SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000708-24

ERIKA A. BUTLER AND RHEIN REALTY & MANAGEMENT CORP., Plaintiffs-Respondents, v. ADVANCE REALTY DEVELOPMENT, LLC, PARAMUS NORTHBOUND PROPERTY, LLC, AND DEKA USA PROPERTY FOUR LP, Defendants-Appellants.	CIVIL ACTION On Appeal From An Order Entered By The Superior Court, Law Division, Bergen County On July 25, 2024 And a Judgment Entered on October 25, 2024 DOCKET NO. BER-L-1540-20 Sat below: Honorable Lina P. Corriston, J.S.C.

BRIEF OF DEFENDANTS-APPELLANTS DEKA USA PROPERTY FOUR, LP AND PARAMUS NORTHBOUND PROPERTY, LLC

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PRELIMINARY STATEMENT

The trial court held that defendants, owners of a commercial property, had "affirmatively assumed" from the prior owner of the property an obligation to pay brokerage commissions and to "make sure plaintiff was taken care of" pursuant to either (a) an unwritten and undisclosed understanding between the broker and the prior property owner as to the meaning of terms in an unambiguous written brokerage agreement or (b) an undisclosed "course of conduct" between the prior owner and the broker. The trial court's ruling is unsupported by the facts or the law. The trial court failed to address the undisputed fact that (a) the so-called "understanding" and "course of conduct" were -- by plaintiffs' own trial admissions -- never disclosed to defendants, (b) the alleged "understanding" and "course of conduct" plainly and directly contradicted the terms of the unambiguous written brokerage agreement, which one of the defendants, through a limited assignment, agreed to assume, and (c) an unwritten verbal "amendment" or "understanding" of a written contract would violate the Statute of Frauds. Notwithstanding all of those facts, the trial court found in favor of the broker.

The terms of the written brokerage agreement were clear: the broker was entitled to a commission if, and only if, a tenant at the subject property exercised a pre-existing contractual option to "renew" its lease through the efforts of the

broker. The undisputed evidence showed that did not happen here; there was no exercise by the tenants of their contractual options to renew and Rhein was uninvolved in the new leases that the tenants ultimately executed. *A fortiori*, plaintiffs were not entitled to a brokerage commission. But the trial court held that the term "renew" did not mean "renew" (as the plaintiff's principal testified it meant), but rather was "intended" by the broker and the prior property owner, albeit not disclosed to anyone else, to be an "umbrella" term encompassing not only renewals of leases, but also new leases, modifications, extensions, and amendments. The trial court then held that new leases that were entered into by two tenants of the property were subject to the undisclosed "umbrella" terms of the brokerage agreement. The trial court's conclusion was not supported by the broker's own testimony that it was to receive a commission for a "renewal" only when an existing tenant exercised its contractual right to "renew" its tenancy on previously agreed-upon terms contained in its lease. As a matter of logic, the contractual assumption of only specifically disclosed brokerage obligations cannot include undisclosed brokerage obligations.

In addition to these errors, the trial court decision if rife with other errors requiring reversal. After first improperly requiring a trial to proceed despite plaintiffs' willful non-compliance with N.J. Court Rule 4:25-7(b), the trial court conducted a three-day bench trial. Three months later, on July 25, 2024, the

trial court entered an Order (the "Order") and on October 25, 2024, the trial court entered judgment (the "Judgment") in this action. The trial court's Order and Judgment contain multiple material errors of law and misapplications of law to uncontradicted facts including: (a) its entry of judgment in favor of plaintiff Erika A. Butler ("Plaintiff Butler") on a breach of contract cause of action, notwithstanding Plaintiff Butler's trial testimony that she had no contract for brokerage commissions, (b) its incorrect holding that private contracts of sale between PNP and the Trust, and subsequently between, PNP and Deka, "created" rights that plaintiffs could enforce, (c) its incorrect holding that PNP and Deka were bound by an undisclosed "course of conduct" that supposedly existed between the Trust and the Plaintiffs notwithstanding that there was no evidence of a course of conduct adduced at trial, including no evidence that that the Trust had ever paid a commission to Rhein under circumstances such as those here, and (d) its entry of judgement at a commission rate of six (6%) with respect to one of the leases at issue despite the admissions of the Plaintiffs that the rate of commission was to be four (4%) percent.

The trial court's multiple errors culminated in an Order and Judgment that are demonstrably incorrect and unjust. The Order and Judgment must be reversed, and this Court should enter judgment in favor of defendants.

PROCEDURAL HISTORY

Plaintiff filed its First Amended Complaint on August 8, 2021. (Pa001). Defendants filed their Answer on May 5, 2021. (Pa006). Plaintiff filed a Second Amended Complaint on February 1, 2023 (Pa020). Defendants filed their Answer to Plaintiff's Second Amended Complaint on March 6, 2023. (Pa036). The case was tried without a jury on April 29, April 30 and May 1, 2024.[1] The trial court rendered its Decision and Order on July 25, 2024. (4T[2]). The trial court entered judgment on October 25, 2024. (Pa036).

[1] The three volumes of the trial transcript are: 1T (April 29, 2024), 2T (April 30, 2024) and 3T (May 1, 2024). The Transcript of the Court's Decision and Order is 4T (July 25, 2024).

References to the trial transcripts in Appellant's brief are to: 1T44, 20 – 1T45, 12; 1T48, 3 – 1T49, 8;; 2T1, 2-18;; 2T23, 17-22; 2T40, 2-5; 2T40, 21 – 2T41, 14; 2T43, 20-23; 2T107, 24 – 2T108, 7; 3T5, 7 – 3T7, 17; 3T7, 18 – 3T8, 17; 3T9, 20 – 3T11, 18; 3T27, 7 – 3T29, 16; 3T60, 15-21; 3T60, 18-23; 3T101, 11 – 3T103, 4; 3T95, 11-18; 3T101, 11 – 3T103, 4; and, 3T109, 19 – 3T110 – 10.

STATEMENT OF FACTS

Rhein and Plaintiff Butler, the principal of Rhein and a licensed New Jersey real estate broker, commenced this action seeking brokerage commissions from PNP and Deka. Pa 001; 4T3, 19, – 4T4, 6. Non-party The Emil Buehler Perpetual Trust (the "Trust") is a New Jersey trust, which from 1983 until 2015, was the owner of certain real property located at 60 Route 17 North, Paramus, New Jersey (the "Property"). 4T4, 14 – 21. Non-party Annaliese Gillespie, now deceased, was at the time of many of the events at issue, both the principal of Rhein and a Trustee of the Trust. Ms. Gillespie was Plaintiff Butler's mother. 4T4, 7 – 21.

PNP held fee title to the Property from 2015, when it acquired the Property through an "Agreement of Purchase and Sale between the Emil Buehler Perpetual Trust, as Seller and Advance Realty Development, LLC, as Purchaser" ("PNP PSA") (Pa320) until it conveyed the Property to DEKA in 2018. Pa457. DEKA is the current owner of the Property, having acquired it through a "Purchase and Sale Agreement between Paramus Northbound Property, LLC, as Seller and Deka USA Property Four, LP, as Purchaser" ("Deka PSA"). Pa457.

A. The Brokerage Agreement

On or about February 1984, Buehler, Inc., the predecessor to the Trust, entered into a Brokerage Agreement with Rhein Management Corp.

("Brokerage Agreement") for an initial ten year term. Pa105. Paragraph 6 of the Brokerage Agreement provides, in pertinent part: "If the Property is sold or leased *or existing lease renewed through the efforts of the Agent* [Rhein Management Corp.] … the Agent will be entitled to a commission in an amount in accordance with the following rates: (a) New Jersey properties; not less than six percent (6%) of the total sales price or gross rental … (emphasis supplied). Pa107. The term of the Brokerage Agreement was extended several times, and on November 21, 2011, the Trust terminated the Brokerage Agreement effective as of December 1, 2011. Pa118.

Plaintiff Butler testified at trial that she personally had no agreement with the Trust, PNP or DEKA with respect to brokerage commissions. 2T40, 2-18 (Q. "Ms. Butler, do you have a contract personally, [with] either Paramus Northbound, Deka, or Buehler that pay you commissions personally? A. I do not").

B. The Leases for Which Plaintiffs Claim Commissions

1. The PetSmart Lease

On February 21, 1996, PetSmart Inc. and the Trust entered into and executed a certain "Shopping Center Lease between The Emil Buehler Trust, a New Jersey charitable trust, Landlord, and PETsMART [sic] Inc., a Delaware Corporation, Tenant" (the "PetSmart Lease"). Pa157. The PetSmart Lease was

executed on behalf of the Trust by, among others, Rhein's principal, Ms. Gillespie, acting in her capacity as a Trustee of the Trust. PA157; PA 187.

Pursuant to the PetSmart Lease, PetSmart was to lease space at the Property for an initial term of fifteen (15) years with two (2) tenant options to renew the PetSmart Lease for a term of five (5) years per renewal option. Pa160-161, Pa162-164. The PetSmart Lease defined Renewal Periods as the two (2) five (5) year renewal options. Pa163-164. The PetSmart Lease defined the "Term" of the Lease as the "Initial [15 year] Term and any and all Renewal Periods". Pa163-164. Under the PetSmart Lease, the total potential "Term" of the PetSmart Lease, assuming the two lease renewal options were exercised, was twenty-five (25) years, or through January 31, 2021. Pa160.

The PetSmart Lease expressly provided that upon the failure of PetSmart to exercise a renewal option, "this Lease shall terminate on the then-applicable expiration date and neither Landlord nor Tenant shall have any further obligation or liability hereunder arising or continuing from and after the later of such expiration date of the date when Tenant vacates the Premises. Pa163-164. Under the PetSmart Lease, para. 47 (Pa185), the Trust and PetSmart represented to one another that they had "dealt with no other broker than as set forth in Exhibit K of the Fundamental Lease Provisions in connection with the negotiation, execution and delivery of this Lease". Pa185. Rhein was not

identified in the PetSmart Lease as a broker involved in the PetSmart Lease. Pa185, Pa161.

On or about July 26, 2011, the Trust and PetSmart entered into and executed a "Second Amendment to Lease by and between The Emil Buehler Trust, a New Jersey charitable trust ("Landlord") and PetSmart, Inc, a Delaware Corporation ("Tenant")(the "Second Amendment"). Pa184. Pursuant to the Second Amendment, PetSmart exercised the renewal options it held under the PetSmart Lease extending the term of its Lease through January 31, 2021 (Pa184, Pa195) and PetSmart was granted two (2) additional five (5) year renewal options. Pa195. The Second Amendment also set forth the specific dates by which PetSmart was to notify the Landlord "in the event Tenant [PetSmart] elects not to exercise such Renewal Period…". Pa195. The Second Amendment does not identify Rhein as a broker with respect to the PetSmart Lease. Pa194 – Pa202. At the time of the original PetSmart Lease and the Second Amendment, Rhein was serving as the Trust's property manager with respect to the Property. Pa182 (email terminating Rhein as broker and property manager).

In 2015, PNP acquired the Property from the Trust through the PNP PSA. Pa320. In 2018, DEKA acquired the Property from PNP through the Deka PSA. Pa457.

In 2019, in compliance with the Second Amendment to the PetSmart Lease (Pa195), PetSmart informed DEKA that it would not exercise its renewal options as set forth in the Second Amendment to the PetSmart Lease. 3T27, 7 – 3T29, 16. PetSmart did not exercise its renewal options under the Second Amendment. 3T27, 7 – 3T29, 16.

Thereafter, in the anticipation that PetSmart would vacate the leased premises, DEKA retained a retail broker (Cushman and Wakefield, Retail Services) and began to prepare plans for obtaining a new tenant and modifying or dividing the leased premises for a potential new tenant. 3T 30, 25 – 3T33, 24; Pa. 481; Pa484. DEKA and its broker, Cushman and Wakefield, knew that the area leased by PetSmart was substantially larger in floor area than was optimal for a PetSmart store and that the renewal rates were no longer reflective of the market. 3T30, 25 – 3T33. Unexpectedly, in or about April 2021 after the expiration of its lease term which ended on January 31, 2021, after its prior written notice that it would not exercise its renewal options, PetSmart contacted Cushman and Wakefield to express a possible interest in a new lease if terms could be agreed to. 3T30, 25 – 3T33. Negotiations between DEKA (including Cushman and Wakefield) and PetSmart ensued over a period of months. 3T30, 25 – 3T33.

Eventually, DEKA and PetSmart reached agreement as to new lease terms, and on October 8, 2021, DEKA and PetSmart entered into and executed a "Shopping Center Lease between DEKA USA Property Four, LP, a Delaware Limited Partnership, Landlord, and PetSmart LLC, a Delaware limited liability company, f/k/a PetSmart, Inc." (the "2021 PetSmart Lease"). Pa278. The New PetSmart Lease reduced the scheduled rent that PetSmart would have been required to pay to DEKA had it exercised its renewal options under the PetSmart Second Amendment and also reduced the rent that PetSmart was paying during the then-current lease term. Pa. 278; 3T35, 3-8. The rent that is scheduled to be paid by PetSmart to DEKA under the New PetSmart Lease is approximately $1.9 million *less* than PetSmart would have been required to pay DEKA had it exercised its renewal options in the Second Amendment. 3T35, 3-8.

The New PetSmart Lease did not grant PetSmart any renewal options. Pa278. In the New PetSmart Lease, Cushman & Wakefield was identified as the only real estate broker involved in the New PetSmart Lease. Pa282. In the New PetSmart Lease, DEKA and PetSmart represented to one another that they had not dealt with any real estate brokers other than the one identified in Sec. K of the Fundamental Lease Provisions (namely, Cushman & Wakefield). Pa311. DEKA paid Cushman and Wakefield an agreed-upon broker's commission with respect to the New PetSmart Lease. 3T34, 21 – 3T35, 2. Plaintiff, Erika Butler,

the principal of Rhein, testified that neither she nor Rhein had any contact with PetSmart or DEKA during the negotiations for the New PetSmart Lease and neither she nor Rhein had any involvement in the New PetSmart Lease. 1T42, 5-14.

2. <u>The Borders Bookstore Lease/DSW Lease</u>

On June 24, 1992, the Trust and Book Inventory Systems, Inc. d/b/a Borders Book Shop entered into a Lease Agreement (the "Borders Lease"). Pa203. The Borders Lease was for an initial term of 10 years, with Borders being granted four (4) renewal options of five (5) years each. Pa203 - 205. The only broker identified in the Borders Lease was "Stu Sherer, Equity Realty, Paramus, New Jersey". Pa203. Under the Borders Lease, the Trust and Borders represented to one another that "there are no claims for brokerage commissions or finder's fees in connection with the execution of this Lease, other than to the party identified in Section 1.6 for which Landlord shall be solely responsible…". Pa231. Rhein was not identified in the Borders Lease as a broker involved in the Borders Lease. Pa203; Pa231.

On or about March 10, 1995, Borders, Inc., the "successor by merger to Book Inventory Systems, Inc.", entered into and executed a "First Amendment to Lease Agreement" ("Borders First Amendment"). Pa257. The Borders First Amendment did not identify Rhein as a broker involved in the Borders Lease of

the Borders First Amendment. Pa257 - 258. The Borders First Amendment clarified that the initial lease term would expire on October 31, 2003. Pa257, para. 1. The Borders First Amendment replaced Exhibit C (the Rent Schedule) with a new Exhibit C. Pa257, para. 2; Pa260.

Rhein is not identified in the Borders First Amendment as a broker involved in the Borders Lease nor with the Borders First Amendment. Pa257 – 258. To the contrary, the First Amendment expressly provides that "except as specifically modified herein, all of the terms, covenants and conditions of the [Borders] Lease Agreement dated June 24, 1992 remain in full force and effect". Pa258, para. 6. The Borders First Amendment was executed on behalf of the Trust by, among other signatories, Anneliese Gillespie, as Trustee. At the time, Ms. Gillespie, the mother of Plaintiff Butler, was also the principal of Rhein Realty. Pa258.

On or about March 10, 1995, Borders entered into a Sublease Agreement dated March 10, 1995 pursuant to which Shonac Corporation was to occupy the entire Leased Premises which Borders had leased pursuant to the Borders Lease. Pa261, recitals a - e. Subsequently, Shonac assigned its rights under the Sublease to Wilkerson Shoe Co., which subsequently changed its name to DSW Shoe Warehouse ("DSW"). Pa261, recitals a – e.

On or about July 31, 2010, the Trust, Borders and DSW entered into an "Assignment and Assumption of Lease and Termination of Sublease" ("Assignment of Lease"). Pa261. Pursuant to the Assignment of Lease, DSW was assigned and assumed all of Border's "right, title and interest in and to the Lease, for the terms of the Lease and all renewal terms thereof exercisable by Assignee [Borders]"…". Pa262, para. 1. In the Assignment of Lease, Borders and DSW represented to one another that "they have not dealt with any broker or agent in connection the negotiation or execution of this Assignment". Pa266, para. 14.

In 2015, PNP acquired the Property from the Trust. Pa320.

Well prior to the time at which DSW would have been required to exercise its right under the renewal options granted to it in the Borders Lease, DSW advised PNP that it would not exercise its remaining renewal options under the Borders Lease. 3T5, 7 – 3T7, 17. DSW did not exercise its renewal options under the Borders Lease. 3T5, 7 – 3T57, 17. As a result of DSW advising PNP that it would not exercise its remaining renewal options, PNP and DSW entered into negotiations to determine whether new terms could be reached to have DSW continue in occupancy at the leased premises under the Borders Lease. 3T7, 18 – 3T8, 17.

On or about September 15, 2016, following extensive negotiations, DSW and PNP entered into a new lease with DSW (the "2016 DSW Lease") to the original Borders Lease which reduced the scheduled rent that DSW would have been required to pay to PNP had it exercised its renewal options under the Borders Lease and also reduced the rent that DSW was paying during the then-current lease term. Pa273. The rent that is scheduled to be paid by DSW to PNP under the DSW Lease is approximately $1.7 million less than DSW would have been required to pay PNP had it exercised its renewal options. 3T9, 20 – 3T11,18.

In addition, the DSW Lease established a single lease term through October 31, 2019 (Pa273, para. 1), and did not grant any further renewal options to DSW. Pa274, para. 3. In the DSW Lease, PNP and DSW represented to one another that "they have not entered into any agreement or incurred any obligation in connection with this transaction which might result in the obligation to pay a brokerage commission to any broker". Pa275, para. 8.

Plaintiff Butler, the principal of Rhein, testified that neither she nor Rhein played any role with respect to negotiations between DSW or PNP for the DSW Lease and neither she nor Rhein had any involvement in the DSW Lease. 1T43, 3-10.

C. <u>The Sale of the Property To PNP</u>

On or about September 15, 2015, non-party "Advance Realty Development, LLC, as Purchaser and The Emil Buehler Trust, as Seller", entered into and executed a certain "Agreement of Sale" ("PNP PSA"). Pa 320. Advance later assigned its interest in the Agreement of Sale to PNP.

Paragraph 6(c) of the PNP PSA contains the "Representation and Warranty" of the Trust to PNP that: "*a complete listing of all leasing brokerage contracts and amendments and modifications thereto*, affecting the Property (the "Leasing Brokerage Contracts") is attached hereto as Exhibit H . … To the best of Seller's knowledge, all sums due under the Leasing Brokerage Contracts with respect to the initial terms of the Lease Documents, and all renewal, extension and expansion options to the extent exercised in writing by the tenant prior to the Effective Date, have been paid in full". (emphasis supplied). Pa328.

In the PNP PSA, the Trust did not disclose any "understandings", modifications, amendments, course of performance or oral modification of the written terms of the Brokerage Agreement. Pa320, et seq.; Pa328, para. 6, and Pa. 102 - Pa156 (the documents attached to PA320 as Exhibit H, were admitted separately, over objection, as trial exhibits P1 - P9). Dariusz Winnicki, an attorney for the Trust who represented the Trust with respect to the PNP PSA, testified at trial that he did not inform, and would not have informed, PNP about

the existence of oral agreements or non-written understandings with respect to the Brokerage Agreement. 3T109, 19 – 3T110, 10.

The Trust and PNP also entered into and executed an "Assignment and Assumption of Brokerage Agreements ("Assignment of Disclosed Broker Agreements"). Pa488. Pursuant to the Assignment of Disclosed Broker Agreements, PNP agreed to assume the liabilities and perform the obligations of the Trust only with respect to "the Brokerage Agreements set forth on Schedule 1 [thereto]". Pa488, para. 1. No oral agreements, oral amendments, oral modifications, "understandings", courses of performance or any other non-written broker agreements, modifications or amendments were disclosed on Exhibit H to the PNP PSA or on Schedule 1 to the Assignment of Disclosed Broker Agreements. Pa488 – 499.

Under the PNP PSA, the only brokerage agreements which PNP agreed to assume or for which PNP agreed to be responsible are those specific written documents disclosed on Schedule 1 to the Assignment of Disclosed Broker Agreements. Pa488 – 499; Pa320; Pa. 102 - Pa156. Expressly, pursuant to the PNP PSA, "The parties acknowledge that this Agreement and its exhibits constitute the full agreement or understanding between the parties with respect to the subject matter of this Agreement". Pa352, Para. 31. The PNP PSA further provides that: "Each party acknowledges that no other party, or agent or attorney

of any other party, or any person, firm, corporation or any other entity, has made any promise, representation or warranty, whatsoever, express, implied or statutory, not contained herein, concerning the subject matter hereof, to induce the execution of this Agreement." Pa352, Para. 31.

D. **The Sale of the Property to DEKA**

On November 21, 2018, PNP sold the Property to DEKA pursuant to a "Purchase and Sale Agreement between Paramus Northbound Property, LLC, as Seller and DEKA USA Property Four, LP, as Purchaser" (the "DEKA PSA"). Pa457. In Paragraph 4.7 of the DEKA PSA, PNP represented that Exhibit 4.7 to the DEKA PSA was a complete list of "all brokerage agreements relating to the Premises as of the Effective Date assumed when Seller acquired the Premises". Pa464, and Pa473 - 475. In Paragraph 5.1.9(f), PNP represented that "except for the obligations under those brokerage agreements listed on Exhibit 4.7 attached hereto, no written obligations exist to brokers for the payment of any commissions or fees for renewals or expansions or the exercise of rights of first refusal, first offer or other rights under any Leases".[3] Pa466, para. 9. In the DEKA PSA, DEKA did not affirmatively assume, and it was not

[3] In the DEKA PSA, PNP expressly limited its representation to "written" brokerage agreements. This is in contrast to the PNP PSA in which the Trust made an unqualified representation to PNP that it had disclosed "all" brokerage agreements, whether written, oral or through a course of performance. Pa328, para. 6(c).

expressly assigned, any brokerage agreements, including but not limited to, the Brokerage Agreement. Pa464 -465; 3T60, 18-23.

E. The Trial Testimony Established That Rhein Was Paid a Commission Only in Accordance with the terms of Written Brokerage Agreement, Not Through a Course of Performance

Both Mr. Winnicki and Plaintiff Butler testified at trial that there was only one written brokerage agreement between the Trust and Rhein, namely, the Brokerage Agreement. Tr1, pg. 44, l. 20 – pg. 45, l. 12; Tr3, pg. 60, l. 15 – 21. Both Plaintiff Butler and Mr. Winnicki testified that under the Brokerage Agreement, Rhein only had a right to be paid commissions for renewals of leases where the tenant exercised its renewal option contained in a lease obtained through Rhein's efforts. 2T40, 21 – 2T41, 14; T3101, 11 – T3103, 4. Mr. Winnicki further testified that the Brokerage Agreement did not provide for Rhein to receive a commission under any other circumstances, and that the Brokerage Agreement did not address (i) the duration of Rhein's right to a commission or (ii) whether Rhein would receive a commission in the event of a tenant holdover, and it does not provide that Rhein is entitled to a commission for as long as a tenant remains in occupancy at the Property. T3101, - T3103, 4. Mr. Winnicki also testified that Exhibit H to the PNP PSA (trial exhibits 1 – 9) "lists all of the [brokerage] arrangements that we were aware of and that we documented and disclosed to the purchaser". 2T107, 24 – 2T208, 7.

In direct contravention of that evidence, the trial court enforced an unwritten "understanding" between the Trust and Rhein as to when Rhein would be paid a commission that was admittedly never disclosed to PNP.

Plaintiffs argued that there was an undisclosed course of performance (addressed by the trial court as a "course of conduct") through which the Brokerage Agreement had been performed repeatedly and over time such that Rhein was paid commissions for tenancies even where the tenant did not exercise its renewal options. However, Plaintiffs introduced literally no factual evidence in support of this theory; rather, Plaintiff Butler and Mr. Winnicki were permitted -- over objection -- to testify as to the alleged unilateral "intent" of the Brokerage Agreement. But neither Butler nor Winnicki could have had any admissible knowledge of the shared intent of the original signatories to the Brokerage Agreement as neither of them had participated in the negotiation and execution of that contract. 3T95, 11-18; 2T148, 3 – 2T49, 8. Further, neither Plaintiff Butler nor Mr. Winnicki testified that Rhein had ever actually been paid a commission for a tenant other than in conformity with the written terms of the Brokerage Agreement, which limited Rhein's rights to a commission only for the exercise by a tenant of its contractual renewal option. There was, accordingly, no evidence at trial of the existence of a course of performance, nor of a "course of conduct".

ARGUMENT(Pa36, 4T)

THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS WERE ENTITLED TO BROKERAGE COMMISSIONS(Pa36, 4T)

The trial court erred in holding that Plaintiffs were entitled to brokerage commissions with respect to the 2016 DSW Lease and the 2021 PetSmart Lease, and that PNP and Deka affirmatively assumed from the Trust the Trust's brokerage obligations under undisclosed "understandings", "agreements" or its "course of conduct" with Rhein.

A. Plaintiff Butler is Not Entitled to a Commission as She Had No Brokerage Contract with the Trust(Pa36, 4T)

Among the trial court's many errors was its grant of judgment to Plaintiff Butler for commissions from Deka and PNP. The basis for the trial court's action is unknowable, since its decision fails to offer a rationale, but what is known is that Plaintiff Butler clearly and unequivocally testified that she did not personally have a brokerage agreement or any other contract with the Trust, PNP or Deka. 2T40, 2-5. Accordingly, under Plaintiff Butler's own testimony, she had no basis to even make a claim in her individual capacity for a brokerage commission, much less to prevail on such a claim.

The elements of a breach of contract are: (1) the parties entered into a contract containing certain terms; (2) the plaintiff fulfilled its obligations under the contract; (3) the defendant failed to perform its obligations under the

contract, "defined as a breach of the contract;" and (4) the plaintiff sustained damages as a result. *Woytas v. Greenwood Tree Experts, Inc.*, 237 N.J. 501, 512 (2019). Here, Plaintiff Butler could not possibly establish any element of a breach of contract claim, much less all them, given her testimonial admission at trial that she had no such contract. The trial court's entry of judgment in Plaintiff Butler's favor is incorrect as a matter of law and fact.

B. Rhein Was Not Entitled to a Commission from PNP Deka Under the Clear Terms of the Brokerage Agreement and the PNP PSA(Pa36, 4T)

Rhein was not entitled to payment of a commission from PNP or Deka, because all evidence showed that (i) the conditions of the written Brokerage Agreement were not satisfied and (ii) neither PNP nor Deka affirmatively assumed the obligation to pay brokerage commissions unless the terms of the specific brokerage agreement were identified in the PNP PSA (or in Deka's case, the Deka PSA). In fact, Deka expressly did not assume any brokerage commission obligations whatsoever. Pa464 -465; T360, 18-23.

The obligation to pay a brokerage commission is personal, there is no obligation on the purchaser's part to pay the broker, unless the purchaser affirmatively assumes that obligation. *VRG Corp. v. GKN Realty Corp*, 135 N.J. 539, *641 A.2d 519 (1994); L*ongley-Jones Associates, Inc. v. Ircon Realty *Co.*, *115 A.D.2d 272, 496 N.Y.S.2d 155 (1985), aff'd*, 67 N.Y.2d 346, 502

N.Y.S.2d 706,493 N.E.2d 930 (1986). Our Supreme Court has held it "grossly onerous and unfair" to hold that in all contracts "a buyer impliedly agrees with the broker that he will pay the commission if the broker cannot legally collect it from the seller …" *McCann v. Biss, 65 N.J. 301, 313, 322 A.2d 161 (1974 ,* and accordingly, a broker seeking a commission from a successor property owner must prove its entitlement to a commission under a brokerage contract and that the successor owner "affirmatively assumed" the prior owner's obligation under the brokerage contract. *VRG Corp. v. GKN Realty Corp*., 135 N.J. 539 (1994); *Pagano Company v. 48 So. Franklin Turnpike, LLC*, 198 N.J. 107 (2009).

Here, in contrast to *VRG* and *Pagano*, neither PNP nor Deka affirmatively assumed the undisclosed "understandings" that Plaintiffs sought to enforce at trial. It was uncontroverted at trial that under the Brokerage Agreement, Rhein was entitled to a commission only when PetSmart or DSW actually exercised a renewal option contained in a lease procured through the efforts of Rhein. T240, 21 – T241, 14; T3101, 11 – T3103, 4. That demonstrably did not occur here.

Logically, to establish the "affirmative assumption" of the Trust's obligations, PNP or DEKA must have had actual knowledge of the specific obligation sought to be enforced and knowingly taken an assignment of those obligations. *Pagano Company v. 48 South Franklin Turnpike, LLC*., 198 N.J. 107 (2009)(distinguishing that case from *VRG* by noting that the leases that

were assigned to defendant made specific reference to brokerage commissions due; in this Action, the leases that were assigned make no reference to Rhein whatsoever). Such facts are not present here.

Paragraph 6 of the Brokerage Agreement provides, in pertinent part:

> "If the Property is sold or leased or existing lease renewed through the efforts of the Agent [Rhein] … the Agent will be entitled to a commission in an amount in accordance with the following rates: (a) New Jersey properties; not less than six percent (6%) of the total sales price or gross rental …

Pa105. Paragraph 6 of the Brokerage Agreement does not state that Rhein is entitled to a commission for any reason other than the exercise of a renewal option by a tenant "through the efforts of [Rhein]". Pa107 – 108. Clearly and unambiguously, Rhein would be entitled to a commission only where a tenant exercised its contractual right to renew its lease and option was exercised "through the efforts of Rhein". Pa105; T240, 21 – T241, 14; T3101, 11 – T3103, 4. As the 2016 DSW Lease -- entered into five years after Rhein was terminated as the broker -- was not a "renewal" exercised by DSW under its Lease, Rhein has no right to a commission under the written Brokerage Agreement. Similarly, because the 2021 PetSmart Lease (entered into ten years after Rhein was

terminated as the broker) was not a "renewal" exercised by PetSmart under its Lease, Rhein has no right to a commission.[4]

Whether a contract provision is clear or ambiguous is a question of law. *Grow Co. v. Chokshi,* 403 N.J.Super. 443, 476, 959 A.2d 252 (App. Div. 2008). The court's role is to determine whether the provision in question is "susceptible to at least two reasonable alternative interpretations." *Nester v. O'Donnell*, 301 N.J.Super. 198, 210, 693 A.2d 1214 (App. Div. 1997). 'If the language is plain and capable of legal construction, the language alone must determine the agreement's force and effect.' " *CSFB 2001–CP–4 Princeton Park Corporate Ctr., LLC v. SB Rental I, LLC,* 410 N.J.Super. 114, 120, 980 A.2d 1 (App. Div. 2009) (*quoting FDIC v. Prince George Corp.,* 58 F.3d 1041, 1046 (4th Cir. 1995)). The plain language of the contract is the cornerstone of the interpretive inquiry; "when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." *Quinn v. Quinn*, 225 N.J. 34, 45 (2016). It is black-letter law that a court may not provide to a party "a benefit or right

[4] As admitted by Plaintiff Butler, the three most material terms of a lease are the term, the rent and the space to be occupied. T243, 20-23. In both the 2016 DSW Lease and the 2021 PetSmart Lease, two of those three material terms were different than the terms under which DSW and PetSmart could renew, namely, rent and term. These changes in the most material terms of a lease alone render the new leases not "renewals".

to which it is not contractually entitled." *See, e.g., Grow Co., Inc. v. Chokshi,* 403 N.J. Super. 443, 464 (App. Div. 2008) ("[C]ourts do not rewrite contracts in order to provide a better bargain than contained in their writing"); *Karl's Sales & Serv., Inc. v. Gimbel Bros.*, 249 N.J. Super. 487, 493 (App. Div. 1991).

Here, the plain language of the Brokerage Agreement is clear and unambiguous, and it does not include any commission for Rhein for new leases that were not exercises of renewal options by tenants and that were not obtained through the efforts of Rhein. Pa107 – 1018; T240, 21 – T241, 14; T3101, 11 – T3103, 4. Both Plaintiff Butler and the Trust's attorney testified that there was only one written Brokerage Agreement and that under that Brokerage Agreement Rhein would only be entitled to a commission when a tenant exercises its contractual rights of renewal on the terms set forth in the renewal option itself. Pa107 – 1018; T240, 21 – T241, 14; T3101, 11 – T3103, 4. The trial admissions by Plaintiff Butler and Mr. Winnicki clearly demonstrated that Rhein was not entitled to a commission for the 2016 DSW Lease or the 2021 PetSmart Lease. Under the expressed terms of the Brokerage Agreement, Rhein had no right to a commission.

But the trial court then did what trial courts are not supposed to do. It created greater rights for a party than it was entitled to under its contract. As far as can be discerned from its opinion, the trial court held that the PNP PSA

created rights for the broker that the Brokerage Agreement did not expressly create by "interpreting" the word "renewal" as an "umbrella" term meant to encompass any and all leases, modifications, renewals or extensions, notwithstanding that Plaintiff Butler and Mr. Winnicki had given clear testimony that a "renewal" occurred only when an existing tenant exercised its contractual option to renew its lease on previously agreed terms. T340, 21 – T341, 14; T3101, 11 – T3103, 4. The court below offered no rationale for its disregard of Plaintiff's direct admission on that important point. Through its holding, which was not only unsupported by law or the trial evidence but was actually contradictory to it, the trial court found that Rhein was entitled to a commission any time a tenant at the Property executed any document to remain in tenancy at the Property and that PNP and Deka had affirmatively assumed this previously non-existent obligation.

Specifically, the trial court held: "The defendant's obligation to plaintiffs arise out of the PSAs. The PSAs set forth their obligations and the plaintiff's commission agreements which are incorporated into the PSAs are applied thereto". Pa 069, l. 4 – 7. The trial court held "Paragraph 18G as noted earlier provides a 'purchaser shall be obligated to pay commissions for existing tenants of the property, in the event existing tenants exercise options after the closing date for renewal, extension, expansion and modifications under the leased

documents[5]. This language is clear and unambiguous and makes the purchaser responsible for commissions for any existing tenants that exercise the option for renewal, extension, expansion of, and modification under the leased documents'". Pa070, l. 15 – 24. The trial court improperly expanded the scope of Paragraph 18(g) in two demonstrable ways. First, the trial court interpreted Paragraph 18(g) as creating obligations on the part of PNP. That is not what Paragraph 18(g) did. Rather, Paragraph 18(g), which was contained in a section of the PNP PSA entitled "Operation of the Property Through Closing" was merely an agreement between the Trust and PNP as to which party would be responsible for certain potential operating costs and during what time each party would be potentially responsible.

Second, Paragraph 18(g) does not expand PNP's potential obligations as assignee to be greater than those of the Trust, the assignor, nor does it confer upon tenants a right to exercise "options" they do not contractually hold. To wit, Paragraph 18(g) applies only to the "Lease Documents", which is defined in Paragraph 6(a) of the PNP PSA as leases and related documents actually

[5] The quoted term from the PNP PSA uses "Lease Documents" as a defined term as set forth in the PNP PSA at Paragraph 6(a). As defined in Paragraph 6(a) of the PNP PSA, the term "Lease Documents" means the leases and related documents contained on Exhibit F to the PNP PSA. The phrase "leased documents" is likely a transcription error; however, when the term "Lease Documents" is applied, it makes abundantly clear, as discussed below, that the trial court erred in its holding.

disclosed on Exhibit F to the PNP PSA and physically provided to PNP. With respect to such Lease Documents, Paragraph 18(g) provides only that PNP would be responsible for "leasing commissions for existing tenants of the Property payable in the event that existing tenants exercise options after the Closing Date for renewals, extensions, expansion and modifications under the Lease Documents". Pa342. In other words, if a tenant had a contractual option in its "Lease Document" to, for example, expand its leased space, and it exercised that option after the closing of the PNP PSA, then PNP, not the Trust, would be responsible for paying commissions with respect to the exercise of that option. But if that same tenant had no existing contractual option to renew its lease, Paragraph 18(g) did not create an option for that tenant to renew its Lease Document. The trial court's finding that PNP was "affirmatively assumed" obligations for commissions for which even the Trust would not have been obligated is simply devoid of evidentiary support.

The trial court's misinterpretation of Paragraph 18(g) also manifested itself by (a) its disregard of the limited scope of the proposed assignment contained in the PNP, and the specific representations made by the Trust as to the existence of brokerage agreement. Pa342, para. 18(g). Specifically, the Trust did not disclose to PNP any non-written understandings between it and Rhein as to their private "interpretation" of the clear and unambiguous terms of

the Brokerage Agreement, while simultaneously also representing to PNP that it had identified in the exhibits to the PSA "all" brokerage agreements. At closing of the PNP PSA, PNP assumed obligations only under disclosed brokerage agreements and the assignment contained important limitations, namely, that the assignment applied only to brokerage obligations arising from (a) obligations that were disclosed to PNP and (b) where the tenant actually exercised contractual option contained in its lease to renew its tenancy. Neither of those prerequisites to find PNP liable for brokerage obligations were met here.

Similarly, the trial court's finding that PNP and Deka assumed the obligation to pay brokerage commissions for "all leases, lease renewals, modifications or extensions" is without evidentiary support and is incorrect. The trial court held:

> The defendant's arguments as to 'renewals only' erroneously ignores the PSA language and looks to the brokerage agreement language. The PSAs clearly do not limit the commissions to renewals only as the defendants contend and as demonstrated by the clear an unambiguous language of paragraph F of the PNP PSA which expressly provides that the purchaser shall pay all commissions due and which may become due on any and all leases and lease renewals, modifications, or extensions entered into after the closing date, including without any limitation any commissions due pursuant to the brokerage agreements entered into between Rhein Corp and Bueller dated February 15 as set forth in exhibit H attached hereto.

4T32, 1-14. [6]

Again, the trial court erred. In fact, the assumption was limited to *disclosed* obligations, which included only the obligation to pay a commission in accordance with the written Brokerage Agreement, not in accordance with some private understanding between the Trust and Rhein of which PNP was unaware. Pa488, para. 1.

To shoehorn Plaintiffs' rights into the operative language, the trial court then held that:

> "the use of the word renewal was essentially an umbrella term *intended* to cover renewals, extensions, and modifications to leases of existing tenants who remained in the premises as clearly set forth in the PSAs. Stated another way, renewal was intended to cover commissions for anything other than the termination of the lease which as testified to at trial, typically occurs as a result of bankruptcy, insolvency, or default.

4T35, 3 -11 (emphasis supplied).

That is not what the Brokerage Agreement says. Neither Plaintiff Butler nor Mr. Winnicki testified as to this supposed interpretation of the word "renewal", which has a clear and unambiguous meaning as testified to by Plaintiff Butler. In fact, since neither Plaintiff Butler nor Mr. Winnicki participated in the drafting of the Brokerage Agreement, neither of them were competent to testify

[6] As noted previously, Deka expressly disclaimed any obligation to pay brokerage commissions when it acquired the Property from PNP.

as to an expansive interpretation of the word "renewal". Plaintiffs offered no expert or other testimony in support of the court's interpretation. To the contrary, as Plaintiff Butler testified at trial, the word "renewal" commission was only owed when a tenant exercised its contractual option to extend its tenancy on terms that were previously agreed to. T240, 21 – T241, 14; T3101, 11 – T3103, 4. That undeniably did not happen here.

Instead, PetSmart, the only entity that had the right to exercise the renewal options contained in the 2011 Second Amendment to the PetSmart Lease, informed DEKA that it would not exercise its renewal options and it did not do so. Thereafter, DEKA and PetSmart entered into lengthy negotiations that resulted, in 2021, in an entirely new lease with a rental rate significantly reduced from the rent PetSmart would have been required to pay had it exercised its contractual renewal options. And DSW, the only entity that had the right to exercise the renewal options contained in its Lease, informed PNP that it would not exercise its renewal options and it did not do so. T35, 7 – T37, 17. Thereafter, PNP and DSW entered into lengthy negotiations that resulted, in 2016, in an entirely new lease with a rental rate significantly reduced from the rents DSW would have been required to pay had it exercised its contractual renewal options. None of these facts were disputed by Rhein at trial.

It is well settled that the exercise of a lease option is not implied, and an option must be exercised, if at all, in compliance with the terms and conditions set forth in the option agreement. 22 N.J. Practice, *Landlord and Tenant Law* § 22.12 (5th ed.)(an option for a lease must be exercised by the holder of the option in the precise manner specified by the option"); *Willow Brook Recr. Center, Inc. v. Selle*, 96 N.J. Super 358, 233 A.2d 77 (App. Div. 1967). Here, Plaintiff Butler clearly testified that the option to exercise its renewal rights is held only by the tenant. And Jared Minatelli testified that DSW informed him that it would not exercise its renewal option and it did not exercise its renewal option. . T35, 7 – T37, 17. Similarly, Enda Bracken testified that PetSmart informed Deka that it would not exercise its renewal option and it did not exercise its renewal option. T317, 7 – T329, 16. 16. There was no competent factual or legal basis for the trial court's Order and Judgment expanding the scope of the Brokerage Agreement through a private understanding between Rhein and the Trust, a misinterpretation of the PNP PSA, ignoring the terms of the Deka PSA and then imposing on PNP and Deka the consequences of its errors.[7]

[7] In that regard, the trial court's finding that the testimony of witnesses on behalf of Deka and PNP was not credible, and that PNP and Deka intentionally "cut" Plaintiffs out of their commission is without any basis in the trial record and is, at best, gratuitous. The refusal by PetSmart and DSW to renew their leases was supported by credible evidence and it was not refuted by any evidence. Further, those tenants' declination to renew their leases was logical in light of their own corporate goals and existing economic conditions affecting brick and mortar

C. Rhein Did Not Prove That It Is Entitled to a Commission Under a "Course of Performance" of the Brokerage Agreement for the 2016 DSW Lease or the 2021 PetSmart Lease(Pa36, 4T)

As previously noted, for a broker to have a claim for commissions from a successor property owner, the successor owner must have "affirmatively assumed" from the prior owner the obligations to pay a broker that the previous owner agreed to pay. *VRG Corp. v. GKN Realty Corp*., 135 N.J. 539 (1994); *Pagano Company v. 48 So. Franklin Turnpike, LLC*, 198 N.J. 107 (2009), and accordingly, a broker seeking a commission from a successor property owner must prove its entitlement to a commission under a brokerage contract and that the successor owner "affirmatively assumed" the prior owner's obligation under the brokerage contract.

Therefore, to establish the "affirmative assumption" of the Trust's obligations, Plaintiffs were required to prove that PNP or DEKA had actual knowledge of the specific obligation sought to be enforced and that it knowingly took an assignment of those obligations either through a writing or through the acceptance of assigned leases that make reference to the broker's rights. *Pagano*

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businesses, and were determined independently by those tenant. Indeed, Deka was uninvolved in the Property in 2016 when DSW decided not to renew; PNP was uninvolved in the Property when PetSmart decided not to renew. The trial court's findings were unsupported by the trial record and the trial court's finding of intentional wrongdoing by Deka and PNP to deprive Rhein of a commission is baseless.

Company v. 48 So. Franklin Turnpike, LLC 198 N.J. 107 (2009)(distinguishing that case from VRG by noting that the leases that were assigned to defendant made specific reference to brokerage commissions).[8] In this Action, the leases that were assigned make no reference to Rhein whatsoever.

To the contrary, PNP was not made aware by the Trust of any oral understandings or course of performance of the Brokerage Agreement, and PNP did not have actual knowledge of any undisclosed understandings between the Trust and Rhein, other than those specifically set forth on the schedule to the Assignment of Disclosed Broker Agreements. As a result, PNP did not affirmatively assume any of the Trust's obligations under any such non-disclosed agreements or understandings.

There was no course of performance between Rhein and the Trust that would entitle Rhein to a commission for a tenant which did not exercise its renewal option and later entered into a new lease with the Trust (or subsequently,

[8] The trial court found that PNP and Deka had knowledge of the Brokerage Agreement and the DSW and PetSmart leases. That much is true, but beside the point. What neither PNP nor Deka had, or could have had, knowledge of was the private understanding between the Trust and Rhein that the Trust to pay brokerage commissions to Rhein under circumstances beyond those expressly contained in the only written Brokerage Agreement in order to "take care of the Plaintiff". It would break new legal ground to hold that a successor property owner "affirmatively assumed" brokerage obligations where, by the Trust's own trial admission, such agreements or understandings were not disclosed to them.

with DEKA or PNP). A course of performance includes repeated occasions for performance by either party when the other party has knowledge of the nature of the performance and an opportunity to object to it. 49 *N.J. Practice Procedure* § 7:25 (2010 ed.) (citing *Restatement (Second) of Contracts* § 202(4) (1979).. No such course of performance was shown at trial to exist. Nor was there a specific course of conduct proven at trial, much less that PNP or Deka knew of such course of conduct and "affirmatively agreed" to be bound by it.

First, Plaintiff Butler's own testimony that (as pertinent here) is wholly consistent with the plain contractual language that Rhein was entitled to a commission only where a tenant at the Property exercised its contractual lease renewal option renders any attempt to expand the meaning of the Brokerage Agreement futile. Plaintiff Butler's testimony clearly stated the parties' mutual intent as expressed in the Brokerage Agreement, and neither Mr. Winnicki nor any witness from the Trust contradicted Plaintiff Butler's testimony. Thus, the mutual understanding of the parties was well-established at trial and supports the conclusion that Rhein is not entitled to a commission for the 2016 DSW Lease or the 2021 PetSmart Lease.

In fact, Plaintiff Butler's testimony confirmed that the Brokerage Agreement was clear and unambiguous, and that Rhein was only to be paid a commission on renewals when a tenant exercised its contractual option to renew

its tenancy. T240, 21 – T241, 14; T3101, 11 – T3103, 4. Plaintiff Butler's testimony also makes manifest that the trial court erred in considering parol evidence as to a course of performance. *Great Atl. & Pac. Tea Co. v. Checchio,* 335 N.J.Super. 495, 501, 762 A.2d 1057 (App. Div. 2000). But even absent Plaintiff Butler's definitive testimony, there was no probative evidence presented at trial that any 'course of performance' existed by which Rhein was paid commissions for a tenant merely remaining an occupant at the Property. Although courts may use course of performance and course of dealing in interpreting contract terms, "express terms are given greater weight than course of performance [and] course of dealing." Restatement (Second) of Contracts § 203(b) (Am. Law. Inst. 1981).

The hypothetical situation posited by Rhein's lawyer in argument at trial in which Rhein would be paid a commission for as long as a tenant remained in occupancy never factually occurred – and could not have taken place – with respect to the DSW Lease or the PetSmart Lease. And even had there been such evidence presented, a course of performance cannot change the clear terms of the Brokerage Agreement or alter the parties' mutual intent, all of which was established through Plaintiff Butler's testimony. The private intent of a party to a contract will not create a material question of fact regarding its interpretation (*Domanske v. Rapid–American Corp.*, 330 N.J.Super. 241, 247–48, 749 A.2d

399 (App. Div. 2000)) and extrinsic evidence offered to establish an intent unexpressed in the writing, is irrelevant, because "[i]t . . . is the mutual intent expressed or apparent in the writing that controls." G*reat Atl. & Pac. Tea Co. v. Checchio*, 335 N.J.Super. 495, 501, 762 A.2d 1057 (App.Div.2000) (*quoting Schnakenberg v. Gibraltar Sav. & Loan Ass'n,* 37 N.J.Super. 150, 155–56, 117 A.2d 191 *(App.Div.1955))* (parol evidence may be considered for evidence of intention, but "not for the purpose of modifying or enlarging or curtailing [the contract's] terms").

Moreover, course of performance evidence cannot change the written terms of the Brokerage Agreement under the Statute of Frauds. N.J.S.A.25:1-16(b). Consistent with the Statute of Frauds, any modification, amendment or new terms of a brokerage agreement made after the enactment of the Statute of Frauds (as relevant, 1996) must also be in writing. *Dworman v. Mayor and Board of Alderman of Morristown*, 370 F.Supp. 1056 (D.N.J. 1974); *Family Kingdom, Inc. v. EMIF New Jersey Limited Partnership*, 255 B.R. 65 (Bankr. D.N.J. 1998); *Willow Brook Recreation Center, Inc. v. Selle*, 96 N.J. Super. 358 (App. Div. 1967), *cert. denied*, 51 N.J. 187, 238 A.2d 473 (1968). *Brechman v. Adamar of New Jersey, Inc*., 182 N.J. Super. 259 (Ch. Div. 1981) ("A conclusion that parol evidence may be offered to complete those contracts within the statute would fly in the face of the statute itself") Here, any parol evidence, including

evidence as to course of performance, could not as a matter of law change or supplement the Brokerage Agreement.

The trial court also found that there was a "course of conduct" and "course of dealing" between Rhein and the Trust pursuant to which the Trust "was to ensure that plaintiff was taken care of". Specifically, the trial court held:

> "there was a course of conduct between the parties as to the continuing right to commission for existing tenants. It is undisputed the relationship with the trust and plaintiffs began more than four decades ago beginning with the plaintiff's mother. And the intent of Bueller and the trust was to ensure plaintiff was taken care of, which included that plaintiff would continue to receive commissions for existing tenants. The course of dealing between the parties clarified and established the continuing obligation to plaintiffs for existing tenants and the focus of course of performance as to renewals only as I said is non-applicable here…

4T50, 13 – 4T51, 1.

The trial court summarized the "evidence" it felt substantiated the existence of a "course of conduct" between Rhein and the Trust. Specifically, the trial court noted: "The testimony of plaintiff that Rhein was paid commissions for DSW and PetSmart over the course of decades, even after her termination, the Hansen agreement entered into after her termination which explicitly provided for commissions to plaintiffs for existing tenants. The related documents which were... The testimony of trust counsel that the intent

of the agreements was that originations by Rhein were to continue to be honored". 4T48, 13-25.[9]

None of the "facts" cited by the trial court in its Decision even relate to a course of conduct or a course of performance. The payment of commissions to Rhein over the "course of decades" was pursuant to the specific terms of the Brokerage Agreement and were not connected to any course of conduct or course of performance. The "Hanson Agreement", which was the brokerage agreement entered into by the Trust with J.A.I. Hanson after the Trust terminated Rhein, merely reserved to Rhein any commissions to which it had a right under the Brokerage Agreement. And the testimony of "trust counsel", Mr. Winnicki, as to the "intent of the agreements" is not only incompetent (since Mr. Winnicki was not involved in the execution of the Brokerage Agreement) but also has nothing to do with "course of conduct" or "course of performance" which relates not to "intent" but to actual conduct by the parties to a contract.

The "course of conduct" or "course of performance" that Rhein was required to prove in order to establish an even arguable claim for a commission would have been a course of conduct of the Brokerage Agreement pursuant to

[9] In fact, Mr. Winnicki testified that he was not involved in 1984 when the Brokerage Agreement was entered into, and he therefore could not testify as to the parties' intent.

which Rhein was paid a commission with respect to tenants who did *not* exercise their contractual renewal options but remained as tenants pursuant to some other agreement, such as a new lease. There was no evidence adduced at trial that any such a scenario ever occurred. Ergo, there literally could be no course of conduct here that should have informed, much less dictated the outcome.[10] And, of course, neither PNP or Deka affirmatively "affirmatively assumed" commission obligations arising from any undisclosed "course of conduct", much less that the obligation (as found by the trial court) to "make sure the plaintiff was taken care of". To the contrary, PNP agreed to assume only specifically disclosed brokerage agreements and Deka did not agree to affirmatively assume any such brokerage agreements.

The trial court's conclusion was simply not supported by the evidence. At trial, neither Plaintiff Butler nor Mr. Winnicki could identify even one single commission payment that was made by the Trust to Rhein for any tenant who, as here, did not exercise its renewal option and then entered into a new lease for the period after its current lease term expired or with respect to a tenant whose lease term had expired but the tenant remained in occupancy. Absent evidence

[10] Moreover, the trial court conflated the evidence. The evidence cited by the trial court went to the "intent" of the parties with respect to the meaning of the Brokerage Agreement, not to a "course of conduct" or "course of performance".

of "repeated occurrences" of such payment under those exact circumstances, there was no relevant course of performance evidence presented by Plaintiff at trial. In fact, such a circumstance could not have occurred as to the DSW or PetSmart Leases as Rhein was only paid a commission when each of them were either within their initial term or where those tenants had exercised their renewal options. In other words, Rhein was paid only in accordance with the terms of the written Brokerage Agreement.

D. The Court Erred in Requiring Trial to Proceed Despite Plaintiff's Failure to Comply with Rule 4:25-7(b) (Pa36, 4T)

New Jersey Court Rule 4:25-7(b) requires, among other things, that parties identify the exhibits they intend to introduce at trial on their case in chief *and* the witnesses they intend to proffer on their case in chief. The Rule is intended to prevent trial by surprise. Notwithstanding Plaintiffs' admitted failure to comply with Rule 4:25-7(b) (which Plaintiffs never remedied), the trial court required the trial to proceed "due to the age of the case" over objection. In so doing, the trial court improperly exercised its discretion.

In *Smith v. North Jersey Truck Center, Inc*., 2023 WL 4509062 (Appellate Division, October 17, 2024, the court held: "[A] trial court has an array of available remedies to enforce compliance with a court rule or one of its orders." *Williams v. Am. Auto Logistics*, 226 N.J. 117, 124 (2016). In

determining the appropriate sanction for failing to abide by an order or rule, a "court must ... carefully weigh what sanction is the appropriate one." *Williams*, 226 N.J. at 125. In its selection of a sanction, a court must consider the "varying levels of culpability of delinquent parties." *Georgis v. Scarpa*, 226 N.J. Super. 244, 251 (App. Div. 1988). The trial court thus had an array of remedies before it, from adjourning the trial to ensure that the defendants were not prejudiced, to limiting testimony or even dismissing the action with or without prejudice. Instead, the trial court chose to impose no remedy and to require trial to proceed notwithstanding that the Plaintiff had failed to comply with its pre-trial disclosure obligations and that the Plaintiff was preparing and marking exhibits even as trial testimony was being given. Defendants were entitled under the Court Rules to be advised before trial of the exhibits and witnesses that Plaintiffs would offer. When Plaintiffs failed to comply with their disclosure obligations, the consequences of that failure should have fallen on Plaintiffs, not on Defendants. The fact that Plaintiffs then woefully failed to establish contract liability by a preponderance of the evidence as demonstrated supra does not excuse the trial court's material and irreparable error. The Court abused its discretion by failing to impose a remedy that would have ensured that the playing field at trial was level.

E. The Trial Court Erred in its Judgment by Awarding a Six-Percent Commission on the PetSmart Lease in

Contradiction to the Trust's Written Agreement with Rhein(Pa36, 4T)

In its Order and Judgment, the trial court found that Plaintiffs were entitled to a six (6%) percent brokerage commission with respect to the 2021 PetSmart Lease. Pa037, para. 1(ii). The trial court was wrong and based its decision on the trial testimony of Plaintiff Butler as to the commission Rhein "was supposed to receive". 2T23, 17-22. Plaintiff Butler's testimony should not have been admitted to contradict the terms of the written agreement pursuant to which the Trust was to pay a four (4%) percent commission with respect to PetSmart. Pa126, para. 1; Pa130. The document setting forth a four percent commission was clear and unequivocal Pa126, para. 1) which was the Trust's confirmation of a four percent commission payable to Rhein. Pa130. Thus, through the written agreements, Rhein was eligible for a maximum of a 4% commission with respect to PetSmart.

The trial court nevertheless allowed Plaintiff Butler to testify that the Trust was "supposed to pay" Rhein a 6% commission once the separate commission payments to Goldstein Brokers was fully paid. 2T23, 17-22. No document to that effect was ever introduced at trial and the only written agreement that was introduced at trial was the exchange of correspondence confirming a four percent commission. Pa126, para. 1; Pa130. As the contract formed by the exchange of correspondence was clear, no parol evidence to

contradict those writings or augment those writings should have been admitted.[11] The trial court's permitting such testimony, and then using such improper testimony as a basis for its decision was reversible error.

[11] And even if the testimony by Plaintiff Butler accurately and truthfully set forth an agreement between Rhein and Trust, PNP could not have "affirmatively assumed" undisclosed agreements.

CONCLUSION

For all the foregoing reasons, the trial court's Order and Judgment should be reversed in their entirety, and judgment in favor of Defendants should be entered by this Court.

Dated: March 5, 2025

GREENBERG TRAURIG, LLP

By: *s/Cory Mitchell Gray*
Cory Mitchell Gray

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000708-24

ERIKA A. BUTLER AND RHEIN REALTY & MANAGEMENT, CORP.,	
Plaintiffs-Respondents	On Appeal From an Order Entered By The Superior Court, Law Division, Bergen County, On July 25, 2024 And a Judgment Entered on October 25, 2024
v.	
ADVANCE REALTY DEVELOPMENT, LLC, PARAMUS NORTHBOUND PROPERTY, LLC. AND DEKA USA PROPERTY FOUR LP,	DOCKET NO. BER-L-1540-20
	Sat Below:
	Honorable Lina P. Corriston, J.S.C.
Defendants-Appellants	

BRIEF OF PLAINTIFFS-RESPONDENTS ERIKA A. BUTLER AND RHEIN REALTY & MANAGEMENT CORP.

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Date Submitted: May 27, 2025

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Respondent relies on the Appendix submitted by the Appellant.

PRELIMINARY STATEMENT

Plaintiff Rhein Realty is a commercial Real Estate Brokerage Company which had commission agreements for properties located at 60 Route 17 North in Paramus, New Jersey.

In a bench trial, after hearing evidence and evaluating the demeanor, conduct and credibility of the witnesses, the court held the Defendants liable to pay brokerage commissions earned under the scope of the written Brokerage Agreements which the Defendants had affirmatively assumed. Consistent with written agreements, the initial brokerage agreement and subsequent amendments and modifications entitled to commissions on tenancies it procured for the lease renewals. The Brokerage Agreements were fully disclosed to Defendants in Purchase and Sales Agreement. It confirms the extent of the commission agreements in the Property Sales Agreement also to both Defendants. This was intended to include renewals, extensions, amendments, modifications to lease tenancies so long as the tenant Rhein procured continued to occupy the leased premises. It was intentionally inclusive both expressly and as construed when reading all of the documents.

In finding that the Defendants expressly assumed the commission agreement and that agreement entitles Plaintiff to commission it found Defendants' testimony was not credible and the legal arguments are untenable. It found Plaintiff's witness reliable.

PROCEDURAL HISTORY

Plaintiff filed its First Amended Complaint on August 8, 2021. (Pa001). Defendants filed their Answer on May 5, 2021. (Pa006). Plaintiff filed a Second Amended Complaint on February 1, 2023 (Pa020). Defendants filed their Answer to Plaintiff's Second Amended Complaint on March 6, 2023. (Pa036).

The case was tried without a jury on April 29, April 30 and May 1, 2024. The trial court rendered its Decision and Order on July 25, 2024. (4T*). The trial court entered judgment on October 25, 2024. (Pa036).

STATEMENT OF FACTS

Parties and Entities

Plaintiffs Rhein Property Management Co. ("Rhein") and Erika Butler ("Butler"), the principal of Rhein and a licensed New Jersey real estate broker, commenced this action seeking brokerage commissions from PNP and Deka. Pa001; 4T3, 19, - 4T4, 6. Non-party The Emil Buehler Perpetual Trust (the "Trust") is a New Jersey Charitable trust, which from 1983 until 2015, was the owner of certain real property located at 60 Route 17 North, Paramus, New Jersey (the "Property"). 4T4, 14 - 21. Non-party Annaliese Gillespie ("Gillespie"), now deceased, was at the time of many of the events at issue, both the principal of Rhein Property Management Co. (now known as Rhein Realty & Management Corp.) and exclusive broker. Ms. Gillespie was Plaintiff Butler's mother. 4T4, 7 - 21.

PNP held fee title to the Property from 2015, when it acquired the Property through an "Agreement of Purchase and Sale between the Emil Buehler Perpetual Trust, as Seller and Advance Realty Development, LLC, as Purchaser" ("PNP PSA") (Pa320) until it conveyed the Property to DEKA in 2018 Pa457.

DEKA is the current owner of the Property, having acquired it through a "Purchase and Sale Agreement between Paramus Northbound Property, LLC, as Seller and Deka USA Property Four, LP, as Purchaser" ("Deka PSA"). Pa457.

A. **The Brokerage Agreements**

On or about February 1984, Buehler, Inc., the predecessor to the Trust, entered into a Brokerage Agreement with Rhein Management Corp. ("Brokerage Agreement") for an initial ten year term. Pal05. Paragraph 6 of the Brokerage Agreement provides, inter alia part: "If the Property is sold or leased or existing lease renewed through the efforts of the Agent [Rhein Management Corp.] ... The Agent will be entitled to a commission in an amount in accordance with the following rates: (a) New Jersey properties; not less than six percent (6%) of the total sales price or gross rental Pal07 4T 7,17-23. The term of the Brokerage Agreement was extended several times, and on November 21, 2011, the Trust terminated the Brokerage Agreement effective as of December 1, 2011 (Pa118). During the course of the relationship through the performance under the Brokerage Agreement and by agreement between the parties commissions were paid, for extensions, renewals, amendments and for keeping tenants occupying the property Pa101;1T 18, 21-1T21, 18; 1T 29 1-7. These agreements were memorialized by written confirmation between the Trust and Rhein was executed in 2012 specifically clarifying and protecting future commissions of Rhein would be entitled to. Pa124. All these agreements were attached to and incorporated in the PSA of Buehler with PNP (Pa 120, 124, 129, 135)

B. **The Leases for Which Plaintiffs Claim Commissions**

1. **The PetSmart Lease**

On February 21, 1996, PetSmart Inc. and the Trust entered into and executed a certain "Shopping Center Lease between The Emil Buehler Trust, a New Jersey charitable trust, Landlord, and PetSmart [sic] Inc., a Delaware Corporation, Tenant" (the "PetSmart Lease") have been procured by Rhein Pa157. The PetSmart Lease was executed on behalf of the Trust Pa157; Pa187. Wells Fargo controlled and managed the Trust as Trustee 3T 80, P 6-20

Pursuant to the PetSmart Lease, PetSmart was to lease space at the Property for an initial term of fifteen (15) years with two (2) tenant options to renew the PetSmart Lease for a term of five (5) years per renewal option. Pal60-161, Pal62-164. The PetSmart Lease defined Renewal Periods as the two (2) five (5) year renewal options. Pal63-164. The PetSmart Lease offered included the "Term" of the Lease as the "Initial [15 year] Term and any and all Renewal Periods". Pal63-164. Under the PetSmart Lease, the total potential "Term" of the PetSmart Lease, assuming the two lease renewal options were exercised, was twenty-five (25) years.

On or about July 26, 2011, the Trust and PetSmart entered into and executed a "Second Amendment to Lease by and between The Emil Buehler Trust, a New Jersey charitable trust ("Landlord") and PetSmart, Inc., a Delaware Corporation ("Tenant")(the "Second Amendment"). Pal84. Pursuant to the Second Amendment, PetSmart exercised the renewal options it held under the PetSmart Lease extending the term of its Lease through January 31, 2021 (Pa84, Pa95) and PetSmart was

granted two (2) additional five (5) year renewal options Pa95 through February 2032. The Second Amendment was the product of substantial efforts of Buehler on behalf of Rhein (4T 18, 18-4T 19, 1-7)

In 2015, PNP acquired the Property from the Trust through the PNP PSA. Pa320. In 2018, DEKA acquired the Property from PNP through the Deka PSA. Pa457.[1]

In 2019, it is claimed by Defendants that in compliance with the Second Amendment to the PetSmart Lease (Pa195), it was PetSmart informed DEKA that it would not renew the options as set forth in the Second Amendment to the PetSmart Lease. 3T27, 7 - 3T29, 16.

On May 20, 2021 Enda Bracken's "boss in Germany" Oliver Lichter sent an email to Bracken inquiring about PetSmart in which he referred to PetSmart status as a renewal and extension Pa 483 3T 50, 11-14

DEKA never notified Rhein the status of the PetSmart tenancy as broker for the tenancy 4T1, 4T2, 5-14 3T38 16-20). DEKA instead retained a retail broker, Cushman and Wakefield, Retail Services ("CW") allegedly to market the space Pa 484. No new tenant was procured by CW.

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[1] Consistent with Defendants' lack of due diligence they never inquired about Trust. Had they inquired, they might have learned that Rhein who had the commission agreement was associated with them. 1T 23 19-24, Pa 161

DEKA paid CW an agreed-upon broker's commission with respect to the New PetSmart Lease of 5-6% but paid only 2%. 3T34, 21 - 3T35, 2 Pa484. Plaintiff Butler confirmed that neither she nor Rhein was contacted by DEKA during the negotiations for the New PetSmart Lease. 1T42, 5-14. DEKA then proceeded to issue a "new" lease reproducing the nearly identical lease negotiated by Rhein combined the two 5-year options in one 10-year term which was executed. Pa157, Pa278. CW was then paid only a fraction of the agreed commission for a lease 3T57, 5-9

The New PetSmart Lease reduced the scheduled rent that PetSmart would have been required to pay to DEKA had it exercised its renewal options under the PetSmart Second Amendment Pa 278; 3T35, 3-8.

2. **The Borders Bookstore Lease/DSW Lease**

On June 24, 1992, the Trust and Book Inventory Systems, Inc. d/b/a Borders Book Shop entered into a Lease Agreement (the "Borders Lease"). Pa203. The Borders Lease procured by Rhein was for an initial term of 10 years, with Borders being granted four (4) renewal options of five (5) years each. Pa203 - 205.

On or about March 10, 1995, Borders, Inc., the "successor by merger to Book Inventory Systems, Inc.", entered into and executed a "First Amendment to Lease Agreement" ("Borders First Amendment"). Pa257. The Borders First Amendment clarified that the initial lease term would expire on October 31, 2003. Pa257, para.

1. The Borders First Amendment replaced Exhibit C (the Rent Schedule) with a new Exhibit C. Pa257, para. 2; Pa260.

On or about March 10, 1995, Borders entered into a Sublease Agreement dated March 10, 1995 pursuant to which Shonac Corporation was to occupy the entire Leased Premises which Borders had leased pursuant to the Borders Lease. Pa261, recitals a - e. Subsequently, Shonac assigned its rights under the Sublease to Wilkerson Shoe Co., which subsequently changed its name to DSW Shoe Warehouse ("DSW"). Pa261, recitals a - e.

On or about July 31, 2010, the Trust, Borders and DSW entered into an "Assignment and Assumption of Lease and Termination of Sublease" ("Assignment of Lease"). Pa261. Pursuant to the Assignment of Lease, DSW was assigned and assumed all of Border's "right, title and interest in and to the Lease, for the terms of the Lease and all renewal terms thereof exercisable by Assignee. A Second Amendment and Third Amendment were executed (Pa273) after the assignment on July 21, 2010. The Second Amendment negotiated by Rhein was entered into on July 31, 2010 Pa273 (C & D). The Second Amendment provided 5-year extensions through October 31, 2029.

In 2015, PNP acquired the Property from the Trust. Pa320.

DSW did not exercise its renewal options under the Borders Lease. 3T5, 7 - 3T57, 17. As a result of DSW advising PNP that it would not exercise its remaining

renewal options, PNP and DSW entered into negotiations to determine whether new terms could be reached to have DSW continue in occupancy at the leased premises under the Amended Borders Lease. 3T7, 18 - 3T8. The "Third Amendment" dated September 16, 2015 between PNP and DSW combined the 5-year extension negotiated by Rhein into one 10-year term and lowered rent under Schedule C, but mirrored the length and term of the Second Amendment Pa275. Zareh Beylerian, Esq., on behalf of Rhein contacted PNP counsel April 23 and again on July 23, 2018 inquired about the renewal status of the DSW, PetSmart leases Pa479. No response was ever received by Rhein's counsel.

C. **The Sale of the Property to PNP**

On or about September 15, 2015, non-party "Advance Realty Development, LLC, as Purchaser and The Emil Buehler Trust, as Seller", entered into and executed a certain "Agreement of Sale" ("PNP PSA"). Pa320. Advance later assigned its interest in the Agreement of Sale to PNP. Paragraph 6(c) of the PNP PSA contains the "Representation and Warranty" of the Trust to PNP that: "a complete listing of all leasing brokerage contracts and amendments and modifications thereto, affecting the Property (the "Leasing Brokerage Contracts") is attached hereto as Exhibit H. ...

In the PNP PSA, the Trust did fully disclose with the broker commission, amendments and correspondence. Pa328, para. 6 Pa101-152 102-Pa56 as Exhibit H. PNP never inquired about the Trust Agreements with Rhein.

The Trust and PNP also entered into and executed an "Assignment and Assumption of Brokerage Agreements ("Assignment of Disclosed Broker Agreements"). Pa488.

D. **The Sale of the Property to DEKA**

On November 21, 2018, PNP sold the Property to DEKA pursuant to a "Purchase and Sale Agreement between Paramus Northbound Property, LLC, as Seller and DEKA USA Property Four, LP, as Purchaser" (the "DEKA PSA"). Pa457. In Paragraph 4.7 of the DEKA PSA, PNP represented that Exhibit 4.7 to the DEKA PSA was a complete list of "all brokerage agreements relating to the Premises as of the Effective Date assumed when Seller acquired the Premises". Pa464, and Pa473 - 475. These are in the same disclosure of the broker agreement and right to commission as was disclosed by the Trust to PNP to provide the scope of rights as in Exhibit H.

E. **Defendants Assumption of Broker Commission**

PNP PSA

On December 15, 2015 PNP executed a PSA and an assignment and an assumption agreement of the brokerage agreement which assumed all the liabilities of the assignee in accordance with PSA Paragraph 18E, F and G. (Pa342)

PNP - The assignment and assumption agreement which included DSW and PetSmart. Pa261. Paragraph 18(F) of the Buehler-PNP PSA requires payment on

all leases and lease renewals, modifications, or extensions entered into after the closing date without limitation any commissions due pursuant to that certain Broker Agreement between Rhein Management Corp. and Buehler Inc., dated February 15, 1984 as set forth in Exhibit H attached hereto (Pa 341-342). Included in the Brokers Agreement are Plaintiff documents PA 101-156 [2]

Paragraph 18(G) of the PSA provides, notwithstanding 18(F) above purchaser shall be obligated to pay any and all leasing commissions for existing tenants of the property, payable in the event the existing tenants exercise options *after the closing date for renewals, extensions, expansions and modifications under the lease documents.* Pa341-342

DEKA PSA

DEKA agreed in its PSA with PNP in paragraph one to purchase and assume all of PNP's right to the interest in and to the property which includes the leases as set forth in paragraph 1.16 including all amendments and modifications thereof and supplement thereto.

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[2] Contrary to any assertions by Defendant, nowhere in the transactions does Plaintiff claim that any undisclosed oral agreements are alleged to be assumed by Defendant. Rather as testified the written correspondence which is memorialized in the document that recognized oral agreements and practices. The modifications and amendments to the brokerage agreements that were provided to Defendant in disclosures.

In paragraph 1.2 DEKA acknowledges it entered the agreement after an opportunity to fully investigate and were satisfied. (Pa465)

Paragraph 3 to 4.6 and 5.1 through 5.1(a) were omitted. 5.1 was to include seller warranties and representations of seller to purchase.[3]

Paragraph 4.7 contains a true, correct and complete list of all brokerage agreements for the properties assumed post-closing and an indemnification from seller's majority owner of one million dollars ($1,000,000.00). (Pa457) Also 4.7 contains all the agreements assumed by PNP in it purchase and was included in the DEKA PSA which specifically survived closing. All of the Buehler and Rhein documents were listed. 4T 13, 15-19.

Paragraph 5.1.9 E and F of the DEKA PSA provided except for the disclosures under 4.7 there were no outstanding or unsatisfied commission obligations for the leases and there are no outstanding or will become due. and no written obligations exist for broker commissions except as disclosed in Section 4.7. 4T 15, 11-19 Pa 457

Paragraph 4.7 identifies brokerage agreements set forth in 4.7 are unpaid and existing and subject to the one million dollar limit for commission owed. The schedule includes both PetSmart and DSW Pa19 4T 15: 9-19.

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[3] Also omits Defendant bate stamp 76 between Pa 461 and 462

POINT I

THE COURT DECISION FINDING DEFENDANT LIABLE FOR BROKER COMMISSIONS IS ENTITLED TO DEFERENCE ON FACT FINDINGS AND WITH CREDIBILITY

STANDARD OF REVIEW

Appellate courts apply a deferential standard in reviewing factual findings by a judge. *Balducci v. Cige*, 240 N.J. 574, 595 (2020); *State v. McNeil-Thomas*, 238 N.J. 256, 271 (2019). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." *Griepenburg v. Twp. of Ocean*, 220 N.J. 239, 254 (2015). Deference is given to credibility findings. *State v. Hubbard*, 222 N.J. 249, 264 (2015). "Appellate courts owe deference to the trial court's credibility determinations as well because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness." *C.R. v. M.T.*, 248 N.J. 428, 440 (2021) (quoting *Gnall v. Gnall*, 222 N.J. 414, 428 (2015)).

"A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" *State v. Mohammed*, 226 N.J. 71, 88 (2016) (quoting *State v. Gamble*, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Griepenburg v. Twp. of Ocean*, 220

N.J. 239, 254 (2015) (quoting *Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am.*, 65 N.J. 474, 484 (1974)).

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." *Gnall v. Gnall*, 222 N.J. 414, 428 (2015) (quoting *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1998)). See *State v. Camey*, 239 N.J. 282, 306 (2019) ("[wle will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); *Motorworld, Inc. v. Benkendorf*, 228 N.J. 311, 329 (2017) ("[wle review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); *State v. K. W.*, 214 N.J. 499, 507 (2013) ("[wle defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

POINT II

COURT'S OPINION IS SUPPORTED BY THE FINDINGS FACT AND APPLICATION OF LAW

In Defendants' Point A Defendants' contention that they were unaware of the brokerage obligations, and therefore did not assume them is clearly an effort to deflect the court from the clear documentary and testimonial evidence in the record. The argument only makes sense if the court accepts the crabbed premise that the only document relevant to the brokerage agreement was the original 1984 agreement ignoring all other documents. This exclusionary interpretation of the of the documents presented does not take into account clear amendments, modifications, and clarifications set forth in the PSA and assumption of brokerage agreements as has clearly identified in the court's opinion. PA 101–142, PA 457, PA 488, PA 320, PA 278. This is among the many arguments Defendants deemed to be disingenuous and untenable.

As further testified by Trust counsellor Dariusz Winnicki, Esq. who was found to be eminently credible, the agreement was amended to reflect it was beyond the narrow scope defendants urge. 4T 35, 12-13, 3T107, 24–108, 3T108, 2–17, 3T1091–18, 3T 110, 16–18, 3T112, 9–15. It also ignores the segregation of the Rhein commissions for tenancies from the subsequent broker Hanson 3T 83, 4–16 3T 84 10–22, 3T 85, 21–25. The assertions are therefore untenable and disingenuous.

Having considered testimony during the trial, documentary evidence, and having evaluated credibility of witnesses, the court correctly concluded that Defendant had affirmatively assumed brokerage obligations for Plaintiff leases. Therefore in its analysis of the facts, the application of the relevant case law yielded the correct result.

It is well settled that in order to incur liability by virtue of a general assignment from a seller the purchaser must have "affirmatively assumed the sellers obligation to pay the commission" that's *VRG Corp. Versus GKN Realty Corp.*. 135 NJ 539, 1994. In the matter following *VRG*., it has been held that in order to incur liability for brokers commission by virtue of such an assignment purchaser must have a affirmatively assumed that I was obligation to pay the commissions. A separate, express promise by the purchaser to pay broker commission certainly will satisfy that standard. But that is not the only way to do so rather determining whether an "affirmative assumption" has taken place requires an analysis of all of the facts and circumstances surrounding the assignment in particularly the documentary record" .

If taken as a whole, the record signals that the assignees agreed to assume the obligation, he or she will be held to it despite the absence of a separate express promise to do so. *Pagano v 48 South Franklin Turnpike,* 198 NJM 107, 109 (2009). It further held a fair reading of VRG leads ineluctably to the conclusion that the affirmative assumption of an obligation to pay a broker commission, which is

personal can take many forms. Obviously, an express promise by the assigning to satisfy the commission obligation, is one of those forms, but not the only one. Although it would be grossly onerous and unfair to hold that an all contracts a buyer impliedly agrees with the broker that he will pay the commission if the broker cannot legally collect it from the seller. VRG affirmed the intuitively correct notion that were a purchaser accepts assignment of leases that include or refer to the obligation to pay commission he or she may be considered to have affirmatively assumed that obligation. *Pagano* at 116-117

Specifically the PSA's for both PNP and DEKA, which accepted assignment of the leases as part of their purchase and in turn expressly referred to and incorporated the obligation to pay commissions under the brokerage agreement for those leases. In addition, PNP executed an assignment in an assumption of brokerage commissions which contains detailed assignment and assumption of brokerage agreements. Pa 489 As to DEKA while there was no separate assignment and assumption of a broker agreement, it accepted assignment of the lease and the PSA expressly referenced as a brokers commission due to plaintiffs in paragraph 4.7 and the corresponding exhibit 4.7 to the PSA, which has the list of brokerage agreements and related documents with regard to Plaintiffs' commission.

Due to this explicit provision in the PSA's the court rightly characterized the argument of Defendants as both without merit and credibility. 4T 22, 24-4 T 23, 1–

2. Testimony the court found defendants assertion that they that neither PNP or DEKA had actual knowledge of specific obligations to pay commissions and did not knowingly take an assignment of those obligations contrary to the evidence and disingenuous. 4T 21, 8–13 Pa.

The indemnification provision in the DEKA PSA substantiates DEKA's knowledge of the Plaintiff's potential claims. The clear and express references to the brokers' commissions are due to plaintiff clearly satisfies the role established in *Pagano* regarding the affirmative assumption of the obligation to pay brokerage commissions. 4T 27, 1-4 As noted in the decision Defendants are sophisticated purchasers of commercial property that fully investigated and conducted a full review of the PSA disclosures. 4T 26, 8-14 Their failure or negligence in due diligence cannot be countenanced.

Defendants claim that they did not have actual knowledge of the agreements between Rhein and the trust, and that they did not affirmatively assume same is neither plausible nor credible. Rather it appears clear as the court found Defendants deliberately chose to bypass or exclude Plaintiffs from the transaction with the existing tenants, DSW and PetSmart to avoid paying the commissions to which Plaintiffs were entitled. 4T 27, 1-4.

Both PNP and DEKA knew there was potential or actual litigation surrounding commissions due to Rhein. Both entities were aware of Rhein's

commission agreement, and that PetSmart and DSW were subject to that agreement. Given their lack of credibility, it was determined that they intentionally did not notify Butler on behalf of Rhein, thereby depriving it of the opportunity to be involved in the continuing occupancy. *Louis Ross Assoc. v. Interstate Holding Corp.,* 249 N.J. Super.; *Ellsworth Dobbs Inc. v. Johnson* 50 N.J. 528; *William Zinn and Company v. Shawnee Pottery* 148 F. Supp. 322 (Ohio) is furtherance of this conduct when contacted by Zareh Beylerian, Counsel for Rhein to advise it of the status of the leases in correspondence of April 23 in July 23, 2018 counsel for PNP and DEKA refused to answer the inquiry and copied a new contract PA 479, PA 275. For its part DSW proceeded to execute a new amendment to the lease. Its third amendment to the DSW lease that Rhein negotiated, combined the two five-year extensions Rhein had negotiated into one 10-year extension. PetSmart merely copied the Rhein negotiated lease to include its prior landlord concessions, and combined it into a 10-year lease. PA 157, PA 278.

Contrary to their protestations of ignorance regarding Defendants in regard to the leases and commissions, they were made well aware of the obligations that were being assumed. Butler, who was found to be highly credible, testified that she was paid consistency consistently pursuant to the agreements set forth on the disclosure of brokerage agreements consistently for any and all leases that were renewed. Pa 101, 1T 18, 21 –1 T 21, 18, 1T 2 91–7. Additionally, the obligation performed

prospectively on these agreements was clear from the disclosures. The letter of September 25, 2012 from Peter Thompson clearly expressed future continuing payment of renewals for PetSmart and for DSW Pa126. The letter states that Rhein is entitled to the commission on the annual rental income for DSW on an annual basis until such time as the *tenancy is terminated*.

Again Defendant attempts to deflect the court's attention from the clear intention and meaning of the brokerage documents by alleging that there were undisclosed agreements and intentions in the PSA. The Defendants also argued that Plaintiff seeks payment on an oral agreement. This mischaracterizes the basis for the assumption of these obligations as undisclosed or unexplained intent. Defendants' reliance upon Winnicki's testimony that the intent of the agreement was to assure the originations by Rhein were to be continued to be honored or the court's determination that the obligation was to make sure Plaintiff was taken care of are misplaced. They are not intended as a substitute for written confirmation. Whether or not it was to give comfort and assurances to Rhein, the written mutual intent is clear from the exchange of correspondence, the letter of Thompson and Plaintiff's attorney Rochford where Thompson expresses:

> "I understand from Darius and Winnicki Esq. he had discussions with your counsel, Robert, E Rochford Esq., and they have reached an understanding regarding the complete brokerage commission schedule that the Emil Buehler trust will pay to Rhein with respect to lease commissions originated by Rhein and its associated brokers. I also

> understand from Mr. Winnicki that your counsel would like a confirmation , as do we., that going forward we would only refer to this letter to confirm: i) the lease transactions you originated and ii) the commissions to be paid related to those transactions. Accordingly, the confirmed transactions and commission payments are as follows:"

This letter memorialized the existing agreement and that it applicable prospectively which confirmed this mutual intent as set forth in his letter of October 19, 2012.

> Finally Mr. Winnicki has discussed, with me the concerns Rhein has expressed about maintaining the excellent good faith relationship of the parties. To benefit both parties we have agreed that neither party will practice any form of artifice or device or even any form of hitherto nonactionable deceit to defeat in part or in whole the other party's rights under any of the agreements now or subsequently existing between them. Pa 125-131

While Defendants later argue that there was unexplained intent by Butler and Winnicki to protect Rhein, that is both implicit and explicit in the letter of Thompson of 2012 above. The court's analysis of the contract language also is the sound applications of the applicable law to the documents in analyzing the meaning or renewals. The standard was set forth by the court as follows:

It is well-settled that a construction of a contract or a written lease is generally a question of law for the Court. *Michaels versus Brookchester* 26 16 N.J. 379; *Great Atlantic and Pacific Tea Company versus Checchio*, 335 N.J.Super. 495. The Court examines the language of the contract and where the terms of the contract are clear and unambiguous the Court gives them their plain ordinary meaning and enforces

the terms as written. *Pizzullo versus N.J. Manufacturers* 196 N.J. 22 251; and *Levinson v. Weintraub* 215 N.J.Super. 273 (APP. 23 DIV. 1987). The Court does not supply terms to contracts that are plain and unambiguous, nor does it make a better contract for either of the parties than the one that the parties' themselves have created. *Maglies versus Estate of Guy* 193 N.J. 109 (2007). A construction which makes the contract fair and reasonable will be preferred to one which leads to harsh or unreasonable results. *Burnstine versus Margulies* 18 N.J. Super. 259. A contract must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty. *Weichert Company Realtors versus Rhein* 128 N.J. 427, 435; see also *Goldfarb versus Solimine* 245 N.J. 356. In addition, a document should not be interpreted to render one it's terms meaningless. *Cumberland County Improvement Authority versus GSP Recycling*, 358 17 N.J.Super. 484 at 497.

The main objective of contract interpretation is determining the intent of the parties. *Capparelli versus Lopatin* 459 N.J.Super. 584, 604. The intent is revealed in the language of the contract taken as a whole. It is the Court's obligation to ascertain the attention of the party and to enforce contracts based on the intent of the parties, the expressed terms of the contract, surrounding circumstances, and the underlying purpose of the contract. That's *IN RE: County of Atlantic* 230 N.J. 237; see also *Solinese Limited and Onderdunk versus Presbyterian Homes*. The law will imply

some terms if the writing indicates that a basic agreement has been entered into between the parties. See *AG Berg Agency*_136 N.J.Super. 369; *Looman Realty Corp versus Broad 8treet National Bank* 74 N.J.Super. 71; and *AS Goldstein versus Bloomfield Plaza Associates* 272 N.J.Super. 59. Whether a contract provision is clear or ambiguous is question of law. That's *The Grow Company 12 versus Chokshi* 403 N.J.Super. 443. The Court's role is to determine whether the provision in question is susceptible to at least two reasonable alternative interpretations. *Nester versus O'Donnell* 301 16 N.J.Super. 198 and *Schor versus FMS Financial Corp*_357 17 N.J.Super. 185. Here the court based upon the documentation testimony that the intention to continued commissions was unambiguous when applying the analysis above. To have found otherwise would have rendered an unjust result.

In addition to restricting the brokerage documents to establish the scope of the commission, Defendants seek to limit the meaning of renewal to its most restrictive construction referring only to the brokerage agreement. The court properly considered that the PSAs and assignment of brokerage agreements clearly provide a broader scope to include the PSAs. PSA Paragraph 18F of the PNP makes clear the commissions due shall be paid in leases, renewals, modifications or extensions due under the brokerage agreements between Rhein to Buehler dated February 15, 1984 entered into 4T 32, 3-14. Paragraph 18G clarifies post-closing obligations are included for renewal, extension, expansion, modification 4T 32, 15-24. These are

clear and unambiguous references and to ignore them, contrary to the guidance of *Cumberland*; thus language would be meaningless 4T 32, 19 – 4T 33, 1. Even if there was any ambiguity extrinsic proofs bear on the interpretation and lead to the same result pursuant to analysis under *Great Atlantic*. The Thompson letter of September 2012 clearly states DSW will paid on commissions into the future until the tenancy was terminated 4T 35, 1-11

The contract exclusion of Rhein commission on existing tenancies complements the affirmative protections of the Thompson letter preserves Rhein's right to ongoing commissions which is consistent with all the brokerage documents 4T 36, 15 – 4T 37, 10. The intention is clear from the extrinsic documents that Trust gave assurance to protect this commission until the tenancy was terminated.

The court's legal analysis is firmly premised from the finding of fact and witness credibility. It is clear that both Defendants engaged a two-step strategy in an attempt to circumvent the Rhein commissions. Step one was to prevent the broker from any involvement with the lease. Step two makes some changes to the current lease and option period. That incorporated the framework negotiated by the broker and claimed excised the commission. This clearly violates the prior expressed intention of good faith expressed in the brokerage documents (particularly the 2012 clarifications) and the implied by good faith *Pollack v. Quick Quality Restaurants* 452 N.J. Super. 174; *Brunswick Hills Raquet Club v. Rt. 18 Shopping* 182 N.J. 201.

The understanding of the parties as expressed to act in good faith in the October 19, 2012 letter of Rochford was also breached by Defendants. Aside from the clear statements in the disclosure, courts have recognized what is material to honoring commissions on extensions when landlords engage in this tactic of circumventing an option or renewal as presented here and discussed herein. This is true as here where Defendants assert that there is no commission due when the option exercised. Here again while Defendants rely on the option exercise as an excuse for non-performance, they fail to justify how they justify it by making a side deal with the tenant to defeat Plaintiffs' claim. Taking their rationale to its extreme, they agree to take one dollar less Rhein loses its commission.

In the matter of *Louis Ross Assoc. v. Interstate Holding Corp*., 249 N.J. Super. 436 the courts have held that where the landlord extends the renewal beyond the option provided in the original lease, he is liable for the full extent of the renewal. *Wm. P. Zenn & Co. v. Shawnee Pottery Company, supra*, 145 *F. Supp.* at 327. Plaintiff is also entitled to its commission based upon the actual rent paid by the tenant. *See Wm. P. Zinn & Co. v. Shawnee Pottery Company,* supra, 148 F. Supp. at 326; *see also Joseph Hilton & Associates, Inc. v. Evans, supra*, 201 N.J. Super. at 168, 492 A.2d 1062 *Louis Ross Assoc. v. Interstate Holding Corp*. @440

The court there also viewed favorably the rationale that: "to hold otherwise would lay open the way for real estate owners to deprive brokers or agents of their commission simply by entering into a new contract with the buyer or lessee cancelling the contract resulting from the services or efforts of the agent, and entering into a contract of sale or lease for a different price or commission." [*291 Ky. at 463, 165 S.W. 2d at 30*] *Louis Ross Assoc. v. Interstate Holding Corp*. @439

In the *Louis Ross* case as here there was an existing lease with an option, the landlord and tenant agreed to an extension of the current lease. After a year extension, landlord and tenant entered into a renewal for 5 years. Other than a change in rent the lease remained the same. The landlord therein would not agree to pay commission on the extension. Similarly here, there was little change but for the rent. The cumulative option was converted to an extension and the option was eliminated and the landlord has refused to pay. Plaintiff cannot be vulture out of its commission by simply redrafting the option and extending the lease.

Here again, DEKA, the landlord, seeks to circumvent the comprehensive scope of the commission agreement. In *Archie Schwartz Co. v. Albert & John Frassetto Development Co.,* the court held "the point" under the agreement Plaintiff's future commissions are earned not because the terms of a later lease match the value potential to stay beyond the term. *Archie Schwartz Co. v. Albert & John*

Frassetto Development Co The court arrived at the same conclusion in *Dubinsky Realty, Inc. v. Vactec, Inc*., 637 S.W.2d 190, 193 (Mo.App. 1982) where it said:

> "The 1975 lease states that Dubinsky Realty is entitled to commissions under that lease or "extensions or renewals" thereof whether or not the extension or renewal is made on exactly the same terms. This language is clear and unambiguous and evidences the intent of Wohl [***6] that as long as the landlord tenant relationship remained in existence between Wohl and Cartec, regardless of changes in the terms governing that relationship, Dubinsky was entitled to commissions on rent paid by Cartec to Wohl. The provision for renewal or extension on different terms indicates that the parties contemplated changes at the end of the term."

In Dubinsky, the commission agreement provided for the payment of commissions "on any renewal of said lease whether or not said extention [sic] or renewal is made exactly on the same terms of this lease." Id. at 191. Although the agreement here does not expressly [**495] state "whether or not said extension or renewal is made exactly on the same terms" as the original lease, that meaning is necessarily implied from what is expressly stated.

Archie Schwartz Co. v. Albert & John Frassetto Development Co., 280 N.J. Super. 43, 46-47, 654 A.2d 493, 494-495, 1995 N.J. Super. LEXIS 90, *3-6

In regard to PetSmart, Plaintiff's agreement would permit exactly what is sought to safeguarded, and to circumvent by merely converting the term and extension.

The court in *Louis Ross Associates* found persuasive the reasoning:

The reasoning behind this result was expressed in *Consolidated Realty Co. v. Graves,* 291 Ky. 456, 165 S.W. 2d 26 (1942). To deprive brokers or agents of their commission simply by entering into a new contract with the buyer or lessee cancelling the contract resulting from the services or efforts of the agent, and entering into a contract of sale or lease for a different price or commission. [291 *Ky.* at 463, 165 *S.W.* 2d at 30].

As with DSW Plaintiff had negotiated 2 five year options. Through the year 2032 for a tenant it procured. While in fact it was extension, an effort to circumvent the commission obligation the options were exercised and recast into a new lease terminating in 2032 with a different rent. Plaintiff's brokerage agreement with the trust was intentionally broad and comprehensive. The court found under its agreement with the Trust that Plaintiff is entitled to its commission regardless of whether it was and extension or a new lease. It appears however in looking at substance over form this is an extension. The clumsy attempt to avoid commission is proffered by Defendant as a brand new lease which almost identical to the original lease Plaintiff negotiated. While the "extension" could have been negotiated with a one page amendment of the rent by the Landlord after allegedly retaining a new broker at 5% to go on an expansive search for potential tenants the broker

discovered PetSmart occupying the building and was paid 2%. Both of these tactics by PNP and Deka are clearly subterfuges to deprived the Plaintiff of its commissions.

POINT III

PLAINTIFF IS ENTITLED TO THE 6% COMMISSION ON PETSMART BASED UPON THE AGREEMENTS

In Defendants' Point E it is argued that the commission is not owed pursuant to the commission agreements. To the contrary, the originating document from 1984 assures Rhein of no less than 6% commission that has never been abrogated in subsequent amendments, for 25 years Rhein received less than 6% due to the participating broker Goldstein. Pa 153. In 2022 when Goldstein's commission expired, as the only broker, Rhein was entitled to the minimum of 6% which it would keep if alone and share if there was a co-broker.

The right to the 6% was addressed in the correspondence in the brokerage agreement disclosures. In the matter of the DSW lease, Rhein had taken 5% rather than 6% due to an agreement for property management. When she was not renewed for the position the exchange of consideration between the trust and Rhein properly concluded as there is no longer any separate consideration to take less than that. Without the co-broker went to the minimum amount of 6% is mandated. Pa126-134

In the PetSmart case, Rhein received 4% while Goldstein was still its co-broker when the Thompson letter of 2012 was written. Upon its last term the commission ended, entitling Rhein to go with the full 6% (Pa153).

POINT IV

THE COURT CORRECTLY EXERCISED ITS DISCRETION IN NOT ISSUING SANCTIONS UNDER RULE 4:25-7b (PA 36, 40)

In Defendants' Point D the court properly determined that there was not a basis in its exercise of discretion to issue sanctions. The court noted the fact that the age of the case and the fact that the scope of the case was narrow and was essentially based on the documents and agreements identified in discovery as forming the basis for commissions. Both parties relied on what was known as Exhibit H from the original sale from the Trust to PNP as the basis for the witnesses to be called. Clearly there was no prejudice that could be identified by the defendant. Plaintiff supplied the names and called only two witnesses with knowledge of the commission agreements disclosed in the memo. The only deviation in the pretrial memorandum was finalizing to mark the documents we already had exchanged as the basis for this action.

There was no evidence of willful failure to provide the pre-marked documents nor was it in any way prejudicial. This was the only reason for the slight delay in starting the trial. The parties had conferred the Friday before the trial date and identified the Exhibit H. Almost all documents offered in support of a Plaintiff's case were documents from Exhibit H which the Defendant allege they relied upon. Documents and exhibit H have been provided in discovery however the Defendants

already had the contents of Exhibit H as it had been disclosed in the purchase and sale agreement for both defendants happened disclosed in the purchase of sale agreements of both Defendants. The only other documents introduced were those documents that were provided by the Defendant in its discovery obligation which are the subject matter of this commission claim. Clearly in this instance there was remedy needed because there was no prejudice that would warrant same.

To demonstrate prejudice on appeal due to late or insufficient production of pretrial discovery under New Jersey Court Rule 4:25-7(b) in a bench trial, an appellant must show that the delay or insufficiency in discovery materially affected their ability to present their case or defend against the opposing party's claims. The key issue is whether the delay caused "specific or demonstrable" prejudice, as mere delay is insufficient. Prejudice must be shown to have impacted the appellant's substantial rights or the fairness of the trial proceedings *Patterson v. Monmouth Regional High School Bd. of Education*, 222 N.J. Super. 448, *Vines v. Orange Memorial Hospital*, 192 N.J. Super. 496, *Moschou v. De Rosa*, 192 N.J. Super. 463.

In cases involving late or insufficient discovery, New Jersey courts have emphasized that prejudice must be specific and demonstrable. Here there was no intention to gain advantage or prejudice.

POINT V

RHEIN CLEARLY ACKNOWLEDGED SHE WAS NOT PERSONALLY A PART OF THE BROKER AGREEMENT

In Point A while Rhein, as a nominal Plaintiff in the action was for all intents and purposes, had the same interest in the commission as Rhein as president and owner of the corporation. Consistent with her credibility as found by the court she forthrightly acknowledged she was not a signator of the Brokerage Agreement. Also, there is nothing in the record below that any Motion to Dismiss was made by Defendants at the closing of the trial.

POINT VI

THE COURT CORRECTLY DETERMINED THERE WAS A COURSE OF PERFORMANCE

In Defendants' Point C, there was a clear course of performance over the years to be paid continually on these agreements and there was a case of performance.

Butler had testified payment of commission had been paid continuously from 1984 forward on renewals and extensions and the amendment to the leases 1T 30, 14- , 38 5-7, 1T 20, 4-21.

It is further noteworthy the renewal was used liberally interchanged with the term amendments and extensions throughout. 1T 37, 1-9; 1T 34 22-25; 1T 36, 8-10, 17-20; 1T 38 5-7; 2T 42 15-17; 2T 5-8; 2T 27 5-6

As the court found, testimony, documentary evidence in combination with the exclusions by Hansen's commissions demonstrated a course of conduct. 4T 52 9-15.

CONCLUSION TO LEGAL ARGUMENT

It is respectfully requested that the court affirm judgment below.

Dated: May 27, 2025

RANDALL & RANDALL, LLC

/Thomas W. Randall/

By: Thomas W. Randall, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000708-24

ERIKA A. BUTLER AND RHEIN REALTY & MANAGEMENT CORP., Plaintiffs-Respondents, v. ADVANCE REALTY DEVELOPMENT, LLC, PARAMUS NORTHBOUND PROPERTY, LLC, AND DEKA USA PROPERTY FOUR LP, Defendants-Appellants.	CIVIL ACTION On Appeal From An Order Entered By The Superior Court, Law Division, Bergen County On July 25, 2024 And a Judgment Entered on October 25, 2024 DOCKET NO. BER-L-1540-20 Sat below: Hon. Lina P. Corriston, J.S.C.

REPLY BRIEF OF DEFENDANTS-APPELLANTS DEKA USA PROPERTY FOUR, LP AND PARAMUS NORTHBOUND PROPERTY, LLC

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Date Submitted: July 3, 2025

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PRELIMINARY STATEMENT

The trial court held, in a decision unsupported by the trial evidence or existing law, that the Brokerage Agreement was intended to provide a commission to Rhein (and, remarkably, also to Ms. Butler) with respect to any tenant originally obtained by Rhein for so long as that tenant remained at the Property. The Brokerage Agreement says no such thing. Yet, despite the actual terms of the Brokerage Agreement, which provided that a commission would be due only when an existing tenant exercised its contractual option to extend its lease, the trial court held that the Brokerage Agreement was "intended" to include not just a tenant's exercise of contractual lease renewal options, but also (apparently in perpetuity) all "modifications, amendments and extensions" of certain tenants. This holding misconstrues applicable law and has no basis in the evidence.

As demonstrated in Appellant's opening brief, as well as by key omissions in Respondents Rhein Realty & Management Corp. ("Rhein") and Erika Butler's ("Ms. Butler") opposition brief, the trial court's Order and Judgment are unsustainable. Specifically, the trial court's key holdings were wrong under the law and under the facts, namely: (a) Rhein and Ms. Butler's rights arose under a Purchase and Sale Agreement to which they were not parties nor third party beneficiaries, (b) the Trust had a benevolent (albeit unwritten) intent to "take

care of" Ms. Butler's mother which warranted the trial court deviating from its proper scope of contract review to find that the specific term "renewal" was an "umbrella" term "intended" to provide a commission to Rhein regardless of the actual terms of the written Brokerage Agreement; (c) testimony as to the "intent" of the parties to the Brokerage Agreement was persuasive despite the fact that no witness with direct knowledge of the original Brokerage Agreement testified at trial, (d) the terms of the Brokerage Agreement were "clear", despite the fact that it was allegedly comprised of one written Agreement, ten emails and letters dating from ten to twenty-five years after the date of the Broker Agreement, and oral testimony as to "intent" that contradicted the written terms of both the Broker Agreement and the subsequent emails, and (e) Plaintiffs colluded with PetSmart and DSW to forbear from exercising their lease renewal options (as to which literally no evidence was adduced and where no tort was even asserted by Respondents.

The trial court's effort to provide Ms. Butler with brokerage commission protections that The Emil Buehler Perpetual Trust ("Trust") and Rhein did not themselves provide for in their agreements should be reversed and judgment should be entered for PNP and Deka.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellants rely upon the procedural history and that Statement of Facts contained in their opening brief.

STANDARD OF REVIEW

This Court reviews *de novo* the trial court's interpretation of a contract, which is a legal question (*Kieffer v. Best Buy,* 205 N.J. 213, 14 A.3d 737 (2021)), and gives no deference to the trial court's conclusions of law or the legal consequences that flow from established facts. *Allstate Ins. Co. v. Northfield Med. Ctr., P.C.*, 228 N.J. 596; 619 (2017); *Cherokee LCP Land, LLC v. City of Linden Planning Bd.*, 234 N.J. 403, 414-15 (2018). A trial court's fact findings, while entitled to deference, must be supported by "substantial, credible evidence in the record". *Mastondrea v. Occidental Hotels Mgmt. S.A.*, 391 N.J. Super. 261, 268 (App. Div. 2007). Specifically, "[w]hen a trial [judge's] decision turns on its construction of a contract, appellate review of that determination is de novo." *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 115 (2014).

Here, while Respondents' brief argues that the trial court based its Order upon a "weighing of the factual evidence" and witness "credibility" (Respondent's Brief, pgs. 13 – 14). In fact, the trial court did no such thing. Rather, the trial court failed to evaluate the trial evidence within the proper parameters of its scope of review and the elements of the causes of action, and

failed to give proper effect to the unrebutted documentary and testimonial evidence that showed that no commission is due to Rhein or Ms. Butler as neither DSW nor PetSmart exercised their contractual rights to renew their leases.

ARGUMENT

Respondent's Opposition Fails to Rebut the Trial Court's Clear Errors

I. The Written Brokerage Agreement Provides for a Commission Only Where a Tenant Exercises a Contractual "Renewal" Option, Which The Indisputable Admissible Evidence Showed Did Not Occur (Pa 36, 4T)

Plaintiff Butler testified clearly and unambiguously that Rhein was entitled to a commission only when an existing tenant exercised its contractual option to renew its lease on previously agreed terms. T340, 21 – T341, 14. Dariusz Winnicki, the Trust's counsel, on cross-examination, admitted that same fact. T3101, 11 – T3103, 4. Their testimony is consistent with the Brokerage Agreement and related correspondence which address "renewals" of leases as the only event that could give rise to a commission. It is unrebutted that no such renewal option was ever exercised by DSW or PetSmart. 3T5, 7 – 3T57, 17; 3T27, 7 – 3T29, 16. Those irrefutable facts alone should have resulted in judgment for Appellants, and the trial court error must be reversed.

To evade the consequences of those indisputable facts, Rhein's and Butler's counsel argued – and the trial court errantly found – that it was the

"intent" of the parties to make sure "that Plaintiff was taken care of". Tr. 51, 18 – 21. Because the Brokerage Agreement itself is unambiguous, the trial court should not even have addressed "intent" beyond the four corners of the document. *Great Atl. & Pac. Tea Co. v. Checchio*, 335 N.J.Super. 495, 501, 762 A.2d 1057 (App.Div.2000). Nevertheless, the trial court did so, finding irrelevantly, that the Trust "intended" to "take care" of Butler and her mother and that accordingly, the word "renewal" as used in Brokerage Agreement was an "umbrella term" implicitly intended to include any modification, amendment, extension or alteration of a lease for which Rhein had been the original broker. T340, 21 –T341, 14; T3101, 11 – T3103, 4. The trial court's finding was well outside the court's proper scope in interpreting a contract. *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43, 161 A.2d 717 (1960); *Levison v. Weintraub*, 215 N.J.Super. 273, 276, 521 A.2d 909 (App.Div.), *certif. denied,* 107 N.J. 650, 527 A.2d 470 (1987). The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." *Id.*; *Brick Tp. Mun. Util. Auth. v. Diversified R.B. & T.*, 171 N.J.Super. 397, 402, 409 A.2d 806 (App.Div.1979). Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other. *James v. Federal Ins. Co.*, 5 N.J. 21, 24, 73 A.2d 720 (1950).

A "clear" contract does not allow for an inquiry into the parties' unstated intent. *Id*. Yet, despite this fact and the unambiguous evidence that the exercise of a contractual renewal option was the only event giving rise to a right to commission, the trial court inexplicably delved into the parties' alleged "intent" and found after such inquiry that the meaning of the Brokerage Commission was "clear". Tr. 31, 1 – 3. This Court will search in vain within the Brokerage Agreement and the related correspondence for any expansion of the terms of the original Brokerage Agreement to include modifications, amendments or extensions.[1] But the Brokerage Agreement is clear, and it supports only one conclusion, namely, that no commission is due.

Nor is there any basis for the trial court's holding that Rhein's right to a commission arises under the Purchase and Sale Agreement between PNP and the Trust. Tr. 31, 3-4. Here, the trial court improperly took language from the PSA, which only addressed the obligations for commissions as between PNP

[1] Respondents argue that Exhibit 4 (a September 25, 2012 letter from the Trust to Ms. Butler (Pa126 – Pa128) establishes Rhein's perpetual right to a commission for the DSW and PetSmart leases. It does no such thing. Instead, the document acknowledges Rhein's existing right to a commission if, and only if, DSW or PetSmart exercise their contractual options to extend their respective leases. The record is unequivocal that neither DSW or PetSmart did so, and by not doing so, the DSW Lease and PetSmart Lease each lease automatically "terminated" at the expiration of the then-applicable term. PetSmart Lease, Pa163 – Pa 164 (Para. 5); DSW Lease Pa204 – Pa205 (Para. 2.3).

and the Trust, and engrained those obligations onto the Brokerage Agreement. The trial court then took that division of responsibility and applied it both broadly and retroactively to hold that PNP's agreement to be liable for commissions after the sale created commission rights for Rhein and Ms. Butler, who were not parties to the PSA. It is obvious that the PSA did not create rights in Rhein – there was no testimony that there was any intent to do so or to make Rhein a third-party beneficiary. *Ross v. Lowitz*, 222 N.J. 494 (2015).

Respondent's recitation in its brief of the trial court's suggestion that PNP or Deka colluded with DSW or PetSmart so they would avoid paying a brokerage commission is unsupported by any evidence. No witness testified as to any such collusion; rather, the unrebutted trial testimony was that both PetSmart and DSW, during difficult times in the brick-and-mortar retail market, each independently declined to exercise their renewal options and negotiated significantly lower rents for different lease periods.

II. There Was No Evidence of a Course of Performance, but Even if There Were, Appellants are Not Obligated to Pay Commissions for Deliberately Undisclosed Commission Obligations (Pa 36, 4T)

Given that neither the Brokerage Agreement by its specific written terms nor the PSA provided a commission right to Rhein, the sole basis for Rhein to claim a commission would be a course of performance, which as shown below, was not proven at trial.

Respondents assert that "[d]uring the course of the relationship through the performance under the Brokerage Agreement and by agreement between the parties commissions were paid, include extensions, renewals, amendments and for keeping tenants occupying the property [sic] Pal 01". Pa101-Pa156 (correspondence related to the Brokerage Agreement) does not support Respondents' argument. Nowhere in Pa101-Pa156 will the Court find the words "modification", "amendment", or "extension" as bases for a commission to Rhein.[2] Those words literally do not appear anywhere in any of those documents that address Rhein's commission right. *A fortiori*, the written documents do not provide for a commission for any event other than the exercise by DSW or PetSmart of their contractual renewal option.

Nor does the testimony cited by Respondent in its brief does support the existence of a course of performance that augments the written Brokerage Agreement. While Butler testified that Rhein was paid a commission on

[2] In stark contrast, however, the commission agreements between the Trust and the Goldstein Group (Pa153 – Pa156) (commissions due on "option to renew, modification, relocation or expansions in the building or other buildings owned or controlled by Owner [the Trust], or additions or extensions pursuant to the terms of the original lease") and between the Trust and NAI James E. Hanson, Inc. (Pa143 – Pa149) commissions to be paid for "extension" of tenancies as well as for renewals. Pa145, Para. (b); Pa146, Para. (d)). While these brokerage agreements are not at issue in this action, they vividly demonstrate how commission agreements are drafted where the parties intend to create an expansive right to include "modifications, extensions and additions".

"renewals" through 2014 (1T 18, 21- 1T21, 18), she did not testify that the Trust ever paid Rhein a commission for any reason other than pursuant to the expressed written terms of the original leases and the Brokerage Agreement. Instead, both Ms. Butler and Mr. Winnicki testified that under the Brokerage Agreement, Rhein only had a right to be paid commissions for renewals of leases where the tenant exercised its renewal option contained in a lease obtained through Rhein's efforts. 2T40, 21 – 2T41, 14; T3101, 11 – T3103, 4. Mr. Winnicki further testified that the Brokerage Agreement did not provide for Rhein to receive a commission under any other circumstances, and that the Brokerage Agreement did not address the duration of Rhein's right to a commission nor state that Rhein is entitled to a commission for as long as a tenant remains in occupancy at the Property. T3101, - T3103, 4.

Here, the testimony and documents admitted at trial did not demonstrate that the Trust and Rhein had a course of performance pursuant to which Rhein was paid commissions for "extensions", "modifications", or "amendments" of the DSW or PetSmart Leases, nor for new leases (unless such new leases were brought about by Rhein as the broker). Instead, the evidence demonstrated that the Trust only paid Rhein where a renewal option contained in a lease obtained by Rhein as broker was actually exercised by the tenant. In other words, the parties' so-called "course of performance" is that they strictly adhered to the

written terms of the Brokerage Agreement. Accordingly, when PNP entered into the Purchase and Sale Agreement in 2015, PNP cold not have "affirmatively assumed" any undisclosed understandings or performance by Rhein or the Trust. Rather, PNP relied on the written documents provided to it by the Trust pursuant to which Rhein was entitled to commissions only where DSW or PetSmart exercised their contractual renewal options.[3] As that did not happen with respect to the 2016 DSW Lease or the 2021 PetSmart Lease, the trial court was required to find that Rhein was not entitled to a commission.

III. Applicable Case Law Supports Appellants (4T)

The cases relied upon by Respondents do not support their position, but instead support PNP and Deka's appeal.

In *Louis Ross Associates, Inc. v. Interstate Holding Corp*., 249 N.J. Super. 436, 592 A.2d 622 (App Div. 1991), the court held only that where a tenant actually exercised its contractual renewal option, but did so after a one-year

[3] The trial court's statement that PNP and Deka claimed not to have "actual knowledge of the agreements between Rhein and the Trust" mis-states Appellants' position. Tr. 26, 19 – 25. PNP and Deka obviously knew of the Brokerage Agreement and the related correspondence as they were exhibits to the PNP Purchase and Sale Agreement; what they did could not know is that Rhein – which had not been the broker since 2011 – claimed a right to commissions in perpetuity and for events other than the exercise of renewal options by DSW and PetSmart. Of course, PNP and Deka could not have known of such claimed rights as the Trust deliberately did not disclose to PNP those alleged understandings and agreements.

consensual extension of the original lease term, the broker would nevertheless be entitled to a commission. The *Louis Ross* court noted: "[w]e find no reported case in New Jersey which deals specifically with a broker's entitlement to a commission on an option not exercised in accordance with the lease". *Louis Ross* addressed an imperfectly exercised option (or perhaps collusion between the landlord and the tenant). Here, there was no exercise of a renewal option by either DSW or PetSmart, each of which expressly declined to exercise their renewal options. Nor is there any evidence that PetSmart or DSW, two international retailers, decided to terminate their leases in collusion with PNP or Deka respectively in order to deprive Rhein of a commission. Thus, *Louis Ross* does not even inform, much less govern, this appeal.

Similarly, the facts of *Archie Schwartz Co. v. Albert & John Frassetto Development Co.*, 280 N.J. Super. 43, 654 A.2d 493 (App. Div. 1995) are entirely different than the facts of this action. In *Archie Schwartz*, the broker's agreement expressly provided for a commission for renewals, extensions and expansions, but the landlord declined to pay the commission based on the assertion that the tenant's expansion, which of necessity also included increased rent and a build-out of the space, was a new lease for which the broker was not entitled to a commission. Thus, the brokerage agreement at issue was entirely different than the Brokerage Agreement here which does not provide for a

commission for new leases entered into after Rhein had been terminated as the broker and after the DSW and PetSmart Leases terminated.

In neither *Louis Ross* nor *Archie Schwartz* were the courts confronted with the application of a brokerage agreement to a situation where, as here, a tenant declines to exercise its renewal option and states that it would vacate the premises, necessitating that a landlord either enter into an entirely new agreement or else find itself with significant vacant space in a challenging retail market.

Similarly, the New Jersey Supreme Court cases that address the obligation of a successor owner to pay brokerage commissions actually support PNP and Deka's position, not Rhein's position. In *VRG Corp. v. GKN Realty Corp*., 135 N.J. 539, 641 A.2d 519 (1994), our Supreme Court held that a broker's commission (which does not run with the land) must be "affirmatively assumed" by a successor owner. The *VRG* Court did not state the form such "affirmative assumption" must take, but made clear that the assumption of such obligation is not to be assumed. The Court had another opportunity in *Pagano Co. v. 48 South Franklin Turnpike, LLC*, 198 N.J. 107, 965 A.2d 1172 (2009) to address what it means to "affirmatively assume" a brokerage commission obligation and held that such assumption is not limited to a formal written assumption but may include specific writings (leases that refer to the broker commission obligation)

that a purchaser assumes. Not surprisingly, neither *VRG* nor *Pagano* held that a purchaser becomes obligated for an undisclosed commission obligation or an obligation of which it was unaware. Neither *VRG* nor *Pagano* addressed facts analogous to the facts here.

Moreover, the principles of law set forth in those cases are fully consistent with PNP and Deka's positions on this appeal. PNP does not dispute that it was assigned and assumed disclosed and identified brokerage commission obligations, if any, under the Brokerage Agreement and correspondence attached to the PSA. However, such assumption was not an assumption of non-existent rights or non-disclosed brokerage commission obligations, nor did it expand Rhein's right to a commission beyond what was expressly provided for in the Brokerage Agreement and related documents. And Deka, in the 2018 Purchase and Sale Agreement expressly disclaimed any assumption of commission obligations.

In short, this case is unlike *Louis Ross* or *Archie Schwartz* and the positions asserted by Deka and PNP are completely consistent with *VRG* and *Pagano*. It is difficult to conceive of a scenario where a party could have "affirmatively assumed" an undisclosed obligation (such as Rhein's claim that it is entitled to a commission for any and all tenancies of DSW and PetSmart, whether by renewal, modification, amendment or otherwise), particularly where

that alleged obligation is inconsistent with the written Brokerage Agreement and related correspondence.

CONCLUSION

For all the foregoing reasons, the trial court's Order and Judgment should be reversed in their entirety, and judgment in favor of Deka and PNP should be entered by this Court.

Dated: July 3, 2025

By: *s/Cory Mitchell Gray*
Cory Mitchell Gray