DEDES REALTY LLC Plaintiff vs. UNION PLAZA DINER CORP Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO. A-00468-24 Civil Action On appeal from Judgment of Superior Court of New Jersey:Law Division: Special Civil Part:Landlord-Tenant Division: Union County Sat below: Hon. Dara A. Govan, J.S.C.

BRIEF OF DEFENDANT-APPELLANT UNION PLAZA DINER CORP.

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Date of submission (original): 2/13/2025
Date of submission (as amended): 3/5/2025

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PRELIMINARY STATEMENT

In an unnecessarily rushed proceeding, which did not allow for the full and fair airing of issues critical to its determination, and which elevated several minor miscues and misunderstandings into a major breach of a leasing relationship, a long-term tenant of a substantial diner property (Defendant-Appellant Union Plaza Diner Corp, hereinafter ("UPD")) was summarily dispossessed of a premises which it had occupied and operated for 12 years and which supported a staff of more than 40 people. Rejecting the efforts and willingness of UPD to promptly cure any supposed deficiencies in its performance of lease obligations and the unwarranted and continuing hardship this caused to the principals, employees, suppliers and creditors of UPD and overlooking the fact that the most significant of these alleged deficiencies were the result of factors beyond the control of UPD, the Court (Hon. Dara A. Govan, J.S.C.) entered a Judgment of Possession (Da52) and issued a Warrant of Removal (Da54), paving the way for a lockout and the termination of a viable business. Apart from the hardship occasioned to those affected by the precipitate shuttering of the business, we respectfully contend: (a) that, without any particular need to do so, and despite the extremely short notice on which the hearing was scheduled, the Court refused to grant a truly modest adjournment request that would have allowed UPD's out-of-state principal to return to New Jersey and assist in the matter and for counsel to prepare for what turned out to be an evidentiary hearing; and (b) that the Court failed to apply to the facts of this case the principles which should guide a court confronted with a commercial dispossession.

STATEMENT OF PROCEDURAL HISTORY

On April 2, 2024, Dedes filed the Complaint in this matter seeking a Judgment of Possession based on non-payment and late payment of rent (Da1). After extensive negotiations, on June 27, 2024, the parties entered into a Stipulation of Settlement (Da12) which provided, *inter alia*, for a certain payment schedule, including: (a) weekly payments over a five week period through July 30, 2024 covering four accrued monthly rental payments of $24,455.55 each; and (b) a one-time payment of $28,333.32 consisting of accrued monthly obligations totaling $13,333.32 under a separate Promissory Note and $15,000 in legal fees for Dedes' attorney. As will be discussed *infra*, these sums, which total $126,154.52, were fully paid.

In addition to the sums so paid, the Stipulation provided for 10 monthly payments of $1006.54 each (which would begin on September 1, 2024) on account of the Promissory Note balance, payment of sewer charges which the were "past due and owing" for 2022 (by July 31, 2024) and for 2023 (by August 31, 2024) (no amount being specified for either year) and that no late charge would accrue on the ongoing monthly rental payments as long as the rent payment was made by the 16th of the month. In addition, to be sure, the Stipulation gave Dedes the right to seek issuance of a Judgment of Possession and a subsequent Warrant of Removal which the Court might then enter, provided Dedes furnished 5 days' notice to UPD and to

UPD's counsel (the undersigned) in the event of a breach.

On August 20, 2024, counsel for Dedes sent an email to the undersigned (but not to UPD directly) , a copy of which is found at Da20. As will be noted, it was claimed that the August rental payment had not been received and that no payment was made on account of the sewer charges (i.e., presumably the 2022 charges, as the August 31st date for payment of past due and owing 2023 sewer charges had yet to arrive). As will also be noted, although direct notice to UPD was omitted, the email purported to constitute the five days' notice provided for in the Stipulation,

Subsequently, on September 6, 2020, counsel for Dedes contacted the Deputy Clerk of the Special Civil Part, and requested the entry of a Judgment of Possession and the issuance of a Commercial Warrant of Removal, submitting in support the Certification of Nicholas Dedes (a member of Dedes)(Da21) claiming that UPD had breached the Stipulation by not paying in a timely way the settlement payments for rent due on July 23rd and July 30th (a point not raised in counsel's letter of August 20th), by not paying August rent and by not making the sewer payments, the September 1st promissory note payment and the rental payment for September.[1]

Apparently because the Clerk deemed the application of September 6th deficient, on September 9th, Dedes submitted a form Certification by Landlord (Da25) to which it again annexed the September 6, 2024 Certification (by Nicholas Dedes). Confronted with this, on September 11, 2024, UPD responded with a motion (Da26) but, since no judgment entered, the motion sought to <u>prevent</u> its entry or issuance

1 UPD's explanation as to why these alleged "breaches" should not be deemed to serve as a basis for the entry of a Judgment of Possession will be discussed *infra*.

of a Warrant. (However, just in case that judgment had been entered without notice or was about to be, the motion alternatively sought to vacate any such Judgment and any Warrant issued pursuant thereto.) The Motion was supported by a Certification (Da28) from UPD's principal, Jun S. Oh, in which Mr. Oh, as discussed *infra*, disputed the claims of breach upon which Dedes was relying.–

Then, notwithstanding the fact that no judgment had been entered to support the issuance of a Warrant, the Court issued a Warrant of Removal on September 13, 2024. (Da41a)[2]. Evidently because of the pending motion filed by UPD, no immediate effort was made to enforce it, however.

On September 19, 2024, Dedes filed another Certification from Nicholas Dedes (Da42) opposing UPD's pending motion, asserting his prior claim of breach.[3] In this Certification, which was devoid of any supporting documentation and was replete with hearsay (all of which will be discussed *infra*), Mr. Dedes again claimed that the July 23rd and July 30th settlement payments were untimely and were returned for insufficient funds, requiring re-deposit; that a monthly settlement payment of

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2 2 Unfortunately, the Warrant issued on September 13, 2024 was omitted from the Appendix initially as prepared and numbered. In order to insert it belatedly in the chronologically appropriate place in the Appendix, the September 13th Warrant has been assigned page number Da41a. It may be noted that the Warrant issued on September 13th, was not capable of being enforced , because there was no prior Judgment of Possession to support it (see discussion at T15-4 to 11). Whether for that reason or because UPD had already moved alternatively to prevent it or vacate it (Da26), no steps were taken by Dedes to enforce the September 13th Warrant. Dispossession was accomplished pursuant to a subsequent Warrant of Removal dated 10/11/24 (Da54)

3 Surprisingly, among its deficiencies, this Certification raised a matter from several years prior which the parties had litigated concerning liability for rent during the Covid crisis (see paras. 3 and 4 at Da49), an issue having nothing to do with the present controversy. Essentially, in that litigation (UNN-L-3955-20) UPD (relying on applicable precedent) argued that, due to the Covid crisis, as a result of which the diner was unable to serve patrons (other than through an extremely limited take-out business), there should be an apportionment of rent on equitable grounds, since the unexpected closing of the facility, for which neither party was responsible, was an unanticipated event which made performance of the rent obligation impracticable. After extensive briefing and argument, the Court did not agree with UPD and required the full payment of rent, and payment was made by UPD on terms acceptable to the parties.

$1006.54 on account of the Promissory Note balance was not received on September 1st but rather on September 16th, and was being held without deposit; that August rent was not paid until September 17th (but without addressing the contention of UPD that this was a replacement check - also being withheld from deposit - for a check written a month earlier (evidently lost in the mail),[4] the replacement having been mailed on September 3rd for anticipated delivery on September 6th (see Da34)); that September's rent was not yet received (although UPD had certified that same would be paid (and was) prior to the late charge activation date (see Da31, para. 9)); and that, risking a supposed (and undocumented notice of the potential imposition of a) municipal lien, UPD had failed to pay (an unspecified amount) for the 2022 and 2023 sewer charges "due and owing,"[5] forcing Dedes to pay same.

Nothing further happened until October 2, 2024 when the parties received through E-courts a hearing notice for Monday, October 7, 2024 (Da48)[6]. As Mr. Oh had just left for California on a personal matter involving family illness and would not be returning until October 9, 2024, the undersigned (upon returning from a family gathering for the religious holiday on October 3, 2024), promptly wrote to the Court to request an adjournment until at least October 10, 2024, and preferably the following week, in order to have an opportunity to confer directly with the client, to allow the client to search records here and to afford a real opportunity to prepare for

4 UPD produced a checkbook carbon for the original check. See Da33.

5 UPD produced a receipt for what was apparently a partial, if not a full, payment in 2022 (see Da39)),

6 Although dated October 1, 2024, the hearing notice was posted through E-Courts on October 2, 2024.

a hearing which involved an attempt to shut down a viable business with all the ramifications this would cause. See Da49. Surprisingly. at least to the undersigned, the short-notice request for this short adjournment was denied the next day (Friday, October 4th) and counsel for the parties were obliged to appear in person the following Monday (Da51).–

Given the inability to fully prepare with the client and the client's records, the request for this minimal adjournment was made again at the outset of proceedings on October 7, 2024 and was again denied (see colloquy at T7-10 to 14-23), the trial judge expressing the view that, while in-person preparation would be ideal, Mr. Oh could appear virtually from California and, additionally, that the case was too old, having been commenced in April 2024, to warrant an adjournment.[7] A suggestion by counsel for UPD that, in light of the magnitude of the case, a transfer to the Law Division, where discovery was available, was advisable was also rejected by the Court (8-4 to 11; T12-15 to 16). In light of this, at the strong suggestion of the Court, Mr. Oh was instead contacted in California and, without any prior notice or preparation, testified (but without the opportunity to review the documents and Certification he was examined about (58-4 to 7)), such testimony given remotely and ultimately from a car (T48-14 to 50-7).—

At the conclusion of Mr. Oh's testimony, the Court entertained brief argument from counsel and then rendered its decision, holding that there were several

7 As set forth *supra*, the April-instituted proceeding was concluded by the June 27, 2024 settlement agreement (Da12). Although under the same docket number, the current proceedings, to obtain possession due to an alleged breach of the settlement agreement, were factually and legally distinct from the earlier case based on supposed lease violations.

breaches of the terms of the settlement agreement, citing what the Court found to be a "casual" approach to payment (T172-15, 16) and the "challenging" nature of the testimony of Mr. Oh (T172-25), pointing in this regard to uncertainty in Mr. Oh's testimony (which, as stated, was rendered from a remote location (including a car) 3000 miles away and was the rough recollection of a witness (Mr. Oh) who had no prior warning or any opportunity to refresh himself, consult colleagues or to review records). In essence, in denying UPD's motion, the Court held that there were no exceptional circumstances here which justified application of a standard of substantial, as opposed to strict, compliance with the terms of the Stipulation or justified equitable relief from the asserted failure of UPD to meet those terms exactly. Thus, the Court refused to excuse the several breaches (the Court counted six) which it found to exist (see generally T176-1 to 178-14) aand, as such, rejected UDP's motion to prevent or vacate, as needed, entry of a Judgment of Possession and issuance of a warrant (T178-14 to 16) - paving the way for the entry of such a Judgment (which was entered *sua sponte* later in the day)(Da49) and the ensuing issuance of a Warrant of Removal (Da51). Having rendered this decision, the Court then denied a motion for a stay pending appeal (T189-20 to 192-19), essentially holding that, although other factors relating to the issuance of a stay were met - particularly, and obviously, irreparable injury and undue hardship (by reason of the loss of the business and the dislocation of its employees) - the application could not be granted because there was no probability of success on the merits (T191-4).

This appeal followed (Da55). Applications for a stay pending appeal were denied by both the Appellate Division (Da60) and the Supreme Court (Da62).–

STATEMENT OF RELEVANT FACTS

The factual foundation of this matter is relatively straight-forward, arising, as it does, from a rental dispute concerning a well-established and substantial diner property owned by Dedes and operated under lease by UPD at 2466 Highway 22, Union, NJ, with a staff of about 40 employees[8] - a dispute resolved by the Stipulation of Settlement found at Da12. As previously stated, this document first provided for: (a) the payment by UPD of four monthly rental obligations of $24,455.55 each to be tendered respectively on July 2, 9, 23 and 30, 2024; (b) an additional payment of $28,333.32 representing accrued monthly payments on a Promissory Note of $13,333.33 and $15,000 in legal fees; (c) payment of any open sewer charges for years 2022 (by July 31, 2024) and 2023 (by August 31, 2024;) and (d) 10 monthly payments of $1006.54 each to liquidate the remaining balance on the Promissory Note. As also noted above, the accumulated payments for rent, the accrued Promissory Note installments and Dedes' $15,000 in legal fees payable under the Stipulation in July were all paid, although to be sure, Dedes claims, albeit without any confirming documentation, that the last two July payments were late and were first returned for insufficient funds before they were re-deposited and paid.

Perhaps the best way to analyze salient facts in this case is by examining each of the claimed deficiencies one-by-one. In this regard, the Court stated there were six

8 See testimony as to diner staff and length of UPD's ownership at T111-21 to112-62,

elements of breach (T176-4), although the Dedes Certification of September 19, 2024 (Da42) lists five, as follows:

(a) The alleged late payment of two installments for monthly rent respectively due on July 23 and July 30, 2024;

(b) The alleged non-payment of August rent;

(c) The alleged non-payment of sewer charges;

(d) The alleged late tendering of the September monthly charge for the Promissory Note debt; and

(e) The late tendering of September rent.

Possibly, the discrepancy between the Dedes certification and the Court's analysis as to the number of instances of alleged breach is due to the inclusion of non-payment of October 2024 rent as a factor or, alternatively, the non-payment of rent when in 2020 UPD sought a rent abatement due to the Covid crisis. Or the discrepancy is perhaps due to the Court counting the two allegedly late and (temporarily) dishonored July payments as separate instances of breach. In any case, the facts surrounding each instance will be examined below.

(A) <u>The July 23 and July 30 payments.</u> Dedes claims these two checks were received late and were not honored but rather were returned for insufficient funds, before being paid when re-deposited. No specific information is supplied , however, as to when they were received, when deposit was originally attempted, when they were allegedly rejected after original deposit, or when they were ultimately paid. Copies of the checks, reflecting rejection stamps and/or rejection reasons are not furnished either. In addition, no mention was made in Dedes' counsel's e-mail of August 20, 2024 (Da20) of these checks or their rejection.

In his Certification (at Da29) and in his testimony (T52-4 et seq.), Mr. Oh explains that the rejection of these checks, each in the amount of $24,455.55, was not the result of insufficient funds (funds being available) but, rather, were not paid at first due to the security program at his bank, which flagged the checks as suspicious because they were written for identical amounts and presented either together or very closely in time. As such, Mr. Oh further explains that, upon learning the reason that these checks were not immediately paid, he advised his bank that they were proper payments and the checks were honored (T53-2 to 6). To the best of his recollection, Mr. Oh took a screen shot of the bank transaction and, he believes, supplied it to his counsel (T53-17 to 20). In any case, in response to an inquiry from the Court, Mr. Oh explained that he was sorry he could not produce the screenshot at that time, since, he was testifying without prior notice of his need to do so, and, due to his being out of state and away from his records, was unable to supply this document during the hearing. (T54- 6 to 9).[9]

Based on this record, the Court simply concluded that the July 23rd and the July 30th payments were "late and returned for insufficient funds" (T-176-22 to 177-10) and that this constituted a breach of the settlement.

9 The Court also inquired whether counsel, the undersigned, had the screen shot available and, not surprisingly, since there was no prior notice that the October 7th hearing would involve the introduction of further evidence and live testimony, counsel advised that he did not have it with him (T54-12 to 18). Subsequently, notwithstanding that there was no notice that there would be such a hearing, the Court criticized the fact that the screenshot and other documentation was not available at the hearing (T172-23 to 173-4).

(B) The August rent. Although Counsel for Dedes did not mention the supposedly delinquent July 23rd and July 30th payments in his e-mail of August 20, 2024 (Da20), he did contend that the August rent payment had not been received. See also Dedes certification of September 6, 2024 (Da 21, at para. 6). In response, in his Certification (Da29, para. 4) and testimony (T55-13 t0 56-15;), Mr. Oh explained that he had indeed issued a check for the August rent and mailed it by regular mail on the date the check was written, August 18, 2024 (T59-22 to 61-6). Although the regular mailing of the August 18th check could not be definitively confirmed by a post office document, Mr. Oh did offer as supporting proof a checkbook carbon of the August 18th check, admitted in evidence as D-1, reflecting the issuance of a check for payment of the August rent on that date (see Da33; T-57-23 to59-4).

When asked by the Court when he understood the monthly rent was due and what would happen if not paid by the due date, Mr. Oh responded that, under such circumstances, a late charge would be assessed[10] and that he had tendered the late fee (T62-11 to 63-19) as part of the August 18th check. Moreover, as set forth in his Certification (Da29) at paragraph 4, after waiting to determine that the August 18th check had not cleared belatedly, Mr. Oh issued a replacement check on September 3, 2024 (the first day after the Labor Day weekend). In support of this assertion, Mr. Oh supplied a Certified Mail Receipt and copy of the envelope in which the replacement

10 The late charge was not insignificant. By March 2024, the monthly late charge was $1164.55. See Da4. Obviously. It well surpassed what would have been earned in 18 days based on annual commercial interest rates.

check was mailed (see Da35, Da37, D-2, D-3.[11]) Evidently fearing waiver, Dedes did not deposit the check, however .

With respect to the August rent payment, the Court, in its opinion appears to have found a breach arising from the fact that the payment was made on August 18th, after the late charge was activated, stating that "the August rent was paid late" since "[t]he grace period ended the 16th." (See T177-15 to 20) .In so ruling, the Court did not address the inherent conflict between the existence of a late charge and its determination that breach for late payment arose upon the date when the late charge became operational. To be sure, however, in issuing its ruling the Court did note another obvious logical conflict, observing that

> "It just makes no sense that in light of all that was going on, in light of the substantial and serious effort that the court acknowledges that Union Plaza Diner took to try to keep the doors open , why [the August rent and other payments] should have been made so late. It makes very little sense, but for the Court to conclude that they must not have been in a position to pay on time." T177-21 to178-3.

In this respect, although there was no proof in the record of financial inability, Mr. Oh did acknowledge that payment of the August rent just after UPD had paid over $125,000 in July would have been "tough." SeeT120-22 This fortified his belief that UPD could pay rent with the late charge after the 16th without breach. In

11 On two occasions during the hearing on October 7th, counsel for Dedes stated that the replacement check was not received until September 17th. See T19-19 to 21; T33-24 to35-2, see also Certification of Nicholas Dedes dated 9/19/24 at para 7d (Da4) where this claim is also made. However, Exhibit D-2 (Pa35) reflects an estimated delivery date of 09/06/2024. Why this letter was not delivered on September 6th, if that is the case, is not clear . Perhaps no one was present to sign for it on a first attempt on or about the estimated delivery date.

any event, UPD will argue that the only reasonable interpretation is that UPD had the latitude to pay up to the 16th without late charge, the sanction for not doing so being the imposition of the late charge rather than a determination of breach.

(C) The Sewer Payments. In counsel's e-mail of August 20, 2024 (Da20), and in the Certifications of Nicholas Dedes (at Da22, paragraph 5 and Da45-46, Paragraph 7f), Dedes complained that UDP had not paid the "past due and owing sewer charges." Dedes contends that it paid them itself in order to forestall the sale of a municipal tax certificate (Dedes cert, Da45). In making these multiple assertions, however, Dedes never mentioned how much it paid and did not produce proof of an imminent municipal sale or documentation reflecting that payment. Indeed, and curiously, the Stipulation of Settlement, does not set forth a figure for the open charges – a figure which had to be known to Dedes. .

In any case, the testimony of Mr. Oh concerning the sewer payments was severely hampered by the fact that he was required to testify without an opportunity to consult his laptop or the cellphone he uses for business purposes, and by his lack of opportunity to prepare for an evidentiary hearing as to which there was no prior notice. Consequently, his testimony was somewhat imprecise and uncertain.[12]

12 For example, at T75-10, Mr. Oh, having been asked when he sought to confirm a statement that the supposedly-delinquent sewer tax had already been paid and when he spoke to counsel about it, responded that he needed to provide the details as to date and time "later" (obviously by consulting then-unavailable records). At that point, the Court replied "[t]here is no later" and "[t]oday is the day" even though, as has been stressed, there was no notice to either Mr. Oh or counsel that, on the return date of a motion, Mr. Oh would be brought before the Court (remotely) to answer questions for which he was not prepared and when, as he repeatedly professed, he had no opportunity to consult his records, gather information from other sources (such as the sewer tax office) or refresh his recollection. Obviously, as discussed in Point I *infra*, we respectfully contend that it would have been appropriate to adjourn the proceedings at that point to allow Mr. Oh to return to New Jersey (he was scheduled to do so two days later), so that he and counsel could review the facts as reflected in the records available here, consult other knowledgeable persons (such as the diner manager, the sewer office personnel, bank personnel (regarding the July 23rd and 30th checks) etc.) and present organized and fully documented testimony and evidence as to what transpired. And see testimony ast T138-17 et seq., where the witness points to the absence of his lapto[and usual cwlll phone as the reason why he could not answer on an informed basis.

Nevertheless, the following can be gleaned from his testimony found at T69-5 to 92-14. Summarizing, Mr. Oh acknowledged an obligation for the sewer tax for 2022 and 2023; produced a receipt (D-4, Da39) reflecting that $2898.70 was paid on account of the 2022 sewer charges; asserted that he was typically informed by Dedes when a sewer bill, which went to the landlord, was received; stated that he does not recall receiving any unpaid sewer bills or information concerning same in connection with this matter; contended that, when advised or reminded of the obligation to pay the sewer bill, he sought to pay any outstanding obligation online but was unable to do so because he lacked information as to the account; stated that, on a date he doesn't presently recall, he sent his manager "Terry" [actually "Teddy"] to the sewer offices with a blank check to pay the open charges; noted that Teddy was informed (subject to an objection as double hearsay), that the account was paid (presumably by Dedes); and promised that UPD would "of course" reimburse Dedes for any moneys Dedes paid on account of the sewer charges.

In rendering its decision (at T171-2 to 172-14), the Court held that UPD did not meet its obligation with respect to the sewer charges, essentially holding that UPD had a responsibility to determine the obligation, rather than rely on the landlord to supply it, but, on the part of UPD "there was no effort whatsoever" to ascertain the amount due. Consequently, the Court held, UPD, having taken a "casual approach" to its responsibility, could not rest upon the contention that Dedes did not supply information as to the amount due and thus avoid a breach as to this charge.

(D) Promissory Note Installment Payments. Testimony concerning the promissory note installment payments was limited. According to his testimony, Mr. Oh had to pay monthly for 10 months, and did pay, in September 2024, the sum of $1000 (actually $1006.54), before the due date for September rent (T93-24 to 94-2).[13] In his Certification of September 10, 2024 (Da28), Mr. Oh stated in paragraph 8 that he had mailed the Promissory Note installment payment on September 9, 2024, and produced a certified mail receipt reflecting an estimated delivery date of September 16, 2024 (D-5 in evidence, Da41). In this respect, in his Certification of September 19, 2024 (Da42), Mr. Dedes although claiming breach, acknowledged in paragraph 7c (Da45) receipt of this payment on the post office-scheduled date of September 16, 2024. In this respect, he also stated in paragraph 7c that, as in the case of the August rent replacement check, Dedes chose not to deposit the September installment payment check "pending a resolution of [the UPD] motion."

E. The September Rent. In the Dedes Certification of September 19, 2024 (Da42) it is claimed in paragraph 7c that September rent had not yet been received. However, in the hearing on October 7, 2024, counsel for Dedes appears to acknowledge that it was received on September 16, 2024. (See T18-14 through 19-6), where it is stated that two checks were received on September 16th – presumably the Promissory Note Installment payment and the September rent payment. Although there is some additional uncertainty about the receipt date of the September rent payment (since counsel subsequently said, on October 7, 2024, that it was "recently

13 Presumably, in referring to the due date, Mr. Oh was referring to the 16th of the month, the last date of the month on which he could pay rent without incurring a late charge.

received" (T19-24)) it is clear that was received at some point but not deposited.

F. October rent. Presumably because the October 7th hearing took place before the 16th of the month (that is, before the date when Mr. Oh understood the rent could be paid without incurring a late charge), UPD did not tender October rent. Obviously, a payment was pointless, as the check would not have been deposited..

G The Prior Litigation. The court is respectfully referred to footnote 3 *supra* for the background of the 2020 rent dispute between the parties. UPD contends that it has no relevance to the instant dispute and that any argument, i.e., that the facts of that matter serve as an additional sample of breach is without merit.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE ADJOURNMENT REQUESTS (Da48-Da51; T7-10 to 14-23)

It is fundamental, indeed, a matter of due process, that,

> "at a minimum, due process requires notice and an opportunity to be heard 'appropriate to the nature of the case' *Mullane v. Central Hanover Trust Co., 339 U.S. 306,313 . . . (1950)*; *Kaprow v. Board of Educ., 131 N.J. 572, 583 (1993)*. To comport with due process, a judicial hearing requires notice defining the issues and an adequate opportunity to prepare and respond. *Nicoletta v. North Jersey Dist. Water Supply, 77 N.J. 145, 162 . . . (1978). [*Emphasis added] *"*

McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 558-59 (1993). See also *H.C.S. v. J.C.S, 175 N.J. 309,321 (2003); Hodges v. Feinstein, Raiss, Kelin & Booker, 383 N.J. Super.596, 614 (App. Div. 2003).*

Plainly, the record in this case demonstrates a failure to adhere to these basic standards. Preliminarily, it may be remarked that this was a case of some import, involving, as it did, the attempted closure of an established commercial business on which a staff of ~40 employees were dependent for their livelihoods. Moreover, the proceeding which took place on October 7, 2024 was convened on a confused record – it was treated by the Court as a motion to set aside a default judgment pursuant to R.4:50-1 and to quash a warrant, even though no judgment had been entered, and puzzlingly, a warrant had been issued on September 13, 2024 despite the absence of a judgment which would support it (seeT15-2 to 10; and see T174-21to 175-18)[14]

The procedural confusion was compounded by the manner in which the hearing was scheduled as well as by the Court's refusal to grant an adjournment to allow Mr. Oh to return to New Jersey and to assist counsel in preparation and to participate in person. As has been stressed, notice of the hearing was issued via E-courts on October 2, 2024, only five days before the hearing date was posted and electronically provided to counsel. On the same day, but before notice,was received by counsel, Mr. Oh departed for California on a personal matter and was not scheduled to return until Wednesday, October 9th.. Counsel for UPD was in Philadelphia for a family celebration of the Jewish New Year. For purposes which

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14 The decision to treat this proceeding as a motion to set aside a default judgment, instead of a motion to set aside a mere default, was not without legal consequence. A motion to set aside a default judgment is subject to the more stringent standards of R.4:50-1, rather than the good cause standard of R.4:43-3, the Rule governing the setting aside of defaults. *Bernhards v. Alden Cafe, 374 N.j.Super. 271, 277 (App. Div. 2005).* Although UPD's motion of September 11, 2024 (Da26) was brought in the alternative as a motion to prevent <u>or</u> vacate a judgment and warrant, the inclusion of the alternative remedy of vacating a default judgment and warrant was simply done for prophylactic purposes in case a judgment had somehow been entered based on the application for same pursuant to the Dedes certification of September 6, 2024 Da21).

were in no sense intended to delay the hearing of the motion, were not contumacious, and were cognizant of the fact that Dedes was in all likelihood anxious to proceed, counsel for UPD, immediately upon returning from Philadelphia the next day, sent an adjournment request via E-courts seeking a postponement for a mere three days, i.e., until October 10, 2024 (or, preferably, for anytime the following week).

To the considerable surprise of counsel for UPD, this short adjournment request, occasioned only by the immediate time frame of the hearing notice and the innocent absence of Mr. Oh, was summarily denied by notice received the next day (Da51) and counsel for the parties were required to report to Court on Monday, October 7th at 9:00 a.m.

Under the circumstances, at the outset of the hearing on October 7th, counsel for UPD renewed the adjournment request (T7-23 et seq.) In this respect, apart from the immediacy of the hearing notice, counsel explained that he sought an adjournment because he wanted the opportunity to review the client's records in New Jersey and go over the matter directly with the client and others having relevant knowledge (T12-1 to 5). Although recognizing that an opportunity to consult with the client would be "ideal," the adjournment request was again denied. (T12-9), In turning down the request, the Court remarked that the case has been pending too long (although, as explained previously, the original case, instituted in April 2024, had indeed been resolved by the Stipulation of Settlement and the facts now before the .

Court were entirely different).

Continuing to address the adjournment, the Court also questioned why the Mr. Oh was needed for a motion hearing (T11-10), but, after counsel had pointed out the possible need to make credibility determinations, the Court suggested that counsel call Mr. Oh to arrange an immediate Zoom appearance, recognizing that, as to credibility, the client must be available for live testimony (T36-16 to 38-25). Notably, this was the first occasion on which the Court acknowledged a need for testimony (on what began as the return hearing date of a motion). Equally notably, in specifying that live testimony from Mr. Oh could proceed, the Court also reiterated that it would not adjourn the matter for the several days UPD requested. Accordingly, Mr. Oh would have to testify remotely from California without any preparation or access to documents or other materials and information which, under the circumstances, he could not review and as to which he did not then have access.

Respectfully, the Court's persistent refusal to provide a minimal adjournment is difficult to understand. Although Dedes certainly wanted to proceed quickly with its attempt to re-capture possession of the premises, the loss of a few more days' time could not possibly be viewed as material or prejudicial. Moreover, UPD was not responsible for the October 7th date as, in accord with the Rules governing motions in the Special Civil Part, in making the motion to prevent or vacate, UPD was not allowed to specify a return date for the hearing, the establishment of a return date being solely a function of the Court. _R_.6:3-3 (c)(1). Furthermore and indisputably, the adjournment request was not made to delay an adjudication, as neither Mr. Oh nor counsel was aware of the notice setting October 7th for the hearing when Mr. Oh left for California for reasons involving a family illness. Plainly, there was no obstructive intent; rather, the date set by the Court (only 5 days before the hearing) was just too belated and inconvenient to permit the proceeding to go forward.. Unlike in the case of upper court motions, which are held on scheduled motions days (every other Friday) on no less than 16 days' notice, there was no way for Mr. Oh or counsel to arrange a schedule so as to make sure a specific hearing date was accommodated. Instead the parties were subject to whatever date the Court (reasonably) assigned. As such, under these circumstances, and most respectfully, it was only fair for the Court to take into account legitimate reasons for non-availability and /or the inability of one of the parties to proceed on an assigned date. And if a crowded schedule was the reason for the Court's reluctance to afford a short adjournment, counsel for UPD had advised that there was considerable flexibility during the following week for a re-scheduled hearing. In short, and again with respect, the Court's refusal to adjourn appears to have been unnecessary and arbitrary.

In this regard, as noted, the effect of the refusal to adjourn the proceeding meant that Mr. Oh had to testify on the spot unprepared and without the ability to re-fresh himself or consult his records or sources. Instead he was limited to rough recollection. As a consequence, his testimony was rather uncertain and sometimes vague[15] Given these circumstances, it is not surprising that the Court found Mr. Oh's testimony to be "credible in some respects and not so credible in others" and

15 Examples of his uncertainty or lack of clear recollection, and the need to consult his cellphone or laptop, neither of which were available, can be found throughout his testimony See. e.g. T54-6 to 9, T71-13, t73-11 to 13, t138-17 to 22.

"challenging" (T-168-21 to 24). We believe these conclusions were most unfair given the circumstances which were created by the Court's refusal to grant the extremely short adjournment requested.

As has been emphasized, the closing of the subject diner was a highly significant event with implications both for the parties and many others. As set forth in *McKeown-Brand, supra* at 558, in light of this, a proceeding was warranted which allowed a hearing "appropriate to the nature of the case" and under circumstances which provided "an adequate opportunity to prepare and respond." Manifestly, the manner in which the hearing in this case proceeded, did not meet that standard. Accordingly, it is respectfully suggested that the Judgment of Possession of October 7, 2024 be vacated, that the Warrant of Removal be deemed void and that the matter be remanded for an appropriate hearing as to whether in light of the factors discussed in Point II of this Brief, Dedes is entitled to such a judgment (or , conversely,whether possession should be restored to UPD).[16]

II. THE JUDGMENT OF POSSESSION WAS NOT JUSTIFIED. (T176-1 to 178-16; Da52)

The award of possession to Dedes was based on several claimed breaches of the Stipulation of Settlement which, on analysis and reflection, were simply not of sufficient import to warrant the extreme sanction of ejection. Although the compiling of several instances concerning payment issues may have created the

16 To the best of the knowledge of UPD, the premises remain currently unoccupied and unused.

impression of substantial breach, a more discerning look at each of these instances, particularly in the light of established legal principles, reflects that the alleged transgressions were the result of circumstances beyond the control of UPD (the determination of UPD's bank to hold payment of the July 23rd and July 30th checks on the ground that they were suspicious[17] and the non-delivery by the Post Office of an August rent check) or, to the questionable extent they were delinquent in light of the late charge provision, were rapidly sought to be cured by payments which Dedes refused to deposit (September payments of rent and the September promissory note installment, as well as the replacement check for August rent) or were of a less than certain amount (the sewer tax payments). In all these cases, the good faith and intention to meet obligations of UPD is manifest and, for the reasons hereinafter expressed, these payment issues should not serve as a basis for expulsion.

In this respect, it should be understood that the summary dispossess procedure has a broader purpose than eviction itself. Rather , as noted in *Hodges v. Feinstein, Raiss Kelin & Booker, supra 383 N.J. Super at 608* "[t]he specific purpose of a summary dispossess proceeding is to secure the performance of the rental obligation in actions based on the nonpayment of rent [emphasis added]." See also *Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. 459, 469 (1961)*, a commercial case in which it was similarly held that "the summary proceeding is designed to

secure performance of the rental obligation and, hence, if it has been performed, the

17 Although these payments were deemed late by Dedes and the Court, there was no proof as to when they were actually received. It is not clear whether lateness was the result of a delivery after the respective payment dates or, rather, because the checks were honored late by the bank due to its security concerns.

summary remedy may not be further pursued." In essence, the breach of the payment obligation may be remedied before the tenant is expelled.

These principles should apply to the case at bar, as UPD either paid the allegedly delinquent rent or tendered it to a landlord who was unwilling to accept it.. Clearly, the July 23rd rental payment and the July 30th payments were made. The August rental payment, which Dedes claims it did not receive, but which is evidenced by a carbon copy of the check (Da33), was replaced on September 3, 2024 (but, as stated, was not cashed), the September rent payment and the installment payment[18] were tendered for delivery on September 16, 2024 (see Da41 and testimony at T93-17 to 94-2) but again were not cashed. Although the sewer tax (the amount of which was never clarified) was not paid by UPD, it was not for a lack of effort, as Mr. Oh sought to pay it online and by sending an employee to the offices of thte Sewer Authority with a blank check, an attempt which was unsuccessful only because the sewer tax had been already paid, apparently by Dedes. In this respect, however, Mr. Oh further testified that "of course" UPD was prepared to compensate Dedes for the sewer payment (T92-10).

Plainly, if with difficulty, UPD, which, after all, had paid over $125,000 in July to preserve its lease of the premises, continued to meet, or made a genuine effort to meet, its rent obligation. Nevertheless, applying dry contractual principles, the Court rejected the argument that the Lease could and should be salvaged through the

18 Although the $1006.54 September installment check was not in payment of an original rent debt, it was treated as a payment due through the summary proceeding and non-payment of same was intended to contribute to the grounds for eviction. Accordingly, it should be governed by the same principles which apply to payments designated as rent.

substantially compliant efforts of UPD to pay the obligation, holding instead that the settlement agreement was a contract, that the Court could not make a better or different contract for the parties and that that the breach of the contract was an "established fact" (T174-1 to 20).

In applying the stringent contract principles in this fashion, we respectfully contend that the Court erred. Apart from the fact, discussed above, that, in a Landlord-Tenant context, breach for non-payment can be overcome, the law relating to the enforcement of such contracts is not so inflexible that it cannot accommodate an inconsequential, that is, an immaterial breach – precisely the situation which is presented here. This is particularly true when it is recognized that, as discussed below, the principles which govern Landlord-Tenant law are infused with equitable concepts derived from property law, a characteristic which moderates the strict interpretation of lease documents and rental agreements and affords a tenant some relief at least where the alleged breach of lease does not appear to be substantial.

In this respect, considerable authority exists to support the principle that, in the Landlord-Tenant context, a trivial or immaterial contractual transgression will not justify a forfeiture of a leasehold. A particularly thorough discussion of the law in this area is found in the opinion of the Arizona Supreme Court in *Foundation Development Corp. v. Loehmann's Inc., 163 Ariz. 438, 788 P.2d 1189 (1990).* In *Foundation*, the Court examined the historical interplay in Landlord-Tenant cases between contract and property concepts, acknowledging that the equitable concepts inherent in property law abhorring forfeitures had had substantial influence on the enforcement of lease provisions and the loss of a leasehold (788 P.2d at 1192-93) and that, as a consequence, the law had developed a principle that leasehold evictions had to derive from substantial violations, meaning that trivial breaches do not warrant a forfeiture of the lease. In particular, the *Foundation* court explained (at 788 P.2d 1196) the following:

> " , , , [A]n overwhelming majority of courts has concluded, without reference to a specific statutory provision, that a lease may not be forfeited for a trivial or technical breach even where the parties have specifically agreed that "any breach" gives rise to the right of termination. *See* Annotation, *Commercial Leases: Application of Rule That Lease May Be Canceled Only For "Material" Breach,* 54 A.L.R.4th 595 (1987). These courts note the sophistication and complexity of most business interactions and are concerned, therefore, that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties to the lease did not intend that every minor or technical failure to adhere to complicated lease provisions could cause forfeiture. Accordingly, nearly all courts hold that, regardless of the language of the lease, to justify forfeiture, the breach must be "material,","serious," or "substantial". [Lengthy footnote setting forth authorities from other states omitted.] Thus, well reasoned authority from other states also refutes the arguments advanced by the landlord in this case."

See also,*Kiriakadis v. United Artists Communications, Inc. 312 S.C.. 271, 440 S.E. 2d 364 (1993)*, where, following *Foundation,* the Court held (at 440 S.E.2d 366) that "the landlord's right to terminate must be tempered by notions of equity and common sense."

Having stated these general principles, the court in *Foundation* turned to the methodology needed to determine when a technical breach of a leasing relationship should be deemed too inconsequential to warrant expulsion of a tenant. In this respect, after reviewing and rejecting as too general a test set forth in Section 13.1 of the Restatement (Second) of Property[19], the Court adopted instead a test set forth in the Restatament (Second) of Contracts at Section 241 under the heading Circumstances Significant in Determining Whether a Failure is Material. In this provision, (quoted at 788 P.2d 1198-98) the following factors are set forth as an aid in determining immateriality in the landlord-tenant context:

(a) The extent to which the injured party will be deprived of the benefit he reasonably expected;

(b) The extent to which the injured party will be reasonably compensated for the part of the benefit of which he will be deprived;

(c) The extent to which the party failing to perform or offer to perform will suffer forfeiture;

(d) The likelihood that the party failing to perform will cure his failure, taking account of all circumstances, including reasonable assurances;

(e) The extent to which the behavior of the party failing to perform or offer to perform conforms to standards of good faith and fair dealing.

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19 Section 13.1 of the Restatement (Second) of Property provides that a tenant's breach is actionable if the landlord "is deprived of a significant inducement to the making of a lease and the tenant does not perform his promise in a reasonable period of time after being requested to do so."

An analysis of these factors yield the conclusion that the claimed violations in this case are indeed immaterial:

In *Foundation*, in addressing factors (a) and (b), deprivation of benefit and adequacy of compensation, the court looked to the economic effect of the loss of use of funds, finding it too insignificant to warrant a determination of actionable breach. Admittedly, the periods of time between the last date for payment (the 16th of the month) and the actual date on which delivery of payments was attempted to be made was greater in this case than in *Foundation* and, also admittedly, the theoretical loss of the use of funds of the various payments in issue here would be larger, as the below footnote reflects. Nevertheless, that loss of use, even when compiled into a single figure, pales in comparison to the fact that this Lease produced approximately $300,000 in annual revenue. As such, relatively and fairly, the theoretical loss of funds usage in this case was immaterial and could have been easily compensated by the checks Dedes did not deposit and reimbursement of the sewer charges it paid on its own. had demand been made. [20] Clearly, UPD was prepared to comply, indeed sought to comply, with its payment obligations.

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20 In this respect, using the current judgment interest rate of 5.5 %, the theoretical annual amount of interest would be ~ $16,640. Dividing this amount by 365 days in turn yields daily interest of $45.59. Multplying that by 21 days (the number of days the from the time initial August payment was last due without penalty (August 16th) to the date when, per the certified mail receipt notes it was to be delivered (September 6, 2024) equals $957.39. The same per diem figure for the 3 days maximum that the September payment was paid after the 16th will yield a total of $136.77. The theoretical loss on the $1006.54 monthly payment from September 1st to September 19th (the apparent date of payment is 34.58 ($1.82 per day x 19 days). Since the amount Dedes paid for the sewer is not known, a reliable figure for alleged loss of use cannot be calculated . Nevertheless, if the June 30, 2023 payment of $2898.70 (Da39, D-4) is deemed a 6-month payment and thus annualized to $5797.40, at 5.5% this would yield interest of $318.85 per annum and $.87 per day. Multiplying that figure by the 30 days which passed from September 7, 2024 (the date it is believed that Dedes made payment) until the October 7, 2024 hearing date yields an interest-lost factor of $26.10, which, undoubtedly could have been paid along with the unspecified amount of the sewer charges themselves that Mr. Oh stated "of course" (T 92-10) would have been reimbursed had demand been made. Summarizing, the total amount for theoretical loss of use of funds was $1154.84 which could have been paid to Dedes in addition to the amounts of checks which Dedes opted not to cash, and the (unspecified) amount of the sewer bill which Dedes paid.

As also pointed out in *Foundation* (at 1198), in assessing the third factor, likeilihood of forfeiture, the court must weigh the extent to which a determination of material breach would result in a forfeiture. Undoubtedly influenced by the equitable reluctance to impose forfeiture, the court should consider the extent to which the party accused of breach has already performed (such as in this case paying over $125,000 pursuant to the settlement), how long the breaching party has performed under the Lease (in this case, 12 years, T111-22), during which time it obviously paid millions of dollars in rent and, additionally, had many millions more to pay over the remaining years of the Lease), the fact that the value of the Lease far exceeded the amounts claimed as an alleged consequence of the breach, and perhaps the social consequences of the breach, including, of course, the substantial unemployment which a forfeiture would (and did) cause.

The fourth factor cited in the Restatement provision adopted in *Foundation* (again 1198) is the likelihood the alleged breaching party will cure or offer to do so.. Clearly, in tendering the replacement check and the September checks, in acknowledging that UPD would reimburse Dedes for the sewer charges, in attempting to pay these charges online and subsequently in person (only to discover that payment had already been made) there is no question that UPD had every intention of curing the alleged breach.

And, as to the fifth factor, good faith and fair dealing, as has been sressed.there is again no question that UPD sought to perform. Although the parties may differ as to the effect the late charge date had on the timeliness of rent payment, UPD met its obligation, as it understood it, to include a late charge in its payments, replaced the allegedly non-delivered August check, did not dispute its obligation with respect to the unsubstantiated sewer charge paid by Dedes, was not responsible for the fact that its Bank delayed honoring the July 23rd and 30th checks for security reasons and indisputably paid over $125,000 to maintain its Lease.

Unquestionably, in a case involving the eviction of a tenant from a leased premises, the court should take into consideration all the factors, legal and equitable, which pertain to the matters in issue. In this regard, we respectfully contend that the a determination to forfeit the tenancy and evict should be tempered by a recognition of the severe consequences of so doing and the long-standing principles that the summary dispossess process in tended in the first instance to secure payment and performance and that, in any event, equity abhors a forfeiture.

CONCLUSION

For these reasons, it is respectfully urged that the Judgment of Possession be vacated along with Warrant of Removal and that the matter be remanded to the trial court for a full hearing of the issues in light of the governing principles.

Respectfully submitted,

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Dated: February 13, 2025