NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1596

ANNA CRANMER, Individually;
BRIAN CRANMER, Individually;
TINY TOTS DAYCARE PRESCHOOL, LLC
d/b/a TINY TOTS DAY CARE PRESCHOOL

Appellants

v.

HARLEYSVILLE INSURANCE COMPANY;
PHILADELPHIA INDEMNITY
INSURANCE COMPANY

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:14-cv-03206)
District Judge: Honorable Esther Salas

Submitted under Third Circuit L.A.R. 34.1(a)
October 11, 2017

Before: HARDIMAN, SHWARTZ, and
ROTH, *Circuit Judges*

(Filed: November 17, 2017)

OPINION*

SHWARTZ, *Circuit Judge*

Anna Cranmer, Brian Cranmer, and Tiny Tots Daycare Preschool, LLC (collectively "Plaintiffs") appeal the District Court's orders (1) granting summary judgment to Defendant Philadelphia Indemnity Insurance Company ("PIIC") based on the affirmative defense of accord and satisfaction and (2) denying reconsideration of that order. Because undisputed material facts support the accord and satisfaction defense and because Plaintiffs did not satisfy the reconsideration standard, we will affirm.

I

The Cranmers own Tiny Tots Daycare Preschool, LLC ("Tiny Tots"). Tiny Tots was covered by an insurance policy from PIIC that covered business-related personal property and business interruption losses. Tiny Tots suffered damage from Superstorm Sandy and filed claims totaling $956,455.09 with PIIC. PIIC's certified public accountants valued Plaintiffs' losses at $28,542.84. After an unsuccessful attempt to resolve the dispute in New Jersey's Sandy mediation program, Plaintiffs retained counsel at The Rain Law Firm

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

("RLF") to represent Tiny Tots, and RLF notified PIIC of that representation by letter dated July 18, 2013.

After a conversation between PIIC's counsel and RLF, PIIC's counsel sent RLF a letter dated August 15, 2013: (1) acknowledging receipt of the July 18, 2013 correspondence, (2) noting that "multiple calls" to RLF "have gone unanswered," and (3) stating, "[a]s I explained to your client, Anna Cranmer, at the time of mediation, . . . upon a review and expert evaluation of hundreds of pages of documents produced by Tiny Tots in support of its claim for recovery," PIIC determined that Tiny Tots "is entitled to $28,542.84 reimbursement under the coverage provided to it by [PIIC]." App. 341. The letter concluded as follows:

> Accordingly, should I not hear from you within ten (10) days of your receipt of this correspondence, I will instruct [PIIC] to tender settlement in an amount of $28,542.84 payable to Tiny Tots Daycare Preschool, LLC and [RLF], its attorney. We will deem the acceptance of this payment as full and final settlement of this claim as well as a release by your client of any further demand for recovery as against Philadelphia Insurance Companies.

App. 341. The letter was delivered to RLF's office, but RLF did not respond to the letter. On September 23, 2013, PIIC's counsel sent RLF a check for $28,542.84, with an accompanying letter that stated:

> Pursuant to my correspondence to you dated August 15, 2013, enclosed please find [PIIC's]

> check, number 1111429396, made payable to Tiny Tots Day Care Preschool, LLC and [RLF] in the amount of $28,542.84 which is being tendered to you in good faith for the purposes of settlement. Upon your receipt of the enclosed, please contact my office so that we may discuss this matter and the positions of the parties moving forward.

App. 345-46. The check was marked "FINAL," and the comment line stated "Business Income, windstorm damage, loss of income from the date of loss through the period of restoration." App. 346. RLF did not respond to this letter. However, the check was deposited on October 4, 2013 and was endorsed by "Tiny Tots Daycare Preschool" and "Gregg J. Anderson" on behalf of RLF. App. 350. On December 9, 2013, PIIC's counsel sent RLF a request for a signed release of claims against PIIC, but he received no response.

Plaintiffs filed a Complaint asserting breach of contract and breach of the implied covenant of good faith and fair dealing against PIIC. The District Court granted PIIC's motion for summary judgment on both claims.

Plaintiffs moved for reconsideration and attached materials not previously included in their opposition to PIIC's motion for summary judgment, including certifications from Anna Cranmer and RLF attorney Matthew Kotzen stating that Cranmer never accepted or saw the $28,542.84 check and that RLF accepted that check only for partial payment of the claim. Based on these certifications, the District Court ordered the parties to submit supplemental briefing on the issue of RLF's authority and its impact on accord and satisfaction under the reconsideration standard. In response, Plaintiffs submitted additional certifications from Cranmer and Kotzen, which stated that (1) Cranmer "agreed to allow [RLF] to deposit the [$28,542.84] check" based on the understanding that it was a partial payment, and (2) RLF lacked authority to settle Plaintiffs' claim for $28,542.84 and did not have authority to endorse checks on behalf of Tiny Tots. The District Court denied the reconsideration motion, finding that Plaintiffs failed to satisfy the reconsideration standard. Plaintiffs appeal.

II[1]

Plaintiffs argue that the District Court erroneously entered orders granting summary judgment to PIIC on Plaintiffs' breach of contract and implied covenant of good faith and fair dealing claims and denying reconsideration of that judgment. We will address each order in turn.

A

"We exercise plenary review over a district court's grant of summary judgment." *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 218 (3d Cir. 2015). We apply the same standard as the District Court, viewing facts and

[1] The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

making all reasonable inferences in the non-movant's favor. *Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 266-67 (3d Cir. 2005). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute "is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party, and a factual dispute is material only if it might affect the outcome of the suit under governing law." *Kaucher v. County of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To survive a summary judgment motion, the non-movant "must point to specific factual evidence showing that there is a genuine dispute on a material issue requiring resolution at trial." *Chavarriaga*, 806 F.3d at 218 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)); *see also* Fed. R. Civ. P. 56(c) (requiring a party who asserts that a fact is genuinely disputed to "cit[e] to particular parts of materials in the record" to support the assertion). We "confine[] our analysis to the record before the district court on the motion[] for summary judgment." *O'Keefe v. Sprout-Bauer, Inc.*, 970 F.2d 1244, 1259 (3d Cir. 1992). Thus, based upon the record before the District Court on PIIC's motion for summary judgment, *O'Keefe*, 870 F.2d at 1259, we will assess whether PIIC demonstrated an absence of a genuinely disputed material fact on each element of its affirmative defense. *In re Bressman*, 327 F.3d 229, 237-38 (3d Cir. 2003) (collecting cases).

Under New Jersey law, the affirmative defense of accord and satisfaction requires the defendant to prove: "(a) a bona fide dispute as to the amount owed; (b) a clear manifestation of intent by the debtor to the creditor that payment is in satisfaction of the disputed amount; and (c) acceptance of satisfaction by the creditor."[2] *Nevets C.M., Inc. v. Nissho Iwai Am. Corp.*, 726 F. Supp. 525, 536 (D.N.J. 1989), *aff'd*, 899 F.2d 1218 (3d Cir. 1990); *see also Ameritemps, Inc. v. Hainesport Indus. R.R., LLC*, No. DC-010783-10, 2014 WL 684583, at *4 (N.J. Super. Ct. App. Div. Feb. 24, 2014).

The undisputed record shows that the first accord and satisfaction requirement of a bona fide dispute was satisfied because PIIC and Plaintiffs disagreed about the amount to which Plaintiffs were entitled under the insurance policy. Plaintiffs submitted Sandy-related claims to PIIC for $956,455.09 while PIIC valued Plaintiffs' loss at $28,542.84. Thus, the record shows that the parties disputed the amount owed.

There is also no genuine dispute that PIIC intended its $28,542.84 payment to satisfy all of Plaintiffs' Sandy-related claims against PIIC, thus satisfying the second element of accord and satisfaction. The August 15, 2013 letter states that PIIC will

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[2] Neither party disputes the applicability of New Jersey common law. Thus, we need not address accord and satisfaction under N.J. Stat. Ann. § 12A:3-311, which contains the same elements as New Jersey common law but adds the element of good faith on the part of the debtor. Even assuming § 12A:3-311 applies, however, the record contains no genuine dispute regarding PIIC's good faith.

"tender settlement in an amount of $28,542.84 payable to Tiny Tots Daycare Preschool, LLC and [RLF], its attorney" and "deem the acceptance of this payment as full and final settlement of this claim as well as a release by [Plaintiffs] of any further demand for recovery as against [PIIC]." App. 341. One month later, PIIC's counsel sent RLF a check for $28,542.84, with an accompanying letter that incorporated by reference PIIC's August 15, 2013 letter and stated that the $28,542.84 payment was tendered "in good faith for the purposes of settlement." App. 345-46. In addition, the check contained a claim number matching the Sandy claim that Plaintiffs submitted to PIIC, was marked "FINAL" in the payment line, and the comment line stated "Business Income, windstorm damage, loss of income from the date of loss through the period of restoration." App. 317 (showing claim number), 346 (check image). The combination of the letters and the check demonstrate that PIIC intended to make a payment in full satisfaction of the claim, and Plaintiffs have identified no evidence to the contrary.[3] *See Bayside*

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[3] Plaintiffs argue that the "FINAL" notation on the check does not reflect an intent to fully settle the dispute because "FINAL" is stamped on checks as a matter of course or inconsistently, but the record does not support this conclusion. In their opposition to summary judgment, Plaintiffs attached copies of other checks from PIIC relating to other losses, and each is accompanied by commentary reflecting that the designation of final or partial is a deliberate act. For example, one check was marked "PARTIAL" in the payment line, with the comment line of the check stating "ACV Parital [sic] Payment," and the check was accompanied by an email stating that the payment was "a partial settlement check." App. 360-61. Other checks were sometimes marked "FINAL" or "PARTIAL" in the payment line, with language in the

Chrysler Plymouth Jeep Eagle, Inc. v. Ma, No. DC-9699-02, 2006 WL 1449783, at *7-8 (N.J. Super. Ct. App. Div. May 26, 2006) (stating that "[t]he requisite manifestation of intent may be expressed in the check itself, or in the letter or account, or receipt accompanying the remittance" and finding such intent where a check referenced the specific claim being paid and that the payment was to fully settle the debt); *Zeller v. Markson Rosenthal & Co.*, 691 A.2d 414, 416 (N.J. Super. Ct. App. Div. 1997) (requiring that the "party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected"). Thus, PIIC established the second requirement of accord and satisfaction.

PIIC also satisfied the third element of accord and satisfaction – acceptance – because the summary judgment record reflected that the check was endorsed by both Tiny Tots and RLF and was deposited. *See Ameritemps*, 2014 WL 684583, at *4 ("In New Jersey, the 'rule has been that when a check is tendered as payment for an unliquidated claim on the condition that it be accepted in full payment, the creditor is deemed to have accepted this condition by depositing the check for collection notwithstanding any

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comment lines of those checks indicating whether the payments were partial or final. These checks thus show that PIIC does not haphazardly designate checks "FINAL." Nevertheless, even if we were to disregard the word "FINAL" on the September 17, 2013 check, the letter accompanying the check and the August 15, 2013 letter show that PIIC's $28,542.84 payment was intended to resolve the Plaintiffs' entire claim.

obliteration or alteration.'" (citation omitted)); *Bayside*, 2006 WL 1449783 at *8 (stating that "[i]f the check was unacceptable as a final settlement, plaintiff's remedy was to return the check to defendant and sue for the full amount claimed due" and that "[e]ven if the creditor protests, there is acceptance the moment the check cashing occurs" because "we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection" (quoting *Zeller*, 691 A.2d at 415)). At the summary judgment stage, Plaintiffs did not identify facts in the record to raise a genuine dispute regarding lack of acceptance, assert that the endorsement on the check was fraudulent or unauthorized, or claim that RLF lacked authority to deposit the check. Therefore, PIIC demonstrated all elements of accord and satisfaction beyond genuine dispute, and the District Court correctly granted summary judgment to PIIC on Plaintiffs' breach of contract claim.

The District Court also properly granted summary judgment to PIIC on Plaintiffs' claim for breach of the duty of good faith and fair dealing because Plaintiffs failed to cite to any evidence or raise any arguments with the District Court to support the claim. Therefore, summary judgment in favor of PIIC on that claim was proper. *See Chavarriaga*, 806 F.3d at 218 (requiring party opposing a motion for summary judgment to "point to specific factual evidence showing that there is a genuine dispute on a material issue requiring resolution at trial").

B

Plaintiffs' assertion that the District Court erroneously denied Plaintiffs' motion for reconsideration also fails. "We review a denial of a motion for reconsideration for abuse of discretion, but we review the District Court's underlying legal determinations de novo and factual determinations for clear error." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 246 (3d Cir. 2010). "The scope of a motion for reconsideration . . . is extremely limited." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). "[A] judgment may be altered or amended only if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (alterations, internal quotation marks, and emphasis omitted).

Plaintiffs rely solely on the third ground, asserting that summary judgment in PIIC's favor is based on an error that would cause manifest injustice because RLF lacked actual and apparent authority to settle Plaintiffs' claim for $28,542.84.[4] In support, they rely on

[4] On reconsideration, Plaintiffs also argued for the first time that PIIC acted in bad faith under "N.J.S.A. [§] 17:29B-1 to 14" and N.J. Admin. Code § 11:2-17.11(b), App. 692-93, but did not support this argument with citations to the record nor identify relevant authority supporting a violation of those provisions. In addition, § 11:2-17.11 does not give rise to a private cause of action. Therefore, the District Court properly denied

Cranmer's and Kotzen's certifications submitted with their motion for reconsideration, which stated that RLF lacked authority both to settle Plaintiffs' claims for $28,542.84 and to endorse checks on behalf of Tiny Tots.

While normally such late-filed materials would not provide a basis for reconsideration, they were seemingly invited by the District Court and, as such, we will consider them but conclude that they do not show that the District Court erred in denying reconsideration. The record reflects that RLF (1) represented Plaintiffs, (2) had communications with PIIC's counsel concerning the matter, and (3) had Plaintiffs' authorization[5] to deposit the $28,542.84 check that contained Tiny Tots' endorsement, App. 602 (stating that Cranmer "agreed to allow [RLF] to deposit the check in their Trust Account"). Even if RLF lacked actual authority to resolve the dispute for $28,542.84, Plaintiffs have not shown that the District Court committed clear error. At a minimum, the record shows that PIIC reasonably relied on RLF's apparent authority[6] because PIIC explicitly informed Plaintiffs'

reconsideration of its order granting summary judgment to PIIC on Plaintiffs' good faith and fair dealing claim.

[5] Although Plaintiffs argue, based on Cranmer's and Kotzen's final certifications, that Plaintiffs did not give RLF authority to endorse checks on Tiny Tots' behalf, Cranmer's final certification states that she "agreed to allow [RLF] to deposit the check," App. 602 ¶ 30, which of course required the firm to ensure that the check was endorsed.

[6] "Apparent authority arises when a third party reasonably believes the actor has authority to act on behalf of the principal

counsel of the check's purpose and that PIIC would deem acceptance as a final settlement of the claim. The check was thereafter deposited bearing the dual endorsement of Tiny Tots and its counsel. Under these circumstances, PIIC reasonably relied on the dual endorsement and deposit of the check to show that Plaintiffs accepted the check to resolve the dispute.

Even if Kotzen erred by depositing the check when he and his client purportedly found the amount unacceptable for a full settlement, the accord and satisfaction defense bars Plaintiffs' claims against PIIC. *See Bayside*, 2006 WL 1449783, at *8 (stating that "we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection, notwithstanding the deposit is made under protest"); *Chancellor, Inc. v. Hamilton Appliance Co.*, 418 A.2d 1326, 1327-28 (N.J. Super. Ct. Law Div. 1980) (explaining that "[i]f the check was unacceptable as a final settlement, plaintiff's remedy was to return the check to defendant and sue for the full amount claimed due"). Moreover, and perhaps more

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and that belief is traceable to the principal's manifestations." *N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co.*, 1 A.3d 632, 639 (N.J. 2010) (quoting Restatement (Third) of Agency § 2.03 (Am. Law Inst. 2006)) (internal quotation marks omitted); *Amatuzzo v. Kozmiuk*, 703 A.2d 9, 12 (N.J. Super. Ct. App. Div. 1997) (stating that an attorney's negotiations are binding on the client where "the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the attorney had authority to enter into a settlement"). "Reliance is usually essential to establish an agency relationship based on apparent authority." *Sears Mortg. Corp. v. Rose*, 634 A.2d 74, 82 (N.J. 1993).

significantly for the purposes of determining whether reconsideration was warranted, the case law shows that attorney error generally does not satisfy the manifest injustice standard for reconsideration of a judgment, and Plaintiffs have not provided a reason to deviate from this principle.[7] *See e.g., Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (recognizing that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer agent"); *Gomez v. City of New York*, 805 F.3d 419, 423-24 (2d Cir. 2015) (noting that courts usually do not disturb a judgment based upon counsel's "mistake or omission" due to his "ignorance of the law or the rules of the court, or his inability to efficiently manage his caseload") (quoting *United States v. Cirami*, 535 F.2d 736, 739 (2d Cir. 1976)); *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 17-18 (D.C. Cir. 2015) (concluding no manifest injustice where plaintiffs' inadvertent omission of arguments "could have [been] easily avoided" if counsel had "exercise[d] due diligence or elected" to act before "the entry of judgment") (citations omitted); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (counsel's "inadvertence" is not a basis for Rule 60(b)(1) relief); *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 696-97 (5th Cir. 1983) (attorney's

[7] Fraud may provide such a reason, *see generally Fox v. RC Fabricators, Inc.*, C.A. No. N12C-06-244 WCC, 2013 WL 6916917 (Del. Super. Ct. Dec. 20, 2013) (finding lack of authority of plaintiff's lawyer to accept payment in accord and satisfaction where the lawyer pleaded guilty to criminal charges for defrauding his client in connection with the dispute at issue), but fraud has not been alleged here.

"misjudgment or careless failure" did not rise to the level of "blatant errors" or "malfeasance" necessary for Rule 60(b) relief).

Therefore, the District Court did not abuse its discretion in denying Plaintiffs' motion for reconsideration.

III

For the foregoing reasons, we will affirm.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1596

ANNA CRANMER, Individually,
BRIAN CRANMER, Individually;
TINY TOTS DAYCARE PRESCHOOL, LLC
d/b/a TINY TOTS DAY CARE PRESCHOOL

Appellants

v.

HARLEYSVILLE INSURANCE COMPANY;
PHILADELPHIA INDEMNITY
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Appeal from the United States District Court
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(D.C. No. 2:14-cv-03206)
District Judge: Honorable Esther Salas

Submitted Under Third Circuit L.A.R. 34.1(a)
October 11, 2017

Before: HARDIMAN, SHWARTZ, and
ROTH, *Circuit Judges*,

JUDGMENT

(Filed Nov. 17, 2017)

This case came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on October 11, 2017.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court entered on September 18, 2015 and the Order of the District Court entered June 30, 2016 are hereby AFFIRMED. Each side shall bear their own costs. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Dated: November 17, 2017

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANNA CRANMER, as an individual, BRIAN CRANMER, as an individual, & TINY TOTS DAYCARE PRESCHOOL, LLC, a Limited Liability Company,	
Plaintiffs,	**Civil Action No. 14-3206**
v.	**OPINION**
PHILADELPHIA INDEMNITY INSURANCE COMPANY & HARLEYSVILLE INSURANCE COMPANY,	(Filed Jun. 30, 2016)
Defendants.	

SALAS, DISTRICT JUDGE.

Before the Court is Plaintiffs' motion for reconsideration pursuant to Local Civil Rule 7.1(i). (D.E. No. 41). The Court has considered the parties' submissions and decides this motion without oral argument pursuant to Federal Rule of Civil Procedure 78(b). For the reasons below, the Court denies Plaintiffs' motion for reconsideration.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 18, 2015, the Court issued an Opinion and Order granting Defendant Philadelphia Indemnity Insurance Company's ("PIIC") motion for summary judgment and dismissing Plaintiffs' claims against PIIC: Counts II and IV of the Complaint. (D.E. No. 39, Opinion). Notably, the Court found that PIIC's tender of the $28,582 settlement check, combined with Plaintiffs' depositing of that check, constituted an "accord and satisfaction" of Plaintiffs' outstanding claims on its insurance policy with PIIC. *Id.*

On October 2, 2015, Plaintiffs filed the instant motion for reconsideration, asking the Court to reconsider its September 18, 2015, Order and Opinion, arguing that summary judgment should not have been granted for Defendant PIIC. (D.E. No. 41, Memorandum of Law in Support of Plaintiff's Motion for Reconsideration ("Pl. Mov. Br.")). On October 14, 2015, Defendant PIIC filed a brief in opposition. (D.E. No. 45, Brief in Opposition to Plaintiffs' Motion for Reconsideration ("Def. Opp. Br.")). On November 9, 2015, Plaintiff Tiny Tots filed a brief in reply. (D.E. No. 49, Plaintiff Tiny Tots' Reply Brief, (Pl. Reply Br.")).

On June 14, 2016, the Court ordered the parties to submit supplemental briefing on the following three issues:

1. Whether evidence shows that attorneys for Plaintiffs acted outside the scope of

their authority in cashing the settlement check at issue;

2. If so, can this fact vitiate Plaintiffs' acceptance of the settlement check for the purposes of "accord and satisfaction;"

3. Whether such a finding warrants the granting of Plaintiffs' motion for reconsideration in order to prevent "manifest injustice."

(D.E. No. 58).

Accordingly, on June 22, 2016, the parties submitted simultaneous supplemental briefing. (D.E. Nos. 59, 60). On June 27, 2016, the parties submitted simultaneous responses. (D.E. Nos. 60, 61). The matter is now ripe for resolution.

II. STANDARD OF REVIEW

Local Civil Rule 7.1(i) governs motions for reconsideration in this District. It requires a movant to set forth "the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked." L. Civ. R. 7.1(i). "A motion for reconsideration is 'an extraordinary remedy to be granted very sparingly.'" *Watkins v. DineEquity, Inc.*, No. 11-7182, 2013 WL 396012, at *2 (D.N.J. Jan. 31, 2013) (quoting *In re Lord Abbett Mut. Funds Fee Litig.*, 417 F. Supp. 2d 624, 627 (D.N.J. 2005)).

To succeed on a motion for reconsideration, the movant must show "at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). "To prevail under the third prong, the movant must show that 'dispositive factual matters or controlling decisions of law were brought to the court's attention but not considered.'" *Catlett v. N.J. State Police*, No. 12-153, 2013 WL 6095824, at *2 (D.N.J. Nov. 19, 2013) (quoting *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 161 F. Supp. 2d 349, 353 (D.N.J. 2001)).

III. DISCUSSION

In their motion for reconsideration, Plaintiffs ask the Court to reconsider its decision to grant summary judgment in favor of Defendant PIIC on Counts II and IV of the Complaint. (Pl. Mov. Br. at 4-5). Generally, Plaintiffs contend that "the Court's decision is incorrect as material facts clearly demonstrate that the elements of the doctrine of Accord and Satisfaction were not met in the case at hand." (*Id.*). According to Plaintiffs, the motion should have been denied as premature because discovery is still incomplete. (*Id.* at 17).

In response, Defendant argues that the motion for reconsideration should be denied because Plaintiffs (1) improperly introduce new evidence which was not presented in opposition to the summary judgment motion, (2) rehash arguments already raised and decided on the motion, and (3) raise additional arguments that they failed to raise in opposition to the motion. (Def. Opp. Br. at 1). The Court will address each argument in turn below.

A. Arguments Raised on the Underlying Motion for Summary Judgment

Plaintiffs' motion for reconsideration reiterates two arguments which were made previously in opposition to the motion for summary judgment. First, Plaintiffs argue that summary judgment was granted in error because the third element of accord and satisfaction, "acceptance," was not met. (Pl. Mov. Br. at 14-15). Specifically, Plaintiffs argue that there was no accord and satisfaction because "Plaintiff viewed the check at issue as a partial payment of the undisputed amount of the overall claim." (*Id.* at 14). And second, Plaintiffs argue that summary judgment should not have been granted because discovery in this case was incomplete at the time the motion was decided. (Pl. Mov. Br. at 17-19; D.E. No. 28 at 7).

"[A] motion for reconsideration may not be used to re-litigate old matters or argue new matters that could have been raised before the original decision was reached." *Fletcher v. St. Joseph Reg'l Med. Ctr.*, No. 10-1499, 2013 WL 3146879, at *3 (D.N.J. June 19, 2013); *see also Warren v. Fisher*, No. 10-5343, 2013 WL 6805668, at *3 (D.N.J. Dec. 20, 2013).

Here, Plaintiffs raised both arguments in their brief in opposition to the summary judgment motion, and the Court ruled on both arguments in its September 18, 2015 Opinion. Regarding the first argument, Plaintiffs argued in opposition to summary judgment that there was no accord and satisfaction, despite depositing the settlement check, because "there was no acceptance of the sum as a final settlement." (D.E. No. 28 at 6). The Court nevertheless found that the element of "acceptance" was met because the law required the Court to impute agreement to Plaintiffs since they deposited the check. (*See* Opinion at 8-9). The Court similarly addressed the second argument in its September 18, 2015 Opinion, finding that it lacked merit because Plaintiffs failed to explain "how any additional discovery could reveal any genuine issue of material fact" to defeat summary judgment. (Opinion at 10).

Clearly, both arguments in support of the present motion constitute attempts to re-litigate matters already decided by the Court. Accordingly, these arguments are not appropriate for a reconsideration motion and will not be considered. *Fletcher*, WL 3146879, at *3.

B. Arguments Raised for the First Time on the Present Motion

Plaintiffs' motion for reconsideration also presents several arguments that were not raised in opposition to the underlying motion for summary judgment. First, Plaintiffs argue that the first element of accord and satisfaction was not met because the amount of the payment owed to Plaintiff was in fact "undisputed," despite the Court's holding to the contrary. (Pl. Mov. Br. at 14, 16). Specifically, Plaintiffs now argue that the check at issue constituted "an undisputed amount in connection with a much larger, multi-tiered disputed amount." (*Id.* at 14). However, as the Court noted in its September 18, 2015 Opinion, Plaintiffs did not squarely address this issue in their opposition brief on the underlying summary judgment motion, (*See* Opinion at 5), and thus the Court will not consider any newly raised arguments on this issue in support of reconsideration.

Second, Plaintiffs argue for the first time that summary judgment should not have been granted because Defendant PIIC violated N.J.S.A. 17:29B-1 *et. seq.* and N.J.A.C. 11:2-17.11(b), which allegedly governs the practice of insurers in New Jersey under certain circumstances. (Pl. Mov. Br. at 16-17).[1]

[1] The Court notes that in Plaintiffs' "Statement of Material Facts" included with their brief in opposition to summary judgment, Plaintiffs cited to N.J.S.A. 17:29B-1 and asserted that under this statute, "Philadelphia had an obligation to investigate, bargain, and settle claims in good faith." (D.E. No. 28 at 1). However, Plaintiffs' briefing provided no argument on this point, and did not explain how the statute was allegedly violated. The Court thus did not consider a violation of this statute in its summary judgment analysis, and treats it as raised for the first time on the present motion.

Furthermore, the Court notes that Plaintiffs expanded upon their "good faith" argument in their supplemental briefing on the present motion. (See D.E. No. 60 at 5, 15-17). However, the Court permitted supplemental briefing only on three discreet issues, as

In making these arguments, however, Plaintiffs fail to establish a proper basis for reconsideration. Rather, Plaintiffs appear to be using the present motion to litigate new arguments that should have been raised on the motion for summary judgment. Accordingly, the Court will not consider either argument on the present motion. *See Warren*, 2013 WL 6805668, at *3 ("[r]econsideration is not . . . an opportunity to present new legal arguments that were available but not advanced when the underlying motion was decided.").

C. New Evidence Submitted in Support of Plaintiffs' Motion for Reconsideration

Plaintiffs attach numerous items of evidence in support of their motion for reconsideration. (*See* D.E. Nos. 41, 49).[2] Defendant argues that this evidence

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outlined in Section I, *supra*, and did not permit supplemental briefing on any other matter. Plaintiffs' continued introduction of such arguments – even in contravention of explicit instructions from the Court – reinforces the conclusion that Plaintiffs impermissibly seek to use the present motion as a "second bite at the apple" of summary judgment. *Garzella v. Borough of Dunmore*, No. 5-1626, 2007 WL 1450416, at *2 (M.D. Pa. May 15, 2007) (noting that "a motion for reconsideration is not a vehicle to reargue the motion or to present evidence which should have been raised in connection with an earlier motion, should not provide the parties with a second bite at the apple").

[2] Evidence attached to Plaintiffs' moving brief, (D.E. No. 41), includes the Certification of Anna Cranmer, a statement of loss, and a disbursement letter from the RAIN Law Firm to Cranmer, (Exhibit A); the Certification of Matthew Kotzen, Esq., (Exhibit B); a copy of the insurance policy, (Exhibit C); PIIC's initial acknowledgment letter, (Exhibit D); emails from the New Jersey Department of Banking and Insurance, (Exhibit E); and correspondence

should not be considered on the present motion because Plaintiffs offer no explanation as to why the documents "were not included in [Plainitffs'] initial opposition or supplemental filing in opposition to summary judgment." (Def. Opp. Br. at 7).

In considering evidence presented in support of a motion for reconsideration, courts should, "[a]bsent unusual circumstances . . . reject new evidence which was not presented when the court made the contested decision." *Waller v. Foulke Mgmt. Corp.,* No. 1:10-06342, 2012 WL 924865, at *1 (D.N.J. Mar. 19, 2012). Rather, on such a motion, the moving party may only present evidence that it "could not earlier submit to the court because that evidence was not previously available." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 252 (3d Cir. 2010). Thus, for example, where the moving party seeks to submit an affidavit in support of its motion for reconsideration, courts may properly disregard the affidavit where it "contain[s] evidence that was available prior to the summary judgment." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985).

As Defendant notes, all of the evidence submitted in support of the present motion appears to have been available during the pendency of summary judgment, and Plaintiffs provide no explanation why this

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from the RAIN Law Firm, (Exhibit G). Plaintiffs attach further evidence in support of their reply brief, (D.E. No. 49), including excerpts of the deposition testimony of Anna Cranmer, (Exhibit AA), Michael Fromosky, (Exhibit BB), and Karl Held, (Exhibit CC).

evidence was not submitted in opposition to the motion. This alone constitutes a sufficient basis for the court to disregard the new evidence. *Howard Hess Dental Labs. Inc.*, 602 F.3d at 252 (affirming district court's refusal to consider new evidence on reconsideration where "[n]othing in the record suggests that the evidence the [p]laintiffs sought to present post-summary judgment was unavailable to them when they filed their summary judgment motion").

However, representations made by Plaintiffs in these new submissions seem to suggest that Plaintiff Anna Cranmer's attorneys may have acted without actual or apparent authority in depositing the settlement check on her behalf, potentially vitiating the resulting accord and satisfaction.[3] *United States v. Lightman*, 988 F. Supp. 448, 464 (D.N.J. 1997) ("Under New Jersey law, it has been held that negotiations of an attorney are not binding on the client unless the client has expressly authorized the settlement or the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the attorney had authority to enter into a settlement, not just negotiations, on behalf of the client.").

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[3] For example, the Certification of Anna Cranmer submitted with Plaintiffs' moving brief, Cranmer certifies that "at no time did I accept a check or even see a check from PIIC in the amount of $28,542.84." (D.E. No. 41-1, Certification of Anna Cranmer). Cranmer makes similar representations in her deposition, as attached to her reply brief. (D.E. No. 49-1, Transcript of Cranmer Deposition at 320:7-21).

Because of this, at the June 14, 2016 Telephone Conference, the Court granted Plaintiffs leave to file additional certifications clarifying the circumstances surrounding their attorneys' depositing of the settlement check on Plaintiff Anna Cranmer's behalf. (*See* D.E. No. 58). The Court also requested supplemental briefing on whether a showing that Plaintiffs' attorneys acted without authority would necessitate reconsideration to avoid "manifest injustice." (*Id.* (citing *Max's Seafood Cafe ex rel. Lou-Ann, Inc.* 176 F.3d at 677).

On June 22, 2016, Cranmer submitted a new certification clarifying that she had in fact been informed that her attorneys at the RAIN Law Firm had received the settlement check, and that she had subsequently allowed the firm to deposit the check in its trust account. (D.E. No. 60-1, Certification of Anna Cranmer II at 6). The certification of Matthew Kotzen at the RAIN Law Firm further supports these assertions. (See D.E. No. 60-2, Certification of Matthew Kotzen). Based on these submissions, the Court is satisfied that Plaintiffs' attorneys at the RAIN Law Firm did not act outside the scope of their authority by depositing the settlement check.[4] Thus, the possibility of a "manifest

[4] In their supplemental briefing, Plaintiffs slightly revise their argument regarding "acceptance" of the $28,542.84 check by contending that neither Cranmer *nor her attorneys at the RAIN Law Firm* intended the depositing of the check to constitute a complete satisfaction of Defendant's debt. (*See* D.E. No 60, Plaintiffs' Supplemental Brief at 9). However, because the new certifications requested by the Court show that Cranmer and her counsel both approved the deposit, the Court finds this argument

injustice" resulting from a denial of reconsideration is not implicated by these facts. *See Max's Seafood Cafe ex rel. Lou-Ann, Inc.* 176 F.3d at 677 (setting forth grounds for reconsideration). As such, even if the Court were to consider the new certifications and depositions submitted for the first time in support of the present motion, such evidence would not warrant reconsideration of the motion for summary judgment. *Id.*

Accordingly, the Court concludes that Plaintiffs' submissions fail to establish grounds for reconsideration.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for reconsideration is denied. An appropriate Order follows this Opinion.

/s Esther Salas
Esther Salas, U.S.D.J.

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to be no different than the one already decided in the Court's September 18, 2015 Opinion. (*See* Opinion at 9 (finding that "the law requires the Court to impute agreement to Plaintiffs because they deposited the check")). Accordingly, this argument will not be considered on the present motion for reconsideration. *See Fletcher*, 2013 WL 3146879, at *3 (holding that "a motion for reconsideration may not be used to re-litigate old matters" previously decided by the court).

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANNA CRANMER, as an individual, BRIAN CRANMER, as an individual, & TINY TOTS DAYCARE PRESCHOOL, LLC, a Limited Liability Company, **Plaintiffs,** **v.** **PHILADELPHIA INDEMNITY INSURANCE COMPANY & HARLEYSVILLE INSURANCE COMPANY,** **Defendants.**	**Civil Action No. 14-3206** **ORDER**

SALAS, DISTRICT JUDGE.

Pending before the Court is Plaintiffs' motion for reconsideration pursuant to Local Civil Rule 7.1(i). (D.E. No. 41). For the reasons set forth in the Court's accompanying Opinion,

IT IS on this 30th day of June 2016.

ORDERED that Plaintiffs' motion is DENIED.

SO ORDERED.

s/ Esther Salas
Esther Salas, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANNA CRANMER, as an individual, BRIAN CRANMER, an individual, & TINY TOTS DAYCARE PRESCHOOL, LLC, a Limited Liability Company, **Plaintiffs,** **v.** **PHILADELPHIA INDEMNITY INSURANCE COMPANY & HARLEYSVILLE INSURANCE COMPANY,** **Defendants.**	**Civil Action No. 14-3206** **OPINION AND ORDER** (Filed Sep. 18, 2015)

SALAS, DISTRICT JUDGE.

Before the Court is Defendant Philadelphia Indemnity Insurance Company's ("PIIC") motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). (D.E. No. 23). The Court has considered the parties' submissions and decides this motion without oral argument pursuant to Federal Rule of Civil Procedure 78(b). For the reasons below, the Court grants PIIC's motion for summary judgment and dismisses the claims against PIIC in their entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Plaintiff Tiny Tots Day Care Preschool, LLC ("Tiny Tots") is a day care business located in Little Egg Harbor Township, Ocean County, New Jersey. (Def. SMF ¶ 2; Pl. SMF ¶ 5). On or about October 29, 2012, Tiny Tots suffered windstorm damage caused by Superstorm Sandy. (Def. SMF ¶ 2; Pl. SMF ¶ 7).

Defendant PIIC is an insurance company that issued Tiny Tots a commercial insurance policy covering personal property and business interruption (the "Policy"). (Def. SMF ¶ 1; Pl. SMF ¶¶ 3-4). The Policy was in effect from May 22, 2012 to May 22, 2013. (Def. SMF ¶ 1).

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[1] The Court takes these facts from the following submissions: D.E. No. 23-1, PIIC's Statement of Material Facts ("Def. SMF."); and D.E. No. 28, Plaintiffs' Statement of Material Facts ("Pl. SMF"). The Court further notes that Plaintiffs' Statement of Material Facts does not comply with Local Civil Rule 56.1(a) because it does not responsively address the paragraphs set forth in PIIC's Statement of Material Facts. *See* L. Civ. R. 56.1(a) (providing that summary judgment opponents must "furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant's statement, indicating agreement or disagreement and, if not agreed, stating each material fact in dispute"). Accordingly, the facts set forth in PIIC's Statement are considered undisputed and accepted as true for purposes of this summary judgment motion. *See* L. Civ. R. 56.1(a) ("[A]ny material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion."); *Schwartz v. Hilton Hotels Corp.*, 639 F. Supp. 2d 467, 469 n.2 (D.N.J. 2009) ("The Court deems undisputed each statement that [the summary judgment opponent] neither admitted nor denied. . . .").

Following the damage, Plaintiff Tiny Tots filed claims against PIIC and Plaintiffs Anna Cranmer and Brian Cranmer filed claims against Harleysville Insurance Company ("Harleysville"), a separate insurance company that insured their real property. (Def. SMF ¶ 2; Pl. SMF ¶ 3; *see also* D.E. No. 1, Complaint ("Compl.")).[2]

In response to the claims, PIIC retained Kim & Wright, P.C., Certified Public Accountants ("Kim & Wright")[3] to determine the value of the insured losses. (Def. SMF ¶ 4). On July 9, 2013, Kim & Wright valued the insured loss at $28,542.84. (*Id.*; *see also* K & W Rpt.).

This action was initially referred to New Jersey's Sandy Mediation program, but the parties did not reach a resolution during their July 16, 2013 mediation. (Def. SMF ¶ 4). After the unsuccessful mediation attempt, Plaintiffs retained their current counsel, The Rain Law Firm, who advised PIIC of their representation by letter dated July 18, 2013. (*Id.* ¶ 5).

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[2] Plaintiffs Anna and Brian Cranmer "leased the subject property to Tiny Tots for use as a preschool and day care for children." (Compl. ¶ 10). Their claims against Harleysville are not at issue in this motion for summary judgment. However, because the parties' motions refer to "Plaintiffs" instead of "Plaintiff," the Court will do the same.

[3] PIIC's Statement of Material Facts refers to the firm as "Kim & Young," but the letterhead of the firm's report indicates that its correct name is "Kim & Wright." (*Compare* Def. SMF ¶ 3, *with* D.E. No. 23-8, Kim & Wright Preliminary and Tentative Report ("K & W Rpt.")).

On August 15, 2013, counsel for PIIC sent a letter to Plaintiffs' counsel advising of Kim & Wright's loss evaluation and offering $28,542.84 as a settlement. (Def. SMF ¶ 6; *see also* D.E. No. 23-9, 8/15/13 Ltr.). Specifically, the letter states as follows:

> [S]hould I not hear from you within ten (10) days of your receipt of this correspondence, I will instruct Philadelphia Insurance Company to tender settlement in an amount of $28,542.84 payable to Tiny Tots Daycare Preschool, LLC and The Rain Law Firm, its attorney. We will deem the acceptance of this payment as a full and final settlement of the claim as well as a release by your client of any further demand for recovery as against Philadelphia Insurance Companies.

(8/15/13 Ltr.). Plaintiffs' counsel did not respond to the August 15, 2013 letter. (Def. SMF ¶ 7).

On September 23, 2015, counsel for PIIC sent a settlement draft for $28,542.84 to Plaintiffs' counsel, along with an accompanying letter. (*Id.* ¶ 8; Pl. SMF ¶ 11; *see also* D.E. No. 23-10, 9/23/13 Ltr.). The letter stated as follows:

> Pursuant to my correspondence to you dated August 15, 2013, enclosed please find Philadelphia Indemnity Insurance Company's check, number 1111429396, made payable to Tiny Tots Day Care Preschool, LLC and The Rain Law Firm in the amount of $28,542.84 which is being tendered to you in good faith for the purposes of settlement. Upon your receipt of the enclosed, please contact my office so that

> we may discuss this matter and the positions of the parties moving forward.

(9/23/13 Ltr.). Plaintiffs' counsel did not respond to the September 23, 2015 letter. (Def. SMF ¶ 9; Pl. SMF ¶ 12).

The settlement draft was deposited on October 4, 2013. (Def. SMF ¶ 10). It was endorsed by Tiny Tots and Gregg J. Anderson on behalf of The Rain Law Firm. (*Id.*).

On December 9, 2013, counsel for PIIC wrote to Plaintiffs' counsel requesting a signed release of claims against PIIC. (*Id.* ¶ 11). Counsel for PIIC did not receive signed release or any other response to his request. (*Id.*).

On May 19, 2014, Plaintiffs filed the Complaint in this action. (Compl.). In the Complaint, Tiny Tots alleges breach of contract and breach of the implied covenant of good faith and fair dealing against PIIC. (*Id.* at 4-9).

On January 12, 2015, the Court held a telephone conference to address PIIC's letter requesting to file an early summary judgment motion. (D.E. Nos. 20-22). The Court granted PIIC leave to file a summary judgment motion, which it filed on January 26, 2015. (D.E. No. 23-1, Brief in Support of PIIC's Motion for Summary Judgment ("Def. Mov. Br.")). Plaintiffs opposed the motion on February 27, 2015, (D.E. No. 28, Brief in Opposition to PIIC's Motion for Summary Judgment ("Pl. Opp. Br.")). In addition, with the Court's permission, Plaintiffs filed a certification in opposition to PIIC's motion on March 20, 2015. (D.E. No. 35-1, Certification of Matthew Kotzen, Esq. ("Kotzen Cert.")). PIIC replied via letter brief on March 23, 2015. (D.E. No. 35). The motion is now ripe for resolution.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, a court must consider all facts and their reasonable inferences in the light most favorable to the nonmoving party. *See Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995). The role of the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

A factual dispute is genuine if a reasonable jury could find in favor of the nonmoving party and it is material only if it bears on an essential element of the plaintiff's claim. *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337 (3d Cir. 2002). When deciding a summary judgment motion, a court must view the record and draw all inferences in a light most favorable to the opposing party. *Knopick v. Connelly*, 639 F.3d 600, 606 (3d Cir. 2011).

III. DISCUSSION

PIIC argues that the doctrine of Accord and Satisfaction bars Plaintiffs' claims against it. (Def. Mov. Br. at 4). "An accord and satisfaction is an agreement which, upon its execution, completely terminates a party's existing rights and constitutes a defense to any action to enforce pre-existing claims. An accord is an agreement whereby one party agrees to make some performance in exchange for extinguishment of a debt or other obligation; execution of an accord constitutes a satisfaction and extinguishes the debt." *Nevets C.M., Inc. v. Nissho Iwai Am. Corp.*, 726 F. Supp. 525, 536 (D.N.J. 1989) (internal citations omitted).

In New Jersey, an accord and satisfaction requires three elements: "(a) a bona fide dispute as to the amount owed; (b) a clear manifestation of intent by the debtor to the creditor that payment is in satisfaction of the disputed amount; and (c) acceptance of satisfaction by the creditor." *Id.* (citing *Loizeaux Builders Supply Co. v. Donald B. Ludwig Co.*, 366 A.2d 721, 726 (N.J. Super. Ct. App. Div. 1976)).

First, the Court considers whether there is a bona fide dispute as to the amount owed. *See id.* The parties do not appear to dispute this element. PIIC asserts that a bona fide dispute exists. (Def. Mov. Br. at 9). Plaintiffs' brief does not directly address whether a bona fide dispute exists, but it asserts that PIIC's obligation is worth "nearly one million dollars." This indicates a bona fide dispute with PIIC, who valued the claim at $28,582.84. (*See* Pl. Opp. Br. at 6). Accordingly, the Court determines that there was a bona fide dispute regarding the amount owed and therefore the first element of an accord and satisfaction is met.

Second, the Court considers whether there was a clear manifestation by PIIC to make a payment in satisfaction of the dispute. *See Loizeaux*, 366 A.2d at 726. New Jersey courts have held that a "check and [Offer Letter] can, and indeed must, be read together" when determining whether there is a manifestation of intent to settle. *See Perotta v. LG Elecs. USA, Inc.*, No. 12-246, 2013 WL 4446975, at *5 (D.N.J. Aug. 15, 2013) (quoting *A.G. King Tree Surgeon v. Deeb*, 356 A.2d 87, 89 (N.J. Super. Ct. App. Div. 1976)); *see also Sculthorpe v. N.Y. Life Ins. Co.*, No. 90-1474, 1991 WL 143454, at *3 (D.N.J. July 16, 1991). "The requisite manifestation of intent 'may be expressed in the check itself, or in the letter or account, or receipt accompanying the remittance, or even orally in conversation.'" *Bayside Chrysler Plymouth Jeep Eagle, Inc. v. Ma*, No. DC-9699-02, 2006 WL 1449783, at *7 (N.J. Super. Ct. App. Div. May 26, 2006). Accordingly, "references on the check 'to the specific claims being paid' and 'language constituting a release' carry significant probative force when determining whether the debtor clearly intended to satisfy the disputed amount." *Id.*

Here, the Court determines that there was a clear manifestation of intent by PIIC to pay $28,542.84 in satisfaction of the dispute. Plaintiffs argue that there was no clear manifestation of intent because "[t]he haphazard action of writing the word 'final' on a check cannot be interpreted as acceptance of settlement" given that "[m]ost first party insurance checks contain the word 'final' on them." (Pl. Opp. Br. at 6). But this argument focuses on the check only, and ignores the fact that PIIC clearly stated its intent in its letters dated August 15, 2013 and September 23, 2013. In its August 15, 2013 letter, counsel for PIIC stated that it will "tender settlement in an amount of $28,542.84" and that it will "deem the acceptance of this payment as a full and final settlement of the claim as well as a release by your client of any further demand for recovery as against Philadelphia Insurance Companies." (Def. SMF ¶ 6; *see also* 8/15/13 Ltr.). Similarly, in its September 23, 2013 letter, counsel for PIIC stated "[p]ursuant to my correspondence to you dated August 15, 2013," a check "is being tendered to you in good faith for the purposes of settlement." (Def. SMF ¶ 7; 9/23/13 Ltr.). The language in these letters is sufficiently clear to establish a manifestation of intent under the law. *See Bayside Chrysler*, 2006 WL 1449783, at *7; *see also A.G. King*, 356 A.2d at 88 (holding that a "notation . . . to the effect that this $100 was in full and final settlement of all claims" was sufficient to manifest intent). The fact that check accompanying the September 23, 2013 letter was labeled "FINAL" lends further support to this conclusion. (*See* Def. SMF ¶ 12). Reading the check and letters together, as the Court is required to do, there is no doubt that PIIC manifested its intent to make a payment in satisfaction of the dispute.

Third, the Court considers whether Plaintiffs accepted the satisfaction offered by PIIC. *See Loizeaux*, 366 A.2d at 726. "In New Jersey, the 'rule has been that when a check is tendered as payment for an unliquidated claim on the condition that it be accepted in full payment, the creditor is deemed to have accepted this condition by depositing the check for collection not withstanding any obliteration or alteration.'" *Ameritemps, Inc. v. Hainesport Indus. R.R., LLC*, No. DC-010783-10, 2014 WL 684583, at *4 (N.J. Super. Ct. App. Div. Feb. 24, 2014) (internal citation omitted); *see also Perotta*, 2013 WL 4446975, at *5 ("Plaintiffs do not contest that they received, endorsed, and cashed each of the four checks they have received to date."). Moreover, if a "check was unacceptable as final settlement, [a Plaintiff's] remedy [is] to return the check . . . and sue for the full amount claimed due." *Perotta*, 2013 WL 4446975, at *5 (internal citation omitted); *see also Bayside Chrysler*, 2006 WL 1449783, at *8 ("Even if the creditor protests, there is acceptance the moment the check cashing occurs. In other words, when a 'check bears a notation indicating that it is being tendered in full satisfaction of the disputed debt, we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection'") (internal citation omitted) (quoting *Zeller v. Markson Rosenthal & Co.*, 691 A.2d 414, 415 (N.J. Super. Ct. App. Div. 1997)).

Plaintiffs argue that PIIC cannot establish its acceptance because there was "no meeting of the minds evidencing final settlement." (Pl. Opp. Br. at 6). Plaintiffs rely on the fact of "conversations between plaintiffs' counsel, Matthew Kotzen, subsequent to tendering of a payment in September 2013, wherein counsel encouraged Philadelphia to pay toward the overall claim, but there was no acceptance of the sum as a final settlement." (*Id.*). Plaintiffs further argue that, "[i]ndeed, no settlement agreement was made between the parties, no consideration was provided, and no release was executed by the insured/plaintiffs." (*Id.*).

The Court disagrees. There is no dispute that the check sent by PIIC's counsel was deposited on October 4, 2013. (Def. SMF ¶ 10). In addition, the Court has already determined that PIIC clearly indicated that the check was being tendered in full satisfaction of a disputed debt. Accordingly, by depositing the check, Plaintiffs accepted the satisfaction. *See Perotta*, 2013 WL 4446975, at *5; *Bayside Chrysler*, 2006 WL 1449783, at *8. Plaintiffs' argument that there was "no meeting of the minds" is without merit. (*See* Pl. Opp. Br. at 6).[4] Specifically, it ignores the clear law in this state that

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[4] Plaintiffs specifically argue that there were "conversations between plaintiffs' counsel, Matthew Kotzen, subsequent to the tendering of a payment in September of 2013, wherein counsel encouraged Philadelphia to pay *toward* the overall claim, but there was no acceptance of the sum as a *final* settlement." (Pl. Opp. Br. at 6). Kotzen's certification contains similar facts. (Kotzen Cert. ¶ 8). The Court notes that these facts contradict facts that Plaintiffs did not dispute in PIIC's Statement of Material Facts, including the fact that Plaintiffs' counsel did not contact PIIC following either the August 15, 2013 or September 23, 2015 letters. (*See* Def. SMF ¶¶ 7, 9). Nevertheless, any dispute regarding these facts is immaterial because acceptance occurs when a creditor deposits a check, regardless of whether it was done "in protest." *See Bayside Chrysler*, 2006 WL 1449783, at *8 (citing *Zeller*, 691 A.2d at 415).

"when 'a check bears a notation indicating that it is being tendered in full satisfaction of the disputed debt, we impute to the creditor an intent to be bound by the amount of the check if the creditor deposits the check for collection.'" *Bayside Chrysler*, 2006 WL 1449783, at *8 (citing *Zeller*, 691 A.2d at 415). Despite Plaintiffs' arguments otherwise, the law requires the Court to impute agreement to Plaintiffs because they deposited the check.[5] Finally, the Court notes that Plaintiffs did not dispute PIIC's statement that Plaintiffs did not respond to either the August 15, 2013 or September 23, 2013 letters, which further supports a determination that Plaintiffs accepted the satisfaction. (*See* Def. SMF ¶¶ 7, 9).

Plaintiffs raise several additional arguments in opposition to PIIC's motions, but all are without merit. First, Plaintiffs point out that "[c]ritical in the analysis is that with Accord and Satisfaction, there is a requirement that consideration must be given as to the partial payment of the original debt."[6] (Pl. Opp. Br. at 6). Plaintiffs provide no further argument on this point, nor do

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[5] For this reason, Plaintiffs' argument that they did not sign a release of claims is also without merit. The acceptance occurred upon depositing a check that was clearly offered as a settlement. *See Bayside Chrysler*, 2006 WL 1449783, at *8 (citing *Zeller*, 691 A.2d at 415). Moreover, Plaintiffs cite no authority to support their argument that an accord and satisfaction cannot be valid without a release.

[6] In support of this proposition, Plaintiffs cite *Decor v. George W. Smith and Company*, 88 N.J. 630 (1960). The Court could not identify any such case, but did identify *Decker v. George W. Smith & Co.*, 88 N.J. 630 (1916), which appears to be the case on which Plaintiffs intend to rely.

they explain why this requirement is not met. Plaintiffs are correct that an accord and satisfaction requires consideration. *Ameritemps*, 2014 WL 684583, at *4 ("Additionally, a valid accord and satisfaction requires consideration, which means '[t]here must be some advantage, or presumed or assumed advantage, accruing to the party who yields his claim, or some detriment to the other party.'" (quoting *Decker*, 88 N.J. at 632)). Here, there was consideration between the parties because Plaintiffs received a sum of money and PIIC received a release of claims. Accordingly, the consideration requirement does not bar a determination that accord and satisfaction occurred.

Next, Plaintiffs argue that summary judgment should be denied as premature because there is outstanding discovery. (Pl. Opp. Br. at 7). First, Plaintiffs argue that the Kim & Wright report "was provided to the defendants on January 15, 2015, although the report was clearly dated nearly 18 months before hand." (*Id.*). However, Plaintiffs fail to explain why the purported delay supports their argument that summary judgment is premature. "Second, and more significantly," Plaintiff argues that PIIC "has referenced in its brief, numerous discussions between the claims adjuster and counsel regarding claims." (*Id.*). Plaintiffs argue that this "information in the claim files would be critical in any type of analysis with regard to the settlement of the claim." (*Id.*). Despite these arguments, Plaintiffs have not raised any genuine issue of material fact in dispute, nor have they explained how any additional discovery could reveal any genuine issue of material fact. Moreover, as Plaintiffs admit, the additional discovery they seek includes "an ongoing discussion between defendant and counsel" which may be undiscoverable and protected by attorney client privilege. (*Id.*). In sum, the Court determines that summary judgment is not premature.

IV. CONCLUSION

For the foregoing reasons, PIIC's motion for summary judgment is granted in its entirety.

Accordingly, it is on this 18th day of September 2015 hereby

ORDERED that Defendant PIIC's motion for summary judgment, (D.E. No. 23), is granted; and it is further

ORDERED that Plaintiffs' claims against PIIC, Counts II and IV of the Complaint, are dismissed in their entirety.

SO ORDERED.

Is Esther Salas
Esther Salas, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1596

ANNA CRANMER; ET AL, Appellants

v.

PHILADELPHIA INDEMNITY
INSURANCE COMPANY, ET AL.

(D.C. Civ. No. 2-14-cv-03206)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge,* McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and *ROTH, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service

Hon. Jane R. Roth vote is limited to panel rehearing only.

not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Patty Shwartz
Circuit Judge

Dated: January 4, 2018
sb/cc: All Counsel of Record