, the performance of students in the District generally is directly related to Newark's efforts to craft workarounds to the LIFO Statute. Students in the District have low test scores, teachers are the most important in-classroom component of education, and the District is undertaking efforts to ensure that it can retain effective and highly effective teachers when a RIF pursuant to the LIFO Statute would otherwise dictate that they be laid off.

[6] Confusingly, NJEA refers to a brief filed by Newark on appeal in relation to this issue. See NJEAb22 ("Newark does not claim in its brief on appeal that the tenure charges currently filed by Newark under TEACHNJ have been costly and time-consuming."). Plaintiffs are unaware of any brief filed by the District in connection with this appeal.

with tenure charges, it is impossible for a district to utilize tenure charges to balance its budget each year given that the budget process typically takes a few months, not years. Consequently, NJEA's argument that tenure charges are the only way Newark can avoid a RIF pursuant to the LIFO Statute is a red herring.

Finally, NJEA, like the trial court, cites to In re Ass'n of Trial Lawyers of America, 228 N.J. Super. 180 (App. Div. 1988). The case is inapposite. Plaintiffs in Ass'n of Trial Lawyers were trial attorneys seeking to contest a newly enacted products liability law as unconstitutional. See id. at 187. The Appellate Division's analysis hinged on "the inescapable fact that the only possible loss to attorneys is a speculative decrease in contingent fees resulting from an amorphous fear and presently unsubstantiated fear that the number and value of new products liability claims may diminish[]" and "may have the effect of making an attorney's professional life more difficult and less attractive." Id. In reaching this conclusion, the court recognized the limited nature of its holding and that the "rights of attorneys to freely practice law [were not] so inextricably bound up and entwined with the rights of their clients as to accord them standing." Id. Put simply, the attorneys were bystanders who would, at most, suffer an indirect economic impact in the future.

In contrast, Plaintiffs are not economic bystanders in their education and their harm is not speculative. Plaintiffs obviously have suffered, and continue to suffer, concrete, ongoing injury and have a stake in the outcome of the case sufficient to have standing.

B. Plaintiffs' Claims Are Ripe

Plaintiffs' claims are ripe because their causes of action are fit for judicial review and there is real hardship to Plaintiffs if judicial review is withheld at this time. See Hogan v. Donovan, 2012 WL 1328279, at *10 (Law Div. Apr. 17, 2012) (Pa 115). As detailed supra and in the Opening Brief, there is current and ongoing harm to Plaintiffs created by the EWPS pool, which is a direct result of the existence of the LIFO Statute.

Nevertheless, NJEA asserts that Plaintiffs' claim will never be ripe unless (i) "a RIF was in effect or planned" or (ii) facts exist relating to the EWPS pool "showing that any of the [P]laintiffs' children have been deprived of an educational opportunity because of the budget cuts or are being taught by an ineffective teacher force-placed in the child's classroom." NJEAb27-28. NJEA's position is nonsensical because it completely fails to address the ongoing diversion of resources within the District to prevent effective teachers from being laid off by preserving ineffective teachers, when faced with a

question of how to manage a deficit and declining enrollment. As set forth supra, individual tenure charges, even if brought by the dozens, cannot and do not adequately remedy the ongoing harm to Plaintiffs from the EWPS pool, and the associated force-placement of teachers back into the classroom.

As to NJEA's asserted two prongs for ripeness, neither are necessary for Plaintiffs' claims to be ripe. First, by focusing on the necessity of a RIF, NJEA, like the trial court, ignores the present harm suffered by Plaintiffs due to the existence of the EWPS pool. Plaintiffs cannot afford to wait for the announcement of a RIF, or for the District to continue to engage in unsustainable workarounds to avoid a RIF, in order to address the current harm they suffer. Dismissing their Complaint essentially forecloses their ability to rectify the deprivation of their constitutional right to a thorough and efficient education. As one member of the Abbott XXI Court acknowledged, "[c]hildren go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences . . . ." Abbott v. Burke, 206 N.J. 332, 479 (2011) ("Abbott XXI") (Albin, J. concurring).

Efforts to downplay the harm suffered by Plaintiffs should not be countenanced. Here, the Complaint clearly details that

the District pays ineffective teachers to keep those teachers out of the classroom or force-places them back into the classroom when provided with no other avenue in order to protect effective, but more junior, teachers. The District does this when the District would otherwise engage in a RIF due to declining enrollment and funding. This catch-22 - preserve the ineffective to save the effective or lay off the effective in order to balance a budget - harms students, including Plaintiffs, in the classroom. Those students have a constitutional right to a thorough and efficient education, which must be protected.

Second, NJEA is simply incorrect as to what needs to be pled regarding the impact of the EWPS pool, including because, to a certain extent, no plaintiff ever could. As set forth supra, there are current, ongoing harms suffered by Plaintiffs due to the existence of the EWPS pool in addition to the presence of a teacher in a specific classroom.

However, assuming arguendo that the particular teacher in a classroom in a specific school year was relevant (understanding that Plaintiffs will be assigned to new teachers each year the action moves forward), NJEA seeks an insurmountable level of specificity not required under the pleading standards. Because of the confidential nature of individual teacher evaluations, it is impossible for any student plaintiff to plead with the level

of specificity NJEA, and the trial court, asserts they must. These students cannot state that the teacher in the front of the classroom is rated ineffective or highly ineffective pursuant to New Jersey's statutory scheme because they do not have access to that information. Accordingly, it is impossible for a student plaintiff to plead (i) that there is an ineffective teacher in the classroom and (ii) that teacher is only in the classroom because of the LIFO Statute (or the EWPS workaround). Such a requirement would essentially bar any remedy to any student in the District impacted by operation of the LIFO Statute.

Consequently, the trial court's sole reliance on Independent Realty Co. v. Twp. Of N. Bergen, 376 N.J. Super. 295 (App. Div. 2005), as the basis for dismissal of the Complaint is improper. At issue in that case was a parcel of undeveloped land that lay fallow for ten years, during which time the township amended the applicable zoning ordinance. As opposed to exhausting her administrative remedies or seeking clarity from the town about prior approvals, the plaintiff sought a declaratory judgment, which the court rejected due to her failure to undertake any steps prior to seeking judicial intervention. There was no constitutional claim in that case.

Here, Plaintiffs have no administrative remedy. Children cannot institute a RIF, request input into a RIF, seek a waiver of the LIFO Statute from the State, bring tenure charges, or

dictate how funds are spent. Children do not have access to the quality ratings of their teachers and have limited, if any, ability to influence their assignment to specific classrooms. Under the State's statutory schemes, any administrative remedies are left to the teachers or the District.

Given this, Hogan, which addresses a situation where withholding judicial review would cause hardship to the affected party, is informative. See 2012 WL 1328279, at *10-11. Unlike the plaintiff in Independent Realty who did nothing with her land for ten years, Plaintiffs have no alternative remedy. They cannot afford to sit and wait for the announcement of a RIF, or for the District to continue to engage in unsustainable workarounds to avoid a RIF, in order to address the current harm they suffer. Dismissing their Complaint essentially stops their ability to rectify the deprivation of their constitutional right to a thorough and efficient education.

Moreover, dismissing the Complaint now forecloses any remedy until (i) an actual RIF is announced and, pursuant to the trial court's opinion and the logical conclusion of NJEA's argument, (ii) the Plaintiffs can plead that they were immediately and directly harmed due to the RIF because they are in a classroom where an effective teacher, laid off as a result of the RIF, was replaced by an ineffective, more senior teacher. This hurdle is almost impossible to overcome, and would

essentially foreclose any remedy to any child Plaintiff in the District. It also ignores the current harm faced by Plaintiffs due to the EWPS pool, which is essentially what NJEA is asking the Court to do here.

For these reasons, the Complaint is ripe and should be reinstated.

II. PLAINTIFFS' HARM IS JUDICIALLY REMEDIABLE

Despite arguing that the Court should not consider anything other than the justiciability questions on appeal, NJEA includes a footnote where it "join[s] in AFT's contention that the trial court properly expressed concern over the role of the court in the political process and the proper scope of relief in this case. . . . Because this Court review[s] judgements, not decisions, it may affirm on these grounds and for different reasons than those articulated below." NJEAb17n.13 (citing to AFTb50-57). As set forth more fully in Plaintiffs' response to AFT's brief, see PAFTrb15-20, there is no need to defer to the Legislature on this issue.

When a specific piece of legislation is challenged as unconstitutional or repugnant to the State Constitution, it is up to the judicial branch to assess that law's constitutionality. See, e.g., King v. South Jersey Nat. Bank, 66 N.J. 161, 177 (1974) ("The power of the Court to enforce rights recognized by the New Jersey Constitution, even in the

complete absence of implementing legislation, is clear."). The Court can consider this claim and enjoin operation of the LIFO Statute without proscribing a specific remedy.

Indeed, should Plaintiffs' allegations be proven, the LIFO Statute cannot be deemed constitutional and should be struck down, because "[n]o statute. . . can authorize an unconstitutional practice." Town of Secaucus v. Hudson Cty. Bd. of Taxation, 133 N.J. 482, 493 (1993) ("Wherever a statute and the constitution come into conflict, the statute must give way."); see also Twp. of W. Milford v. Van Decker, 120 N.J. 354, 357 (1990) ("[I]t is axiomatic that no statute can sanction an unconstitutional practice," and refusing to consider issues attempting to permit unconstitutional practice).

III. THE TRIAL COURT IMPROPERLY CONSIDERED DISCOVERY BURDENS ON A MOTION TO DISMISS

Plaintiffs do not "misunderstand" the trial court's comment, NJEAb35-36, that, in denying the motion to dismiss, "the parties [would start] down the road of lengthy discovery, burdensome on a state entity and on" Newark. 1T 77:4-77:8; see also 1T 73:17-73:25 ("[T]he fundamental absence of the link, you know, certainly that causation link in the context of a constitutional claim that would, you know, require discovery going on for months if not years at the expense of State and [Newark] . . . ." (emphasis added)). The issue of discovery was

never raised by Plaintiffs in the context of responding to the motion to dismiss. Plaintiffs argued that the Complaint was properly pled and, on its face, set forth actionable claims. Moreover, an assumption that there would be a lengthy and burdensome discovery process puts the cart before the horse. The District has made numerous statements about the impact of both the LIFO Statute and the EWPS pool on both the District and the students - clearly, the District has previously compiled much of the relevant data regarding the impact of the statute on children in the District.

More importantly, neither the State nor the District raised any concerns about the burdens of discovery before the trial court in connection with the motion to dismiss or on this appeal.

IV. THE DE NOVO STANDARD OF REVIEW APPLIES

NJEA agrees with Plaintiffs that the Appellate Division reviews a trial court's decision to dismiss a complaint de novo. See NJEAb17n.12; Pb11. Yet NJEA asserts that the Appellate Division should consider only "the findings that th[e] plaintiffs have no standing and that the issues are not ripe for review," without consideration of the other issues raised by Plaintiffs in their opening brief – i.e., the ability of the court to order a remedy for Plaintiffs' harm, the improper consideration of discovery burdens by the trial judge, and

Plaintiffs' satisfaction of the pleading requirements. See NJEAb16-17. NJEA's argument is not consistent with a de novo review, and the cases cited by NJEA do not support the principle that the other arguments raised by Plaintiffs on appeal should be ignored.[7] The cases cited by NJEA simply stand for the non-controversial principle that a trial court order is appealable.

It is uncontested that the trial court entered an order granting NJEA's and AFT's motions to dismiss the Complaint. Therefore, all grounds associated with such motions to dismiss can be considered de novo on appeal, and NJEA's efforts to limit the issues presented on appeal should be ignored.

V. PLAINTIFFS MET THEIR PLEADING REQUIREMENTS

NJEA does not address Plaintiffs' arguments that they have met their obligation to state a cause of action. Therefore, Plaintiffs rely upon the arguments set forth in their Opening Brief.

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[7] See NJEAb34 (citing to Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (declaring moot certain constitutional claims brought against city code after determining superseding statute applied); Duddy v. Gov't Emp. Ins. Co., 421 N.J. Super. 214, 221 (App. Div. 2011) (declining to address question of whether plaintiff was entitled to attorneys' fees after reversing and remanding trial court's grant of summary judgment in favor of defendant); Heffner v. Jacobson, 100 N.J. 550, 553 (1985) (noting there was nothing to review on appeal because there was no order entered denying motion to vacate); McFadden v. McFadden, 49 N.J. Super. 356, 359 (App. Div. 1958) ("Even though [issue] was not specifically raised by the pleadings or the pretrial order, where, as here, the matter was tried without the objection of the parties on that issue, it shall be treated in all respects as if it had been raised in the pleadings and pretrial order[]" and giving effect to statement by trial judge that action was one for specific performance)).

CONCLUSION

For the reasons set forth in Plaintiff-Appellants' Opening Brief and above, the Court should reverse the trial court's Order.

Dated: December 11, 2017

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