SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
CASE NUMBER: A-1232-23

WOODBRIDGE NJ HOLDINGS LLC, Plaintiff-Respondent. v. WHIBY 13 WOODBRIDGE LLC, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY SPECIAL CIVIL PART LANDLORD-TENANT SECTION Docket No.: MID-LT-5021-20 SAT BELOW The Honorable J. Randall Corman, J.S.C.

DEFENDANT-APPELLANT'S REVISED BRIEF

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PRELIMINARY STATEMENT

This appeal from a final judgment following a trial in Landlord-Tenant court raises multiple errors and irregularities in the disjointed and protracted proceedings in the trial court below that warrant vacating the orders the trial court issued, correcting its errors, and remanding for further proceedings.

The trial court's principal error was failing to recognize that the landlord seeking to dispossess its commercial tenant owed the tenant more money in construction reimbursements under the lease than the tenant owed in rent. The lease contemplated this scenario and provided a remedy, namely that if the amount owed under the reimbursement exceeds the amount owed under the delinquent rent, the smaller number would automatically be deducted from the bigger one to make both parties whole without judicial intervention.

Instead, the landlord refused to acknowledge the automatic deduction, refused to pay the reimbursements owed, and sued to evict the tenant. The trial judge, after openly prejudging the case in the landlord's favor without having first read the lease, then issued an order on November 10, 2021 finding that the tenant was not entitled to recover the reimbursement amounts the landlord owed under the lease while tenant was in "breach." The trial judge gave no legal analysis, citations, or statement of reasons explaining the decision. The tenant posted the full amount of rent arrears in escrow with the court and submitted a

motion to fix the reimbursement amount owed by the landlord. Despite having invited the additional briefing, the trial judge made no further rulings for another two years and once the judge did finally rule, he still refused to reach the merits the tenant's arguments as to the construction reimbursements, claiming a lack of jurisdiction. The trial judge failed to reconcile this abnegation of his judicial role with a prior interlocutory order in the same case already purporting to address the reimbursement issue, finding that no reimbursement could be awarded while tenant was "in breach." The record is muddled at best regarding what the trial judge regarded as within his jurisdiction but what is clear from the record is that the trial court failed to set forth any reasoned analysis of the relevant lease provisions on how they work together to address a situation in which both landlord and tenant owe each other at the same time under the Lease.

This Court should vacate paragraph one of the trial court's November 10, 2021 order, vacate the entirety of its November 9, 2023 order, correct the trial court's multiple errors in interpreting the lease at issue, and remand for further proceedings.

STATEMENT OF PROCEDURAL HISTORY

On July 22, 2020, the Plaintiff-Respondent Woodbridge NJ Holdings LLC (the "Plaintiff" or the "Landlord") filed a complaint for possession against its tenant, the Defendant-Appellant WHIBY 13 Woodbridge, LLC, (the

"Defendant" or "Tenant") in the Middlesex County Superior Court, Special Civil Part, Landlord-Tenant Division, under civil docket number MID-LT-5021-20 (the "Complaint"), Docket Entry No. SCP20201308677 (Da88-Da101).[1] In the Complaint, Landlord alleged to be owed $121,051.47 in unpaid rent plus interest and other charges collectible as additional rent (Da94-Da95). Due to the landlord-trial proceeding suspension then in effect, however, no trial would be scheduled for more than a year.

On August 18, 2021, the Honorable J. Randall Corman, J.S.C. (the "trial judge") presided over the remotely conducted trial in the Middlesex County Special Civil Division, Landlord-Tenant Part. Landlord and Tenant agreed to certain stipulated exhibits, and principally disagreed on two issues: (1) the calculation of late fees and interest Landlord alleged to be owed; and (2) the amount of "fit-up reimbursement," or Tenant's Allowance,[2] if any, owed from Landlord to Tenant as a potential offset to amounts Landlord claimed to be owed in rent (1T5-13 to 1T6-11).[3]

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[1] There is a second complaint for possession under the same civil docket number with eCourts docket entry number SSCCPP220022011235098963767. Because the two complaints appear to be identical, the duplicative complaint is omitted here.

[2] The annual installment payments owed from Landlord to Tenant are referred to interchangeably as "fit-up reimbursement" and Tenant's Allowance reimbursement payments in the proceedings below. For clarity and to avoid confusion, this brief refers to these payments as "Tenant's Allowance" in conformity with the Lease.

On November 10, 2021, following a decision issued from the bench, the trial judge ordered that "[b]ecause the Tenant is in breach of the lease due to nonpayment of five months of rent, the Tenant is not due any refund of fit up costs under Section 4.02 of the lease" (Da1). The trial judge further ordered Tenant to deposit $196,669.16 with the court to be held in escrow (the "Escrow Funds") within three weeks to avoid a judgment of possession being entered (Da1-Da2). The trial judge also permitted Landlord's counsel to submit an application for attorney's fees and permitted "both parties" to "file motions for reconsideration with regard to the determinations made by the Court" (Da2).

After Tenant timely deposited the Escrow Funds with the court (Da179-Da181), the parties submitted additional briefing including a motion filed by Defendant to fix the amount owed from Landlord to Tenant for Tenant's Allowance (Da168-Da239).

Neary two years later, on November 9, 2023, the trial judge held a hearing and entered an order denying "Tenant's motion for reconsideration," awarding Landlord a portion of its requested counsel fees, and ordering the Escrow Funds to be disbursed entirely to Landlord (Da3-Da4).

This appeal follows.

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[3] "1T" designates the transcript of proceedings dated August 18, 2021.
"2T" designates the transcript of proceedings dated November 10, 2021.
"3T" designates the transcript of proceedings dated November 9, 2023.

STATEMENT OF FACTS

On September 13, 2017, Tenant entered a commercial lease with Quality Way Operator, LLC ("Quality Way") to rent 20,800 rentable square feet at the Woodbridge Crossing Shopping Center at 455 Green Street in Woodbridge, New Jersey (the "Premises") for a 190-month term, subject to two successive five-year renewal terms (the "Lease") (Da5-Da87). In February 2019, Quality Way sold the shopping center to Plaintiff, and assigned Plaintiff its rights and obligations under the Lease (Da193).[4]

I. The Lease

Tenant's occupancy proceeded in phases. In phase one, the pre-rent-commencement period spanning the first ten months of the Lease, no rent was charged to Tenant (Da13-Da15). During that time, Tenant was responsible for furnishing to Landlord specifications for the construction of improvements and alterations to the space making it suitable to the proposed use of the Premises as a fitness facility as set forth in the Lease. Tenant was obligated to perform "Tenant's Work," a defined term that meant, in pertinent part, "the improvements and installations necessary for Tenant's use of the Premises . . . including, without limitation, installing a demising wall," and "separating the

[4] Although Quality Way was "Landlord" at the time the Lease was executed, it assigned its rights and obligations to Plaintiff prior to the events that led to this litigation. When this brief refers to the term "Landlord" Plaintiff is intended.

utilities serving the Premises" (Da15-Da17). Tenant further had to obtain all permits and approvals required by local authorities (Da16). Landlord, for its part, was "not required to do any work to the Premises" (Da15).

In phase two of the Lease, the Rent Commencement Period, spanning from the first day after the tenth full month following execution, i.e. August 1, 2018, throughout the next five years,[5] Tenant was responsible for paying monthly rent in the amount of $24,266.67, in addition to related charges collectible as additional rent (Da10-11;Da13-Da14). Upon fulfilment of, and in consideration for, Tenant's Work, after the first full year of phase two, beginning on August 1, 2019, the Landlord was required to begin making annual payments to Tenant, referred to in the Lease as "Tenant's Allowance," in six separate installments plus five-percent (5%) interest against the balance owed until the entire Tenant's Allowance—$730,000 plus interest—was satisfied in full (Da17-Da18).

The reimbursement was contingent on Tenant satisfying six specified conditions (the "Reimbursement Conditions") related to Tenant's Work:

> (i) Tenant's Work shall have been completed in accordance with the plans and specifications approved by Landlord;
> (ii) Tenant shall have opened the Premises for business with the public;

[5] Tenant's rent is set to increase in phase three, for Lease years 6-10, on August 1, 2024, and again in later years within the 190-month term, however, because the Lease is still in phase two, these scheduled increases are not pertinent here.

> (iii) Tenant shall have furnished Landlord with a written certification of the actual cost of the leasehold improvements comprising Tenant's Work excluding Tenant's movable trade fixtures, together with evidence of such cost and the payment in full thereof, as Landlord shall require;
>
> (iv) Tenant shall have furnished Landlord with "as-built" plans for the leasehold improvements comprising Tenant's Work;
>
> (v) Tenant shall have provided Landlord with final lien waivers from Tenant's general contractor and all subcontractors that performed Tenant's Work and all suppliers of material used in the performance of Tenant's Work; and
>
> (vi) at or prior to Tenant's opening for business at the Premises, Tenant shall have, at its sole cost and expense, obtained and delivered to Landlord a final certificate of occupancy for the Premises
>
> [Da17.]

There is no dispute that Tenant fully satisfied the six Reimbursement Conditions. Upon doing so, the Lease states "Landlord shall pay to Tenant up to the sum of Seven Hundred Thirty Thousand and 00/100 ($730,000) Dollars . . . as reimbursement for the actual cost of Tenant's leasehold improvements comprising Tenant's Work as and for 'Tenant's Allowance'" (Da17).

After setting forth the six "if and when" Reimbursement Conditions that trigger the vesting of Tenant's right to receive Tenant's Allowance from Landlord, § 4.02 of the Lease listed four different methods by which the Landlord could satisfy its reimbursement obligation for Tenant's Work (Da17). Under the standard method, Landlord would make six equal annual installment

payments to Tenant in the amount of $121,666.67, together with 5% annual interest on the unpaid balance of Tenant's Allowance (Da17). That method required that Tenant not be "in monetary default" at the time any installment was due (Da17). In the event either party failed to make a required payment, however, the Lease provided two reciprocal "offset" provisions, the first stating "[i]f Landlord fails to pay Tenant an installment of the Tenant's allowance within ten (10) days after Landlord's receipt of written notice from Tenant that such installment is past due, then, as its sole remedy, Tenant shall have the right to offset such amount against the Minimum Rent payable by Tenant hereunder" (the "Rent Offset") (Da17).

The other reciprocal offset clause stated that "Tenant . . . expressly grant[ed] to Landlord an offset and deduction against Tenant's Allowance for all costs, payments and expenses Tenant is obligated to pay to Landlord pursuant to this Lease . . . at the time an installment of Tenant's Allowance shall be due" (the "Allowance Offset") (Da17-Da18). No provision in § 4.02, or anywhere else in the Lease, stated that a Tenant's vested right to receive Tenant's Allowance could be permanently forfeited or waived for any reason.

II. Mutual missed payments and emergency statewide gym closure

Approximately six months after being assigned the Lease by Quality Way, Landlord defaulted on its obligation to make its initial annual Tenant's

Allowance installment payment on August 1, 2019, opting to pay only the principal payment of $121,666.67 and not the five-percent (5%) interest owed under the Lease (1T14-24 to 15-10;3T12-19 to 3T12-22). Specifically, $36,500 in interest was owed from Landlord to Tenant on August 1, 2019, but for reasons never made clear to Tenant, only the principal was paid and not the interest (Da169). Landlord would later fail to make any principal or interest payments towards Tenant's Allowance for either 2020 or 2021, though it would resume principal-only payments in 2022 and 2023 (3T7-4 to 3T7-9;3T10-5 to 3T10-18). Tenant, by contrast, promptly made all monthly payments under the Lease until, as detailed herein, the Premises was shut down by gubernatorial decree.

On March 9, 2020, New Jersey Governor Philip D. Murphy promulgated Executive Order No. 103 declaring a state of emergency in New Jersey due to the COVID-19 pandemic (the "Pandemic") (Da102-Da109).

Five days later, on March 14, 2020, in a statewide Notice to the Bar, the Chief Justice of the New Jersey Supreme Court, Stuart Rabner, and the Honorable Glenn A. Grant, Acting Administrative Director of the trial judges, temporarily suspended all Landlord-Tenant calendars (Da149).

On March 16, 2020, one week after declaring a state of emergency, Governor Murphy issued Executive Order No. 104, providing in pertinent part, that because "gyms . . . are . . . locations where large numbers of individuals

gather in close proximity," and "suspending operations at these businesses is part of the State's mitigation strategy to combat COVID-19 . . . Gyms and fitness centers and classes" would be closed to the public for "as long as this Order remains in effect" (the "Gym Closure") (Da110-Da118).

Between April and August 2020, while the statewide Gym Closure was in effect,[6] Tenant did not make monthly rent payments to Landlord. All loans Tenant received from the federal government under the Paycheck Protection Program ("PPP") went to fund payroll for Tenant's employees (Da171-Da172).

Meanwhile, on June 8, 2020, about three months into the Pandemic, Landlord's counsel sent Tenant a default notice for failing to pay rent in April, May, and June (Da162-Da166). The letter made no reference to the fact that Landlord was itself already in breach of the Lease for never having made the $36,500 interest payment on Tenant's Allowance that Landlord owed Tenant under § 4.02 of the Lease since August 1, 2019 (Da169;1T14-24 to 1T15-4).

III. Landlord sues Tenant for possession of the Premises

On July 14, 2020, Chief Justice Rabner issued an order permitting new Landlord-Tenant complaints to be filed but continued the suspension of Landlord-Tenant trials (Da150-Da161).

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[6] On June 26, 2020, Executive Order No. 157 continued the ban on indoor fitness centers, but permitted gyms to "open their outdoor spaces to the public" (Da119-Da138). There is no evidence Tenants' facility was equipped for this.

On July 22, 2020, Landlord filed the Complaint, alleging that Tenant owed $121,051.47 in unpaid rent plus interest and other charges collectible as additional rent in unpaid rent plus late fees, legal fees, and interest (Da94-Da95).

On August 1, 2020, Landlord's second annual Tenant's Allowance installment payment of $121,666.67 plus interest became due (Da169). Landlord did not pay it (3T7-4 to 3T7-9;3T10-5 to 3T10-18).

On August 27, 2020, through Executive Order No. 181, Governor Murphy rescinded the Gym Closure and permitted gyms to reopen (Da139-Da148).

In September 2020, Tenant reopened its doors for the first time since March 16, 2020, and immediately Tenant resumed payment of rent the following month, in September 2020 (1T4-9 to 1T4-15;Da142). There is no record of Tenant having missed any monthly rent payments since the Gym Closure ended in September 2020.

On August 1, 2021, Landlord, for the second consecutive year, failed to pay the Tenant's Allowance annual installment payment of $121,666.67 plus interest (1T9-17 to 1T10-2).

Seventeen days later, at the trial conducted virtually on August 18, 2021, the trial judge candidly admitted he had not yet read the Lease (1T18-4 to 18-6). The parties agreed that there were two main issues for the judge to decide: (i) how to calculate the amount of late fees and interest; and (ii) whether the

amount Tenant owed Landlord should be reduced or offset entirely by what had by then become multiple years of unreimbursed or under-reimbursed Tenant's Allowance installment payments dating back to August 2019, before the Tenant had missed any payments (1T11-25 to 1T12-11).

Regarding the late fees, Tenant maintained that Landlord was calculating them at a usurious, unconscionable, and illegal interest rate rising to eighty-three percent (83%), and that once properly calculated the amount actually owed in overdue rent plus interest, assessable late fees, and other additional rent was actually $196,669.16, rather than the $313,106.39 that Tenant was seeking at the hearing (1T8-23 to 1T9-8).

As to Tenant's Allowance, there was no dispute as to whether Landlord was current on its Tenant Allowance reimbursement payments. It was not. Tenant's counsel argued that as of the date of the trial "the landlord owe[d] [tenant] money back" (1T6-8 to 6-11). Specifically, the missed interest payment for 2019 to the missed principal and interest payments from 2020 and 2021, Landlord was delinquent a total of $334,583.33, an amount $137,914.17 greater than the amount the Tenant owed Landlord (1T25-11 to 1T25-13;Da169).

Landlord's counsel did not dispute, as a factual matter: (i) that $334,583.33 in unreimbursed Tenant's Allowance installment payments plus interest had not been paid; (ii) that Landlord underpaid its annual Tenant's

Allowance payment in 2019 before it had missed a single payment from Tenant; or (iii) that Landlord made no payments whatsoever towards Tenant's Allowance in 2020 or 2021. Counsel acknowledged these facts but argued that Tenant was no longer "entitled" to receive Tenant's Allowance (1T9-22 to 1T10-2), contending, as a legal matter, that Tenant's Allowance was no longer "payable under the terms of the lease" (1T9-21 to 1T9-25). In essence, Landlord argued the Lease permitted it to ignore its reimbursement obligation under § 4.02 in 2020 and 2021, and its delinquent interest payment from 2019, because Tenant had not paid rent during the Gym Closure in 2020.

Also on August 18th, the trial judge heard testimony from two witnesses. First, Jeffrey Adler, for the Landlord, testified, inaccurately, that Tenant is "a much larger corporation" than Plaintiff, and "own[s] several franchises" (1T28-7 to 1T28-9). Per Mr. Adler, Landlord "kept current and did what we had to do, even though we are a smaller business." (1T28-19 to 1T28-20).

For the defense, Angela Blaisdell, Tenant's Manager, testified that Tenant "is a franchisee," neither associated nor owned by the corporate franchisor known as Planet Fitness (1T29-23 to 1T29-24). Ms. Blaisdell testified that in the wake of the Pandemic, Tenant struggled to stay afloat and prevent the company bank account from dwindling, even with the aid of federal loan assistance, all of which was used to avoid terminating staff (1T30-1 to 1T30-2).

It was illegal under state law at that time to operate a health club, but Tenant was committed to paying its employees as well as security personnel to protect against vandalism or other property destruction (1T31-1 to 1T31-3). Once the Gym Closure was lifted and Tenant reopened, Tenant paid Landlord rent (1T30-13 to 30-15).

After Blaisdell's testimony, the trial judge noted that because he "want[ed] to get rid of this," once he "had a chance to look at" the Lease and interpret it, he would "make a decision on that," and once the decision was made, it would then "be up to the tenant to either pay it or . . . a warrant will have to be issued; judgment would be entered." (1T36-9 to 1T36-25).

Again, even though the trial judge acknowledged Tenant was arguing that Landlord owed Tenant money under the Lease, he stated: (1) he had not yet looked at the Lease; but (2) once he did, he would make a decision; and (3) after that decision it would be up to "the tenant" alone whether to pay or be evicted. In other words, the Tenant's central defense--that the Lease provided for offset of Tenant's delinquent rent against the larger sum Landlord owed Tenant--had already been rejected by trial judge before he even read the Lease.

IV. The trial judge's initial ruling and subsequent two-year delay

When the parties returned for continued argument on November 10, 2021, following post-trial briefing on the issues of Tenant's Allowance and on the

correctness and enforceability of the late fees and interest assessed, among other matters, the trial judge remarked the parties submitted "a voluminous amount of material," which he "was afraid was going to happen" (2T3-17 to 2T3-23).

On the late fees/interest issue, the trial judge ruled in favor of Tenant and recalculated the late fees with interest owed from Tenant to Landlord at the rate of interest suggested by Tenant, thereby reducing the amount to satisfy the judgment from the $313,106.39 sought to $196,669.16 (2T8-7 to 2T8-10).

On the Tenant's Allowance issue, the trial judge reiterated that he understood Tenant's argument that the amount of unpaid rent, additional rent, interest, and late fees owed by Tenant to Landlord "should have [been] eclipsed by $334,000 in refund, a refund that they would be due under Section 4.02 of the lease to compensate them for a certain percentage of the fit up cost" (2T4-9 to 2T4-13). But the trial judge nevertheless dismissed the argument without much discussion. The entirety of the trial judge's substantive ruling on the Tenant Allowance offset issue was as follows:

> THE COURT: [T]he Landlord had argued that the Tenant was not entitled to the refund because they were in breach. And my reading of the contract, I think that bears out. You know you want those refunds, you've got to be, you can't be in breach. So there is rent due and owing for this period of time.
>
> [2T6-23 TO 2T7-2.]

Upon Tenant's counsel's request for clarification, the trial judge responded, "I looked at the contract. And I concluded that's only payable if you're not in breach. And you're in breach. So I, so you don't get the fit up refund. That's my ruling" (2T9-15 to 2T9-18).

Near the conclusion of the hearing, Tenant's counsel again requested clarification as to whether the trial judge was ruling that Tenant had "forfeit[ed] the entire amount of its fit ups, because those were to be reimbursed from 2019 to 2024 on an annual basis, pursuant to the lease" (2T12-15 to 2T12-18). The trial judge responded "you don't get those costs while you're in breach," without ruling on whether Landlord was itself in breach for failing to make the reimbursement payments both before and after Tenant missed payments (2T12-19 to 2T12-20). The trial judge added: "Once you're no longer in breach, maybe you are entitled to the costs. But that's something for another day. You want that money you've got to get out of breach" (2T12-22 to 2T12-25). Tenant's counsel asked if the Escrow Funds would remain with the court "pending the further motion practice regarding the tenant improvement" and the trial judge confirmed that was the case (2T15-21 to 2T16-4).

The trial judge did not make even a passing reference to the Rent Offset or Allowance Offset clauses in the Lease. In an order memorializing the decision issued on the same day--November 10, 2021--the trial judge found, in paragraph

one, that "[b]ecause the Tenant is in breach of the lease due to nonpayment of five months of rent," Tenant was "not due any refund of fit up costs under Section 4.02 of the lease" (Da1).

On or about November 29, 2021, Tenant deposited the Escrow Funds within the time frame set forth in the November 10, 2021 order (Da179-Da181).

On December 9, 2021, Landlord filed an application for attorneys' fees and costs seeking an award of an additional $65,798.68 (Da242;Da246).

On December 29, 2021, Landlord requested an order directing the disbursement of the Escrow Funds (Da236-Da237).

On January 7, 2022, Tenant filed a motion seeking to fix the amount of Tenant's Allowance reimbursement and opposing Landlord's request for attorney's fees (Da173-Da178). After filing additional submissions (Da238-Da240), the parties awaited the trial judge's ruling. Unfortunately, that wait took another six hundred and twenty-four (624) days. In the interim, both parties wrote multiple letters asking the judge to rule on the requests for disbursement of the Escrow Funds, along with the other pending applications (Da241-Da252). In the meantime, Tenant continued paying rent and Landlord paid some of Tenant's Allowance for 2022 and 2023 (3T7-6 to 3T7-9;3T10-4 to 3T10-14).[7]

[7] Although it is undisputed Tenant made additional payments in 2022 and 2023, the record is not clear on whether Landlord paid the full principal and interest payments for those years.

V. The trial court's mixed jurisdictional and merits ruling

On November 9, 2023, the trial judge finally convened oral argument on the remaining issues. At the outset, the trial judge mischaracterized Tenant's motion to fix the amount owed under Tenant's Allowance as a "motion for reconsideration" (3T3-11 to 3-14). The trial judge then apologized for the delay in issuing a ruling, while casting at least some of the blame on the parties themselves for the length of their submissions, comparing them to the novel "War and Peace," a copy of which the trial judge then brandished to illustrate the voluminousness of the parties' submissions (3T3-15 to 3T3-23).

The trial judge held that "the order that tenant's counsel would like me to make adopt [sic] is something I really don't have jurisdiction to adopt," finding that Tenant's claim to the Tenant's Allowance offset would be "the equivalent of a judgment for damages," which he could not rule upon as a landlord-tenant judge (3T14-3 to 3T14-8). The trial judge added his view that there were only "two results to an eviction complaint. Either a judgment for possession or . . . dismiss[al]," in which case Tenant would "maybe . . . get the 192,000 [sic]," but he believed he lacked "jurisdiction" to order that (3T14-9 to 3T14-14). The trial judge added that his decision only had "limited res judicata value," and Tenant remained "free to do something in the Law Division" (3T14-15 to 3T14-18).

Confusingly, however, the trial judge then went on to hold that "while the tenant was in default or breach, he's not entitled to fit up costs," that the trial judge had already ruled on that issue, and that "[n]othing changes my mind about that" (3T15-2 to 3T15-4). He mischaracterized the "tenant's position" to be "we don't have to pay rent while [Gym Closure] is going on" (3T15-10 to 3T15-11), even though, at the time of that November 2023 hearing, Tenant had, approximately two years earlier, already paid into court the entirety of the Escrow Funds, representing all rent Landlord claimed to be owed (Da179-Da181). The trial judge did not reference the Rent Offset or Allowance Offset, instead ruling simply it would not be "equitable" for Tenant to receive the Tenant Allowance reimbursement, relying on a quote by the fictional antagonist in the movie The Maltese Falcon (3T15-20 to 3T15-22). He added, "[y]ou can't have everything your way in equity" (3T15-23 to 3T15-25), apparently not recognizing the irony that he was de facto ruling that Landlord would be entitled to every cent of rent owed by Tenant but that Landlord did not have to pay \one cent of Tenant's Allowance for 2020 and 2021, or the unpaid interest from 2019.

Regarding Tenant's Allowance, the trial judge held that he did not "need to decide those issues to decide this case" (3T16-21 to 3T16-23). Moments later, he decided the issue anyway, ruling "when you're in breach . . . the landlord does not have to pay the fit up costs. And I think that's clearly outlined in the

lease documents" without citing the Lease provision(s) on which he relied (3T17-1 to 3T17-4). But he hedged back yet again, stating that he was not reaching that issue because there were "a lot of ways that that could be interpreted," (3T17-13 to 3T17-15). When Tenant's counsel sought clarification, the trial judge said "if you press me for a decision on it, my decision would be actually harsher" (3T23-5 to 3T23-10).

The trial judge decided the attorney's fees issue, ultimately awarding Landlord $38,462.50 (3T18-24 to 3T19-4), but did not definitively rule in 2023 on whether Tenant was entitled to receive Tenant's Allowance for 2020 and 2021, or the unpaid interest for 2019, finding he had no "jurisdiction" to decide those issues (3T14-5 to 3T14-8; 3T14-13 to 3T14-4). Nonetheless, the trial judge also declined to vacate, revise, or amend in any way paragraph one of the November 10, 2021 order that had stated that Tenant could not be reimbursed because it was "in breach" (Da1). Indeed, he reiterated the opinion that "Tenant was in breach" (3T16-25 to 3T17-1) without acknowledging that Landlord had breached earlier or that Landlord owed Tenant more money than Tenant owed Landlord, or that the Allowance Offset clause was relevant to the analysis.

Viewing the trial judge's 2021 and 2023 rulings in concert, the judge decided: (1) as a landlord-tenant judge he lacked jurisdiction to rule on whether Landlord owed Tenant more money under the Lease than Landlord claimed

Tenant owed under the Lease; but also (2) Landlord did not owe Tenant money under the Lease. As a factual matter, these propositions are inconsistent.

On December 1, 2023, Defendant wrote a letter to the court seeking disbursement of the Escrow Funds.[8]

LEGAL ARGUMENT

POINT I

THE FIRST PARAGRAPH OF THE TRIAL COURT'S NOVEMBER 10, 2021 ORDER STATING THAT TENANT WAS NOT ENTITLED TO TENANT'S ALLOWANCE BECAUSE IT WAS "IN BREACH" MUST BE VACATED, AS MUST THE NOVEMBER 9, 2023 FINAL ORDER THAT FOLLOWED, BECAUSE THE TRIAL JUDGE IMPROPERLY PREJUDGED THE CASE AND FAILED TO GIVE LEGAL CITATIONS, ANALYSIS, OR ANY STATEMENT OF REASONS TO SUPPORT HIS DECISIONS (Da1-Da4)

For reasons described more fully in Point II, infra, the trial court's interlocutory ruling in paragraph one of its November 10, 2021 order stating that because Tenant was "in breach of the lease due to nonpayment of five months of rent, the Tenant is not due any refund of fit up costs under Section 4.02 of the Lease," must be vacated. For similar reasons, the November 9, 2023 order flowing from the interlocutory decision must also be vacated.

The trial court's rulings ignored relevant provisions of the Lease, thereby depriving Tenant of its entitlement to reimbursement for delinquent mandatory

[8] The appellate record is silent on whether the Escrow Funds were released.

annual installment payments for Tenant's Allowance plus interest in 2019, 2020, and 2021. However, as an initial matter, the trial court must be reversed for having prejudged the case before rendering a decision and then rendering decisions lacking in any legal analysis, case citations, or statement of reasons for having ruled against Tenant.

The central disputed issue in this case was whether Section 4.02 of the Lease directed the Landlord to offset unpaid rent owed under the Lease as a deduction against the larger sum of unreimbursed Tenant's Allowance owed from Landlord to Tenant under the same Lease. As will be described, the answer under the Lease is yes. However, the trial judge improperly prejudged the merits of the case and failed to set forth any legal citations, analysis, or statement of reasons to support its bare conclusion of law in the November 10, 2021 ruling that Landlord was excused entirely from liability for missing multiple mandatory installment payments on the Lease. The trial judge then exacerbated that error by ruling, again without any legal citation, analysis, or statement of reasons that he had no jurisdiction to decide that issue.

Even before diving into the merits of the underlying issues, the totality of the trial judge's procedural errors deprived Tenant of a fair hearing. "An essential element of a fair hearing within the concept of due process of law is

the impartiality, i.e., open-mindedness, of the trial body." Falcone v. Dantinne, 420 F.2d 1157, 1166 (3d Cir. 1969).

Here, the trial judge's comments from the outset of this proceeding reflected that he was neither impartial nor open-minded about the case. Specifically, after acknowledging he had not yet read the entire Lease or had any other exposure to the case (1T18-4 to 18-6), and having confirmed in that colloquy his understanding of Tenant's claim that under the Lease Landlord owes Tenant for the Tenant's Allowance offset, the trial judge stated that it would "be up to the, the tenant" whether to pay some amount to be determined later, having apparently already ruled out the offset argument without first looking at the Lease. Again, at that exact time that the eviction case was pending, Landlord owed Tenant significantly more in unreimbursed Tenant's Allowance installments than Tenant owed Landlord in unpaid or overdue rent and additional rent. Yet the trial judge indicated by his comments that he had already ruled out the possibility of an offset, before having even analyzed that provision of the Lease.

At the hearing held on November 10, 2021, even after having presumably read the Lease, the trial judge still offered no analysis whatsoever of the Rent Offset or Allowance Offset in the Lease (2T6-23 TO 2T7-2). The order memorializing the trial court's ruling did not delve deeper, stating simply:

"Because the Tenant is in breach of the lease due to nonpayment of five months of rent, the Tenant is not due any refund of fit up costs under Section 4.02 of the lease" (Da1-Da2).

Again, no further legal analysis, statement of reasons, or citation to a single case accompanied the trial judge's ruling that Tenant was not entitled to the Tenant's Allowance reimbursement. The trial judge's lack of open-mindedness, lack of engagement with Tenant's claim, and lack of factual or legal support for the ruling denied Tenant a fair hearing in accord with due process of law. Falcone, 420 F.2d at 1166.

Similarly, at the November 10, 2023 hearing, when the trial judge ruled--inconsistently with his own prior interlocutory ruling and his own contemporaneous comments on the merits during the hearing--that he lacked jurisdiction to make any decision whatsoever on whether Landlord owed Tenant anything under the Lease in dispute--he did so without any legal analysis, statement of reasons, or citation to a single case. Instead, the trial judge vaguely asserted that "equity" favored the Landlord, itself reversible error, since "a court hearing a summary dispossess action lacks general equitable jurisdiction." Benjoray, Inc. v. Acad. House Child Dev. Ctr., 437 N.J. Super. 481, 488 (App. Div. 2014). The trial judge also stated it was denying Defendant's "motion for

reconsideration," notwithstanding that Defendant had not filed a motion for reconsideration but a motion to fix the amount of Tenant's Allowance.

These rulings failed to adhere to Rule 1:7-4(a), which directs courts to "find the facts and state . . . conclusions of law . . . on every motion decided by a written order." Ibid. Courts analyzing the Rule have found that appellate review of a cursory order "is hampered by the absence of findings and a more complete record." Foley, Inc. v. Fevco, Inc., 379 N.J. Super. 574, 589 (App. Div. 2005)." See also In re Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 302 (App. Div. 2018) (noting the "function [of] an appellate court is to review the decision of the trial court, not to decide the motion tabula rasa."); Great Atl. & Pac. Tea Co., Inc. v. Checchio ("A&P"), 335 N.J. Super. 495, 498 (2000) ("[N]either the parties nor we are well-served by an opinion devoid of analysis or citation to even a single case.").

In Foley, 379 N.J. Super. at 581, for example, on appeal of an order vacating a final judgment on a debt alleged to have previously been discharged in bankruptcy, the appellate court had remanded the case to permit additional briefing and findings on the dischargeability of the debt, yet on remand the trial court made no such findings. The Appellate Division held insufficient under Rule 1:7-4(a) the trial court's cursory ruling that "gave no reasons for his conclusion," that "clearly the debt did not fall within any of the exceptions [to

dischargeability] provided by . . . the Bankruptcy Code." Id. at 588-89. Because the trial court failed to "fully address" the legal issue as to "the dischargeability of the debt," appellate review of that decision was "hampered by thence of findings and a more complete record," warranting a remand. Id. at 581, 589.

Here, similarly, because the trial judge's ultimate rulings on the offset and complete lack of a ruling on the motion to fix the reimbursement amount failed to "fully address" the legal issues, ibid., and were "devoid of analysis or citation to even a single case," A&P, 335 N.J. Super. at 498, the rulings flouted the requirements of Rule 1:7-4(a). Therefore, this Court should vacate paragraph one of the November 10, 2021 order, and the entirety of the November 9, 2023 order, and remand with instructions to the trial judge to fully address the issue as to the amount of reimbursement owed from Landlord to Tenant under the Lease.

POINT II

BECAUSE THE TRIAL JUDGE MISCONSTRUED THE LEASE BY FAILING TO ASCERTAIN THAT TENANT'S ALLOWANCE WAS AN UNWAIVABLE REIMBURSEMENT OWED TENANT AND THAT ANY RENT OWED WAS AUTOMATICALLY OFFSET AGAINST TENANT'S ALLOWANCE, PARAGRAPH 1 OF THE COURT'S NOVEMBER 10, 2021 ORDER, AND THE ENTIRETY OF THE NOVEMBER 9, 2023 FINAL ORDER MUST BE VACATED (Da1-Da3)

Landlord owed Tenant more money under the Lease than Tenant owed Landlord in rent. The Lease is clear that in such situations, the lower amount—

the unpaid rent in this case—offsets automatically against the higher amount—the unpaid Tenant's Allowance. The trial judge's ruling that no offset of the rent against the Allowance was available while the Tenant was "in breach," misconstrued the applicable lease provisions resulting in an unwarranted and unjustifiable windfall to Landlord at Tenant's expense. A remand is warranted so that the trial court can fix the amount due on Tenant's Allowance.

"[A] summary dispossess action does not permit either a landlord or tenant to plead a claim for damages," but rather "confin[es] itself to the landlord's right to possession, and fixing the amount of rent due to afford the tenant the opportunity to avoid eviction by its payment." Green v. Morgan Properties, 215 N.J. 431, 449-50 (2013). The intent of the summary landlord-tenant proceeding is "a quick disposition of the landlord's claim for possession." Ibid.

The amount of rent claimed to be owed in the complaint must be "the amount that the tenant is required to pay by . . . the lease." R. 6:3-4(c).

"In interpreting a lease agreement," as with any contract, "the function of the trial judge is to enforce the lease as written, not to write for the parties a different or better contract." Liqui-Box Corp. v. Estate of Elkman, 238 N.J. Super. 588, 600 (App. Div. 1990). "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009). "[W]here the terms of a contract are

clear and unambiguous, there is no room for interpretation or construction and the trial judges must enforce those terms as written." Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 140 (Ch. Div. 2018). Accord E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc., 365 N.J. Super. 120, 125 (App. Div. 2004). "Importantly, '[a] contract 'should not be interpreted to render one of its terms meaningless.'" C.L. v. Div. of Med. Assistance & Health Servs., 473 N.J. Super. 591, 599 (App. Div. 2022) (quoting Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011)).

"When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo." Kieffer v. Best Buy, 205 N.J. 213, 222 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)). "Appellate courts give 'no special deference to the trial court's interpretation and look at the contract with fresh eyes.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (quoting Kieffer, 205 N.J. at 223).

Here, under § 4.02 of the Lease, Tenant's Allowance is undisputedly payable by Landlord to Tenant under the Lease. What is in dispute is whether Tenant's Allowance is payable when Tenant owes Landlord overdue rent and related charges while Landlord owes Tenant an installment payment of Tenant's Allowance that exceeds the sum of the charges owed to Landlord. The Lease provides that in that situation, an amount equal to the charges owed from Tenant

to Landlord are automatically deducted from the installment payment Landlord owes Tenant without Tenant going into default. By operation of this deduction the Tenant owed Landlord no rent as of trial.

A. Because the Offset Allowance is mandatory under the Lease, Tenant was never in monetary default as of trial

The Lease provides six specific Reimbursement Conditions and states that "Landlord shall pay to Tenant up to the sum of Seven Hundred Thirty Thousand and 00/100 ($730,000) Dollars . . . as reimbursement for the actual cost of Tenant's leasehold improvements comprising Tenant's Work as and for 'Tenant's Allowance.'" (emphasis added). There is no Lease provision suggesting that the Tenant's Allowance reimbursing Tenant for its construction and improvements to Landlord's premises was waivable, forfeitable, or otherwise capable of being canceled or voided.

While the Lease is rigid in providing that, upon fulfillment of the Reimbursement Conditions, the Landlord "shall pay" Tenant's Allowance in full, the Lease is more flexible with respect to the "manner" of Reimbursement that Landlord may "elect[]" to use "to pay the Tenant's Allowance." The standard method under the Lease is "six equal annual installments together with five percent (5%) interest." Alternatively, Landlord also had "the right to elect, at any time at its sole option, to pay the entire outstanding amount of Tenant's Allowance to Tenant." The Lease provided a further alternative reciprocal

method to be employed in the event that either party falls behind on any obligations under the Lease: the Rent Offset and the Allowance Offset. Again, the Rent Offset provides "[i]f Landlord fails to pay Tenant an installment of the Tenant's Allowance . . . Tenant shall have the right to offset such amount against the Minimum Rent." Along the same lines, the Allowance Offset provides, "Tenant hereby expressly grants to Landlord an offset and deduction against Tenant's Allowance for all costs, payments and expenses Tenant is obligated to pay to Landlord pursuant to this Lease or otherwise due and owing to Landlord, at the time an installment of Tenant's Allowance shall be due."

Viewing these provisions "in a fair and common sense manner," consistent with "[a] basic principle of contract interpretation," Hardy, 198 N.J. at 103, the Lease set up mutual payment obligations by both parties of different amounts on different schedules and, upon either party's delinquency, the appropriate offset method would true-up the amount owed by the non-delinquent party. The Lease established four potential reimbursement methods, each of which are capable of satisfying Landlord's unwaivable reimbursement duty independently or in combination:

> (i) Landlord pays Tenant six annual installments;
>
> (ii) Landlord fails to fully pay Tenant an annual installment and the unreimbursed amount is used as an offset against Tenant's rent obligation;

> (iii) Landlord pays the entire balance of Tenant's Allowance at once;
>
> and/or
>
> (iv) If Tenant misses rent payments, § 4.02 of the Lease automatically deducts the rent owed from the balance of the Tenant's Allowance installment at the time it is owed
>
> [Da17-Da18.]

The Lease also provides that the standard six annual installment payments method only kicks in if additional conditions are met, essentially, that neither Tenant nor the Guarantor is in default and that the Lease remains in effect. The Tenant's right to receive reimbursement via the standard method, as opposed to one of the other methods, is contingent upon these conditions being satisfied.

Landlord, in an argument adopted by the trial court, contends that the "monetary default" clause for triggering the annual installment payments operates to forfeit permanently Tenant's right to receive its allowance at all during the period of the Tenant's or Guarantor's default, even after making up the monetary default. In essence, Landlord and the trial court add "monetary default" as an additional, seventh, unstated Reimbursement Condition. That construction of the Lease is unsupported and unjustifiable for multiple reasons.

First, the plain text of the contract does not permit this construction. Again, § 4.02 states that, "if and when"[9] the Reimbursement Conditions (of which there are six, not seven) are satisfied, the "Landlord shall pay to Tenant" the Tenant's Allowance in the amount of $730,000. Whether interpreting statutes or contracts, the word "shall," as a matter of black-latter law, "carries with it a presumption that the provision is mandatory and not merely permissive." Johnson Mach. Co. v. Manville Sales Corp., 248 N.J. Super. 285, 304 (App. Div. 1991). Accord Medford Tp. Sch. Dist. v. Schneider Elec. Bldgs. Ams., Inc., 459 N.J. Super. 1, 12 (App. Div. 2019); George Harms Constr. Co. v. Lincoln Park, 161 N.J. Super. 367, 371-72 (Law Div. 1978); Cryan v. Klein, 148 N.J. Super. 27, 30 (App. Div. 1977). Where "parties specifically used the term, 'shall,'" in an agreement, it conveys "they intended [such] provisions . . . to be mandatory," whereas "use of the permissive term, 'may,'" by contrast, "underscore[d] their intention that the . . . provision was permissive." Medford, 459 N.J. Super. at 12.

Under these and similar precedents, the "Landlord shall pay" language in § 4.02 is "mandatory and not merely permissive." Johnson Mach., 248 N.J.

[9] The Lease states the "if and when" part twice. It is worth pausing on why it is important enough to be stated twice: "if" connotes that all six succeeding conditions must be met and "when" connotes that, once met, the conditions immediately and inexorably ripen into Landlord's obligation to pay Tenant's Allowance.

Super. at 304. "If and when" the Reimbursement Conditions are met, Tenant's right to receive payment of Tenant's Allowance from Landlord is vested, even if the precise, exclusive method of reimbursement is not. Neither Landlord nor the trial court have explained why "shall" should no longer mean "shall" under their (re)construction of § 4.02.

Second, Landlord's and the trial judge's interpretation of § 4.02 conflates the six Reimbursement Conditions necessary to vest Tenant's right to Tenant's by improperly adding the seventh condition while reading the offset options out of the Lease. The annual installment method of payment is only one (1) of four possible reimbursement methods permitted under the Lease. The other three are: (2) Landlord using a delinquent Tenant's Allowance annual installment payment as a setoff against rent and other payments Tenant owes Landlord; (3) Landlord setting off as a deduction against the balance of Tenant's Allowance rent or other payments Tenant owes Landlord; and (4) Landlord paying Tenant's Allowance in full.

The Lease could have easily added to the six listed "if and when" Reimbursement Conditions that "Tenant shall have been current on all rent payments throughout the term of the Lease and shall not be in monetary default," or something along those lines but it did not. Instead, it listed six very specific prerequisites to the vesting of Tenant's right to receive Tenant's Allowance, and

the exclusion of Tenant's monetary default from that group is deemed intentional under the doctrine expressio unius est exclusio alterius. See, eg., Evans v. Atl. City Bd. of Educ., 404 N.J. Super. 87, 92 (App. Div. 2008) (holding that omission of "such as" or "including" before listing four specified items in list reflected Legislature's intention to exclude unmentioned items from list under "expresio unius" doctrine).

Third, because since the date the Gym Closure was lifted in September 2020 (aka one year before trial until the present), Landlord has consistently owed Tenant more money than Tenant owed Landlord, Landlord's complaint should have been dismissed.

"The jurisdictional issue of 'default' encompasses the question of whether the amount of rent alleged to be in default, is due, unpaid and owing, not only whether it is due and unpaid." Marini v. Ireland, 56 N.J. 130, 139 (1970) (emphasis added). "The mere fact of the tenant's failure to pay rent . . . is not in and of itself a sufficient fact to meet the statutory jurisdictional requisite." Ibid.

Here, given the automatic deduction of Tenant's Allowance provided by the Allowance Offset, rent, even if "due" was not "owing" at the time of trial. Ibid. As of and since the Gym Closure was lifted in September 2020, Landlord has consistently owed Tenant more than Tenant owed Landlord. This was true as of the date the Gym Closure was lifted, true at trial, and is true today.

Fourth, the canon against surplusage further undercuts Landlord's and the trial judge's alternative interpretation of the "Landlord shall pay" clause in § 4.02. Mirroring a principle employed in statutory interpretation "to avoid an interpretation that reduces specific language to mere surplusage," DKM Residential Props. Corp. v. Twp. of Montgomery, 182 N.J. 296, 307 (2005), when interpreting contracts, courts are similarly instructed not to adopt an interpretation of the instrument at issue that would "render one of its terms meaningless." Cumberland Cty. Improvement Auth. v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div. 2003). Accord C.L., 473 N.J. Super. at 599. The Restatement similarly provides that "[i]n the interpretation of a promise or agreement or a term thereof," it is preferred to generally apply "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement of Contracts §203(a).

Again, the Lease has two "offset" provisions in § 4.02: the Rent Offset and the Allowance Offset. The language in the latter—granting "an offset and deduction against Tenant's Allowance for all costs, payments, and expenses Tenant is obligated to pay to Landlord . . . at the time an installment of Tenant's Allowance shall be due"—can only mean one thing: if Tenant is delinquent in rent at the time a Tenant's Allowance installment payment is due, the amount of

arrears will automatically be deducted from the amount of Landlord's annual installment payment. If Tenant were not delinquent in payments there would be no purpose for the Allowance Offset, because otherwise no amounts would be already owed "at the time an installment of Tenant's Allowance shall be due."

The Lease provides that the Tenant "expressly grants" in advance, as of the date of the Lease execution, a future deduction against Tenant's Allowance for any amounts that it may owe the Landlord at the time of an annual installment payment, and contains no provision granting the Landlord discretion to decline to accept the deduction that has been automatically granted.

"A covenant in a lease can arise . . . by necessary implication from specific language of the lease or because it is indispensable to carry into effect the purpose of the lease." Marini, 56 N.J. at 143. "In determining, under contract law, what covenants are implied, the object which the parties had in view and intended to be accomplished, is of primary importance." Ibid.

In this instance, "the object which the parties had in view" with respect to the reciprocal offset provisions in § 4.02 was clearly resolving issues related to delinquent payments between the parties amicably through accounting adjustments rather than through the courts. Ibid. This is a "necessary implication" of the offset clauses as well as § 17.06 which allows either party to recover attorneys' fees against the other if the prevailing party has established a

breach of the Lease. As this Lease requires reciprocal performance by payment, the offset clauses sensibly ensure that both parties' rights to be made whole are protected. For these reasons, it is clear from the language and purpose of § 4.02 that any rent or other charges owed at the time an annual installment payment becomes due are automatically deducted from the installment payment.

This interpretation of Allowance Offset—indeed, the only plausible interpretation—is harmonious with the "monetary default" clause relied upon heavily by Landlord and the trial court. If the total amount of Tenant's unpaid rent exceeds the total amount owed at the time an annual installment payment from Landlord is due, no annual installment payment is tendered because of Tenant's "monetary default" and Tenant is subject to dispossession. If, on the other hand, the total amount of the annual installment payment due exceeds, as here, the amount of unpaid rent or other payments owed Landlord, there is no "monetary default" because Tenant's delinquent payments have been automatically deducted from the annual installment sum owed, as expressly granted under the Lease, thereby reducing the out-pocket cost to the Landlord of the installment payment.

Under Landlord's and the trial court's interpretation, Tenant is in "monetary default" even if Landlord presently owes Tenant more money under the Lease than Tenant owes Landlord under the Lease. As an initial matter, this

construction of § 4.02 is illogical and absurd, and should be dismissed for that reason alone. See, eg., Mendles v. Danish, 74 N.J.L. 333, 336 (1907) ("Where ambiguity exists or literal interpretation may lead to absurd results, resort may be had to the principle that the spirit of the law controls the letter."); In re Somerset Reg'l Water Res., LLC, 949 F.3d 837, 848 (3d Cir. 2020) (citation omitted) (rejecting "commercially unreasonable" interpretation of contract based on "'prohibition of any interpretation' of a contract 'that leads to an absurd result.'"). But even setting that absurdity aside, if Landlord were forgiven from ever paying Tenant's Allowance whenever any rent, utility, interest, or other related payment, however minimal, is late or outstanding, both the Rent Offset and Allowance Offset provisions would be rendered meaningless surplusage, an interpretation to be strenuously avoided. DKM, 182 N.J. at 307.

Fifth, Landlord's interpretation of § 4.02 is internally inconsistent to the point of being incomprehensible. On one hand, Landlord contends that the Tenant's Allowance is forfeited if Tenant is in "monetary default," but yet, undisputedly, Landlord paid Tenant some portion of Tenant's Allowance in 2022 and 2023; this despite the fact that Landlord had not yet received any rent from the Gym Closure period (which had been paid into court) nor had it received attorney's fees. Which is it? Does the Lease provide that a one-time monetary default removes permanently Landlord's obligation to ever pay

Tenant's Allowance during the period that the default is uncured or does it permit Landlord to withhold the Allowance until the default is cured? Landlord does not seem sure, because on one hand it withheld Tenant's Allowance entirely for years, suggesting Landlord may believe a one-time monetary default should result in permanent excusal of its contractual reimbursement obligations. On the other hand, Landlord paid at least some potion of Tenant's annual installment payments in 2022 and 2023 despite an alleged "monetary default" not having yet been cured. Landlord's position on the duration of its self-created atextual reimbursement obligation amnesty is, at best, inconsistent.

Seventh, as a matter of drafting intent, in constructing the simultaneous mutual payment structure with mutual offset mechanism, the parties appear to have chosen an arithmetically simple, indisputable, easy to implement method of resolving out of court delinquent payments among the two parties. That choice by the parties who drafted the Agreement should be respected.

B. <u>In the alternative, even if Landlord could decline the Allowance Offset doing so was an unreasonable failure to mitigate damages</u>

For the reasons discussed above, there is no provision in the Lease permitting forfeiture or waiver of Landlord's obligation to make payments towards Tenant's Allowance. Nor does the Lease have any mechanism allowing Landlord to refuse the contractual deduction against Tenant's Allowance that

happens automatically when Tenant owes Landlord less than Landlord owes Tenant when a Tenant's Allowance installment payment is due.

Even assuming arguendo that Landlord had discretion to somehow refuse or decline the deduction against the Tenant's Allowance installment payment expressly granted in the Lease, such declination was an unnecessary, unreasonable refusal to mitigate damages that the trial court should have held precluded Landlord from recovering the amount of claimed rent.

"There is no dispute that a commercial landlord must make 'reasonable' efforts to mitigate its damages after a tenant breaches the lease." Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470, 473 (App. Div. 1998). Accord Borough of Fort Lee v. Banque Nat'l de Paris, 311 N.J. Super. 280, 292 (App. Div. 1998); McGuire v. City of Jersey City, 125 N.J. 310, 320–21 (1991).

"[T]he same policy considerations which apply to mandate a mitigation of damages requirement in residential leases . . . apply to commercial leases." Fanarjian v. Moskowitz, 237 N.J. Super. 395, 405-06 (App. Div. 1989). Therefore, in a commercial lease, "landlord's recovery against tenant for unpaid rent" will be "diminished by the sum which landlord would have received had he mitigated damages." Carisi v. Wax, 192 N.J. Super. 536, 542 (Dist. Ct. 1983).

"Whether or not the landlord's efforts were reasonable is a question for the trier of fact." Banque Nat'l, 311 N.J. Super. at 292. Accord Harrison Riverside, 309 N.J. Super. at 475. "The lessor bears the burden of demonstrating actions taken to mitigate damages." McGuire, 125 N.J. at 323.

In Fanarjian, 237 N.J. Super. at 406-07, the Appellate Division upheld the trial court's finding that the landlord failed to exercise reasonable diligence in mitigating damages due to the lack of any "sufficient attempts toward mitigation for a substantial period of time".

Here, even assuming for the sake of argument that Allowance Offset was not automatic and mandatory under the Lease, there is no dispute that at the very least the Allowance Offset was available to the Landlord in its discretion. And if it was available why not take advantage? Had Landlord simply taken the reasonable step of deducting the rent owed from Tenant's Allowance in August 2020 as the Lease permitted, by exercising that simple step Landlord would have instantly mitigated all of Landlord's damages in total without any additional cost or burden. Any short-term costs borne the Landlord from the delinquent rent would have been washed away 1:1 within year's end by virtue of the setoff.

If only both parties were loyal to the Lease's simple and efficient built-in reconciliation mechanism, everyone would have been made whole by September 1, 2020, the day the Gym Closure ended. Application and execution of a simple,

contractually authorized accounting adjustment that did not require anyone to sue anyone else would have avoided much litigation and expense subsequently borne by both parties. Reviewing the Lease "in a fair and common sense manner," avoidance of litigation via the offset method is what the parties to the Lease—the original parties—intended, alas, in vain. Hardy, 198 N.J. at 103. Instead of effectuating the automatic deduction by simply paying a reduced Tenant's Allowance installment payment in 2020, the Landlord opted to pay nothing that year, or the next year.

The trial judge similarly failed to consider the contractual offset clauses at all, not even mentioning them, much less analyzing their operation under the Lease. In missing these crucial provisions, the trial court misapprehended and misconstrued § 4.02. Paragraph one of the November 10, 2021 order and the entirety of the November 9, 2023 order should be vacated and the matter should be remanded so that the trial court can fix the amount Landlord owes Tenant for the unreimbursed Tenant's Allowance installment payments under the Lease.

POINT III

THE TRIAL JUDGE ERRED IN FAILING TO ASCERTAIN IT HAD JURISDICTION TO FIX THE AMOUNT LANDLORD OWED TENANT FOR REIMBURSEMENT OF TENANT'S ALLOWANCE AS AN ELEMENT OF TENANT'S DEFENSE TO LIABILITY (Da3)

The trial court had jurisdiction to entertain Tenant's primary defense to liability and in failing to recognize it had that jurisdiction, the trial judge

unjustifiably nullified the defense. Therefore, the November 9, 2023 order must be vacated entirely and this Court should remand for reconsideration.[10]

The Rules of Court provide that "[t]he following matters shall be cognizable in the Special Civil Part . . . Summary landlord/tenant actions." R. 6:1-2(a)(3). The summons to a tenant "shall require the Tenant to appear and state a defense at a certain time and place." R. 6:2-1 (emphasis added).

The relevant statute at issue provides, in pertinent part that "[if] upon trial of a landlord and tenancy proceeding the Landlord shall not be able to prove, by lease or other evidence, his right to the possession of the premises claimed by him . . . the cause shall be dismissed." N.J.S.A. 2A:18-52.

"The summary dispossess statute was designed '. . . to give a landlord a quick remedy for possession.'" Carr v. Johnson, 211 N.J. Super. 341, 347 (App. Div. 1986) (quoting 18 N.J. Practice (McDonough, County District and Municipal Courts) (2nd ed. 1971), § 1567 at 303)). As "[i]t is entirely a creature of the Legislature . . . and as such its provisions should be construed strictly." Ibid. "The only remedy that can be granted in a summary-dispossess proceeding is possession; no money damages may be awarded." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 280 (1994). Although, "as a practical matter, the fixing

[10] For reasons already discussed, paragraph one (1) of the trial court's November 10, 2021 interlocutory order must also be vacated.

of rent due by the court . . . create[es] a finite sum that, if paid by the tenant, will be made available to the landlord to bring the tenant's rent current.'" Green, 215 N.J. at 449-50.

Here, from the initial hearing in this case to the final one, Tenant consistently asserted as a defense to Landlord's action for possession that Landlord had no right to possession since Landlord owed more money to Tenant under the Lease than Tenant owed Landlord under the Lease and, moreover, the Lease directed that the Landlord could reimburse itself automatically on all rent alleged to be owed by offsetting the rent against the Tenant's Allowance. This defense went directly to whether the Landlord proved its case, "by lease or other evidence," N.J.S.A. 2A:18-52, that it had the right to possession under the Lease.

Inconsistently, at the 2023 hearing, the trial judge purported to rule both on the merits of Tenant's argument as to how § 4.02 of the Lease should be interpreted and to rule that it had no jurisdiction to evaluate the merits of that argument, contending "the order that tenant's counsel would like me to make adopt [sic] is something I really don't have jurisdiction to adopt," and that Tenant was "free to do something in the Law Division" if it wanted to do so (3T14-3 to 3T14-18), because the trial judge was "not ruling on that" and did not "need to decide those issues to decide the case" (3T16-21 to 3T16-23).

Notwithstanding the expressed trepidation, the trial judge nevertheless rejected the defense anyway, holding that "while the tenant was in default or breach, he's not entitled to fit up costs," acknowledging that he had "already ruled" on that and that "[n]othing changes my mind about that" (3T15-2 to 3T15-4). "[W]hen you're in breach," the trial judge held, "the landlord does not have to pay the fit up costs. And I think that's clearly outlined in the lease documents" (3T17-1 to 3T17-4). Further contradicting the trial judge's own comments that he was not really deciding the Tenant's Allowance issue because he had no jurisdiction to do so is the trial judge's own prior ruling in 2021 that "[b]ecause the Tenant is in breach of the lease due to nonpayment of five months of rent," Tenant was "not due any refund" of the "fit up costs," that Landlord was contractually obligated to pay Tenant under the Lease.

It would be quite extraordinary, bordering on Kafkaesque, if it were true that a trial judge tasked with deciding whether a tenant had violated a lease lacked all jurisdiction to review a defense premised entirely on a provision within that same lease that went directly to the ultimate issue of amount owed. Fortunately, that is not the case. While the scope of Landlord-Tenant part jurisdiction must be construed narrowly, Carr, 211 N.J. Super. at 347, it cannot be so narrow as to preclude the Tenant from presenting a defense, particularly a defense premised on the Lease. See Gonzalez v. Safe & Sound Sec. Corp., 185

N.J. 100, 114 (2005) (quoting N.Y. S. & W. R. Co. v. Vermeulen, 44 N.J. 491, 501 (1965)) ("Due process requires that there be an opportunity to present every available defense."). Nor would it be sensible or fair for the landlord-tenant court to hold that it had jurisdiction to read one part of the Lease to determine Tenant owed Landlord money but no jurisdiction to read a different part of the Lease to determine whether Landlord owed Tenant more money subject to offset that would resolve the landlord-tenant case. In any event, the statute requires that, in any landlord-tenant proceeding, if Landlord cannot show the right to possession of the premises under the Lease and other evidence, "the cause shall be dismissed." N.J.S.A. 2A:18-52. Therefore, under the statute, because the trial judge has jurisdiction to dismiss based on the failure to present proof within the Lease, the trial judge necessarily also had jurisdiction to read the entire Lease to determine whether it supported Landlord's claim. The trial court's holding to the contrary was inconsistent with the statute, with Rule 6:1-2(a)(3), and with due process. Gonzalez, 185 N.J. at 114.

Moreover, for the reasons already described above, the trial court's rulings as to whether it has jurisdiction to decide the issue of Tenant's Allowance are hopelessly internally inconsistent, with the trial judge several times stating he lacked jurisdiction to decide the issue and other times ruling that Tenant was precluded from recovering Tenant's Allowance on the circular grounds that

Tenant was "in breach." This inconsistency alone on the issue of whether the trial judge thought he had jurisdiction is sufficient grounds to vacate the 2021 and 2023 orders and remand. See, eg. Poluhovich v. Pellerano, 373 N.J. Super. 319, 365 (App. Div. 2004) ("[A]mbiguity regarding whether a court has declined jurisdiction can result in one court improperly exercising jurisdiction because it erroneously believes that the other court has declined jurisdiction. . . This raises significant due process concerns.").

The trial judge clearly had jurisdiction to ascertain whether the Lease supported Tenant's primary defense under the Lease. Because the trial judge's inconsistent comments make it entirely unclear whether he understood he had the jurisdiction to make that determination, the entirety of the 2023 order must be vacated and the matter remanded.

POINT IV

IF, UPON REMAND, TENANT PREVAILS IN FIXING THE AMOUNT OWED UNDER THE LEASE, THE ATTORNEY'S FEES PAID FOR TENANT'S "BREACH" MUST BE RETURNED TO TENANT AND TENANT'S ATTORNEY'S FEES MUST BE PAID BY LANDLORD (Da3)

Under § 17.06 of the Lease, "Tenant shall pay to Landlord all legal costs and other reasonable attorneys' fees and expenses" only in the event that Landlord has brought suit "for recovery of possession . . . and a breach shall be established." The same section of the Lease further provides:

> In the event suit shall be brought by Tenant because of the breach of any covenant contained herein on the part of Landlord to be performed, and a breach shall be established, Landlord shall pay to Tenant all legal costs and other reasonable attorneys' fees and expenses incurred by Tenant in connection therewith.
>
> [Da56.]

Tenant's motion to fix the reimbursement amount and this appeal are both a "suit." See Black's Law Dictionary, 8th Ed. 2004 (defining "suit" to mean "[a]ny proceeding by a party or parties against another in a court of law").

First, this Court should vacate the order awarding Landlord attorney's fees because Defendant, for the reasons already discussed, supra, was not in breach. Moreover, on remand, in addition to fixing the amount Landlord should pay Tenant to satisfy its delinquent Tenant's Allowance obligation plus interest, if it is determined here that Landlord has breached its obligations to Tenant under the Lease for failing to pay multiples annual installments of Tenant's Allowance, Landlord must be held responsible for Tenant's attorney's fees under § 17.06. The trial court should determine the amount of those fees as well.

CONCLUSION

For the above reasons, paragraph one (1) of the trial court's 2021 order must be vacated, the entirety of the 2023 order must be vacated, and the matter

must be remanded to fix the amount of Tenant's Allowance and determine what effect the remand should have on attorneys' fees under § 17.06 of the Lease.

Respectfully submitted,

THE KELLY FIRM, P.C.
Attorneys for Defendant-Appellant

/s/ *Nicholas D. Norcia*
Date: June 5, 2024 NICHOLAS D. NORCIA

Superior Court of New Jersey

Appellate Division

Docket No. A-001232-23T2

WOODBRIDGE NJ HOLDINGS LLC,	:	CIVIL ACTION
Plaintiff-Respondent-Cross-Appellant,	:	ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION– SPECIAL CIVIL PART, LANDLORD-TENANT DIVISION, MIDDLESEX COUNTY
vs.	:	
WHIBY 13 WOODBRIDGE LLC,	:	
Defendant-Appellant-Cross-Respondent.	:	DOCKET NO. MID-LT-5021-20
	:	Sat Below:
	:	HON. J. RANDALL CORMAN, J.S.C.

BRIEF AND APPENDIX FOR PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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[1] Pages Pa041 and Pa042 have been filed in the redacted form in the Law Division.

Unpublished Opinions

[2] This limited portion of Appellant's Brief is being included in Respondents' Appendix pursuant to R. 2:6-1(a)(2) in support of Respondent's Argument that two (2) of the arguments raised by Appellant in this Appeal were not raised in the Underlying Action. The balance of Appellant's briefing in the Underlying Action were submitted as letter briefs without Tables of Contents

PRELIMINARY STATEMENT

This appeal arises out of a summary disposition proceeding (the "**Underlying Action**"), pursuant to which Plaintiff-Respondent-Cross-Appellant, Woodbridge NJ Holdings LLC ("**Respondent**" or "**Landlord**"), sought to evict Defendant-Appellant-Cross-Respondent, WHIBY 13 Woodbridge LLC ("**Appellant**" or "**Tenant**"), from certain commercial real property located in Woodbridge, New Jersey due to Tenant's admitted failure to pay any rent due and owing under the parties' written Lease Agreement (the "**Lease**") for the months of April 2020 through August 2020 (the "**Events of Default**"). As recognized by The Honorable J. Randall Corman, J.S.C., as of November 10, 2021, absent legal fees and costs, Tenant owed Landlord nearly $200,000 in past due Rent and Additional Rent under the Lease (the "**Rent Arrears**"). Tenant has not appealed, nor does dispute, this aspect of the lower court's holding.

Rather, Tenant attempts to escape its admitted defaults by arguing that its liability to Landlord should be "offset" because, had it not been in monetary default, it would have been entitled to certain construction reimbursement payments under Section 4.02 of the Lease. This argument is specious because the Lease expressly provides that Tenant is not entitled to these reimbursement payments where, as here, it was in monetary default under the Lease when the

payments came due. Tenant's attempt to rewrite the Lease to reinstate these payments and grant itself a better deal than it bargained for has twice been rejected by the lower court. This Court should, respectfully, affirm these holdings as they are in accordance with the express terms of the Lease and well-settled New Jersey law.

The lower court's findings of fact and conclusions of law on these issues are properly articulated in the applicable orders and on the record. As such, Judge Corman fully complied with Rule 1:7-4(a) when denying Tenant's frivolous defenses and remand for further findings on these issues is not warranted.

Moreover, Landlord's refusal to apply these unearned reimbursements as an "offset" against the Rent Arrears does not constitute a failure to mitigate damages. In fact, this argument should be disregarded out of hand because it was not raised in the Underlying Action.

Furthermore, despite Tenant's contentions to the contrary, Judge Corman did not hold that the Landlord-Tenant Division lacked jurisdiction to rule on Tenant's offset defense. Rather, the lower court properly considered, and expressly rejected, this purported defense.

Moreover, even if Tenant was somehow able to rewrite the Lease to reinstate these unearned reimbursement payments (it cannot), Tenant's appeal

is nonetheless moot because the Rent Arrears were paid to Landlord in December 2023. Therefore, even if this Court were to remand the Underlying Action, as Tenant requests, the lower court (i.e. the Landlord-Tenant Division) lacks jurisdiction to issue the money judgment Tenant seeks.

Simply put, Judge Corman's rejection of Tenant's offset defense was a well-reasoned decision in accordance with the express terms of the Lease and long standing New Jersey law. As such, it should, respectfully, be affirmed by this Court.

The only aspect of Judge Corman's rulings that should be overturned is his failure to grant Landlord the full attorney fee award it is undoubtedly entitled to under the express terms of the Lease. Specifically, in contravention to well-settled New Jersey law, the lower court cut Landlord's contractually mandated fee award by nearly forty-percent (40%) based solely on Judge Corman's personal belief that the rates charged by Landlord's counsel were "a little high." This is simply not permitted in this State.

For the foregoing reasons and as more fully elucidated below, the lower Court's November 10, 2021 Order should be affirmed in its entirety and the lower court's November 9, 2023 Order should be affirmed in all aspects except for paragraph two (2), which should be amended to grant Landlord's fee application in its entirety.

PROCEDURAL HISTORY

I. Pleadings and Trial

Due to the Events of Default and Tenant's failure to respond to Landlord's written notices regarding the same, on July 22, 2020, Landlord commenced the underlying summary commercial eviction proceeding by filing a Summons and Verified Complaint (Non-Payment of Rent) (the "**Complaint**") with the Clerk of the Superior Court of New Jersey, Middlesex County, Special Civil Part, Landlord-Tenant Division under Docket No.: MID-LT-5021-20 (i.e. the Underlying Action). (Da88-101). Due to the restrictions on commercial evictions put in place by the State of New Jersey arising out of COVID-19, the Underlying Action was not scheduled for trial until August 18, 2021 (i.e. more than a year after the Complaint was filed)[1]. (Pa115).

On August 18, 2021, the case was tried before The Honorable J. Randall Corman, J.S.C. (Pa115). At trial, Judge Corman heard oral arguments from counsel as well as testimony from representatives of Landlord and Tenant. (Pa115; 1T). At the conclusion of this testimony and arguments, Judge Corman directed the parties to file short, post-trial briefs concerning the amount due to Landlord under the Lease. (Pa115; 1T34-13 to 1T36-25).

[1] As such, based on Tenant's own representations, its business was reopened and operating for more than eleven (11) months prior to trial yet Tenant failed to pay any of the past due Rent and Additional Rent it admittedly owed under the Lease. (Db11).

II. Post-Trial Submissions

Rather than comply with the Court's directive to submit a short statement regarding the amount Tenant believed was due and owing under the Lease, on August 27, 2021, Tenant filed a twenty-eight (28) page brief raising every conceivable legal and equitable defense as to why Tenant's admitted failure to pay any amounts due and owing under the Lease for five (5) months should be excused. (Pa116). By way of example and not limitation, Tenant argued that its liability to Landlord should be offset because, had it not been in default, Tenant would have been entitled to certain construction reimbursement payments (the "**Tenant Allowance**") under Section 4.02 of the Lease[2]. (Pa116). Tenant further argued that, due to, *inter alia*, COVID-19,

[2] As discussed more fully below, pursuant to Section 4.02 of the Lease, Landlord was required to make six (6) annual Tenant Allowance payments to Tenant beginning on August 1, 2019 and ending on August 1, 2024. (Da17-18, Lease at § 4.02). Tenant's entitlement to these annual reimbursements payments, however, is expressly conditioned on Tenant being, among other things, current on its monetary obligations under the Lease when the payments come due. (Da17-18, Lease at § 4.02). Here, it is undisputed that, due to the Events of Default, Tenant was in default of its monetary obligations under the Lease when the August 1, 2020 and August 1, 2021 Tenant Allowance payments came due. (Pa107; Db10). As such, pursuant to the terms of the Lease, Tenant forfeited the 2020 and 2021 Tenant Allowance payments and Landlord had no obligation to pay the same. (Da17-18, Lease at § 4.02). On November 29, 2021, Tenant cured the Events of Default by depositing the Rent Arrears to the Clerk of Court. (Da179-181). Therefore, Landlord resumed making the Tenant Allowance payments under Section 4.02 beginning with the payment due on August 1, 2022. (3T6-22 to 3T7-21).

enforcing the Lease as written violated equitable doctrines of unclean hands, unjust enrichment, frustration of purpose and impossibility. (Pa116).

In response to Tenant's submission, on September 3, 2021, Landlord submitted a twenty-one (21) page post trial brief addressing the myriad of legal and equitable arguments interposed by Tenant. (Pa116).

Rather than allow the Court the decide this case based on the parties' respective post trial briefs, on September 14, 2021, Tenant filed an additional six (6) page Sur-Reply Brief, which, for the first time[3], argued that Tenant was not obligated to pay $16,659.25 in Common Area Maintenance ("**CAM**")

[3] At trial, Tenant vaguely insinuated that Landlord's calculation of the 2020 CAM, Real Estate Taxes and Utilities owed by Tenant under the Lease were "unaudited". (1T7-2 to 1T8-18, 1T26-7 to 1T26-18). In its Sur-Reply, Tenant, for the first time, further alleged that Landlord's calculation of these amounts was not properly supported by the record. (Pa117). This contention, which Tenant smartly does not raise on appeal, was nothing more than a red herring utilized by Tenant in a desperate attempt to escape its express contractual obligation to pay the Rent and Additional Rent due under the Lease. Indeed, in raising this frivolous argument, Tenant ignored that, in February 2021 (i.e. six (6) months prior to the trial), the parties engaged in a formal reconciliation of the 2020 CAM charges, during which Tenant was granted a $4,678.26 credit towards the 2021 CAM charges because the actual 2020 CAM charges were less than the yearly estimate included in Tenant's monthly rental payment. (Da26-29, Lease at § 7.01; Da184-188). In accordance with the terms of the Lease, Tenant and its accountants had ninety (90) days to review this reconciliation, including the thousands of underlying invoices, and raise any challenges to the same. (Da26-29, Lease at § 7.01; Da184-188). Tenant, of course, failed to raise any timely challenges to this reconciliation, which awarded Tenant a $4,678.26 credit, and only challenged Landlord's calculation of these charges in the Underlying Action as part of its ongoing efforts to avoid paying Landlord the full Rent and Additional Rent due under the Lease. (Da186).

charges despite its express contractual duty to do so and the admission in Tenant's own Post Trial Brief that this exact amount is due. (Pa117; Da169).

Due to these arguments improperly raised by Tenant for the first time in its second post-trial submission, Landlord was forced to review and analyze nearly two-hundred (200) pages of utility and third-party vendor invoices and draft, in response to the Sur-Reply, an eight (8) page client certification, a four (4) page counsel certification and a ten (10) page memorandum of law. (Pa117; Da182-189).

III. The Post Trial Order

On November 10, 2021, after reviewing the extensive record detailed above, Judge Corman issued an Order (the "**Post Trial Order**"), pursuant to which the lower court held, *inter alia*, that: (i) due to its admitted monetary defaults under the Lease, Tenant was not entitled to any Tenant Allowance (i.e. "Fit Up" Payments) under Section 4.02 of the Lease; and (ii) absent legal fees and costs, Tenant owed Landlord $196,669.16 in past due Rent under the Lease (i.e. the Rent Arrears). (Da1-2). Specifically, the Post Trial Order provides the following, in relevant part:

> **IT IS on this 10th day of November 2021**, that this Court makes the following findings and determinations:
>
> 1. Because Defendant is in breach of the lease due to nonpayment of five months rent, the defendant is not due any refund of fit up costs under Section 4.02 of the Lease; and

…

4. Based on the determinations set forth above and set forth in greater detail on the record this date, the Court concludes that the amount of rent now due and owing is $196,669.16.

(Da1-2)

On the day the Post Trial Order was issued, Judge Corman held an additional hearing at which he further articulated his basis for these holdings on the record. Specifically, with respect to Tenant's argument that the Rent Arrears should be offset by the 2020 and 2021 Tenant Allowance payments that Tenant would have been owed had it not been in monetary default under the Lease, Judge Corman stated the following:

> THE COURT: … And it was the defendant's position that they owed $196,669.16, however they believed that that would have been, should have eclipsed by $334,000 in refund, a refund that they would be due under Section 4.02 of the lease to compensate them for a certain percentage of the fit up cost.
>
> …
>
> THE COURT: Okay. All right, well let me – just to somewhat simplify things, or I hope it will simplify things, I'll give you my ruling on certain legal issues.
>
> First of all, the plaintiff had argued that the defendant was not entitled to the refund because they were in breach. And my reading of the contract, I think that bears out. You know you want those refunds, you've got to be, you can't be in breach. So there is rent due and owing for this period of time

(2T4-7 to 2T4-13, 2T6-18 to 2T7:2).

Tenant, however, refused to accept this ruling and continued to argue that the $196,669.16 in Rent Arrears Tenant admittedly owed to Landlord for April 2020 through August 2020 should be offset by the 2020 and 2021 Tenant Allowance payments. (2T9-2 to 2T9-9). Judge Corman clearly and unambiguously rejected this argument because, under the express terms of the Lease, Tenant was not entitled to these payments where it was admittedly in monetary default when they came do. (2T9-10 to 2T9-18). Specifically, the following exchange occurred on the record on November 10, 2021:

> MR. SCHENKE [TENANT'S COUNSEL]: … The $196,669 would represent the total amount that the tenant would be due and owing. But that is directly intertwined by lease provisions with the tenant fit up improvement reimbursement.
>
> THE COURT: Right, and I just ruled against you on that subject.
>
> MR. SCHENKE [TENANT'S COUNSEL]: My apologies, Your Honor.
>
> THE COURT: That's okay. I mean I was going to do that back in August and then you raised that, and I looked at the contract. And I concluded that that's only payable if you're not in breach. And you're in breach. So I, so you don't get the fit up refund. That's my ruling …
>
> (2T9-5 to 2T9-18)

Due to the aforementioned rulings, the Post Trial Order further directed that: (i) in order to avoid a judgment of possession, Tenant was required to deposit the $196,669.16 in Rent Arrears with the Court on or before November

30, 2021; (ii) upon Tenant's deposit of the Rent Arrears with the Court, Landlord may submit a certification of counsel fees collectable as Additional Rent for the Court's consideration; and (iii) each party may file a motion for reconsideration of the Post Trial Order:

> **IT IS ORDERED that** based on the finding and determinations set forth above:
>
> 1. The Defendant is directed to deposit with the Court $196,669.16 in cash, Cashier's check or money order no later than the close of business November 30, 2021; and
>
> 2. Failure to deposit $196,669.16 with the Court by November 30, 2021 will result in entry of a judgment of possession against the Defendant, effective as of today's date; and
>
> 3. If the Defendant does deposit $196,669.16 with the Court by November 30, 2021, the Plaintiff may submit a certification of counsel fees collectable as additional rent and both parties may file motions for reconsideration with regarding to the determinations made by the Court in this Order.
>
> (Da1-2)

IV. Tenant's Deposit of the Rent Arrears with the Court, Landlord's Fee Application and Request for Disbursement of the Rent Arrears

On or about November 29, 2021, Tenant deposited the $196,669.16 in Rent Arrears with the Court. (Da179-181).

On December 9, 2021, in accordance with the terms of the Post Trial Order, Landlord submitted a five (5) page Counsel's Certification in Support of Plaintiff's Application for Reimbursement of Its Attorneys' Fees and Costs

("**Landlord's Fee Application**") demonstrating that, as of December 9, 2021, Landlord had incurred $55,940.68 in legal fees and costs arising out of Tenants' defaults under the Lease. (Pa47-51). Thereafter, by letter dated December 29, 2021, Landlord wrote to the Court and respectfully requested that the $196,669.16 in Rent Arrears be distributed to Landlord and that Landlord' Fee Application be granted. (Da236-237).

V. Tenant's Motion for Reconsideration

On January 7, 2022, while the Rent Arrears were still being held in escrow with the Clerk of Court, Tenant filed a seven-hundred (700) page motion for reconsideration of the Post Trial Order titled "Motion to Fix Amount Due for Tenant Fit-Up Reimbursement and Other Related Relief" (the "**Motion for Reconsideration**"). (Da173-178). The Motion for Reconsideration wholly ignored the Post Trial Order and re-asserted Tenant's failed argument that it is entitled to the 2020 and 2021 Tenant Allowance Payments under Section 4.02 of the Lease despite its admitted monetary defaults. (Da173-175). Pursuant to the Motion for Reconsideration, Tenant argued that the $196,669.16 in Rent Arrears being held in escrow with the Clerk should be paid back to Tenant. (Da173-175). In addition to the refund of these escrowed funds, the Motion for Reconsideration sought a jurisdictionally prohibited money judgment against Landlord for difference between the

$334,583.33 in Tenant Allowance payments that Tenant claimed it was owed and the $196,669.16 in Rent Arrears being escrowed with the Clerk. (Da173-175). Tenant's Notice of Motion sought the following, in relevant part:

> Compelling Landlord to pay the remaining presently due amount of fit-up reimbursement to Tenant after set-off for Landlord's attorneys' fees and costs and after Tenant's recoupment of its escrow deposit with the Court

(Da174; see also Pa100-101, Tenant's proposed Order submitted with the Motion for Reconsideration seeking the payment of these amounts by Landlord).

On January 18, 2022, Landlord filed opposition to the Motion for Reconsideration, which included an update to Landlord's Fee Application demonstrating that that from December 9, 2021 to January 18, 2022 Landlord incurred an additional $9,858.00 in legal fees and costs in relation to the Underlying Action. (Pa104-129). Summarily, Landlord's Fee Application sought an award of $65,798.68 in connection with the Underlying Action. (Pa120).

On February 16, 2022, Tenant filed a wholly improper and untimely reply brief in further support of its Motion for Reconsideration. (Pa130). This reply brief, which was submitted seventeen (17) days late and twelve (12) days after Tenant's noticed return date for the Motion for Reconsideration, was nonetheless considered by the lower court. (Pa130-132).

VI. The Reconsideration Order

On November 9, 2023, Judge Corman heard oral argument on the Motion for Reconsideration. (3T). Following these arguments, the lower court issued an Order dated November 9, 2023 (the "**Reconsideration Order**"), pursuant to which Judge Corman: (i) denied the Motion for Reconsideration in its entirety[4]; (ii) awarded Landlord $38,462.60 of its $65,798.68 Fee Application; and (iii) directed that the $196,669.16 in Rent Arrears be disbursed to Landlord. (Da3). The Reconsideration Order provides the following:

> **IT IS ORDERED on this 9th day of November 2023**, that for the reasons set forth on the record:
>
> 1. The Defendant's motion for reconsideration is denied; and

[4] Although the lower court denied the Motion for Reconsideration on the merits (3T14-19 to 3T14-20), this application was procedurally improper for two (2) independent reasons: (i) it was untimely because Tenant filed the motion fifty-nine (59) days after the Post Trial Order was served; and (ii) Tenant failed to articulate any basis for reconsideration under New Jersey law and, instead, simply repeated the failed arguments set forth in Tenant's Post Trial Brief, which had already been considered and rejected by the lower court in issuing the Post Trial Order. See R. 4:49-2 ("Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any."); see also (Da1-2, 173-175; Pa120).

2. The Plaintiff is awarded counsel fees in the amount of $38,462.60, which shall be paid directly to the Plaintiff or deposited with the Court in cash, cashier's check or money order by November 20, 2023. If this amount is paid to the Plaintiff and no appeal has been filed, the complaint will be dismissed; and

3. The $1996,669.16 now on deposit with the Court shall be disbursed to Plaintiff. This portion of the Order is stayed until November 30, 2023, in the event the Defendant wishes to appeal. Further stays must be sought from the Appellate Division.

(DA3).

Once again, Judge Corman further articulated the basis for these rulings on the record. First, Judge Corman, once again, rejected Tenant's argument that it was due the 2020 and 2021 Tenant Allowance Payments under Section 4.02 of the Lease:

> THE COURT: … First of all, before I had ruled that while the tenant was in default or breach, he's not entitled to fit up costs. Nothing changes my mind about that. I understand the equitable argument, well number one, well there's a pandemic, we're not allowed to open the gym and have our customers in because we're not allowed to run a gym because of the Government's executive orders. And I did give credit for that.
>
> But the tenant's position is that well, we don't have to pay rent while this is going on. Plus, now there was never a moratorium on paying property taxes. Landlord still has to pay property taxes no matter what. And plus all the carrying costs. Got to have heat in the building to keep the pipes from freezing, you've got to have insurance on the place. So the landlord had to pay all these carrying costs. The tenant would pay nothing. Plus the tenant argues based on the fit up, the landlord should also pay

> the tenant for fit up costs. And as Sidney Greenstreet said to Humphrey Bogart in the Maltese Falcon, that is hardly equitable.
>
> Equity is a two way street. It's not a one way street. You can't have everything your way in equity.
>
> (3T15-2 to 3T15-25)
> …
> But for purposes of this, I'm not reconsidering what I've already ruled. Tenant was in breach, when you're in breach you don't have to pay -- the landlord does not have to pay the fit up costs. And I think that's clearly outlined in the lease documents.
>
> (3T16-24 to 3T17-4)

Similarly, with respect to Tenant's claim for money damages, Judge Corman aptly held that he lacked jurisdiction to issue such an award in the Landlord-Tenant Division:

> THE COURT: … The, first of all, the order that tenant's counsel would like me to make adopt is something I really don't have jurisdiction to adopt. I can't, in this court, I can't make -- it's almost the equivalent of a judgment for damages. And I can't – in landlord/tenant court I can't do that.
>
> There's two results to an eviction complaint. Either a judgment for possession or I dismiss the case. Now if I agree with everything you say about that, well then case dismissed. But, and maybe you get the 192,000 that's in the bank. But I can't – that particular order I don't have jurisdiction to adopt.
>
> (3T14-3 to 3T14-14)

In connection with Landlord's application for reimbursement of its legal fees and costs, however, Judge Corman arbitrarily cut Landlord's contractually mandated fee award by more than forty-percent (40%) based upon his own,

personal opinion that the hourly rates charged by Landlord's counsel were "a little high." (3T18-4 to 3T19-9). Specifically, Judge Corman cut the hourly rates of Douglas A. Stevinson, Esq. and Ryan W. Federer, Esq. from $570.00 and $530.00, respectively, to $425.00, the hourly rate of Amanda A, Meehan, Esq. from $395.00 to $325.00 and the hourly rate of paralegal Ronetta Suber from $295 to $200. (3T18-4 to 3T19-9; Pa47-51, 119-120). In so doing, Judge Corman stated the following:

> THE COURT: … So now we get to counsel fees. Landlord is entitled to counsel fees under the lease. There was 5.6 hours that the tenant's counsel objected to because it involved other tenants. These were in June of 2020, June 4th and I think the 9th. So I'll subtract that from the total amount of hours.
>
> Now, one place is the amounts, the hourly rates, which I think were a little high. Windels Marx is a good firm, good lawyers, you do good work. And your clients are happy to pay top dollar for your services. Though those numbers are higher than – and I'm not comparing you to the landlord that represents apartment complexes. I'm comparing you to landlords that represent large commercial tenants, with complex leases. I think the highest I can allow is 425 an hour. I guess Amanda Meehan, 395, I'll reduce that to 325. And the paralegal rate I'll reduce that from 395 to 200. That's more in line with what I've seen in these types of substantial commercial cases that have been before me in recent months.
>
> So when I recalculate everything, the amount that I come up with billed from Mr. Stevinson is $5,780. The amount for Mr. Federer is, would be $32,682.50. The amount for Ms. Meehan is $167.50. And the amount for the paralegal, [Ronetta Suber] (phonetic), would be $1,040. Total amount, $38,462.50.

> So basically my order will be to deny the motion for reconsideration. And require that the tenant pay 38,000 and change in legal fees. And if that's done, and also disburse the money to the landlord, if that's done, case dismissed.

(3T18-4 to 3T19-9).

VII. Payment of Legal Fee Award and Disbursement of the Rent Arrears

In accordance with the Reconsideration Order, Tenant paid Landlord the $38,462.60 legal fee award by check dated November 20, 2023. Thereafter, the Clerk disbursed the $196,669.16 in Rent Arrears to Landlord. (Da251-252). To date, Tenant remains in possession of the Premises under the Lease. (3T6-2 to 3T10-18).

This appeal and cross-appeal followed.

STATEMENT OF FACTS

A. The Lease

On or about September 13, 2017, Tenant entered into a written Lease Agreement (the "**Lease**")[5] with Quality Way Operator LLC ("**Quality Way**"), pursuant to which Quality Way leased to Tenant approximately 20,800 square feet of commercial real property designated as Unit LL2 (the "**Premises**") in the Woodbridge Crossing Shopping Center (the "**Shopping Center**") located at 455 Green Street, Woodbridge, New Jersey 07095. (Da5-87). At all times

[5] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Lease.

relevant to this appeal, Tenant has utilized the Premises to operate a "Planet Fitness" health and fitness center. (Da11, Da18, Lease at §§ 1.01(c), 5.01; Pa105). By letter dated September 22, 2017, Tenant and Quality Way agreed that the Lease Commencement Date was September 14, 2017 and the Tenant's Rent Commencement Date was August 1, 2018. (Da191).

In February of 2019, Quality Way sold the Shopping Center to Landlord. (Pa105). Simultaneously with this sale, Quality Way assigned to Landlord all of its rights, obligations and interests under the Lease. (Da193).

B. Terms of the Lease

(i) Tenant's Payment Obligations

Beginning on the Rent Commencement Date (i.e. August 1, 2018), Tenant is required to pay to Landlord, on the first day of each calendar month, all Rent and Additional Rent[6] due under the Lease. (Da13-14, Lease at § 2.01). These monthly payments include each of the following charges (collectively, the "**Monthly Payment**"):

- Minimum Rent of $24,266.67 (from August 1, 2018 to July 31, 2023). (Da11, 13-14, Lease at §§ 2.01, 1.01(H));
- Tenant's proportionate share of Common Area Maintenance for the Shopping Center. (Da12, 26-29, Lease at §§ 7.01, 1.01(K));

[6] Pursuant to the terms of the Lease, all sums due and payable by Tenant to Landlord are defined as "Additional Rent". (Da14, Lease at § 2.01(d)).

- Tenant's proportionate share of Real Estate Taxes assessed against the Shopping Center. (Da12, 14-15, Lease at §§ 2.04, 1.01(L)); and

- Tenant's proportionate share of Utilities for the Shopping Center, including Tenant's proportionate share of heat, water, gas, electricity, sewer and garbage collection. (Da30, Lease at § 8.01(c)).

The Lease provides that, if Tenant fails to make any payment due and owing under the Lease on or before the fifth (5th) day after the applicable due date, Tenant shall pay to Landlord an overhead charge equal to five percent (5%) of the then delinquent amount. (Da54-55, Lease at § 17.03). The Lease further provides that all unpaid amounts due under the Lease shall bear interest at the rate of 5% above the prime lending rate offered by Bank of America or its successor (i.e. 8.25% - consisting of 5% above the Bank of America prime lending rate of 3.25% that was in place during the applicable timeframe). (Da54-55, Lease at § 17.03; Pa106).

(ii) Events of Default

Pursuant to the terms of the Lease, Tenant's failure to pay any amount due and owing under the Lease constitutes an Event of Default entitling Landlord to, *inter alia*, regain possession of the Premises. (Da50-53, Lease at § 17.01). In addition, Landlord is entitled to recover from Tenant its reasonable attorneys' fees in connection with enforcing its rights and remedies under the Lease, including pursuing eviction proceedings against the Tenant.

(Da56, Lease at § 17.06). These amounts constitute Additional Rent due and owing under the Lease. (Da14, Lease at § 2.01(d)).

(iii) Tenant Allowance (i.e. "Fit-Up" Reimbursement)

The primary issue in this appeal is whether Tenant can offset its liability to Landlord under Section 4.02 of the Lease. Judge Corman twice aptly held that Tenant was not entitled to such an offset due to its admitted monetary defaults under the Lease. (Da1-3). This holding is in accordance with the express terms of the Lease and should, respectfully, be affirmed by this Court.

As noted above, Tenant leased the Premises for the sole purpose of operating a health and fitness center. (Da11, Da18, Lease at §§ 1.01(c), 5.01). As is customary in commercial leases of this nature, Landlord agreed to deliver the Premises to Tenant "as is" and Tenant agreed that, prior to opening the fitness center, it would make certain improvements to the Premises so the space could be utilized for its intended purpose ("**Tenant's Work**"). (Da15-16, Lease at § 4.01; 1T14-7 to 1T15-12). Tenant had no obligation to pay rent when completing Tenant's Work. (Da11, 13-14, Lease at § 2.01). Moreover, the Lease expressly provides that Tenant's Work was solely for Tenant's benefit:

> It is understood and agreed that the improvements and installations being installed by Tenant are specific to Tenant's business and are being procured for the sole purpose of enhancing Tenant's

> business and not to confer any permanent benefit or enhancement in value on the Landlord or the Premises.
>
> (Da34, Lease at § 8.05(b))

Pursuant to the terms of the Lease, Tenant's Work was to be completed at Tenant's sole cost and expense. (Da15-16, 35-36 Lease at §§ 4.01, 9.01). If, however, Tenant timely completed Tenant's Work and satisfied certain enumerated conditions regarding the same, Tenant would become eligible to recoup a portion of these expenses under Section 4.02 of the Lease. (Da15-16, Lease at § 4.02). Specifically, once Tenant's Work was complete and the related conditions satisfied, Tenant would be eligible to recover **up to** the sum of $730,000, together with interest at the rate of five (5%) per annum, in six (6) equal annual installments beginning on August 1, 2019 and ending on August 1, 2024 (i.e. the "Tenant Allowance").[7] (Da17-18, Lease at § 4.02). Crucially, in accordance with the terms of the Lease, Tenant's entitlement to these annual reimbursement payments is expressly conditioned upon, *inter alia*, Tenant being current on its monetary obligations under the Lease when the payments come due. (Da17-18, Lease at § 4.02). Section 4.02 provides the following, in relevant part:

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[7] The Lease further provides Landlord with the option to prepay the Tenant Allowance to avoid the five-percent (5%) annual interest component. (Da17-18, Lease at § 4.02 ("Notwithstanding the foregoing, Landlord shall have the **right to elect**, at any time **at its sole option**, to pay the entire outstanding amount of Tenant's Allowance to Tenant.") (emphasis added)).

> … Landlord shall pay to Tenant **up to** the sum of Seven Hundred Thirty Thousand and 00/100 ($730,000.00) Dollars in the following manner as reimbursement for the actual cost of Tenant's leasehold improvements comprising Tenant's Work as and for "Tenant's Allowance." **Provided that** (a) this Lease is in full force and effect, (b) **Tenant is not in monetary default under this Lease after notice and expiration of any applicable cure period**, (c) the Guarantor is not in default under the Guaranty and (d) the aforesaid conditions shall have been satisfied, Tenant's Allowance, together with interest at the rate of five (5%) percent per annum on the unpaid balance of Tenant's Allowance from and after the Rent Commencement Date, shall be paid to Tenant in six (6) equal annual installments (plus interest as aforesaid) as follows: (I) the first installment shall be paid on the first date of the second (2nd) Lease Year; and (II) the remaining installations shall be paid on the first day of each Lease Year commencing with the third (3rd) Lease Year and ending with the seventh (7th) Lease Year.
>
> (Da17-18, Lease at § 4.02).

Section 4.02 further provides that if Landlord fails to pay an annual Tenant Allowance payment when due, Tenant's **sole remedy** is to provide Landlord with written notice of the default then, if the same is not cured within ten (10) days of such notice, to deduct the same from the next payment of Minimum Rent when due:

> If Landlord fails to pay Tenant an installment of the Tenant's Allowance within ten (10) days after Landlord's receipt of written notice from Tenant that such installment is past due, then, **as its sole remedy**, Tenant shall have the right to offset such amount against the Minimum Rent payable by Tenant hereunder.
>
> (Da17-18, Lease at § 4.02 (emphasis added)).

In addition, pursuant to Section 4.02, Tenant granted Landlord the right, but not the obligation, to deduct any amount that Tenant owes to Landlord under the Lease when remitting payment of the Tenant Allowance:

> Tenant hereby expressly grants to Landlord an offset and deduction against Tenant's Allowance for all costs, payments and expenses Tenant is obligated to pay to Landlord pursuant to this Lease or otherwise due and owing to Landlord, at the time an installment of Tenant's Allowance shall be due or at the time Landlord otherwise elects to pay the Tenant Allowance.

(Da17-18, Lease at § 4.02). This elective remedy may be employed by Landlord if, for example, an annual Tenant Allowance payment came due (or Landlord otherwise elected to prepay the same to avoid, or lessen, the interest component) and Tenant owed landlord monies under the Lease but the default was not noticed or the applicable cure period had not expired. (Da17-18, Lease at § 4.02 (expressly conditioning the annual Tenant Allowance payments on Tenant not being "in monetary default under this Lease **after notice and expiration of any applicable cure period**.") (emphasis added)).

Landlord's express contractual right to offset these past due amounts during the cure period was not, however, mandatory nor did it permit Tenant to ignore its obligation to pay Rent when the same came due. Indeed, pursuant to the express terms of the Lease, Landlord's remedies are cumulative:

> The various rights, remedies, powers and elections of Landlord, reserved, express or contained in this Lease are cumulative, and no one of them shall be deemed exclusive of the other or of such

> other rights, remedies, powers, options or elections as are now or may hereafter be conferred upon Landlord by law or in equity.

(Da56, Lease at § 17.05; see also Da59-60, Lease at § 22.01 ("The mention in this Lease of any specific right or remedy shall not preclude Landlord from exercising any other right nor from having any other remedy nor from maintaining any action to which it may be otherwise entitled either at law or in equity.")).

C. Tenant's Admitted Events of Default Under the Lease

It is undisputed that Tenant committed the Events of Default under the Lease by failing to make the required Monthly Payments due on April 1, 2020, May 1, 2020, June 1, 2020, July 1, 2020 and August 1, 2020.[8] (Pa107; Db10). While Tenant did resume making its regular Monthly Payments starting in September 2020, it failed, at that time, to pay any of the back rent, late fees, interest, or other sums due under the Lease for the months of April 2020 through August 2020. (Pa107). Indeed, as detailed above, these arrears were not paid until November 29, 2021 when, under Court Order, Tenant finally

[8] It is also undisputed that Tenant's failure to timely pay rent during this period was not excused by the COVID-19 pandemic. (1T13-7 to 1T14-6) see also Washington-Hudson Associates II, LLC v. Town Sports Int'l Holdings, Inc., A-1357-21, 2023 WL 2801523, at *4 (N.J. Super. Ct. App. Div. Apr. 6, 2023) (unpublished) (Da61, Lease at § 22.05 (*force majeur* clause, expressly providing that Tenant's inability to operate its business due to acts beyond its control does not excuse its obligation to timely pay all Rent and Additional Rent when due under the Lease).

remitted the Rent Arrears to the Clerk of Court (not Landlord)[9]. (Da1-2, 179-181; Db11). Therefore, it is undeniable that Tenant was in monetary default under the Lease from April 1, 2020 until November 29, 2021 (i.e. more than twenty (20) months). Id.

By letters April 28, 2020 and June 8, 2020 (together the "**Default Notices**"), Landlord notified Tenant of its payment defaults and demanded that Tenant cure the same. (Da194-199). Notably, in the Default Notices, Landlord recognized the economic strain COVID-19 placed on both Landlord and Tenant and requested that Tenant respond to the Landlord's correspondence so that the parties could amicably resolve Tenant's defaults and avoid an unnecessary eviction proceeding. (Da194-199). The April 28, 2020 Default Notice provides the following, in relevant part:

> Woodbridge NJ Holdings LLC recognizes the economic strain that many business are facing as a result of the COVID-19 pandemic, and we are committed to working with our tenants to the extent we are able.
>
> We value our tenants and our thoughts are with you, your family, and employees during these difficult times.
>
> While we are sympathetic to the current hardship, these events do not excuse the full payment of rent under your lease. Like you, we

[9] As detailed above, due to Tenant's untimely and wholly improper Motion for Reconsideration, the Rent Arrears were held in escrow with the Clerk of Court and not disbursed to Landlord until December 8, 2023 (i.e. more than three (3) years after these rent payments were due).

> have financial and contractual obligations to others which must be met and they are counting on us to rise to the occasion in the face of this crisis.

(Da195). Similarly, the June 8, 2020 Default Notice provides the following, in relevant part:

> As Mr. Nichols indicated in his [April 28, 2020] letter, the Landlord values its relationship with its tenants and is mindful of the current COVID-19 health crisis. In that regard, the Landlord would prefer to reach to a mutually acceptable arrangement for the satisfaction of Tenant's outstanding rental obligations to permit your continued occupancy at the Property in lieu of pursuing eviction proceedings. In order to achieve such a mutually-beneficial result, however, you must communicate with the Landlord. To date, the Landlord has received no response to Mr. Nichols' letter and the monthly arrearage continues to mount. Demand is therefore made that you contact the Landlord within the next five days to explore ways of resolving the Tenant's defaults. Should you fail to communicate with the Landlord or should the parties be unable to reach a mutually acceptable resolution of Tenant's defaults, Landlord will have no choice but to commence eviction proceedings forthwith.

(D198-199). Tenant failed to respond to the Default Notices.

D. Tenant Allowance Payments

It is undisputed that Landlord made a Tenant Allowance Payment on August 1, 2019.[10] (1T14-24 to 1T15-11). It is further undisputed that on

[10] Whether Landlord underpaid the Tenant Allowance due on August 1, 2019 has no impact on this appeal as it is undisputed that Tenant never noticed such a default, as is required by the terms of the Lease, or exercised its **sole** contractual remedy in response to the same. (Da17-18, Lease at § 4.02). Having failed to do so, Tenant cannot now argue that this alleged underpayment bars Landlord's express contractual rights.

August 1, 2020 and August 1, 2021 Tenant was in monetary default under the Lease due to its admitted failure to pay any Rent or Additional Rent for the months of April 2020 through August 2020, which defaults were properly noticed and cure periods expired. (Da194-199; Pa107; Db10). As such, Tenant forfeited the 2020 and 2021 Tenant Allowance payments that would have been due on those dates and Landlord had no obligation to pay the same. (Da17-18, Lease at § 4.02).

As detailed above, on November 29, 2021, Tenant deposited the Rent Arrears with the Clerk of Court. (Da179-181). Therefore, Landlord, in a good faith effort comply with the terms of the Lease and New Jersey statutory law, considered the Events of Default cured and resumed making the Tenant Allowance payments under Section 4.02 beginning with the payment due on August 1, 2022. (3T6-22 to 3T7-21); see also N.J.S.A. 2A:18-55 (providing that summary eviction actions for non-payment of rent shall be dismissed upon the payment of the rent arrears to the clerk).

LEGAL ARGUMENT

POINT I
THE POST TRIAL ORDER AND RECONSIDERATION ORDER ARE IN COMPLIANCE WITH RULE 1:7-4(a) (Da1-3)

Tenant's argument that Judge Corman failed to comply with Rule 1:7-4(a) when issuing the Post Trial Order and Reconsideration Order misses the mark by a large margin.

The New Jersey Rules of Court require judges presiding over non-jury trials and rendering final orders appealable as of right to issue findings of fact and conclusions of law supporting their decisions. R. 1:7-4(a). These factual findings and legal conclusions may be issued either in writing or on the record. Id. Rule 1:7-4(a), which governs this requirement, provides the following:

> **(a) Required Findings.** The court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right, and also as required by R. 3:29. The court shall thereupon enter or direct the entry of the appropriate judgment.

R. 1:7-4(a).

To satisfy this requirement, a trial judge "need only make brief, definite, pertinent findings and conclusions upon the contested matters." Franzoni v. Franzoni, 60 N.J. Super. 519, 522 (App. Div. 1960); Connell v. Connell, A-5645-06T3, 2008 WL 2901855, *2 (N.J. Super. Ct. App. Div. July 30, 2008) (unpublished) (same). In this regard, a trial judge need not address all the

evidence presented when rendering a decision. See Geffner v. Geffner, A-2896-08T2, 2011 WL 2314743, *8 (N.J. Super. Ct. App. Div. May 11, 2011) (unpublished) ("The court was not required to address all evidence that was presented in this lengthy proceeding. The judge clearly explained the evidence he relied upon to support his decision, and failure to discuss evidence supporting arguments does not, in and of itself, render the judge's findings inadequate under *Rule* 1:7–4."). Indeed, the purpose of Rule 1:7-4(a) is to ensure that the litigants and reviewing court are apprised of the basis of the trial court's decision. Geffner, 2011 WL 2314743 at *8.

Here, Judge Corman fully complied with Rule 1:7-4(a) when issuing the Post Trial Order and Reconsideration Order. (Da1-3). Specifically, despite Tenant's baseless allegations to the contrary, Judge Corman clearly articulated his factual and legal conclusions that, pursuant to the express terms of the Lease, Tenant was not entitled to offset the Rent Arrears with the 2020 and 2021 Tenant Allowance payments because Tenant was admittedly in monetary defaults under the Lease when those annual installment payments came due. (Da1-3; 2T4-7 to 2T4-13, 2T6-18 to 2T7-2, 2T9-5 to 2T9-18; 3T15-2 to 3T15-25). The Post Trial Order provides the following, in relevant part:

> Because Defendant is in breach of the lease due to nonpayment of five months rent, the defendant is not due any refund of fit up costs under Section 4.02 of the Lease

(Da1-2). In addition, on the day the Post Trial Order was issued, Judge Corman further articulated the basis for this holding on the record by stating, *inter alia*, that Tenant was not entitled to these reimbursement payments under Section 4.02 because such reimbursements are "only payable if you're not in breach. And you're in breach … so you don't get the fit up refund. That's my ruling …" (2T9-15 to 2T9-18).

Judge Corman then reaffirmed this ruling by denying Tenant's Motion for Reconsideration in its entirety (Da3) and clearly stating on the record, once again, that Tenant was not entitled to these reimbursements because "Tenant was in breach, when you're in breach you don't have to pay -- the landlord does not have to pay the fit up costs. And I think that's clearly outlined in the lease documents." (3T16-24 to 3T17-4). Based on these clear and unambiguous findings of fact and conclusions of law, the parties and this Court were clearly apprised of the basis of Judge Corman's holdings. Tenant's refusal to accept these ruling does not render them deficient under Rule 1:7-4(a).[11]

[11] Tenant's repeated contention that Judge Corman held that the lower court lacked jurisdiction to decide whether Tenant was entitled to the Tenant Allowance payments under Section 4.02 of the Lease is specious. (Db22-24). Judge Corman expressly held Tenant was not entitled to these reimbursement payments because it was admittedly in monetary default under the Lease when the payments came due. (Da1-3; 2T4-7 to 2T4-13, 2T6-18 to 2T7-2, 2T9-5 to 2T9-18; 3T15-2 to 3T15-25, 3T16-24 to 3T17-4). Tenant's confusion, whether

We pause only briefly to address Tenant's offensive contention that Judge Corman was "neither impartial nor open-minded about the case". (Db23). This insulting allegation is both factually inaccurate and disrespectful to the Court. Indeed, Judge Corman did not pre-judge this case or "rule[] out the offset argument without first looking at the Lease", as Tenant claims. (Db23). Rather, at trial, Judge Corman asked counsel to "[e]xplain to me this fit up provision. What, what is that all about?" (1T14-7 to 1T14-8). Counsel then set forth, in detail, their respective client's interpretation of Section 4.02, following which Judge Corman requested, then reviewed, extensive post-trial submissions, including the Lease, before ruling that Tenant was not entitled to offset the Rent Arrears under Section 4.02. (1T5-22 to 1T6-22, 1T9-17 to 1T10-2, 1T11-25 to 1T13-6, 1T14-7 to 1T18-7, 1T25-14 to 1T25-16, 1T36-9 to 1T36-25). Indeed, on the day he issued the Post Trial Order, Judge Corman stated on the record that he "look at the contract[] [a]nd … concluded that [the Tenant Allowance is] only payable if you're not in breach. And you're in breach … so you don't get the fit up refund." (2T9-15 to 2T9-17).

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real or manufactured, seems to arise out of Judge Corman's adept holding that the Landlord-Tenant Division lacked jurisdiction to grant Tenant's request for money damages in connection with in the Motion for Reconsideration. (3T14-3 to 3T14-14). As discussed more fully below, these holdings are, in no way, contradictory.

Simply put, Judge Corman, at all times, treated the parties fairly, considered all arguments raised and complied with the New Jersey Rules of Court when issuing the Post Trial Order and Reconsideration Order. Tenant's unhappiness with the lower court's rulings does not render Judge Corman's holdings improper in any manner.

POINT II
TENANT IS NOT ENTITLED TO OFFSET THE AMOUNTS DUE TO LANDLORD WITH THE TENANT ALLOWANCE (Da1-3)

In the Underlying Action, Judge Corman twice held that, pursuant to the express terms of the Lease, Tenant was not entitled to payment of the 2020 or 2021 Tenant Allowance because it was admittedly in monetary default when those installment payments came due. (Da1-3; 2T4-7 to 2T4-13, 2T6-18 to 2T7-2, 2T9-5 to 2T9-18, 3T15-2 to 3T15-25, 3T16-24 to 3T17-4). Tenant's attempts to ignore its undisputed defaults and reinstate these payments as an "automatic offset" is nothing more than a thinly veiled attempt to rewrite the Lease and grant itself a better deal than it bargained for. Such efforts are contrary to New Jersey law and should, respectfully, be rejected by this Court.

A. Tenant is Not Entitled to Payment of the Tenant Allowance Due to Its Undisputed Monetary Defaults (Da1-3)

It is well-settled that contractual provisions negotiated at an arm's length between sophisticated commercial entities should be enforced as written. Standard Refinery Union v. Esso Standard Oil Co., 31 N.J. Super.

548, 551 (App. Div. 1954); HLP Associates, L.P. v. Carpet City Inc., A-4134-13T3, 2015 WL 1181271, *5-6 (N.J. Super. Ct. App. Div. Mar. 17, 2015) (unpublished). "[T]he court will not write a new contract for the parties or vary, enlarge, alter or distort its terms for the benefit of one to the detriment of the other under the guise of judicial interpretation." Standard Refinery, 31 N.J. Super. at 551; see also HLA Associates, 2015 WL 1181271 at *5 ("The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them."). In this regard, unambiguous language will be strictly enforced as written even if, in hindsight, one party regrets the result. HLA Associates, 2015 WL 1181271 at *5. As articulated by this Court:

> Unambiguous language controls the rights and obligations of the parties, even if it was unwise in hindsight. The court will not make a more sensible contract than the one the parties made for themselves. The parties, especially sophisticated ones like the commercial parties involved in this case, are generally in the best position to determine their respective needs and obligations in negotiating a contract.

HLA Associates, 2015 WL 1181271 at *5 (internal citations omitted); Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 496 (App. Div. 2003) ("Where the terms of a contract are clear, the court must enforce the contract as written."); Mury v. Tublitz, 151 N.J. Super. 39, 44 (App. Div. 1977) ("Courts are required to enforce contracts, including leases,

according to their terms in the absence of some superior contravening policy.").

Here, the Lease expressly and unambiguously provides that Tenant is not entitled to the Tenant Allowance unless it is current on its monetary obligations under the Lease when the payments come due. (Da17-18, Lease at § 4.02). Because it is undisputed that Tenant was in monetary default when the 2020 and 2021 Tenant Allowance payments came due on August 1, 2020 and August 1, 2021, Tenant is simply not entitled to payment of these amounts. (Pa107; Da179-180; Db10-11).

Tenant's argument that, despite its admitted monetary defaults, it is entitled to the Tenant Allowance in the form of a setoff is antithetical to the terms of the Lease. (Da17-18, Lease at § 4.02). By its express terms, the Lease conditions Tenant's entitlement to these installment payments upon it being current on its monetary obligations to Landlord. Id. Simply stated, Section 4.02, does not, as Tenant alleges, allows Tenant to unilaterally refuse to pay rent for five (5) months and then deduct such amount when the Tenant Allowance comes due. Id. In fact, Section 4.02 provides just the opposite. Id.

B. Tenant Cannot Rewrite the Lease for Its Own Benefit (Da1-3)

Tenant's attempts to rewrite the Lease to reinstate the 2020 and 2021 Tenant Allowance payments as an "automatic offset" should be rejected by this Court.

Tenant first argues that, despite the express terms of the Lease, the full amount of the Tenant Allowance is "unwaivable" once the Tenant's Work and related conditions are satisfied and, therefore, must be paid regardless of whether Tenant is current on its monetary obligations to Landlord when the annual installment payments come due. (Db29-30). This "interpretation" of Section 4.02 is belied by its express language. (Da17-18, Lease at §4.02). Indeed, pursuant to the terms of the Lease, the completion of the Tenant's Work and related conditions only makes Tenant **eligible** to receive the annual Tenant Allowance payments. (Da17-18, Lease at §4.02). In order to actually recoup these annual installments, Tenant must, among other things, be current on its monetary obligations under the Lease when the payments come due. (Da17-18, Lease at § 4.02). Section 4.02 provides the following, in relevant part:

> If an when (i) Tenant's Work shall have been completed in accordance with the plans and specifications approved by Landlord; (ii) Tenant shall have opened the Premises for business with the public; (iii) Tenant shall have furnished Landlord with a written certification of the actual costs of the leasehold improvements comprising Tenant's Work excluding Tenant's

> movable trade fixtures, together with evidence of such cost and the payment in full thereof, as Landlord shall require; (iv) Tenant shall have furnished Landlord with "as-built" plans for the leasehold improvements comprising Tenant's Work; (v) Tenant shall have provided Landlord with final lien waivers from Tenant's general contractor and all subcontractors that performed Tenant's Work and all suppliers of material used in the performance of Tenant's Work; and (vi) at or prior to Tenant's opening for business at the Premises, Tenant shall have, at its sole cost and expense, obtained and delivered to Landlord a final certificate of occupancy for the Premises; then, when and if each condition contained in the foregoing items (i) through (vi), inclusive, hereof shall have been complied with in full, Landlord shall pay to Tenant **up to** the sum of Seven Hundred Thirty Thousand and 00/100 ($730,000.00) Dollars **in the following manner** as reimbursement for the actual cost of Tenant's leasehold improvements comprising Tenant's Work as and for "Tenant's Allowance." **Provided that** (a) this Lease is in full force and effect, (b) **Tenant is not in monetary default under this Lease after notice and expiration of any applicable cure period**, (c) the Guarantor is not in default under the Guaranty and (d) the aforesaid conditions shall have been satisfied, Tenant's Allowance, together with interest at the rate of five (5%) percent per annum on the unpaid balance of Tenant's Allowance from and after the Rent Commencement Date, shall be paid to Tenant in six (6) equal annual installments (plus interest as aforesaid) as follows: (I) the first installment shall be paid on the first date of the second (2^{nd}) Lease Year; and (II) the remaining installations shall be paid on the first day of each Lease Year commencing with the third (3^{rd}) Lease Year and ending with the seventh (7^{th}) Lease Year.
>
> (Da17-18, Lease at § 4.02 (emphasis added)).

Based on this clear and unambiguous language, Section 4.02 plainly provides for Tenant's forfeiture of the annual Tenant Allowance instalments where, as here, Tenant is in monetary default when the payment comes due. Id. Specifically, Section 4.02 expressly states that Tenant can recoup "**up to**"

$730,000 in the "**following manner**", immediately after which Section 4.02 details Landlord's obligation to make the annual Tenant Allowance payments "**[p]rovided that** … **Tenant is not in monetary default under this Lease after notice and expiration of any applicable cure period**." Id (emphasis added). Tenant's submission that these annual Tenant Allowance payments are "unwaivable" would render this restrictive language meaningless. See Cumberland Cnty., 358 N.J. Super. at 497 ("[A contract] should not be interpreted to render one of its terms meaningless.").

In this same vein, Tenant's position that Section 4.02 provides for four (4) separate reimbursement methods is antithetical the terms of the Lease. (Da17-18, Lease at § 4.02). Rather, Section 4.02 provides that, as long as Tenant is not, *inter alia*, in monetary default when the installment comes due, Landlord must, at a minimum, make six (6) annual Tenant Allowance payments, but has the option to prepay these amounts to avoid the interest component. (Da17-18, Lease at § 4.02 ("Notwithstanding the foregoing, Landlord shall **have the right to elect, at any time at its sole option**, to pay the entire outstanding amount of Tenant's Allowance to Tenant.") (emphasis added)). As discussed immediately below, the other two (2) "reimbursement methods" posited by Tenant are actually each parties' unique and respective

remedies, which do not, in any way, replace either parties' payment obligations under the Lease. (Da17-18, Lease at § 4.02).

In this regard, Section 4.02 does not provide for an "automatic offset" of the amounts owed under the Lease, as Tenant alleges. Rather, this provision provides each party with separate and distinct remedies in the case of non-performance. Crucially, Tenant's remedy is exclusive and Landlord's remedies are cumulative. Specifically, Section 4.02 provides that if Landlord fails to pay an annual Tenant Allowance payment when due, Tenant's **sole remedy** is to provide Landlord with written notice[12] of the default then, if the same is not cured within ten (10) days of such notice, to deduct the same from the next payment of Minimum Rent when due:

> If Landlord fails to pay Tenant an installment of the Tenant's Allowance within ten (10) days after Landlord's receipt of written notice from Tenant that such installment is past due, then, **as its sole remedy**, Tenant shall have the right to offset such amount against the Minimum Rent payable by Tenant hereunder.

(Da17-18, Lease at § 4.02) (emphasis added). Conversely, Landlord's ability to offset past due amounts prior to the expiration of the applicable cure period is not its sole remedy; rather it is merely one of the various enumerated rights and remedies that Landlord may exercise in its sole discretion:

[12] Tenant's obligation to provide Landlord with a written notice of any alleged failure to remit a Tenant Allowance payment when due further cuts against Tenant's position that Section 4.02 provides for an "automatic offset" of the amounts due under the Lease.

> Tenant hereby expressly grants to Landlord an offset and deduction against Tenant's Allowance for all costs, payments and expenses Tenant is obligated to pay to Landlord pursuant to this Lease or otherwise due and owing to Landlord, at the time an installment of Tenant's Allowance shall be due or at the time Landlord otherwise elects to pay the Tenant Allowance.

(Da17-18, Lease at § 4.02). Tenant's contention that this elective remedy should be deemed mandatory and Landlord should be forced to grant Tenant an "automatic deduction" each August of all amounts Tenant unilaterally decides not to pay during the applicable Lease Year is not in accordance with New Jersey law or the express terms of the Lease.[13] See Gen. Elec. Contracts Corp. v. Band, 186 A. 684, 686 (N.J. Sup. Ct. 1936) ("The contract executed by the buyer in this case provides that all rights and remedies are cumulative and not alternative. The fact that the seller has other remedies does not limit or defeat his right to insist upon the payment of the price by the buyer."); HLP Associates, 2015 WL 1181271 at *7 ("plaintiff's decision not to exercise its rights under Section 13.1 to declare the lessee in material default, and to terminate the lease, did not prevent it from invoking the protections afforded it

[13] Notably, the interpretation of Section 4.02 advanced by Tenant would be highly inequitable to Landlord as it would grant Tenant a license to withhold Rent, at any time, without notice thereby depriving Landlord of the cash flow needed to operate the Shopping Center. Indeed, Landlord's representative testified that Tenant's withholding of Rent for April 2020 through August 2020 was a "major burden on [Landlord's] entire business model" as it forced Landlord to make a capital call to its investors and obtain a loan modification so that Landlord could continue paying its monthly expenses, including taxes and insurance. (1T28-6 to 1T28-22).

under Section 16"); (Da56, Lease at § 17.05 ("The various rights, remedies, powers and elections of Landlord, reserved, express or contained in this Lease are cumulative, and no one of them shall be deemed exclusive of the other or of such other rights, remedies, powers, options or elections as are now or may hereafter be conferred upon Landlord by law or in equity."); Da 59-60, Lease at § 22.01 ("The mention in this Lease of any specific right or remedy shall not preclude Landlord from exercising any other right nor from having any other remedy nor from maintaining any action to which it may be otherwise entitled either at law or in equity.")).

Finally, Tenant's loquacious argument that "Landlord's interpretation of § 4.02 is internally inconsistent to the point of being incomprehensible" because it remitted the 2022 and 2023 Tenant Allowance payments after Tenant deposited the Rent Arrears with the Clerk demonstrates that Tenant simply does not understand New Jersey landlord-tenant law. Indeed, pursuant to N.J.S.A. 2A:18-55, Tenant's payment of these arrears to the Clerk cured the Events of Default:

> **Discontinuance upon payment into court of rent in arrears; receipt**

> If, in actions instituted under paragraph "b" of section 2A:18-53[14] of this title, the tenant or person in possession of the demised premises shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default, together with the accrued costs of the proceedings, all proceedings shall be stopped. The receipt of the clerk shall be evidence of such payment.
>
> The clerk shall forthwith pay all moneys so received to the landlord, his agent or assigns.

See N.J.S.A. 2A:18-55. Pursuant to this statutory mandate and in a good faith effort comply with the express terms of the Lease, upon payment of the Rent Arrears to the Clerk, Landlord considered the Events of Default cured and resumed making the Tenant Allowance payments under Section 4.02 beginning with the payment due on August 1, 2022. (3T6-22 to3T7-21).[15]

Simply put, Tenant's contention that it is entitled to the 2020 and 2021 Tenant Allowance payments in the form of an "offset" despite the fact that it was admittedly in monetary default under when these payments came due is belied by the express terms of the Lease, which must be enforced as written by this Court.

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[14] N.J.S.A. 2A:18-53(b) permits commercial eviction proceedings "[w]here such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held."

[15] It's curious that Tenant would argue that its remittance of the Rent Arrears to the Clerk did not cure the Events of Default. If this is true, Tenant must be compelled to refund the Tenant Allowance payments made by Landlord after the Rent Arrears were escrowed and pay to Landlord late fees, interest and cost from November 29, 2021 to the disbursement of these funds to Landlord in December 2023.

C. Landlord's Did Not Fail to Mitigate its Damages (Da1-3)

Tenant's argument that Landlord failed to mitigate its damages fails for three (3) separate reasons: (i) Tenant is precluded from asserting this argument because it was not raised in the Underlying Action; (ii) Landlord did not seek, nor was it awarded, money damages in the Underlying Action; and (iii) Landlord had no obligation to re-write the Lease and award Tenant unearned Tenant Allowance payments as part of its duty to mitigate damages.

(i) Tenant is Barred from Arguing Landlord Failed to Mitigate Damages Because This Issue Was Not Raised Below (Da1-3)

"It is a well-settled principle that [New Jersey] appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Here, despite its unrestricted opportunity to do so, Tenant never argued in the Underlying Action that Landlord not offsetting the Rent Arrears with the unearned 2020 and 2021 Tenant Allowance payments constituted a failure by Landlord to mitigate its damages. (1T; 2T; 3T; Pa133-134). As such, Tenant is precluded from raising this argument on appeal. Nieder, 62 N.J. at 234.

Tenant's spurious mitigation argument should be wholly disregarded for this reason alone.

(ii) Landlord Did Not Seek Money Damages in the Underlying Action (Da1-3)

Even if Tenant was not precluded from arguing that Landlord failed to properly mitigate its damages (it is), this argument is nonsensical as Landlord did not seek, nor was it awarded, money damages in the Underlying Action.

Under long standing New Jersey law, a landlord seeking a money judgment against a former tenant is required to demonstrate that it properly mitigated its damages. Fanarjian v. Moskowitz, 237 N.J. Super. 395, 402-406 (App. Div. 1989); Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470, 473 (App. Div. 1998); Borough of Fort Lee v. Banque Nat'l de Paris, 311 N.J. Super. 280, 292 (App. Div. 1998). This obligation is satisfied where the landlord makes reasonable efforts to re-let the property. Fanarjian, 237 N.J. Super. at 402; Harrison Riverside, 309 N.J. Super. at 472-475; McGuire v. City of Jersey City, 125 N.J. 310, 320 (1991). In recognition of this well-settled tenet of New Jersey landlord-tenant law, the Lease expressly provides that upon retaking possession of the Premises "Landlord shall use reasonable efforts to mitigate damages and relet the Premises, but Landlord shall not be liable for failure to relet the Premises." (Da52, Lease at § 17.01).

As detailed above, the Underling Action is a summary disposition proceeding, pursuant to which Landlord sought only possession of the Premises (Da88-101). Indeed, as discussed more fully below, Landlord was precluded from seeking money damages in the Underlying Action, which proceeded before the Landlord-Tenant Division. R. 6:3-4(a); N.J.S.A. 2A:18-53; Raji v. Saucedo, 461 N.J. Super. 166, 170 (App. Div. 2019); Alhagaly v. Mega Properties at 100-104 Romaine Ave., L.L.C., A-4287-19, 2021 WL 2944837, *3 (N.J. Super. Ct. App. Div. July 14, 2021) (unpublished). While Tenant did remit payment of the Rent Arrears, this was only done in accordance with N.J.S.A. 2A:18-55 so Tenant could avoid a Judgment of Possession. (Da1-2). Because Landlord did not seek, nor was it awarded, money damages in the Underlying Action whether Landlord reasonably mitigated its damages is irrelevant to this appeal. Borough of Fort Lee, 311 N.J. Super. at 292; Fanarjian, 237 N.J. Super. at 402; Harrison Riverside, 309 N.J. Super. at 472-475; McGuire v. City of Jersey City, 125 N.J. 310, 320 (1991).

(iii) Landlord Did Not Fail to Mitigate Its Damages (Da1-3)

Even assuming *arguendo* that Landlord was required to mitigate the damages it did not seek and was not awarded, it had no duty to re-write the

Lease and award Tenant the unearned 2020 and 2021 Tenant Allowance as an "offset".

A commercial landlord's duty to mitigate its damages is limited to making reasonable effort to re-let the property at issue. Fanarjian, 237 N.J. Super. at 402; Harrison Riverside, 309 N.J. Super. at 472-475; McGuire, 125 N.J. at 320. Indeed, every case cited by Tenant in support of its frivolous position that Landlord failed to mitigate its damages discusses whether the landlord made reasonable efforts to re-let the rental property at issue. See Fanarjian, 237 N.J. Super. 406 (affirming the trial court's holding that the commercial landlord failed to mitigate its damages where the landlord's "efforts at reletting the premises were so minimal as to be virtually nonexistent."); Harrison Riverside, 309 N.J. Super. at 472-475 (modifying order granting summary judgment and remanding for further proceedings as to whether landlord used reasonable efforts to re-let warehouse after former tenant vacated); Borough of Fort Lee, 311 N.J. Super. at 292-293 (affirming holding that landlord did not fail to reasonably mitigate damages where tenant-police department refused to vacate portion of premises thereby chilling leasing market); McGuire, 125 N.J. at 320 (holding that landlord's sale, rather than re-letting, of property satisfied its duty to mitigate its damages); Carisi v. Wax, 192 N.J. Super. 536, 540 (Dist. Ct. 1983) (holding that a lease allowing

tenant to re-enter and re-let the premises once the same becomes vacate did not excuse landlord from its duty to mitigate damages).

Here, Landlord could not mitigate its damages by re-letting the Premises because Tenant has been in continuous possession thereof since September 14, 2017. (Da191).

Tenant fails to cite to any legal authority for its contention that a commercial landlord's duty to mitigate its damages extends to re-writing the applicable Lease to award Tenant an unearned offset against the Rent Arrears, or requiring Landlord to elect the remedy most beneficial to Tenant. Moreover, due to the Events of Default, the 2020 and 2021 Tenant Allowance payments that Tenant claims form the basis for this offset were never payable to Tenant; as such there was no amount owed to Tenant that could be offset against the Rent Arrears. (Da17-18, Lease at § 4.02).

For the foregoing reasons, Tenant's newly raised argument that Landlord failed to mitigate its damages should be wholly rejected by this Court.

POINT III
THE LOWER CONSIDERED, AND PROPERLY REJECTED, TENANT'S OFFSET DEFENSE (Da1-3)

Tenant next spuriously alleges that the lower court never reached the merits of whether Tenant was entitled to payment of the Tenant Allowance under Section 4.02 of the Lease due to a perceived lack of jurisdiction to

render a decision on this issue. This argument ignores the record, including the express terms of the Post Trial Order, which provides the following, in relevant part:

> Because Defendant is in breach of the lease due to nonpayment of five months rent, the defendant is not due any refund of fit up costs under Section 4.02 of the Lease;

(Da1-2; see also Da3, 2T4-7 to 2T4-13, 2T6-18 to 2T7-2, 2T9-5 to 2T9-18, 3T15-2 to 3T15-25). Simply put, Judge Corman considered, and properly rejected, this argument on the merits.

Tenant's confusion on this issue seems to arise out of Judge Corman's adept holding that, as a Judge sitting in the Landlord-Tenant Division, he lacked jurisdiction to award Tenant the money damages it sought in connection with its Motion for Reconsideration. Indeed, as detailed above, in connection with the Motion for Reconsideration, Tenant ignored the jurisdictional limits of Landlord-Tenant Court and sought an award of money damages against Landlord for the payment of the Tenant Allowance. Tenant's Notice of Motion for this application provides the following, in relevant part:

> Compelling Landlord to pay the remaining presently due amount of fit-up reimbursement to Tenant after set-off for Landlord's attorneys' fees and costs and after Tenant's recoupment of its escrow deposit with the Court

(Da174). Similarly, Tenant's proposed Order submitting with the Motion for Reconsideration asked the lower court to enter the following:

> **ORDERED** that Landlord is hereby compelled to pay Tenant the remaining balance of Tenant fit-up reimbursement after set-off credit for Landlord's reduced fee award, in the amount of $_____ within ten (10) days of the date of this Order.

(Pa100-101). In accordance with long-standing New Jersey law, Judge Corman properly ruled that even if Tenant was entitled to payment of the Tenant Allowance (the lower court ruled it was not), Tenant still could not be awarded money damages in the Underlying Action. (3T14-3 to 3T14-14) This Court should, respectfully, affirm this holding.

It is well-settled in New Jersey that the Landlord-Tenant Division is a Court of limited jurisdiction that may only determine whether the landlord is entitled to possession of the property at issue. R. 6:3-4(a) ("Summary actions between landlord and tenant for the recovery of premises shall not be joined with any other cause of action, nor shall a defendant in such proceedings file a counterclaim or third-party complaint."); N.J.S.A. 2A:18-53. As such, it is axiomatic that an award for money damages cannot be issued in Landlord-Tenant Court. Raji, 461 N.J. Super. at 170; Alhagaly, 2021 WL 2944837 at *3. As articulated by the Appellate Division:

> [A] summary dispossess action does not permit either a landlord or tenant to plead a claim for damages. The only judgment entered in a summary dispossess proceeding is a judgment for possession of the premises, though part of the court's findings may include the amount of rent that is due and owing, thereby fixing the amount that the tenant may pay in order to prevent the eviction from taking place. By confining itself to the landlord's right to

> possession, and fixing of the amount of rent due to afford the tenant the opportunity to avoid eviction by its payment, the statutory summary dispossess device provides a quick disposition of the landlord's claim for possession.

Alhagaly, 2021 WL 2944837 at *3 (internal citations omitted) See also Raji, 461 N.J. Super. at 170 ("a summary dispossess action does not permit either a landlord or tenant to plead a claim for damages.")

Based on the aforementioned law, Judge Corman correctly held that he lacked jurisdiction to issue such an award for money damages in the Landlord-Tenant Division:

> THE COURT: … The, first of all, the order that tenant's counsel would like me to make adopt is something I really don't have jurisdiction to adopt. I can't, in this court, I can't make -- it's almost the equivalent of a judgment for damages. And I can't – in landlord/tenant court I can't do that.
>
> There's two results to an eviction complaint. Either a judgment for possession or I dismiss the case. Now if I agree with everything you say about that, well then case dismissed. But, and maybe you get the 192,000 that's in the bank. But I can't – that particular order I don't have jurisdiction to adopt.
>
> (3T14-3 to 3T14-14)

This holding is in accordance with New Jersey law and should, respectfully, be affirmed by this Court.

POINT IV
TENANT'S APPEAL IS MOOT (Da1-3)

Even if this Court were to rule, for any reason, that Tenant was entitled to payment of the 2020 and 2021 Tenant Allowance installments despite the express terms of the Lease and its admitted monetary defaults, Tenant's appeal of the Post Trial Order and Reconsideration Order should nonetheless be dismissed as moot because the Rent Arrears have already been paid to Landlord. As such, Landlord is no longer seeking possession of the Premises and there is no further directive the Landlord-Tenant Division can issue in this case.

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Benjamin H. Realty Corp. v. Young, A-3158-21, 2023 WL 8596172, *2 (N.J. Super. Ct. App. Div. Dec. 12, 2023) (unpublished), cert. denied, 257 N.J. 233 (2024). An issue is moot when the decision sought by a litigant "can have no practical effect on the existing controversy." Young, 2023 WL 8596172 at *2; Joey T LLC v. Hall, A-1903-19T3, 2021 WL 168473, at *2 (N.J. Super. Ct. App. Div. Jan. 11, 2021) (unpublished). Courts generally "do not resolve issues that have become moot due to the passage of time or intervening events." Young, 2023 WL 8596172 at *2. Crucially, because the Landlord-Tenant Division's jurisdiction is limited to determining

which party is entitled to possession of the premises, this Court has routinely dismissed, as moot, appeals of summary disposition actions where, as here, the landlord is no longer seeking possessing. See Daoud v. Mohammad, 402 N.J. Super. 57, 61 (App. Div. 2008) (dismissing tenant's appeal from judgment of possession in summary dispossession action following tenant vacating premises "[b]ecause the court's jurisdiction is limited to determining the issue of the landlord's right to possession of the premises."); Young, 2023 WL 8596172 at *2 (dismissing appeal of summary dispossession action as moot following tenant vacating the premises because "the only remedy that can be granted in a summary-dispossess proceeding is possession; no money damages may be awarded."); Hall, 2021 WL 168473 at *2 ("Ordinarily, we will dismiss as moot an appeal challenging an eviction where the tenant has been removed, and the premises have been re-rented, or the tenant has vacated the premises.").

Here, the Rent Arrears were paid to Landlord in December 2023. Therefore, the Events of Default have been cured and Landlord is no longer seeking possession of the Premises. As such, based on long-standing New Jersey law, Tenant's appeal is moot and should be dismissed for this reason alone. Daoud, 402 N.J. Super. at 61; Young, 2023 WL 8596172 at *2; Hall, 2021 WL 168473 at *2. Indeed, if this Court were to remand the Underlying

Action, as Tenant requests, the Landlord-Tenant Division lacks jurisdiction to issue the money judgment Tenant seeks. Id.

POINT V
TENANT IS NOT ENTITLED TO ANY FEE AWARD (Da1-3)

Tenant's newly conceived argument that Landlord's Fee Award should be vacated and Landlord should be compelled to pay Tenant's legal fees and costs should be denied for three (3) separate reasons: (i) Tenant is precluded from asserting this argument because it was not raised in the Underlying Action; (ii) Tenant is judicially estopped from raising this argument because it admitted in the Underlying Action that it was required to pay Landlord's legal fees and costs due to the Events of Default; and (iii) Tenant is not entitled to legal fees under the express terms of the Lease.

First, Tenant is precluded from seeking recovery of its legal fees from Landlord because it failed to assert such a claim, or argue that it was entitled to such an award, in the Underlying Action. Nieder, 62 N.J. at 234 ("appellate courts will decline to consider questions or issues not properly presented to the trial court") (1T; 2T; 3T; Pa133-134). Tenant's argument that Landlord is liable for its legal fees and costs must be denied for this reason alone.

Second, Tenant is judicially estopped from raising this argument because it admitted in the Underlying Action that it was liable for Landlord's legal fees due to the undisputed Events of Default. "Judicial estoppel is an equitable

doctrine precluding a party from asserting a position in a case that contradicts or is inconsistent with a position previously asserted by the party in the case or a related legal proceeding." Tamburelli Properties Ass'n v. Borough of Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998). In the Underlying Action, Tenant, on multiple occasions, took the position that it was liable for Landlord's legal fees and costs; going so far as to craft its Motion for Reconsideration around this tenet. Specifically, in its Notice of Motion, Tenant sought the following, in relevant part:

> Compelling Landlord to pay the remaining presently due amount of fit-up reimbursement to Tenant **after set-off for Landlord's attorneys' fees and costs** and after Tenant's recoupment of its escrow deposit with the Court

(Da174 (emphasis added)). Tenant's proposed Order submitted with the Motion for Reconsiderations similarly sought entry of the following:

> **ORDERED** that Landlord is hereby compelled to pay Tenant the remaining balance of Tenant fit-up reimbursement **after set-off credit for Landlord's reduced fee award**, in the amount of $_____ within ten (10) days of the date of this Order.

(Pa100-101 (emphasis added)). Tenant' counsel further stated the following on the record during oral argument on the Motion for Reconsideration:

> … My client is looking for a determination from the Court that there is still money owed to my client for the fit up under Section 4.02 of the lease, for the years 19, 20 and 21.
>
> And that should be, that amount, 334,000 and change, should be offset against the 196. Then whatever fees Your Honor

> awards to Mr. Federer's [i.e. Landlord's] firm, deduct that, we do the math, and then everything gets squared up and we're right back where we should be under the lease and everybody is current.
>
> (3T6-12 to 3T6-21)

Having repeatedly taken the position in the Underlying Action that it was liable to Landlord for its legal fees and cost, Tenant is judicially estopped from changing this position and arguing, on appeal, that not only should it not pay Landlord's legal fees but that Landlord should pay Tenant's. Tamburelli Properties, 308 N.J. Super. at 335.

Third, even if Tenant were not precluded from seeking to vacate Landlord's Fee Award and recoup its own, Tenant is simply not entitled to a fee award under the Lease due to its admitted Events of Default. Indeed, it is well-settled in New Jersey that if the terms of a commercial lease are clear and unambiguous, the function of the Court is to enforce the agreement as written. Han Yang Plaza, LLC v. Optical Ctr., 2006 WL 74130, *2 (N.J. Super. Ct. App. Div. Jan. 13, 2006) (unpublished). With respect to commercial leases, this Court has stated the following:

> The function of the court is to enforce the lease as written. The parties' intention, as disclosed by the language used in the document, taken in its entirety, controls the meaning of their contract. If that intention is clear from the contract itself, we may not alter the terms, or write a different or better contract for the parties.

Id. (internal citations omitted); see also Mury, 151 N.J. Super. at 44 ("Courts are required to enforce contracts, including leases, according to their terms in the absence of some superior contravening policy."). It is further axiomatic that attorneys' fee shifting provisions in leases are enforceable. See Mury, 151 N.J. Super at 44.

Here, the Lease clearly and unambiguously provides that Landlord is entitled to recover from Tenant its reasonable attorneys' fees in connection with enforcing its rights and remedies under the Lease, including pursuing eviction proceedings against the Tenant. (Da56, Lease at § 17.06). Section 17.06 of the Lease provides the following:

> In the event suit shall be brought by Landlord for recovery of possession of the Premises, for the recovery or rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant contained herein on the part of Tenant to be performed, and a breach shall be established, Tenant shall pay to Landlord all legal costs and other reasonable attorneys' fees and expenses incurred by Landlord in connection therewith. In the event suit shall be brought by Tenant because of the breach of any covenant contained herein on the part of Landlord to be performed, and a breach shall be established, Landlord shall pay to Tenant all legal costs and other reasonable attorneys' fees and expenses incurred by Tenant in connection therewith.

(Da56, Lease at § 17.06). The Lease further provides that such fees are recoverable by Landlord as Additional Rent. (Da13-14, Lease at § 2.01(d)).

For the reasons detailed above, Landlord is entitled to a fee award because it commenced the Underlying Action to recover possession of the Premises due to Tenant's admitted Events of Default under the Lease[16]. Conversely, Tenant is not entitled to any fee award because it did not commence suit against Landlord and further failed to establish that Landlord, in any way, breached the Lease.

POINT VI
JUDGE CORMAN COMMITTED A REVERSIBLE ERROR BY FAILING TO GRANT LANDLORD'S FEE APPLICATION IN ITS ENTIRETY (Da3)

While Judge Corman's holdings in the Post Trial Order and Reconsideration Order were generally well reasoned and astute, his sole error was failing to grant Landlord's Fee Application in its entirety. (Da3). Specifically, Judge Corman inappropriately cut the hourly rates of each of Landlord's attorneys and paralegals based upon his own personal view that these rates were "a little high". (3T18-19; Pa47-51, 119-120). This holding, which arbitrarily reduced Landlord's contractually mandated Fee Award by nearly forty-percent (40%), should, respectfully, be reversed and Landlord should be awarded its entire $65,798.68 Fee Application. (Pa47-51, 119-120).

[16] Landlord is further entitled to an additional fee award in connection with this appeal and reserves its right to apply for the same following the determination of the appeal. R. 2:11-4; Viceroy Equity Interests, LLC v. Mount Hope Dev. Associates, 350 N.J. Super. 1, 5 (App. Div. 2002).

On appeal, a lower court's legal fee award should be overturned where, as here, the trial judge clearly abused his discretion in lowering the award. Seigelstein v. Shrewsbury Motors, Inc., 464 N.J. Super. 393, 404 (App. Div. 2020). Indeed, "where the trial court's determination of fees was based on irrelevant or inappropriate factors, or amounts to a clear error in judgment, [the Appellate Division] should intervene." Seigelstein, 464 N.J. Super. at 404. Similarly, "where the methodology used by the judge is untethered to the standards adopted by [the New Jersey] Supreme Court for determining an award of counsel fees, the ultimate conclusions reached by the judge are thus arbitrary and reversible." Seigelstein, 464 N.J. Super. at 404-405. Here, Judge Corman, respectfully, abused his discretion by arbitrarily lowering Landlord's contractually mandated fee award based upon his own, personal view that the hourly rates charged by Landlord's counsel were "a little high." (3T18-4 to 3T19-9).

It is well-settled in New Jersey that an attorney fee award is to be determined based on the "lodestar", which equals the number of hours reasonably expended multiplied by a reasonable hourly rate. Seigelstein, 464 N.J. Super. at 404-405; Walker v. Giuffre, 209 N.J. 124, 130-131 (2012). Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community, which will necessarily

include assessing the experience and skill of the prevailing party's attorneys and comparing their rates to the prevailing rates in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. Seigelstein, 464 N.J. Super. at 406; Walker, 209 N.J. at 131. When making this determination, the trial court must consider the following factors outlined in New Jersey Rule of Professional Conduct ("**RPC**") 1.5(a):

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> Seigelstein, 464 N.J. Super. at 406, n. 6; RPC 1.5(a).

The party seeking attorney's fees has the burden of proving that its fee request is reasonable, which burden can be satisfied by submitting evidence in the form of a certification supporting the hours worked and the rates claimed. Seigelstein, 464 N.J. Super. at 407; Walker, 209 N.J. at 131. While the trial judge may reduce the hourly rates of a prevailing party's attorneys and paralegals, such reduction must be based upon the above analysis and may not be based solely upon the judge's personal experience. Seigelstein, 464 N.J. Super. at 408; Walker, 209 N.J. at 147.

Here, Landlord's Fee Application meets the above-standards and should have been granted in its entirety. Indeed, in support of its fee application, Landlord submitted a detailed certification of its lead counsel attaching Landlord's legal bills and setting forth the experience of Landlord's attorneys, the hourly rates[17] charged, the time expended on this matter (116.9 hours) and the length of Landlord's relationship with its counsel. (Pa47-97, 119-120).

Moreover, as detailed above and as is evident from the procedural history and lengthy submissions by the parties, the Underlying Action is not a standard summary disposition proceeding involving the removal of a non-paying tenant. Rather, it is complex commercial proceeding that has been

[17] As detailed in the Fee Application, the hourly rate charged to Landlord by its counsel are customary for clients of the firm. In fact, the legal fees billed to Landlord reflect all discounts, write-offs and reductions made by the firm before sending the invoices to Landlord. (Pa49).

ongoing for more than four (4) years and concerns an eighty-three (83) page commercial Lease requiring mutual payment obligations and a detailed calculation of the nearly $200,000 in arrears. (Da5-87). Furthermore, all of this occurred against the backdrop of a global pandemic where Tenant's business was temporarily closed leading to Tenant asserting defenses sounding in equity, including unclean hands, unjust enrichment, frustration of purpose and impossibility of performance. (Pa116).

In total, Landlord's Fee Application sought an award of $65,786.68, comprised $2,679.64 in disbursements and $63,107.04 in time charges, calculated as follows:

> **Ryan W. Federer, Esq**, then an associate[18] with the firm with a total of 101.1 hours at the rate of $530.00 per hour, for a total time value of $53,583.00.
>
> **Douglas A. Stevinson, Esq.** a partner with the firm with a total of 10.1 hours at the rate of $570.00 per hour and 3.5 hours at the rate of $585.00 per hour, for a total time value of $7,804.50.
>
> **Amanda A. Meehan, Esq.**, and associate with the firm with a total of 0.5 hours at the rate of $395.00 per hour, for a total time value of $197.50; and
>
> **Ronetta Suber**, a paralegal with the firm with a total of 5.2 hours at the rate of $295.00 per hour, for a total time value of $1,534.00.
>
> (Pa47-97, 119-120).

[18] Mr. Federer was elevated to partner in March of 2024.

Despite the foregoing, in the Reconsideration Order, Judge Corman only granted Landlord $38,462.60 in legal fees. (Da3). Specifically, Judge Corman cut the hourly rates of Douglas A. Stevinson, Esq. and Ryan W. Federer, Esq. from $570.00 and $530.00, respectively, to $425.00, the hourly rate of Amanda A, Meehan, Esq. from $395.00 to $325.00 and the hourly rate of paralegal Ronetta Suber from $295 to $200. (3T18-19; Pa47-51, 119-120). As set forth on the record, the basis for these arbitrary cuts were simply Judge Corman's personal experience as he felt these lower rates were "more in line with what I've seen in these types of substantial commercial cases that have been before me in recent months." (3T18-21 to 3T18-22).

Based on the foregoing, Landlord respectfully submits that Judge Corman abused his discretion by arbitrarily lowering Landlord's contractually mandated fee award by more than forty-percent (40%) based upon his own, personal experience, which is prohibited in this State. Seigelstein, 464 N.J. Super. at 408; Walker, 209 N.J. at 147. As such, Landlord respectfully requests that paragraph two (2) of the Reconsideration Order be amended and Landlord be granted its $65,786.68 Fee Application in its entirety.[19]

[19] Because Landlord's legal fees are payable as Additional Rent, Landlord's cross-appeal is not moot as the Landlord Tenant Division can order that Tenant pay these fees to Landlord (or to the Clerk of Court) absent which a judgment of possession would be entered. (Da13-14, Lease at § 2.01(d)). This is precisely how this issue was handled in the Reconsideration Order. (Da3).

CONCLUSION

For the foregoing reasons, the Post Trial Order should be affirmed in its entirety and the Reconsideration Order should be affirmed in all aspects except for paragraph (2), which should be amended to grant Landlord the entirety of its Fee Application.

Dated: August 5, 2024

WINDELS MARX LANE & MITTENDORF, LLP

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
CASE NUMBER: A-1232-23

WOODBRIDGE NJ HOLDINGS LLC, Plaintiff-Respondent. v. WHIBY 13 WOODBRIDGE LLC, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY SPECIAL CIVIL PART LANDLORD-TENANT SECTION Docket No.: MID-LT-5021-20 SAT BELOW The Honorable J. Randall Corman, J.S.C.

DEFENDANT-APPELLANT'S REPLY & CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-APPEAL

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PRELIMINARY STATEMENT

This case presents a simple issue of contract interpretation: Is there any language under the commercial lease between Plaintiff-Respondent/Cross-Appellant Woodbridge NJ Holdings, LLC (the "Landlord") and Defendant-Appellant/Cross-Respondent WHIBY 13 Woodbridge, LLC (the "Tenant") that authorizes Landlord to penalize Tenant for a default by extracting more than double the amount of missed rent even after the default has been cured? The answer is no. Accordingly, the trial court's order adopting and enforcing Landlord's flawed interpretation of the Lease warrants a reversal and remand for a reassessment and recalculation of the parties' obligations to each other.

Landlord's brief confirms there are no real material facts in dispute. Landlord does not dispute, for instance, that the Lease required it to pay Tenant $730,000 over the course of six annual installment payments as reimbursement for the substantial build-out work Tenant did on the property before the Lease commenced. Landlord does not dispute that it elected to skip two of these installment payments, and to forgo paying interest on a third--amounting to more than a quarter-million-dollar windfall to Landlord--and did so based on Tenant's temporary monetary default that, undisputedly, has since been cured. Landlord identifies no language in the Lease that justifies this permanent forfeiture.

The opposing brief further clarifies that the parties broadly agree on at least part of the answer to one of the central issues in the case: what happens in the event that both parties in the Lease owe each other money at the exact same time? Landlord agrees with Tenant that in that situation Landlord gets to use the missed rent to take a deduction against the aggregate amount Landlord owes Tenant, thereby reducing the total amount due. Where the parties disagree is whether the Landlord gets to take that deduction even after it has accepted 100% of the missed rent payments curing the Tenant default that justified the deduction to begin with. Landlord insists, without pointing to any supporting language in the Lease, that it is entitled to both the default-curing rent and the deduction. Landlord is mistaken.

As to the cross-appeal, Landlord has failed to meet the high hurdle it faces in seeking to overturn a trial court's discretionary determination regarding the amount of counsel fees to be awarded. This is particularly true here where litigation was entirely avoidable and Landlord could have made itself whole with a minor accounting adjustment but instead has been litigating this case for four years in the hopes of hanging onto its double recovery. In the event this Court agrees with Tenant's argument that a reversal and remand is warranted, the issue of counsel fees and of who is the "prevailing party" entitled to such fees is a subject more appropriate for disposition on remand.

STATEMENT OF PROCEDURAL HISTORY

Tenant relies on and incorporates by reference the prior Statement of Procedural History from Tenant's brief in support of its own appeal and incorporates the same by reference as if fully set forth herein (Db2-Db4).[1]

SUPPLEMENTAL STATEMENT OF FACTS

Tenant relies on and incorporates by reference the prior Statement of Facts from the Tenant's brief in support of its own appeal and incorporates the same by reference as if fully set forth herein (Db5-Db21). For context and clarity of presentation, however, Tenant repeats the following twelve facts, all of which are undisputed:

First, the Lease lists six Tenant's Work conditions (the "Reimbursement Conditions") that, if satisfied, entitle Tenant to $730,000 plus 5% annual interest that the Lease directs Landlord "shall pay" ("Tenant's Allowance") (Da17).

Second, Tenant satisfied the Reimbursement Conditions.

Third, the Lease provides Landlord with multiple methods of satisfying Tenant's Allowance once Tenant's right to receive it has vested, including by

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1 "Db" designates Defendant-tenant's initial brief.
"Pb" designates Plaintiff-landlord's brief.
"Da" designates Defendant-tenant's appendix.
"Pa" designates Plaintiff-landlord's appendix.

making annual, installment payments, making advance payments, or by offsetting missed rent owed against the Tenant's Allowance balance.

Fourth, Landlord missed a contractually obligated $36,500 interest installment payment that was owed on August 1, 2019, before any allegation of any Tenant default, and Landlord still has not paid that interest for reasons barely acknowledged,[2] much less justified, in Landlord's brief (Da169).

Fifth, Landlord chose not to make the Tenant's Allowance installment payment of $121,666.67 plus interest that "came due" on August 1, 2020 (Pb22-Pb23), even though that installment amount exceeded the missed rent then owed and Landlord had the "express contractual right to offset [Tenant's] past due amounts" against the installment owed (Pb23).

Sixth, Landlord again chose not to make the Tenant's Allowance installment payment of $121,666.67 plus interest that "came due" on August 1, 2021 (Pb22-Pb23).

Seventh, from ten days after the eviction lawsuit was filed through the Landlord-Tenant court trial and beyond, the amount Landlord claimed to be due

[2] Landlord's brief relegates to a footnote its discussion of the underpayment from August 1, 2019 (Pb26). Landlord does not dispute that it failed to make this contractually obligated interest payment. Instead, Landlord attacks an unasserted straw-man argument--"that this alleged underpayment bars Landlord's express contractual rights"--and implies that Tenant permanently forfeited its right to receive the $36,500 payment--which no language in the Lease supports.

in unpaid rent was always less than the amount Tenant claimed to be due in unpaid Tenant's Allowance installments plus interest (1T5-22 to 1T6-22).[3]

Eighth, the Lease either mandated or, at the very least, permitted Landlord to offset missed rent against an owed Tenant's Allowance installment payment (Da17-Da18).

Ninth, the Lease contains no provision stating that Tenant permanently and irrevocably forfeits its right to receive a percentage of Tenant's Allowance as a penalty for a temporary default that has since been cured.

Tenth, Landlord has now received every cent of unpaid, late, or additional rent that it claimed to be owed.

Eleventh, Tenant has not received one cent of payment for the $243,333.34 plus interest in Tenant's Allowance that Tenant was owed in 2020 and 2021, but Landlord has nevertheless elected to deduct the amounts it would have paid from the principal balance anyway, as if it had made those payments.

Twelfth, Landlord's only basis for withholding more than a quarter million dollars, including the unpaid 2019 interest, of its contractually obligated allowance payments due to Tenant is that Tenant was in a "monetary default" four years ago that Landlord admits was "cured" (Pb40;Pb41;Pb50).

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[3] "1T" designates the transcript of proceedings dated August 18, 2021.
"2T" designates the transcript of proceedings dated November 10, 2021.
"3T" designates the transcript of proceedings dated November 9, 2021.

LEGAL ARGUMENT

POINT I

BECAUSE LANDLORD FAILS TO REFUTE TENANT'S SUBSTANTIAL SHOWING THAT THE TRIAL COURT VIOLATED RULE 1:7-4(A), A REMAND IS WARRANTED

Tenant has already set forth in its merits brief the substantial record evidence that supports its argument that the trial court's unorthodox rulings in this matter warrant a remand for the court's prejudging of the case and failure to comply with Rule 1:7-4(a) (Db21-Db26). To avoid unnecessary duplication Tenant will not repeat those arguments except as necessary to provide context.

A. Landlord fails to dispute that the trial court prejudged the case

The Code of Judicial Conduct directs that judges should disqualify themselves from presiding over any "proceeding in which the judge's impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(C)(1). The Rules of Court similarly provide, "[t]he judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if . . . there is any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g).

"The mere appearance of bias in a judge -- however difficult, if not impossible, to quantify -- is sufficient to erode respect for the judiciary." In re

Advisory Letter No. 7-11 of the Supreme Court Advisory Comm., 213 N.J. 63, 70 (2013). "Even a 'righteous judgment' will not find acceptance in the public's mind unless the judge's impartiality and fairness are above suspicion." Id. at 75. "Th[e]se principles have been distilled to a simple question: 'Would a reasonable, fully informed person have doubts about the judge's impartiality?'" Ibid. (quoting DeNike v. Cupo, 196 N.J. 502, 517 (2008)).

Here, at trial, (i) without having first read the Lease (1T18-4 to 1T18-6), and (ii) after hearing Tenant's argument that Landlord owed Tenant more than double under the Lease what Landlord claimed to be owed by Tenant (1T6-8 to 1T6-11; 1T25-11 to 1T25-13), the trial judge informed the parties that, (iii) after he reviewed the lease, in order to "get rid of this," it would "be up to the tenant to either pay . . . or . . . a warrant will have to be issued," and "judgment will be entered" (1T36-9 to 1T36-25). Under these circumstances, a reasonable, fully informed person would not merely have doubts about the judge's impartiality; a reasonable person would assume the judge had already disregarded the tenant's argument. Otherwise, why would the only two possible outcomes be (1) tenant pays or (2) judgment of possession?

Other than feigning "offens[e]" on the trial court's behalf at Tenant's allegedly "disrespectful" contention that the trial court ruled out Tenant's primary defense before looking at the lease documents, Landlord offers nothing

substantive to in any way dispute that is what happened (Pb31). Landlord does not contradict, attempt to rationalize, or even comment on the judge's above remarks. Instead, aside from its affected umbrage, Landlord rests its entire counterargument on the fact that the judge asked for post-trial briefing and then, at the next court session, months after making the above comments, stated that he had "look[ed] at the contract[]" (Pb31) (quoting 2T9-15 to 2T9-17). Neither of these banal observations belies the fact that the judge had already decided before looking at the lease that the only two possible outcomes of the case were that either tenant pays landlord or a judgment of possession is entered, both of which were dismissive of Tenant's lease-based argument. Because judicial bias "constitutes structural error," and a violation of due process, Williams v. Pennsylvania, 579 U.S. 1, 14 (2016), a remand for adjudication by a different judge is warranted. See, eg., State v. McCabe, 201 N.J. 34, 37 (2010).

B. The trial court failed to find facts or otherwise support its ruling with reasons premised in the language of the Lease

The operative, deferential test governing whether a statement of reasons is sufficient is did the judge "find the facts . . . and state conclusions of law." R. 1:7-4(a). "A trial judge is obliged to set forth factual findings and correlate them to legal conclusions." Great Atlantic & Pacific Tea Co., Inc. v. Checchio ("A&P"), 335 N.J. Super. 495, 498 (App. Div. 2000).

"The requirement that the trial judge file findings of fact and conclusions of law is not merely for the convenience of the upper court on appeal[;] . . . it has the far more important purpose of evoking care on his part in ascertaining the facts and the applicable law." Testut v. Testut, 32 N.J. Super. 95, 100 (App. Div. 1954). In a case of contract interpretation, "[t]he construction of a written contract is usually a legal question for the court." A&P, 335 N.J. Super. at 502. In A&P, the Appellate Division noted that a trial court's decision was insufficient under Rule 1:7-4(a) for, among other things, failure to "analy[ze] or cit[e] to even a single case." Id. at 498.

Here, the judge made no meaningful findings or conclusions of law construing any Lease terms, and cited no case law. The court's only finding and or conclusion as to the Tenant's Allowance issue was to repeat Landlord's bottom-line legal position without referencing the Tenant's Allowance Offset or explaining why it was inoperative (2T6-23 to 2T7-2).

Again, the Lease states "Tenant . . . expressly grants" Landlord, in the present tense, a "deduction against Tenant's Allowance for all costs, payments and expenses Tenant is obligated to pay to Landlord pursuant to the Lease at the time," in the future, that "an installment of Tenant's Allowance shall be due" (Da17-Da18) (emphasis added). In other words, at the moment a Tenant's Allowance installment payment becomes due, any overdue rent is automatically

deducted from the installment owed by operation of the Lease, and Tenant is no longer in default by virtue of the deduction. The delta between the overdue rent amount and the amount of the Tenant's Allowance installment payment that would have been due but for the missed rent is the amount the Landlord pays.

Landlord does not deny that the court in its oral decision made no explicit reference to any Lease provision and no reference to a single case, statute, regulation, treatise, or any legal authority whatsoever, though it did cite approvingly a reflection on "equity" uttered by the villain of The Maltese Falcon to support of its ruling (3T15-20 to 3T15-22). Landlord's brief neither denies, explains, or rationalizes the trial court's freestanding reliance on "equity" to decide the contract-based Landlord-Tenant dispute before it (3T23-3T25), in clear contravention of binding precedent. See Benjoray, Inc. v. Acad. House Child Dev. Ctr., 437 N.J. Super. 481, 488 (App. Div. 2014) ("[A] court hearing a summary dispossess action lacks general equitable jurisdiction.").

Instead, Landlord attempts to distract this Court by pointing to three highly distinguishable, matrimonial cases--two unpublished and one sixty-four years old. Starting with the latter, Landlord reaches all the way back to 1960 for the Appellate Division's discussion of R. R. 4:53-1 and 4:93-1--rules that no longer exist--in Franzoni v. Franzoni, 60 N.J. Super. 519, 522 (App. Div. 1960), a case that does not support Landlord's position. Franzoni was an appeal from a

matrimonial maintenance case where the trial court lamented the "difficulty a judge faces in resolving financial issues of this sort," and promised to "do the best [he] can so that justice will be done" before entering judgment for one side without finding any facts or stating any conclusions of law. Id. at 521. The Appellate Division reversed, after "observ[ing], with regret," that trial judges' obligations to make pertinent findings of fact and conclusions of law were too frequently being ignored. Ibid. In supporting the reversal of the opinion on appeal, the panel specifically found it objectionable that the court "did not report to the litigants what he found to be the facts or upon what factors he arrived at" in making its determination on the maintenance obligation.

Here, similarly, the trial judge found no facts about what the various provisions of the Lease at issue meant nor did he report what factors or considerations supported his raw conclusion that "[b]ecause Defendant is in breach of the lease due to nonpayment of five months rent, the defendant is not due any refund of fit up costs." Accordingly, to the extent its discussion of moribund court rules is useful at all, Franzoni supports Tenant's position.

As to the unpublished cases, these cases are not binding on this Court. Bowser v. Bd. of Trs., Police & Firemen's Ret. Sys., 455 N.J. Super. 165, 171 (App. Div. 2018) ("[O]ur court's unpublished decisions, which do not bind us."). Nor are they helpful to Landlord's position.

Connell v. Connell, A-No. A-5645-06T3, 2008 N.J. Super. Unpub. LEXIS 1416, at *3 (App. Div. July 30, 2008) was concerned with the sufficiency of the trial court's reasoning for denying a post-judgment motion for reconsideration of the same issues that the judge had already addressed in the initial judgment of divorce. Because the court had, by then, already issued detailed findings, the panel held "it was unnecessary to find the facts again." Ibid. In this case, of course, the trial court's above-referenced ruling on fit-up reimbursement costs did not follow a more exhaustive and detailed finding of facts. The one-sentence ruling in the November 10, 2021 order, untethered to any Lease terms, was it.

Nor is the other unpublished matrimonial case on which Landlord relies any more helpful to its cause. In Geffner v. Geffner, No. A-2896-08T2, 2011 N.J. Super. Unpub. LEXIS 1203, at *22 (App. Div. May 11, 2011), the Appellate Division rejected on appeal that the trial court's ruling failed to set forth adequate findings under Rule 1:7-4(a) on a "critical issue." Geffner v. Geffner, No. A-2896-08T2, 2011 N.J. Super. Unpub. LEXIS 1203, at *22 (App. Div. May 11, 2011). That affirmance was because, unlike here, the trial court had made "specific" record-based findings supported by record evidence. Ibid.

That the only precedents Landlord even claims to be supportive of the trial court's conclusory ruling here are matrimonial cases is more than a mere curiosity--it is quite telling. The standard of review in matrimonial cases is

deferential. See, eg., Brown v. Brown, 348 N.J. Super. 466, 475-76 (App. Div. 2002); Tannen v. Tannen, 416 N.J. Super. 248, 276 (App. Div. 2010). This case, by contrast, presents a question of a contract interpretation that is "subject to de novo review by an appellate court." Kieffer v. Best Buy, 205 N.J. 213, 222 (2011). In that setting, the failure of the trial court to construe and interpret all relevant provisions of the lease that was before it, along with the failure to cite a single case, and the failure to grapple in any meaningful way with Tenant's arguments or its contractually-based entitlement to an offset dooms the court's ruling under Rule 1:7-4(a). The trial court failed to "set forth factual findings and correlate them to legal conclusions" on one of the only two legal issues that the judge was charged with deciding (1T11-25 to 1T12-11). The court violated Rule 1:7-4(a), thereby warranting a vacating of paragraph one of the November 10, 2021 order along with the entirety of the November 9, 2023 order, and a remand to finally fix the amount owed on Tenant's Allowance and address any related issues. A&P, 335 N.J. Super. at 498.

POINT II

LANDLORD'S CLAIM THAT "TENANT IS NOT ENTITLED TO PAYMENT OF THE TENANT ALLOWANCE" IS CONTRADICTED BY PLAIN LANGUAGE OF THE LEASE

Landlord continues to insist that, as a result of Tenant's alleged default for the first five months of the COVID-19 pandemic in 2020, the Tenant's

Allowance installments that had been due in 2020 and 2021 are permanently forfeited, as is the unpaid pre-default 2019 interest payment. Landlord's claim is unsupported by any provision of the Lease.

A. The Lease and the Undisputed Facts Reflect Tenant Has a Vested Right to Receive Tenant's Allowance

The Lease vests in Tenant an affirmative right to receive $730,000 from Landlord for Tenant's Work, all of which was completed in phase one of the Lease before a single monthly rent payment was even owed. Section 4.02 states: "[W]hen and if each condition contained in the foregoing items (i) through (vi), inclusive, hereof shall have been complied with in full, Landlord shall pay to Tenant up to the sum of Seven Hundred Thirty Thousand . . . Dollars . . . as reimbursement for the actual cost of Tenant's leasehold improvements.'" (Da17) (emphasis added).

Landlord does not dispute in any way that the Reimbursement Conditions set forth in "items (i) through (vi)" were satisfied, therefore, that point being conceded, it is not necessary to re-discuss those items.[4] Instead, Landlord posits that notwithstanding the use of "shall" in the clause just cited, payment of the $730,000 was essentially optional, because the term "up to" was a maximum ceiling under which Landlord could unilaterally elect to pay less, perhaps zero.

[4] For the Court's reference, Tenant lists the Reimbursement Conditions on pages 6-7 of its initial brief.

Landlord is mistaken. While "up to" sometimes imposes a limit or boundary, as in "up to 50,000 copies a month," it just as often, if not more often, means "as much as," denoting the minimum point to which something is extended, such as "up to his knees in mud."[5] Out of these two ordinary uses of "up to," the latter is clearly the most logical in the context of § 4.02, and the Landlord's preferred construction the more far-fetched for at least three reasons.

First, as already discussed (Db32), when parties insert the word "shall" into an agreement they intend for what follows the "shall" to be "mandatory and not merely permissive." Johnson Mach. Co. v. Manville Sales Corp., 248 N.J. Super. 285, 304 (App. Div. 1991). Accord Medford Tp. Sch. Dist. v. Schneider Elec. Bldgs. Ams., Inc., 459 N.J. Super. 1, 12 (App. Div. 2019). Applied to §4.02, the clause "Landlord shall pay to Tenant . . . $730,000" is mandatory, and not subject to Landlord's unilateral discretion.

Second, as has also been discussed (Db33-Db34), there are only six Reimbursement Conditions and "Tenant shall never miss a rent payment" is not among them. That strongly suggests missing a rent payment is not a Reimbursement Condition. See Evans v. Atl. City Bd. of Educ., 404 N.J. Super. 87, 92 (App. Div. 2008) ("[T]he doctrine of 'expressio unius est exclusio

[5] See Up to, Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/up%20to (last visited Sept. 20, 2024).

alterius,' . . . suggests that the mentioning of one or more things excludes others."); Wolverine Flagship Fund Trading Ltd. v. Am. Oriental Bioengineering, Inc., 444 N.J. Super. 530, 535 (App. Div. 2016) ("[T]he maxim expressio unius est exclusio alterius . . . stands for the proposition that explicitly naming one or more things implies the exclusion of all other things.").

Third, if "up to" sets a ceiling, as Landlord argues, rather than a floor, then Tenant would never receive any interest because the interest payments bring the overall total above $730,000. But § 4.02 expressly provides for five percent (5%) annual interest on Tenant's Allowance payments (Da17). Therefore, "up to" $730,000 most logically means at least $730,000, but more if there is also interest.

In sum, Landlord has failed to seriously contest that, upon having fulfilled the Reimbursement Conditions, Tenant had a vested right to receive Tenant's Allowance that Landlord was mandated to pay under the Lease.

B. Tenant Was Not in Monetary Default at the Time of Trial

Landlord first incorrectly claims "it is undisputed that Tenant was in monetary default when the 2020 and 2021 Tenant Allowance payments came due on August 1, 2020 and August 1, 2021," and then adds "tenant is simply not [ever] entitled to payment of these amounts" (Pb34). Both claims are wrong.

First, Tenant was not in monetary default on August 1, 2020 when Landlord's Tenant Allowance installment payment of $121,666.67 plus interest came due because the Allowance Offset automatically cured any default by operation of the Lease on that exact date. Again, the Lease pre-granted "an offset and deduction against Tenant's Allowance for all costs, payments and expenses . . . due and owing to Landlord, at the time an installment of Tenant's Allowance shall be due" (Da17-Da18) (emphasis added).

This provision is cross-referenced in § 2.01 of the Lease that calls for Tenant to pay annual minimum rent (Da13-Da14). Through § 2.01, Tenant "covenants and agrees to pay to Landlord . . . without any deductions, offsets (except as otherwise provided in Section 4.02 hereof) . . . [t]he sums set forth in Section 1.01(H) above," i.e. the minimum monthly rent (Da11;Da13-Da14) (emphasis added). The only sensible way to read this provision is that the pre-granted deductions and offsets for Tenant's Allowance set forth in § 4.02 are exceptions to Tenant's otherwise unwaivable obligation to pay the minimum monthly rent. And it is not difficult to see why. In a two-payor Lease like this where the amount of the annual Tenant's Allowance installments is approximately equivalent to a give-back of 54% of the annual minimum rent, an offset to that Allowance installment payment is extremely valuable to Landlord.

At the time Landlord filed its eviction action against Tenant on July 22, 2020, Landlord alleged Tenant to owe the sum of $121,051.47--inclusive of both monthly rent and any additional charges (Da94). Adding to that the $24,266.67 in monthly rent that became due ten days later on August 1, 2020 results in a sum of $145,318.14. This sum is far less than the amount Landlord owed Tenant on that same date: adding the unpaid interest from August 1, 2019 ($36,500) to the Tenant's Allowance installment ($121,666.67) plus interest due and owing on August 1, 2020 ($30,416.67) equals $188,583.34. Therefore, as of August 1, 2020, any default by the Tenant for failure to pay rent between April and August 2020 was cured, and the amount Landlord owed on its Tenant Allowance installment payment reduced to $43,265.20. Landlord did not and has not made that payment and is now claiming it need not ever make that payment. The clear language of the Lease suggests Landlord is mistaken.

Indeed, regarding the Landlord's second contention on forfeiture--that if Tenant owes rent at the time an Allowance installment is due, "tenant is simply not [ever] entitled to payment of these amounts,"--that interpretation has zero support in the Lease, or the law. Rather, § 4.02 only permits withholding of Tenant's Allowance installment payments during "monetary default under this Lease after notice and the expiration of any applicable cure period" (the "Monetary Default" clause) (Da17 emphasis added). In other words, if Tenant

has cured the default, there is no longer any basis for withholding the installment payment.

There is no dispute here that Tenant has cured the default because Landlord admits that no less than three times in its brief: "Tenant's payment of these arrears to the Clerk cured the Events of default" (Pb40); "Landlord considered the events of default cured and resumed making the Tenant allowance payments" (Pb41); "the Events of Default have been cured" (Pb51).

Despite admitting repeatedly that Tenant cured the alleged monetary default that was the sole basis on which Landlord predicated the withholding of the Tenant's Allowance payments required under the Lease, Landlord still insists, notwithstanding § 4.02, that Tenant should simply never receive those payments (Pb27;Pb36;Pa109). Under Landlord's (re)construction of the Lease, the Tenant's Allowance balance is automatically adjusted to deduct the installment that had been owed if rent happened to be overdue on the date of an installment payment. Even if the deficient rent is paid and the default cured the Tenant's Allowance balance deduction remains. The problem with this interpretation, as already pointed out in Tenant's opening brief, but which bears repeating, is it renders the Tenant Allowance Offset clause superfluous.

To illustrate using simple numbers, suppose Landlord L owes Tenant T a reimbursement amount of $20 payable in five annual installments of $4 plus

interest. Then suppose that in year three, after the principal balance has been reduced to $12 from the previous two years, T owes L an overdue rent balance of $3 at the time the installment payment becomes due. Suppose further that the Lease directs that in that situation the $3 T owes L is deducted from the $4 L owes T, bringing the total reimbursement balance down to $8 upon L's payment of $1 to T. Now suppose L opts to sue T for the $3 instead and gets it. Does L still get to take the deduction anyway and bring the reimbursement balance down to $8? That is the precise scenario presented here with different numbers and Landlord has not and cannot answer how, where, and why the Lease provides Landlord this windfall at Tenant's expense.

In sum, Tenant's more sensible interpretation is straightforward. "Shall" means shall. "Up to" means "as much as." A cured default is cured. And the omission of any Lease provisions setting forth the situations and circumstances under which Tenant's right to receive $730,000 may be permanently forfeited suggests the Lease does not authorize the permanent forfeiture of any portion of Tenant's Allowance once it is vested any more than it allows the permanent forfeiture of any portion of minimum rent.

C. Tenant's mitigation argument was argued below

As pointed out in Tenant's opening brief, even putting aside the legal

question of whether the Tenant's Allowance Offset clause operates automatically--as the Lease language supports--or discretionarily, as Landlord argues, Landlord did not need to do any of this. It is undisputed that on September 1, 2020, Landlord, at the very least could have[6] deducted the entire $145,318.14 in missed rent and other charges that Tenant owed Landlord from the $188,583.34 that Landlord owed Tenant, paid the remainder, and avoided all litigation. Instead, in pursuit of a double recovery, Landlord spent four years and, according to their brief (Pb56) $65,798.68 in legal expenses litigating an eviction action to avoid paying what it owes Tenant. This, at a minimum, was a failure by the Landlord to reasonably mitigate its damages. See McGuire v. City of Jersey City, 125 N.J. 310, 323 (1991) ("The lessor bears the burden of demonstrating actions taken to mitigate damages.").

Landlord contends that Tenant did not argue below that Landlord failed to mitigate its damages but this argument is both legally and factually flawed. The law is well-established that "[m]itigation of damages need not be specially pleaded, but is an issue where the general issue of damages is in dispute." Fanarjian v. Moskowitz, 237 N.J. Super. 395, 403 (App. Div. 1989). The Landlord carries the burden of proving reasonable mitigation efforts, McGuire,

[6] Again, this is for illustrative purposes only. Tenant's position is that the deduction operates automatically under the Lease, as described supra.

125 N.J. at 323, and the court may even raise the issue sua sponte. See, eg. Cohen v. Radio-Electronics Officers Union, Dist. 3, NMEBA, AFL-CIO, 275 N.J. Super. 241, 250 (App. Div. 1994).

In any event, a fair reading of the record reflect that Tenant squarely put into issue whether Landlord reasonably mitigated damages. On August 18, 2021, the date of the trial and seventeen days after Landlord missed its second consecutive reimbursement payment, Tenant's counsel explained the Tenant's Allowance provision of § 4.02 to the judge and asked the court to calculate the amount of rent due and "[s]et that number off against the tenant's fit up" (1T14-2 to 1T14-5). Tenant's counsel then noted that if a dispossession action was granted because of the missed rent rather than a simple offset, that could cause Tenant to close its business and Landlord would then "have to go out and find a new tenant for over 20,000 square feet" (1T16-6 to 1T16-13). Tenant's counsel later argued further along these lines, "I don't know that it serves either party to result in a dispossess" rather than an offset calculation (1T21-10 to 1T21-16).

Accordingly, despite its attempts to obfuscate the issue, Landlord cannot escape the fact that did not, and could not, establish it took reasonable efforts to mitigate its damages when all it had to do to make itself 100% whole was to pay Tenant less than the installment amount originally owed on August 1, 2020. Tenant raised this below and reserves the right to continue raising it on appeal.

POINT III

BECAUSE A LANDLORD-TENANT JUDGE HAS JURISDICTION TO DECIDE WHETHER THE AMOUNT TENANT OWES LANDLORD IS OFFSET BY THE AMOUNT LANDLORD OWES TENANT AND THE TRIAL COURT FAILED TO ASCERTAIN THAT, A REMAND IS WARRANTED

Landlord does not deny that a Landlord-Tenant judge has jurisdiction to determine whether the Landlord seeking eviction for unpaid rent owes the Tenant a greater amount of money under the terms of the Lease than the amount it claims to be owed in unpaid rent. Instead, Landlord insists the Landlord-Tenant judge understood it had jurisdiction to decide that issue (Pb28-Pb32), which is belied by the record.

Again, in 2021 when Tenant's counsel asked the judge for clarification as to whether the judge was ruling that Tenant's Allowance had been permanently forfeited, the judge responded that Tenant would "maybe" be entitled to those payments at some point when Tenant was not "in breach . . . [b]ut that's something for another day" (2T12-15 to 2T12-18; 2T22-2T23) (emphasis added). But at the next hearing date two years later, long after the missed rent payments had been placed in escrow, the trial court still refused to rule on the issue of permanent forfeiture, stating it was "something I really don't have jurisdiction to adopt" (3T14-3 to 3T14-8) (emphasis added). The court acknowledged there were different ways of interpreting the Lease (3T16-9 to

3T17-11), but ultimately opted to "not rul[e] on any of that," because it was "really not [the court's place," and the judge did not "need to decide those issues to decide this case" (3T16-9 to 3T17-15).

Worse, the trial judge left undisturbed his prior ruling from November 10, 2021 that "the defendant is not due any refund of fit-up costs under Section 4.02 of the lease," thereby giving Landlord cover to take the position that the 2020 and 2021 Tenant's Allowance installments had already been ruled permanently forfeited notwithstanding the curing of the default.

This was egregious error by the trial judge. "[L]andlords seeking to evict for nonpayment of rent . . . can only look to the amount of rent that is due and owing, and it is that calculation that is used to fix the obligations of the parties as to possession." Green v. Morgan Props., 215 N.J. 431, 450 (2013). As already discussed, the Lease contains no provision whatsoever that would result in Tenant permanently forfeiting its phase-one fit-up reimbursement as a result of any later-phase rent deficiency. On the contrary, the Lease directs, in § 4.02 that if, "at the time" a Tenant's Allowance installment payment is due the Tenant owes the Landlord rent, the missed rent amount is automatically offset against the installment amount (Da17-Da18).

Landlord's alternative construction cannot be taken seriously. As Landlord would have it, on August 1, 2020, the Tenant's Allowance payment of

$121,666.67 plus interest that the Lease says is due and owing on that date disappears forever and need never be paid. On that same day, that exact amount is deducted from the principal amount of the Tenant's Allowance balance owed. Also, Tenant still has to pay all the missed rent, without any offset, to avoid eviction. But even if Tenant pays all the missed rent, the balance deducted from the Tenant's Allowance is never restored. And yet somehow, Landlord can still "elect" to "offset" the missed rent against the Allowance Installment that, again, no longer exists. As this illustration demonstrates, Landlord's overly robust construction of the Monetary Default clause renders the Tenant's Allowance Offset clause totally absurd and meaningless, an interpretation always to be strenuously avoided when interpreting commercial contracts. In re Somerset Reg'l Water Res., LLC, 949 F.3d 837, 848 (3d Cir. 2020).

As the Lease is actually written, the Tenant's Allowance Offset automatically deducts overdue rent payments from the Tenant's Allowance installment amount then owed and there remains nothing "due and owing" from Tenant to Landlord. The trial court could agree or disagree with that analysis, but what it ought not to have done was forfeit its judicial role and decline to decide the issue at all due to a purported lack of jurisdiction. Landlord argues that the trial court decided the issue insofar as it ruled conclusorily that Tenant does not get its reimbursement while it is in "breach," but that misses two key

points. First, the trial court did not grapple with, dismiss, or even discuss Tenant's argument that it was not in breach because the Allowance Offset clause automatically cured the default. Second, the court failed to recognize that it had jurisdiction to, in that moment, calculate the amount of Tenant's Allowance owed after the payment went into escrow and unquestionably cured the default.

This abnegation of the judicial role was reversible error.

POINT IV
TENANT'S APPEAL IS NOT MOOT

In Point IV, Landlord argues that Tenant's appeal is moot because the rent arrears have already been paid. This argument is meritless.

"An issue is moot when the 'decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" Intern. Broth. of Elec. Workers Local 400 v. Borough of Tinton Falls, 468 N.J. Super. 214, 224 (App. Div. 2021) (quoting Redd v. Bowman, 223 N.J. 87, 104 (2015)).

Landlord takes the position that because it has received full payment of what it claimed to be owed on the 2020 rent, all issues have been resolved and no decision by this Court can have any effect on the existing controversy. The problem with this argument is that there are two parties in this dispute, and only one has been paid in full. If this Court grants the relief Tenant is seeking by vacating paragraph one of the trial court's November 10, 2021 order, vacating the November 9, 2023 order in its entirety, and remanding for a ruling that, at

long last, fixes the amount owed on the Tenant's Allowance reimbursement, that would have a "practical effect on the existing controversy." Ibid. Moreover, both sides are seeking attorney's fees, and if either request is granted that would have a clear and obvious effect on the controversy as well. Accordingly, Tenant's appeal is obviously not moot.

POINT V
TENANT IS ENTITLED TO LEGAL FEES ON REMAND

Landlord raises two procedural arguments, and one legal one, contesting Tenant's argument respecting legal fees, all of which lack merit.

Regarding the procedural arguments, Landlord first contends that Tenant is either precluded or judicially estopped from seeking legal fees "because it failed to assert such a claim" before the trial court. Landlord misapprehends Tenant's argument. Tenant is not contending the trial court erred by not granting Tenant legal fees nor is Tenant seeking a reversal on that ground. Tenant is raising the practical argument that if this Court vacates paragraph one of the November 10, 2021 order, the entirety of the November 9, 2023 order, and remands to fix the amount Landlord owes Tenant under the § 4.02, the Court will necessarily have found Landlord in breach of the Lease. At that point, on remand, Landlord would no longer be the prevailing party and Tenant would. Hence, attorney's fees would then be available to Tenant for Landlord's breach under § 17.06 of the Lease (Da056).

As to the estoppel argument, it is absurd. Tenant did not show up for trial demanding that the trial court order Tenant to pay Landlord's legal fees. All of the examples that Landlord relies upon to establish that Tenant allegedly "took the position that it was liable for Landlord's legal fees and costs" came in the context of arguments Tenant raised after the trial court's November 10, 2021 ruling in Landlord's favor. In that ruling, the trial court not only ruled against Tenant on the Tenant's Allowance issue, but further authorized counsel for Landlord to "submit a certification of counsel fees collectible as additional rent" (Da002). Tenant then submitted a brief seeking to fix the amount owed on the Tenant's Allowance "after set-off for Landlord's attorneys' fees and costs" (Pb53). Landlord appears to be making the argument that by asking that the court-authorized counsel fees be set off against Tenant's Allowance, Tenant somehow "admitted" liability for those attorney's fees. On the contrary, all Tenant was doing was accepting the ruling that the judge had already made and staking its legal position against that backdrop.

As to the third argument, that "Tenant is not entitled to legal fees under the express terms of the Lease," it is unclear what "express terms of the Lease" Landlord is referring to. Indeed, Tenant is somewhat at a loss as to how to respond to this point because Landlord's brief makes the argument for Tenant

already. The Court need only look to the portion of §17.06 of the Lease that Landlord directly quotes in its brief:

> In the event suit shall be brought by Tenant because of the breach of any covenant contained herein on the part of Landlord to be performed, and a breach shall be established, Landlord shall pay to Tenant all legal costs and other reasonable attorneys' fees and expenses incurred by Tenant.
>
> [Da56;Pb55 (emphasis added).]

Again, if this Court rules in Tenant's favor on appeal, Landlord's breach shall have been established and then, on remand, Tenant would be well within its rights to seek "reasonable attorneys' fees" under § 17.06. No "express terms of the Lease" contradict this, notwithstanding Landlord's bald invocation of a phantom provision that says otherwise.

POINT VI

THE TRIAL COURT DID NOT MISAPPLY ITS DISCRETION IN REDUCING LANDLORD'S COUNSEL FEES

Landlord's cross-appeal, premised on its dissatisfaction with the attorney's fees it was awarded by the trial court is flawed for three reasons: (1) If this Court should, for reasons already discussed, vacate one or both of the trial court's orders on appeal and remand, Landlord would no longer be a prevailing party entitled to fees; (2) Landlord is not entitled to compensation for hours spent unnecessarily prolonging and belaboring this litigation; and (3) the trial

court did not abuse its discretion in reducing the hourly rate where Landlord's proofs were wholly insufficient.

A trial court's determination on counsel fees is highly discretionary and only to be disturbed "on the 'rarest occasion,' and then only because of clear abuse of discretion." Feliciano v. Faldetta, 434 N.J. Super. 543, 548-49 (App. Div. 2014) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

"In calculating the amount of reasonable attorney's fees, courts determine the 'lodestar,' defined as the 'number of hours reasonably expended' by the attorney, 'multiplied by a reasonable hourly rate.'" Feliciano, 434 N.J. Super. at 549 (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). With respect to the first step, "[t]he court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Ibid. (quoting Furst, 182 N.J. at 22). "Whether the hours the prevailing attorney devoted to any part of a case are excessive ultimately requires a consideration of what is reasonable under the circumstances." Furst, 182 N.J. at 22-23.

With respect to the second step, "[g]enerally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community." Rendine v. Pantzer, 141 N.J. 292, 337 (1995) (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). "That determination need not be unnecessarily complex or protracted, but the trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." Ibid. It is "[t]he party seeking attorney's fees" that "has the burden to prove that its request for attorney's fees is reasonable." Seigelstein v. Shrewsbury Motors, Inc., 464 N.J. Super. 393, 406 (App. Div. 2020) (quoting Rode, 892 F.2d at 1183. To meet that burden, "[t]he prevailing party must support its fee application with proof of the reasonableness of the requested hourly rate, including evidence of the rates charged by lawyers of reasonably comparable skill, experience, and reputation in the relevant community." Hansen v. Rite Aid Corp., 253 N.J. 191, 215 (2023)

Here, as an initial matter, Landlord's arguments regarding the amount of counsel fees it claims to be entitled to are essentially preempted because there Landlord may be found not to be entitled to any counsel fees. For reasons already explained infra, points I-V, this court should vacate paragraph one of the trial court's November 10, 2021 and the entirety of the November 9, 2023 order and remand for reassessment and recalculation of the amount that Landlord owes

Tenant in Tenant's Allowance--a payment that Landlord has, to this point emphatically denied it is obligated to ever pay. Assuming this Court agrees with Tenant that Landlord is incorrect about that, then Landlord is no longer a prevailing party in this litigation and is not entitled to any attorneys' fees. See, eg. Rendine, 141 N.J. at 335 ("[T]he question whether and to what extent in awarding counsel fees under state fee-shifting statutes a trial court should take into account the relationship between the damages recovered and the hours expended."); Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 244 (App. Div. 2014) ("Because we have reversed the judgment . . . she is not a prevailing party, and therefore is not entitled to an award of fees"); Furst, 182 N.J. at 23 ("[A] trial court should decrease the lodestar if the prevailing party achieved limited success in relation to the relief he had sought.").

Relatedly, it was simply not reasonable for Landlord to expend 117 hours seeking unpaid rent that the Landlord could have extracted from Tenant in one minute by making an arithmetically simple accounting adjustment ten days after, and in lieu of, filing the complaint. It bears repetition that this entire eviction proceeding, and the hundreds of attorney hours and hundreds of thousands of dollars in attorneys' fees incurred on both sides in this process was entirely excessive and unnecessary and therefore cannot be used in fixing the lodestar. Feliciano, 434 N.J. Super at 548-49.

One of two things is true. Tenant's primary contention is that, in the event that both parties in this two-payor Lease owe each other money at the exact same time the money that Tenant owes Landlord is automatically deducted from the larger Tenant Allowance installment amount to cure the default. But suppose that is wrong, for argument's sake only. Even if the deduction is not automatic there is no dispute that, at a minimum, Landlord could have taken such a deduction on its own in 2020 and adjusted the amount of Tenant's Allowance it would pay that year accordingly. Doing so would have been unchallengeable by Tenant under § 4.02. This begs the question why Landlord did not simply make the accounting adjustment, avoid the litigation, and allow both parties to be made 100% whole instantly. Landlord's only answer is it wanted to keep the Tenant's Allowance installment it owed in 2020, coerce Tenant into paying the rent out-of-pocket instead, but then still keep the deduction against the Tenant's Allowance balance even after Tenant's alleged default was cured. The attorney hours employed in pursuit of this scheme were not hours "reasonably expended" and should be excluded from the lodestar. Feliciano, 434 N.J. Super. at 548-49.

Thirdly, and only in the event that this court does not vacate the orders on appeal and remand, the trial court's ruling regarding the second step in the lodestar calculation, reproduced in pertinent part below, should be affirmed:

> Landlord is entitled to counsel fees under the lease. There was 5.6 hours that the tenant's counsel

> objected to because it involved other tenants. Those were in June of 2020, June 4th and I think the 9th. So I'll subtract that from the total amount of hours.
>
> Now, one place is the amounts, the hourly rates, which I think were a little high. Windels Marx is a good firm, good lawyers, you do good work. And your clients are happy to pay top dollar for your services. Though those numbers are higher than--and I'm not comparing you to the landlord that represents apartment complexes. I'm comparing you to landlords that represent large commercial tenants, with complex leases. I think the highest I can allow is 425 an hour. I guess Amanda Meehan, 395, I'll reduce that to 325. And the paralegal rate I'll reduce that from 395 to 200. That's more in line with what I've seen in these types of substantial commercial cases that have been before me in recent months.
>
> [3T18-4 to 3T18-23.]

In its cross-appeal, Landlord does not appear to take issue with the trial court's deduction under step one of the lodestar analysis of the 5.6 hours expended by attorneys on matters pertaining to different tenants. Rather, the sum and substance of Landlord's challenge to the trial court's discretionary ruling on the appropriateness of the counsel fees awarded was that the court referenced "personal experience" in making its determination in step two, "which is prohibited in this State," according to Landlord (Pb61).

Landlord's analysis not only sweeps too broadly, but more importantly it misses the point. Again, it was Landlord's burden, not the judge's, to provide evidence of the as to the prevailing market rate in the relevant community for

the services for which Landlord is seeking attorneys' fees compensation. Rendine, 141 N.J. at 337. That evidence is then used by the judge in comparing "the rate of the prevailing attorney in comparison to rates 'for similar services by lawyers of reasonably comparable skill, experience, and reputation' in the community." Furst, 182 N.J. at 22 (citation omitted). Landlord did not come close to meeting its burden. Rather, in support of its fee application, Landlord simply submitted a certification in which counsel attested that the fee arrangement was in accordance with the firm's own "prevailing hourly rate," not the market rate in the relevant community as is required. Ibid.

As an example, in Rendine, in addition to providing a certification from the attorneys for the party seeking the fee award as to that firm's own compensation rate,

> counsel submitted certifications from three experienced employment-law practitioners from other law firms who had provided estimates of the hours required to litigate a plaintiff's employment-discrimination case, and the estimates either exceeded or approximated the hours expended by plaintiffs' counsel. Those unaffiliated lawyers also certified that the hourly rates billed by the attorneys that had worked on the litigation appeared to be reasonable and consistent with rates charged by lawyers of comparable seniority and experience.
>
> [Id. at 318 (emphasis added).]

Similarly, in Seigelstein, 464 N.J. Super. at 399, the party seeking compensation for attorneys' fees submitted certifications that "identified several New Jersey

state and federal cases where the court had approved their current and comparable prior hourly rates" which the Appellate Division found had "mirrored the certifications deemed acceptable in Rendine." Id. at 408.

The reason why this extra showing--beyond rote recitation of the rate of the firm to be compensated--is required in supporting the lodestar is not difficult to ascertain. Were this not the case courts would simply affirm the lodestar, ipse dixit, every single time it is asked for in the exact amount it is asked for in every case as long as the firm to be compensated attests that it is charging what it always charges. That sort of rubber-stamping would not be at all consistent with the judicial role. See, eg. State v. Arroyo-Nunez, 470 N.J. Super. 351, 380 (App. Div. 2022) ("It is evident from our discussion that regardless of the particular context, any determination of good cause demands the court's considered judgment, not some rubber stamp.").

Accordingly, Landlord's failure to provide any evidence as to the prevailing community market rate is all the court needed to deny the fee application in its entirety under step two. Ibid. That the court opted instead to insert its own experience and perspective[7] where the Landlord's proofs were lacking did not constitute a misapplication of the court's discretion.

[7] Contrary to Landlord's position there exists no bright-line prohibition in New Jersey against a court considering attorneys' hourly rates in other cases (Pb59). What was objectionable in Siegelstein was the trial court's reliance on "personal

CONCLUSION

For the above reasons, paragraph one (1) of the trial court's 2021 order must be vacated, the entirety of the 2023 order must be vacated, and the matter must be remanded to fix the amount of Tenant's Allowance and determine what effect the remand should have on attorneys' fees under § 17.06 of the Lease.

Respectfully submitted,

THE KELLY FIRM, P.C.
Attorneys for Defendant-Appellant

/s/ *Nicholas D. Norcia*
Date: October 4, 2024 NICHOLAS D. NORCIA

experience in private practice," Siegelstein, 464 N.J. Super. at 408, which is distinguishable from the judge's ascertainment of rates attorneys charge in other cases before that same judge in the same community. Indeed, consideration of attorney billing rates in the community is what step two is. Rendine, 141 N.J. at 337.

Superior Court of New Jersey

Appellate Division

Docket No. A-001232-23T2

WOODBRIDGE NJ HOLDINGS LLC,	:	CIVIL ACTION
	:	
Plaintiff-Respondent-Cross-Appellant,	:	ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY,
vs.	:	LAW DIVISION– SPECIAL CIVIL PART, LANDLORD-TENANT
WHIBY 13 WOODBRIDGE LLC,	:	DIVISION, MIDDLESEX COUNTY
	:	
Defendant-Appellant-Cross-Respondent.	:	DOCKET NO. MID-LT-5021-20
	:	Sat Below:
	:	HON. J. RANDALL CORMAN, J.S.C.

REPLY BRIEF AND APPENDIX FOR PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Respondent-Cross-Appellant, Woodbridge NJ Holdings LLC ("**Respondent**" or "**Landlord**"), respectfully submits this memorandum of law in further support of its cross-appeal (the "**Cross Appeal**") seeking reversal of paragraph 2 of the lower court's November 9, 2023 Order (the "**Reconsideration Order**"), pursuant to which The Honorable J. Randall Corman, J.S.C. failed to grant Landlord the full attorney fee award it is undoubtedly entitled to under the express terms of the written Lease Agreement (the "**Lease**") at issue in the underling summary disposition proceeding (the "**Underlying Action**"). Specifically, in contravention to well-settled New Jersey law, the lower court abused its discretion by cutting Landlord's contractually mandated fee award by nearly 40% based solely on Judge Corman's personal belief that the rates charged by Landlord's counsel were "a little high." This arbitrary lowering of Landlord's fee award is not permitted in this State and should, respectfully, be reversed by this Court.

The opposition interposed by Defendant-Appellant-Cross-Respondent, WHIBY 13 Woodbridge LLC ("**Appellant**" or "**Tenant**"), provides no basis to deny Landlord's Cross Appeal. Indeed, despite Tenant's baseless allegations to the contrary, Landlord's Fee Application clearly meets the standard established by the New Jersey Supreme Court and should have been granted in its entirety.

Moreover, Tenant's attempt to avoid its contractual obligation to reimburse Landlord for its legal fees by shifting blame for the Underlying Action to Landlord has no basis in reality. The Underlying Action was necessitated due to Tenant's admitted failure to make any payment due and owing under the Lease for five (5) months. At any point, Tenant had the option to seek dismissal of the Underlying Action by paying the delinquent Rent either to Landlord or the lower court. Tenant simply refused to do so until entry of the Post Trial Order nearly twenty (20) months after such Rent was due. Worse yet, after finally depositing the Rent Arrears with the Court, Tenant filed an untimely and meritless seven-hundred (700) page motion for reconsideration of the Post Trial Order, which application, although denied in its entirety by the lower court, caused Landlord to incur additional legal fees and delayed the Underlying Action, and Landlord's receipt of the Rent Arrears, for an additional two (2) years.

Similarly, Tenant's argument that Landlord should have avoided this litigation by "automatically offsetting" the Rent Arrears with the unearned 2020 and 2021 Tenant Allowance payments that Tenant would have been entitled to had it not been in monetary default is antithetical to the terms of the Lease and Tenant's own actions. Indeed, under Section 4.02 of the Lease, Tenant was never owed the 2020 or 2021 Tenant Allowance payments because

it was admittedly in monetary default when such payments came due. In fact, Tenant's entire argument that the Lease provides for an "automatic offset" of these amounts is belied by Tenant's own failure to assess such an offset after Landlord's alleged underpayment of the 2019 Tenant Allowance. Clearly, Tenant never believed the Lease provided for an "automatic offset" and only raised such arguments after it realized the consequences of its transparent attempt to avoid paying any Rent to Landlord during the COVID-19 pandemic.

Simply put, Tenant fails to articulate any reason why the Lease, which was negotiated at arm's length between sophisticated business entities, should be re-written to excuse Tenant from its contractual obligation to reimburse Landlord for its legal fees and costs arising out of the Underlying Action. Tenant is not entitled to a better deal than it bargained for and Tenant's continued insistence that Landlord rewrite the Lease for its benefit is what necessitated, and prolonged, the Underlying Action.

For the foregoing reasons and as more fully elucidated below and in Landlord's prior submission, the lower court's November 10, 2021 Order should be affirmed in its entirety and the lower court's November 9, 2023 Order should be affirmed in all aspects except for paragraph two (2), which should be amended to grant Landlord's Fee Application in its entirety.

PROCEDURAL HISTORY

For a full and complete recitation of the procedural history of the Underlying Action, this Court is respectfully referred to the Procedural History set forth in Landlord's Brief and Appendix ("**Landlord's Initial Brief**" or "**Pb**"). (Pb4-17). All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Landlord's Initial Brief.

STATEMENT OF FACTS

For a full and complete recitation of the facts at issue in the Underlying Action, this Court is respectfully referred to the Statement of Facts set forth in Landlord's Initial Brief. (Pb17-27).

LEGAL ARGUMENT[1]

POINT I
JUDGE CORMAN COMMITTED A REVERSIBLE ERROR BY FAILING TO GRANT LANDLORD'S FEE APPLICATION IN ITS ENTIRETY (Da3)

For the reasons set forth in Landlord's Initial Brief and as more fully elucidated below, the lower court committed a reversible error by cutting Landlord's contractually mandated fee award by nearly forty-percent (40%) based solely on Judge Corman's personal belief that the rates charged by Landlord's counsel were "a little high." (Da3; 3T18-19; Pa47-51, 119-120).

[1] Pursuant to Rule 2:6-11(b), the instant Reply Brief is limited to the issued raised in Landlord's Cross Appeal.

This holding is not in accordance with long-standing New Jersey law and should, respectfully, be reversed and Landlord should be awarded its entire $65,798.68 Fee Application. (Pa47-51, 119-120).

A. The Lower Court Abused Its Discretion by Reducing Landlord's Fee Award Based on Judge Corman's Personal Experience (Da3)

It is well-settled in New Jersey that an attorney fee award is to be determined based on the "lodestar", which equals the number of hours reasonably expended multiplied by a reasonable hourly rate. Seigelstein v. Shrewsbury Motors, Inc., 464 N.J. Super. 393, 404-405 (App. Div. 2020); Walker v. Giuffre, 209 N.J. 124, 130-131 (2012). When making this determination, the trial court must consider the following factors outlined in New Jersey Rule of Professional Conduct ("**RPC**") 1.5(a): (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers

performing the services; and (8) whether the fee is fixed or contingent. Seigelstein, 464 N.J. Super. at 406, n. 6; RPC 1.5(a).

It is axiomatic that a lower court's fee award should be overturned on appeal where, as here, the trial judge abused his discretion by failing to apply the above-referenced standard and, instead, set the fee award based on irrelevant or inappropriate factors, such as the Judge's personal experience. Seigelstein, 464 N.J. Super. at 404-408; Walker, 209 N.J. at 147.

When reviewing Landlord's Fee Application, Judge Corman simply failed to apply the above-standard adopted by the New Jersey Supreme Court in RPC 1.5(a) and, instead, lowered Landlord's contractually mandated fee award from $65,786.68 to $38,462.60 because he felt the hourly rates charged by Landlord's counsel were "a little high." (Da3, 3T18-19; Pa47-51, 119-120). Specifically, Judge Corman cut the hourly rates of Douglas A. Stevinson, Esq. and Ryan W. Federer, Esq. from $570.00 and $530.00, respectively, to $425.00, the hourly rate of Amanda A, Meehan, Esq. from $395.00 to $325.00 and the hourly rate of paralegal Ronetta Suber from $295 to $200. (3T18-19; Pa47-51, 119-120). As set forth on the record, the basis for these arbitrary cuts were simply Judge Corman's personal experience as he felt these lower rates were "more in line with what I've seen in these types of substantial

commercial cases that have been before me in recent months." (3T18-21 to 3T18-22).

Such an arbitrary reduction of Landlord's Fee Application based upon the Judge Corman's own personal experience is simply not permissible under New Jersey law and should, respectfully, be reversed. See Seigelstein, 464 N.J. Super. at 406 (reversing lower court's reduction of hourly rates charged by plaintiffs' counsel and paralegals where the reduction was based upon the lower court judge's personal experience); Greco v. State Farm Ins. Co., A-4344-01T5, 2003 WL 1917318, at *5 (N.J. Super. Ct. App. Div. Apr. 14, 2003) (reversing lower court's reduction of hourly rate in a fee award from $275 to $200 because the reduction was based solely on the lower court judge's belief, without explanation, that $275 was "a little steep on this kind of matter for this kind of litigation."); In re Estate of Riordan, A-5286-12T1, 2014 WL 8810027, *3 (N.J. Super. Ct. App. Div. May 13, 2015) ("a trial judge's award of counsel fees could not be based on the judge's personal policy.").

B. Landlord's Fee Application Meets the Standard Set by the New Jersey Supreme Court (Da3)

Tenant's argument that Landlord's Fee Application fails to satisfy the standard set by the New Jersey Supreme Court misses the mark by a wide margin.

As detailed above, when evaluating a fee application, the trial court must consider the factors set forth in RPC 1.5(a). Seigelstein, 464 N.J. Super. at 406, n. 6; RPC 1.5(a). The most important of these factors is the calculation of the "lodestar." Seigelstein, 464 N.J. Super. at 405. To satisfy their burden, the prevailing party is required to submit a "certification of services that is sufficiently detailed to enable the court to accurately calculate the lodestar." Walker, 209 N.J. at 131; see also Seigelstein, 464 N.J. Super. at 407 ("The party seeking attorney's fees has the burden to prove that its request for attorney's fees is reasonable. To meet its burden, the fee petitioner must submit evidence supporting the hours worked and rates claimed.") (internal citations omitted).

While the trial court should "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application" (Walker, 209 N.J. at 131), the determination of the prevailing party's reasonable hourly rate "need not be unnecessarily complex or protracted." Rendine v. Pantzer, 141 N.J. 292, 337 (1995); see also Seigelstein, 464 N.J. Super. at 405-406. Rather, "the trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." Rendine, 141 N.J. at 337; see also Seigelstein, 464 N.J. Super. at 406.

Here, Landlord's Fee Application meets the Supreme Court's standard and should have been granted in its entirety. Indeed, in support of its Fee Application, Landlord submitted a detailed certification of its lead counsel attaching Landlord's legal bills and setting forth the experience of Landlord's attorneys, the hourly rates charged, the time expended on this matter (116.9 hours) and the length of Landlord's relationship with its counsel. (Pa47-97, 119-120). Crucially, in its Fee Application, Landlord's counsel certified, among other things, that: (i) "[t]he fees and charges invoiced to the Landlord are customary charges to the Landlord and other clients of this firm"; (ii) "[t]hese fees and charges are this firm's standard rates for the work performed"; and (iii) "[t]he hourly fees for each attorney who performed work in this action are reasonable, customary, and reflect the fees actually charged to the Landlord." (Pa49). In fact, as certified by Landlord's counsel, the legal fees billed to Landlord reflect all discounts, write-offs and reductions made by the firm before sending the invoices to Landlord. (Pa49). Despite Tenant's baseless contentions to the contrary, such representations are more than sufficient to establish that the hourly rate charged by Landlord's counsel was reasonable and in conformity with the prevailing market rates for similar services; especially where, as here, Tenant failed to present any countervailing proofs rebutting the reasonableness of the hourly rates charged. See Yueh v.

Yueh, 329 N.J. Super. 447, 466 (App. Div. 2000) (finding no issue with the adoption of the hourly rate charged by the prevailing party's counsel where "[a]lthough the judge's acceptance of the hourly rate [was] not accompanied by any findings of fact concerning the prevailing rates in the community, the rates for counsel work [did] not appear unreasonable. Defendant has not challenged plaintiff's attorney's hourly rate of $200."); Seigelstein, 464 N.J. Super. at 406 (noting in a statutory fee shifting case that, once the prevailing party submits evidence supporting the hours worked and the rates claimed, "the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee.").

Moreover, as detailed in Landlord's Initial Brief, the Underlying Action is not a standard summary disposition proceeding involving the removal of a non-paying tenant. Rather, it is complex commercial proceeding that has been ongoing for more than four (4) years and concerns an eighty-three (83) page commercial Lease requiring mutual payment obligations and a detailed calculation of the nearly $200,000 in arrears. (Da5-87). Furthermore, all of this occurred against the backdrop of a global pandemic where Tenant's business was temporarily closed leading to Tenant asserting defenses sounding in equity, including unclean hands, unjust enrichment, frustration of purpose and

impossibility of performance. (Pa116). Such factors make the lower court's arbitrary reduction of the hourly rate contained in Landlord's Fee Application all the more egregious.

As such, Landlord's Fee Applications satisfied the standard set by the New Jersey Supreme Court and should have been granted in its entirety.

C. The Time Expanded by Landlord's Counsel in the Underlying Action was Reasonable (Da3)

Tenant's attempt to avoid its contractual obligation to reimburse Landlord for its legal fees by shifting blame for the Underlying Action to Landlord has no basis in reality. Simply put, the Underlying Action was necessitated due to Tenant's admitted failure to make any payment due and owing under the Lease for five (5) months. At any point, Tenant had the option to seek dismissal of this proceeding by paying the delinquent Rent either to Landlord or the lower court. See N.J.S.A. 2A:18-55. Tenant simply refused to do so until entry of the Post Trial Order nearly twenty (20) months after such Rent was due.

Instead of timely paying the amounts due and owing to Landlord under the Lease, Tenant spent the last four (4) years raising every conceivable legal and equitable defense as to why Tenant's breaches of the Lease should be excused, including arguing that enforcing the Lease as written violated equitable doctrines of unclean hands, unjust enrichment, frustration of purpose

and impossibility. (Pa116). Rebuffing such specious defenses required Landlord to expend significant legal fees. (Pa47-97).

In a desperate attempt to avoid paying the full amount due and owing under the Lease, Tenant further argued in its second post trial submission that it was not obligated to pay $16,659.25 in Common Area Maintenance ("**CAM**") charges despite: (i) its express contractual duty to do so; (ii) the admission in Tenant's first post-trial submission that this exact amount was due; and (iii) the indisputable fact that six (6) months prior to trial Landlord and Tenant underwent a formal reconciliation of these charges in accordance with the terms of the Lease, which reconciliation Tenant failed to timely challenge in accordance with the terms of the Lease. (Pa117; Da26-29, Lease at § 7.01; Da169; Da184-188). This frivolous challenge to the CAM charges forced Landlord to incur substantial legal fees in connection with reviewing, analyzing and explaining hundreds of pages of underlying utility and third-party vendor invoices. (Pa117; Da182-189). As articulated by Judge Corman in the Post Trial Order, "Defendant has failed to set forth any substantive basis to disbelieve [Landlord's business records]." (Da1)

Worse yet, after finally depositing the Rent Arrears with the Court, Tenant filed an untimely and meritless seven-hundred (700) page motion for reconsideration of the Post Trial Order. (Da173-178). Although this

application was denied in its entirety by the lower court, Landlord was forced to incur an additional $9,858.00 in legal fees opposing the same. (Da3; Pa119-120). This frivolous application also delayed the Underlying Action, and Landlord's receipt of the Rent Arrears, for an additional two (2) years. (Da179-180).

Similarly, Tenant's argument that Landlord should have avoided this litigation in its entirety by rewriting the Lease and "automatically offsetting" the Rent Arrears with the unearned 2020 and 2021 Tenant Allowance payments that Tenant would have been entitled to had it not been in monetary default is antithetical to the terms of the Lease and Tenant's own actions. Indeed, as detailed at length in Landlord's Initial Brief, under Section 4.02 of the Lease, Tenant was never owed the 2020 or 2021 Tenant Allowance payments because it was admittedly in monetary default when such payments came due. (Pa107; Pb32-46).

In fact, Tenant's entire argument that the Lease provides for an "automatic offset" of these amounts is belied by Tenant's own failure to assess such an offset after Landlord's alleged underpayment of the 2019 Tenant Allowance. (Db9-11). Simply put, to the extent Section 4.02 is deemed vague or ambiguous with respect to the parties' respective offset remedies, Tenant's own failure to offset the alleged 2019 Tenant Allowance underpayment from

Tenant's following Rent payment demonstrates that the Lease does not provide for a compulsory or "automatic" offset, as Tenant spuriously alleges on appeal. See Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 77 (App. Div. 2011) (considering course of performance in construing vague or ambiguous contract provisions); Valenti v. Bassinder, A-2255-12T3, 2014 WL 861487, at *3 (N.J. Super. Ct. App. Div. Mar. 6, 2014) ("The parties to an agreement know best what they meant and their action under it is often the strongest evidence of their meaning.") (citing *Restatement (Second of Contracts § 202(4), comment g (1981)*). Clearly, Tenant never believed the Lease provided for an "automatic offset" and only raised this argument after it realized the impact of its transparent attempt to avoid paying any Rent to Landlord during the COVID-19 pandemic, which withholding of Rent caused Landlord to endure great hardship. (1T28-6 to 1T28-22).

Briefly stated, the legal fees incurred by Landlord in this action are not attributable to any action by Landlord but are the result of Tenant's steadfast refusal to pay any Rent for five (5) months followed by its intransigent litigation strategy during the Underlying Action.

D. Tenant is Not Entitled to Any Fee Award (Da1-3)

As set forth in Landlord's Initial Brief, Tenant's argument that Landlord's Fee Award should be vacated and Tenant should be awarded its

legal fees fails for three (3) separate reasons: (i) Tenant is precluded from asserting this argument because it was not raised in the Underlying Action; (ii) Tenant is judicially estopped from raising this argument because it admitted in the Underlying Action that it was required to pay Landlord's legal fees and costs due to the Events of Default; and (iii) Tenant is not entitled to legal fees under the express terms of the Lease. (Pb 52-56). Landlord respectfully refers this Court to its Initial Brief for a full recitation of these arguments. Id.

CONCLUSION

For the foregoing reasons, the Post Trial Order should be affirmed in its entirety and the Reconsideration Order should be affirmed in all aspects except for paragraph (2), which should be amended to grant Landlord the entirety of its Fee Application.

Dated: October 18, 2024

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