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BASELINE ASSOCIATES, INC.,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001940-23
Plaintiff/Appellant,	:	CIVIL ACTION
v.	:	ON APPEAL FROM ORDER OF THE COURT DATED FEBRUARY 2, 2024 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY UNDER DOCKET NUMBER BER-L-005660-23
DAVID E. KONIGSBERG, MD,	:	
Defendant/Respondent	:	SAT BELOW: HON. PETER G. GEIGER, J.S.C.

BRIEF SUBMITTED ON BEHALF OF PLAINTIFF/APPELLANT, BASELINE ASSOCIATES, INC.

Submitted by:
Randal W. Habeeb, Esq.
Attorney ID #029431982
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Date Submitted:

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PRELIMINARY STATEMENT

This case involves a single issue: whether the court below erred in ruling that there were no genuine issues of material fact in a case where Baseline Associates, Inc. (Appellant – Plaintiff below)and David E. Konigsberg, MD (Appellee and Defendant below) entered into a written lease agreement for Dr. Konigsberg's medical practice which contained two (2) five (5) year extension options (occasionally referred to herein as "options", "renewal options", "option renewals or "renewal terms") the first of which was not exercised in writing but was honored in practice (with the enhanced rent paid by Defendant in each year of the first extended term) and the second of which was also not exercised in writing but which was again honored for three (3) years (with the enhanced rent paid by Defendant) at which point Defendant decided to vacate claiming that its occupancy during the three (3) plus years of the second renewal period constituted a holdover tenancy and not a renewal by conduct.

Plaintiff maintains that the intent of the parties as reflected by conduct and communications between the parties were critical issues for which discovery, which had not yet commenced, was necessary.

PROCEDURAL HISTORY

A Complaint in which the primary claims were for breach of contract and action on a guaranty was filed on October 19, 2023 (Ja3-8). A Notice of Motion for Summary Judgment in Lieu of Filing an Answer was filed by Defendant on November 29, 2023 which included a Statement of Material Facts Not in Dispute in Support of Defendant Dr. Konigsberg's Motion for Summary Judgment, a Certification of David E. Konigsberg, MD with Exhibits attached (Ja9-56) as well as a brief and proposed form of Order (Ja57-58).

On January 8, 2024, Plaintiff filed a Counter Statement of Material Facts in Opposition to Defendant Dr. Konigsberg's Motion for Summary Judgment (Ja59-62) and a Certification of Mark Infante with attachment (Ja63-67).

On January 16, 2024, Defendant filed a Response to Plaintiff's Counter Statement of Material Facts Not in Dispute in Support of Defendant Dr. Konigsberg's Motion for Summary Judgment (Ja69-72) together with a reply Certification of David E. Konigsberg, MD with attachment (Ja73–77). Since the reply Certification of Dr. Konigsberg added additional critical facts to the action, to wit, alleged conversations between the parties containing a statement highly beneficial to Defendant's case, Plaintiff filed a letter with the Court on the following day requesting the opportunity to file a one (1) paragraph Sur-Reply Certification of Mark Infante in response thereto (Ja78–79).

The Court never responded to the letter request. Honorable Peter G. Geiger heard oral argument on February 2, 2024 and placed his ruling on the record dismissing the Complaint (T28-7 to T33-9). An Order dismissing the Complaint without prejudice was entered on that date as well (Ja1-2). This appeal follows.

STATEMENT OF FACTS

Plaintiff, Baseline Associates, Inc., owns the land and building located at 600 Godwin Avenue, Midland Park, New Jersey (hereafter the "Property"). (Paragraph 1 of Ja14; Paragraph 1 of Ja60). Dr. David E. Konigsberg, a medical doctor, entered into a commercial lease agreement with Plaintiff on or about November 22, 2010 for rental of Unit #4 at the Property for use as a medical office. (Paragraph 2 and 3 of Ja14; Paragraph 2 and 3 of Ja60). The lease was for five (5) years terminating on November 30, 2015 with renewal options for two (2) additional five (5) year terms. (Paragraph 4 of Ja14; Paragraph 4 of Ja60; Ja26 – 27). The language regarding the renewal options at Paragraph D2 on page 3 of the lease required advance certified mail notice. (Paragraph 5 of Ja14-15; Paragraph 5 of Ja60). However, the provision, set forth below, also provided for an exception for "further agreement of the parties" (Paragraph 58 of Ja14; Paragraph 5 of Ja60):

> If Tenant fails or omits to give to Landlord the written notice referred to in this Paragraph 2, it shall be deemed, without further notice and without further agreement between the parties hereto that Tenant elected

> not to exercise the option granted Tenant pursuant to this Paragraph to extend the Term of this Lease for said additional period. Time is of the essence for such notification. [Emphasis added]. (Ja26– 27; Paragraph 6 and 7 of Ja64).

Paragraph A8 of the lease contained the following language regarding the option periods:

> If tenant exercises their [sic] options there will be 3% annual increases at the start of each year of the option period. (Paragraph 8 of Ja24; Paragraph 8 of Ja64).

Defendant did not provide written notice to exercise the first option (Paragraph 6 of Ja15; Paragraph 6 of Ja60) which went into effect on December 1, 2015 (Paragraph A4 and A7 at Ja24). However, Defendant did pay the three (3%) percent increase set forth in Paragraph A8 of the lease for each month of the five (5) years during the first option period. (Paragraph 9 and 10 of Ja64–65; Paragraph 11 of Ja75). Plaintiff's understanding was that the Defendant was not a holdover tenant during the first option period (2015 – 2020) as the rent was paid and accepted in accordance with the terms of the rent option clause. (Paragraph 11 of Ja65; Paragraph 11 of Ja75).

Defendant followed the same procedure with respect to the December 1, 2020 extension option in which no written notice was provided but the additional 3% rent was paid in each month of the almost three (3) years during the second option term (Paragraphs 11 to 13 of Ja75; Paragraphs 9 to 10 and 13 of Ja64–65)

until such time as Defendant vacated without Plaintiff's consent and despite Plaintiff's entreaties to the contrary. (Paragraphs 11, 12 and 13 of Ja20; Ja48-56; Paragraph 15 of Ja65). As with the first extension option, Plaintiff's understanding was that Defendant was not a holdover tenant during the second option period as the enhanced rent was paid and accepted in accordance with the terms thereof. (Paragraphs 11 and 12 of Ja65).

Defendant provided no notification prior to or during either option term that it intended to be a holdover tenant but was providing the additional 3% for each option year as some sort of accommodation to Plaintiff (Paragraph 13 of Ja65).

Mr. Infante, the President of Plaintiff certified below that had a third party tenant approached Plaintiff and offered to pay a higher rent for Defendant's space at any time during either of Defendant's renewal terms, Plaintiff would have declined the offer based upon its understanding that Defendant had exercised its renewal options. (Paragraph 14 of Ja65).

Mr. Infante believed that Defendant had the same intent at all times relevant hereto which was confirmed in a discussion with Defendant in April 2023 during which the parties discussed Defendant's decision to vacate more than halfway through the second option term. Mr. Infante certified that in that conversation he asked Defendant how he would have felt if Plaintiff had attempted to replace him

with a higher paying tenant during the renewal term. Defendant's reply was that he would have refused to vacate.[1] (Paragraph 15 of Ja65).

Plaintiff maintains that the understanding of the parties was that both option terms were exercised based upon the conduct of the parties which constituted a "further agreement between the parties" in accordance with Paragraph 2 of the lease (top of page Ja27) and based upon caselaw on point. Importantly, Dr. Konigsberg in his reply Certification does not deny that he told Mr. Infante that he would have refused to vacate had Mark Infante asked him to do so. (Ja73-76). The absence of such a denial is critical.

However, instead of such a denial, in Paragraph 10 of Dr. Konigsberg's reply Certification he alleges as follows:

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[1] A typographical error in Paragraph 15 of the Certification of Mark Infante cites the phone call as April, 2022 instead of April 2023. This year reference error is confirmed by the fact that the discussion between the parties was about Defendant's decision to vacate which had not occurred as of April, 2022. Furthermore, this conversation between principals appears to be the same conversation that Defendant references in his Certification at Paragraph 8 of Ja74. It seems clear that the parties had one conversation sometime in April 2023 (not 2022) after Defendant's receipt of the letter from Plaintiff's counsel dated April 6, 2023 which maintains that Defendant is violating the terms of the second lease option but requests that Defendant permit showings of the space to mitigate damages. (Ja53-54). Defendant, in his Certification refers to a conversation "[i]n on or around April 2023" in which he responded to Plaintiff's request by "invit[ing] [Plaintiff] to show the Property to potential tenants at any time. (Paragraph 8 of Ja74).

> "Whenever the Infantes, or any other representative of Plaintiff would ask me to execute the Lease renewal option, I made it clear that I would not do so." (Paragraph 10 of Ja75).

If accepted as true, it is incomprehensible how such an important statement, which implies a number of such conversations between the parties, would not have been made in Defendant's initial Certification. Had same been included in Defendant's initial Certification, Mark Infante would have responded to it. As a result of that critical statement being made anew in Dr. Konigsberg's reply Certification, counsel for Plaintiff was compelled to write a letter to Judge Geiger asking for an opportunity to file a one (1) paragraph Certification in response. (Ja78-79) The Court never responded.

Plaintiff would like the opportunity to conduct discovery regarding Defendant's true intentions as of the date of commencement of the first and second extension option terms and as of the time Defendant decided to vacate the space. Plaintiff believes that testimony regarding the conduct and statements of the parties or their representatives will enable the Court to make an appropriate determination of the parties' respective states of mind concerning the two options.

LEGAL ARGUMENT

POINT 1

STANDARD OF REVIEW ON APPEAL

(Issue Not Raised Below)

The standard of review for appeals in New Jersey for most cases provides that a trial court ruling should not be disturbed absent an abuse of discretion. State v. Koedatich, 112 NJ 225, 313 (1988) certif. denied 488 U.S. 1017 (1989); Masone v. Levine, 382 NJ Super. 181, 193 (App. Div. 2005).

However, when the appeal involves the grant or denial of a motion for summary judgment, the standard is a de novo review. As the Court said in Crisitello v. St. Theresa School, 255 NJ 200, 218 (2023):

> We review the grant or denial of summary judgment de novo and apply the same legal standard as the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022). Summary judgment is appropriate "when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.' " Brill v. Guardian Life Ins. Co. of Am.,142 N.J. 520. 528-29 (quoting R. 4.46-2). Because St. Theresa's moved for summary judgment, we view the evidence in the light most favorable to Crisitello and draw all reasonable inferences in her favor. See Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165 (2021). We owe no deference to conclusions of law that flow from established facts. State v. Perini Corp., 221 N.J. 412 (2015).

See also Conforti v. County of Ocean, 255 NJ 142, 162 (2023); Sackman Enterprises, Inc. v. Mayor and Council of Belmar, 478 NJ Super. 68, 75 (App Div. 2024); Ng v. Fairleigh Dickenson University, 478 NJ Super. 41, 49 (App. Div. 2024).

The rationale for this standard is based largely on the fact that the Court's ruling below on a summary judgment motion does not involve a hearing with live testimony. As the Court stated in Cesare v. Cesare, 154 NJ 394, 411-412(1998):

> The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484(1974). Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117(1997). Because a trial court "'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33(quoting Gallo v. Gallo, 66 N.J. Super. 1, 5(App. Div. 1961)).

As will be highlighted this case cries out for live testimony about the intention of the parties when each option to renew arose and the parties continued their landlord-tenant relationship with tenant paying the enhanced rent required by the terms of each option extension set forth in the Lease.

POINT 2

THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT IN THIS MATTER IN THE COURT BELOW (T28-1 to T33-9)

A. THE SUMMARY JUDGMENT STANDARD (T28-7 to T29-20)

Summary Judgment is an extraordinary measure opposed to the policy of law that "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977) (citing Robbins v. Jersey City, 23 N.J. 220, 240-41 (1957), See also: Velantzas v. Colgate-Palmolive Co.. 109 N.J. 189, 193 (1981); Mohamed v. Iglesia Evangelicala Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). Accordingly, trial courts are admonished to grant such a motion only with extreme caution. See Devlin v. Surgent, 18 N.J. 148 (1955).

R. 4:46-2 provides that "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate issues therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Accordingly, summary judgment should only be granted when it appears there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. See R. 4:46-2.

The New Jersey Supreme Court has repeatedly held that on a motion for summary judgment the court must view the evidence presented in the light most favorable to the non-moving party and grant all the favorable inferences to the non-movant. Brill v Guardian Line Insurance Company of America, 142 N.J. 520, 535 (1995): Schelcusky v. Garjulio, 172 N.J. 185, 199-202 (2002). In determining whether a genuine issue of material fact exists, the Court "must decide whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-movant." Carmichael v. Bryan, 310 N.J. Super. 34, 47 (App. Div. 1998) (quoting Brill, 142 N.J. at 540). Accordingly, "if competent evidence, when viewed in the light most favorable to the non-movant, is sufficient to permit a rational fact finder to resolve the disputed factual issues in favor of the non-moving party," summary judgment must be denied. Taylor v. Metzger, 152 N.J. 490, 495 (1998).

On a motion for summary judgment, a judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Brill 142 N.J. at 540. A court should not pass on the veracity of matters contained in the various certifications but must only determine on such a motion whether a question of fact has been raised. First Fidelity Bank v. Southeastern Ins. Group, 253 N.J. Super. 439 (Law Div. 1991); Conrad v. Michelle

& John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007); Kopin v. Orange Products, Inc., 297 NJ. Super. 353, 366 (App. Div. 1997) ("[T]he motion judge does not make credibility determinations and must afford the opponent of the summary judgment motion all favorable inferences.")

B. SUMMARY JUDGMENT SHOULD NOT BE GRANTED ABSENT DISCOVERY IN THE PRESENT CASE (T28-1 to T33-9)

It is important to note that his motion for summary judgment is brought in lieu of an answer to the complaint. Therefore, no discovery has occurred. Indeed no discovery has occurred on crucial issues such as the intent and state of mind of the parties. Our courts have held that summary judgment is not appropriate in cases where such matters are in issue. In re: Estate of DeFrank, 433 N.J. Super 258, 266 (App. Div. 2013). See also: Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276 (1988). See also Columbia Savings and Loan v. Easterlin, 191 N.J. Super 327, 343 (Ch. Div. 1983) aff'd. 198 N.J. Super 174 (App. Div. 1985) (noting that questions of waiver and estoppel are based upon intent and therefore should not be determined by summary judgment).

C. THERE ARE CRUCIAL ISSUES OF MATERIAL FACT IN THE PRESENT MATTER (T28-1 to 5; T29-21 to T33-9)

There are issues of fact involved in this case surrounding the conduct of the parties and the intentions of the parties with respect to the exercise of options to extend the lease term by Defendant. As will be set forth in detail in POINT 3, the

conduct and past practice of the parties indicate that Defendant did not meet the formal lease requirements of the renewal provision for the exercise of either of the two (2) extended terms but complied in full with the provisions of each by paying the additional rent required during each year of each new term and for the duration thereof until Defendant prematurely vacated the property during the second extended term. Furthermore, as Defendant admitted in a discussion with the principal of Plaintiff, Defendant would have held Plaintiff to the terms of the second extension had Plaintiff sought to violate them.

POINT 3

THE CASELAW PERMITS EXERCISE OF LEASE EXTENSION BY CONDUCT (E.G. PAYMENT OF EXTENSION RENT) (T30-4 to T32-21)

With respect to decisions concerning written leases, the case law makes clear distinctions between those with and without lease renewal clauses. The cases are legion that a tenant who continues in possession and pays the same rent beyond the term of a lease without a renewal clause becomes a month to month tenant. See, e.g. Heyman v. Bishop, 15 N.J. Super. 266, 269 (App. Div. 1951) ("the tenant's holding over with the consent of landlord is presumed to be upon the same terms and conditions as the original lease"); Andreula v. Slovak Gymnastic Union Sokol Assembly No. 223, 140 N.J. Eq. 171 (1947) (continuation of possession

beyond the lease terms in absence of a lease renewal provision becomes a holdover of month to month tenant pursuant to N.J.S.A. 46:8-10).

There are, however, a handful of cases that contain facts similar to those in the case at hand in which a lease containing an option to renew is not exercised in writing in accordance with the language of the option clause but is exercised by the actions of the parties. The case of Garfield Partners 2, LLC v. Washing Town, LLC, N.J. Super. (App. Div.) 2023 WL3807163 (copy attached at80-90) is instructive. In that case, the written lease contained a "time of the essence" renewal clause. The option clause contained a time deadline (six (6) months) for notice of renewal and also required that the notice be sent by certified mail, return receipt requested. Id. at p. 2-3.

The option was never exercised orally or in writing. However, as in the present case, the tenant Defendant paid the rent set forth in the "unexercised" renewal term set forth in the lease. Plaintiff accepted the rent for seven (7) months prior to sending a notice to quit. Plaintiff contended that paying the increased renewal rent did not comply with the clear terms of the lease and was ineffective. Defendant claimed that the acceptance of the enhanced renewal rent demonstrated an intent to accept the renewal since a holdover tenant would have merely paid the prior rent, not the enhanced rent. Id. at p. 4. The trial court agreed and found in favor of Defendant.

First, the court looked to N.J.S.A. 46:8-10 which provides as follows:

> Whenever a tenant whose original term of leasing shall be for a period of one month or longer shall hold over or remain in possession of the demised premises beyond the term of the letting, the tenancy created by or resulting from acceptance of rent by the landlord shall be a tenancy from month to month in the absence of any agreement to the contrary.

The court then considered whether the actions of the parties constituted a renewal. Id. at p. 5. The court stated:

> As was explained by our Supreme Court more than seventy years ago, "[a] waiver or novation may be made by oral agreement of the parties." Van Dusen Aircraft Supplies v. Terminal Const. Corp., 3 N.J. 321, 326 (1949). Thus, "[n]o matter how stringently [a contractual clause is] worded, it is always open for the parties to agree orally or otherwise upon proper consideration, that they shall be partially or entirely disregarded[,] and another arrangement substituted." Ibid (quoting Headley v. Cavileer, 82 N.J.L. 635, 638 (E. & A. 1912)).

The court ultimately concluded that the actions of the parties warranted a "relaxation of the formal renewal requirements." Id. at p. 6.

A number of other cases are in accord. In Dries v. Trenton Oil Co., Inc., 17 N.J. Super. 591 (App. Div. 1952), the court overturned a lower court directed verdict in favor of Plaintiff landlord to eject Defendant tenant based upon tenant's failure to exercise an option to renew in accordance with the terms thereof. The lower court excluded testimony from Defendant regarding the oral waiver by

Plaintiff of the formal exercise of the option in which tenant had agreed to pay the enhanced renewal rent.

The court held:

> The requirement in the primary lease for written notice of intention to renew could be waived and such a waiver could be effected either by parol agreement or by the actions of the parties. Headley v Cavileer, 82 N.J.L. 635 (E. & A.1912); Goldstein v Barclay Amusement Corp., 123 N.J.L. 166 (Sup.Ct.1939); Van Dusen Aircraft Supplies, Inc. v. Terminal Const. Corp., 3 N.J. 321 (1949)

See also: Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409 (Ch. Div. 1971), (permitting exercise of an option where failure to provide notice under the lease was due to the "honest mistake of fact" by tenant); Wallworth v. Johnson, 25 N.J. Misc. 449 (Sup. Ct. 1947) (payment and acceptance of rent beyond the term where the lease contained a two (2) year renewal clause at a rent "agreeable to both the party of the first part and the party of the second part" constituted exercise of the renewal clause).

The above cases all involve facts much closer to the facts in the present case and all allow for extrinsic evidence including the conduct of the parties and parol evidence to vary the otherwise clear language in an unexercised written lease option to renew. Indeed, a careful review of New Jersey caselaw revealed no case to the contrary when dealing with an integrated lease document with a renewal clause. In the present action it is clear that Defendant paid the additional rent required by the lease only in the event of a renewal. Defendant did it for both five

(5) year renewals and for each year during each renewal period. That rent was accepted by Plaintiff. Had Defendant wished to remain a holdover tenant, Defendant should have continued to pay the rent required under the prior lease year.

Plaintiff's position is that Defendant's conduct and undisputed statement that he would not have vacated the Property had Plaintiff attempted to terminate the Lease during the second renewal option term, on its face, indicated Plaintiff's clear understanding that the parties were bound by the terms of the second five (5) year extension. In fact, at best it appears that Defendant intended to have it both ways - a renewal of the second option term if he decided at any time that he wanted to have an uninterrupted tenancy for the second option term or, if needed, a month to month holdover tenancy if he decided to leave mid-term. Only discovery will assist in determining his true intentions.

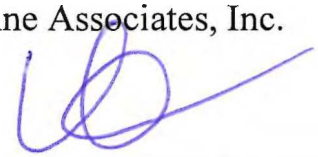
By failing to permit discovery as to the parties' state of mind including estoppel due to Plaintiff's justifiable reliance on the silence of Defendant in the face of conduct consistent with renewal, the Court below has wrongfully deprived Plaintiff of the opportunity required by cases such as In re: Estate of DeFrank, supra. This is especially so in a ruling on summary judgment in which all inferences must be made in favor of the non-movant.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests entry of an Order reversing the Order of the Court below and returning the case to the trial court for further proceedings.

Respectfully Submitted,

PLESS & HABEEB
Attorneys for Plaintiff/Appellant
Baseline Associates, Inc.



By: Randal W. Habeeb, Esq.

Dated: June 19, 2024

BASELINE ASSOCIATES, INC., Plaintiff/Appellant, v. DAVID E. KONIGSBERG, MD, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001940-23 **CIVIL ACTION** On Appeal From Order of the Court Dated February 2, 2024 in the Superior Court of New Jersey, Law Division, Bergen County Under Docket No.: BER-L-005660-23 Sat Below: Hon. Peter G. Geiger, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT, DAVID E. KONIGSBERG, MD

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PRELIMINARY STATEMENT

Plaintiff—Appellant, Baseline Associates Inc. ("Baseline") alleges in this action that Defendant, David E. Konigsberg, MD ("Dr. Konigsberg") breached a November 22, 2010 lease ("Lease") for a commercial office space he rented from Baseline. Baseline alleges that Dr. Konigsberg exercised renewal options in the lease, and breached the lease by vacating the leased premises before the end of the extended term.

However, there is no proof that Dr. Konigsberg ever exercised the renewal options. And the Lease specifically requires that any extension be in writing and delivered by a particular date. Paragraph 2 of the Lease requires that Dr. Konigsberg provide written notice of his request to extend the term of the Lease to the Landlord not later than six months prior to the expiration of the original term of the lease. (Ja 26 at ¶2).

The unambiguous renewal option provision within the lease further provides as follows:

> If Tenant fails or omits to give to Landlord the written notice referred to in this Paragraph 2, it shall be deemed, without further notice and without further agreement between the parties hereto that Tenant elected not to exercise the option granted Tenant pursuant to this Paragraph to extend the term of this Lease for said additional period. **Time is of the essence for such notification.**

(Ja 26-27 at ¶2).

Indeed, while the Lease provides a renewal option, Dr. Konigsberg never exercised the renewal option. Instead, Dr. Konigsberg remained on the property after the termination of the Lease as a month-to-month holdover tenant and provided Baseline with more than adequate notice of his intent to vacate the premises.

Based upon the unambiguous terms of the Lease and the lack of any proof that Dr. Konigsberg exercised the two renewal options, the trial court granted Dr. Konigsberg's motion for summary judgment and dismissed Baseline's claims.

Dismissal was appropriate as it is undisputed that the Lease requires an exercise of the lease renewal option to be in writing, and Dr. Konigsberg never provided any such writing evidencing his intent to exercise the lease renewal option. It is also undisputed that Dr. Konigsberg provided adequate notice to Baseline and vacated the leased premises on or about October 31, 2023. Discovery will not reveal anything inconsistent with the facts before the trial court.

Baseline's position that Dr. Konigsberg's conduct amounted to a "waiver" of the Lease's written notice requirement for the exercise of a renewal option lacks any basis in fact, and is simply an attempt to have the Court rewrite the clear language of the Lease. Not only does the case law cited by Baseline fail to support its position, but the undisputed facts clearly show that Dr. Konigsberg did not exercise the renewal option. Paying rent at a higher rate as a month-to-month holdover tenant at

Baseline's request does not constitute any waiver of the Lease's clear requirement for written notice to exercise the renewal option under the Lease.

The Court should affirm the decision of the trial court granting Dr. Konigsberg's motion for summary judgment and dismissing Baseline's Complaint.

STATEMENT OF PROCEDURAL HISTORY

On October 19, 2023, Baseline filed the Complaint against Dr. Konigsberg. (Ja3-8). On November 29, 2023, Dr. Konigsberg filed a Motion for Summary Judgment in lieu of an Answer pursuant to R. 4:46 (Ja 9-12), which included a Statement of Material Facts Not in Dispute (Ja 13-17), Certification of Dr. David E. Konigsberg (Ja 18-22) with exhibits thereto (Ja 23-47, Ja 48-49, Ja 50-51, Ja 52-54, Ja 55-56), proposed Form of Order (Ja 57-58) and a supporting brief.

On January 8, 2024, Baseline filed a Counter Statement of Material Facts (Ja 59-62), Certification of Mark Infante (Ja 63-66) with an exhibit thereto (Ja 67), a proposed Form of Order (Ja 68) and a brief in opposition to Dr. Konigsberg's motion.

On January 16, 2024, Dr. Konigsberg filed his Response to Plaintiff's Counter Statement of Material Facts (Ja 69-72), a Reply Certification of Dr. Konigsberg (Ja 73-76) attaching an exhibit (Ja 77), and a reply brief.[1]

[1] Dr. Konigsberg's reply certification was nearly identical to his Certification in Support of his Motion for Summary Judgment, it included some additional context to Dr. Konigsberg's conversations with the representative of Baseline wherein Dr.

On February 2, 2024, the Hon. Peter G. Geiger, J.S.C. heard oral argument before dismissing Baseline's Complaint against Dr. Konigsberg and placing the statement of reasons on the record. (See Ja 1-2; T28-7 to T33-9). Judge Geiger noted that the clear language of the Lease requires the lease renewal option to be in writing to be effective, that Dr. Konigsberg became a month-to-month tenant, that Dr. Konigsberg advised Baseline of his intention to vacate the leased premises, and that discovery regarding the intent of Dr. Konigsberg is not necessary and has no bearing on this case. (See Ja 1-2; T28-7 to T33-9).

COUNTER-STATEMENT OF FACTS

Baseline owns the property located at located at 600 Godwin Avenue, Unit #4, Midland Park, New Jersey 07432 (the "Property"). (Ja 73 at ¶2). On or about November 22, 2010, Dr. Konigsberg and Baseline entered into a commercial lease agreement for the rental of the property. (Ja 74 at ¶3, Exhibit A). The initial lease term was for five years with a termination date of November 30, 2015. See id. Dr. Konigsberg used the property to operate his medical practice. (Ja 73 at ¶2).

Paragraph 2 of the General Terms and Conditions Section of the Lease on pages 3-4 provided Dr. Konigsberg with a renewal option to extend the term of the Lease for two additional periods of five years. (Ja 26). To exercise the renewal

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Konigsberg reiterated that he had never intended to exercise the Lease Renewal Option and that Baseline was notified of Dr. Konigsberg's intent to vacate the leased premises in the fall of 2023. (Compare Ja 77 with Ja 18-22).

option, the Lease required Dr. Konigsberg, as tenant, to provide written notice (via certified mail, return receipt requested) to Plaintiff of the intent to exercise the renewal option no earlier than twelve months and no later than six months prior to the expiration of the original term of the Lease (November 15, 2023). (Ja 26-27).

Moreover, the renewal option of the Lease was very specific that if Tenant failed to give Landlord written notice as required, that it would be deemed that Tenant did not exercise the renewal option. (Ja 26-27). The unambiguous renewal option provision provides:

> If Tenant fails or omits to give to Landlord the written notice referred to in this Paragraph 2, it shall be deemed, without further notice and without further agreement between the parties hereto that Tenant elected not to exercise the option granted [to] Tenant pursuant to this Paragraph to extend the term of this Lease for said additional period. Time is of the essence for such notification.

(Ja 26-27).

It is undisputed that Dr. Konigsberg never sent written notice exercising the renewal option. (Ja 74-75 at ¶¶ 6, 7,10). In the response to Dr. Konigsberg's Statement of Undisputed Facts, Baseline "Admitted that (Dr. Konigsberg) never provided written notice to plaintiff evidencing his intent to exercise the renewal option in the Lease." (Ja 60).

Lastly, the Lease specifically requires that any change, modification or amendment to the Lease is ineffective unless the agreement is in writing and signed by the party against whom enforcement of the modification is sought. (Ja 40, ¶32)

As a result, the renewal options were not exercised and the Lease terminated at the end of the original lease term on November 30, 2015, at which time Dr. Konigsberg became a month-to-month tenant. (Ja 26-27, ¶2).

In or around April 2023, it is undisputed that Dr. Konigsberg had telephone conversations with Mark Infante, a representative of Baseline, and provided notice that Dr. Konigsberg planned to vacate the premises approximately a year before he vacated. In April of 2023, Dr. Konigsberg specifically advised Mr. Infante of his intent to vacate the property in October 2023 (thereby providing 6 months' notice) and that Baseline could show the property to other potential tenants. (Ja 74 at ¶7-10; Ja 60-61, ¶7-10).

While Dr. Konigsberg was a month-to-month tenant, he would pay rent at the rate required by the Lease. (Ja 75 at ¶11, 12). Dr. Konigsberg understood his payment of rent as a condition of his tenancy, as a month-to-month tenant or otherwise, and never did Dr. Konigsberg indicate his payment of rent was to be construed as his intent to exercise the lease renewal option. (Ja 75 at ¶13).

While Baseline asserts on appeal that discovery be conducted regarding the "intent of Dr. Konigsberg" as it relates to his exercise of the renewal option, the record is clear that Dr. Konigsberg never intended to exercise the lease renewal option and never provided Baseline with a signed writing evidencing his intent to exercise the lease renewal option, as clearly required by the Lease. No amount of

discovery will reveal a signed notice given by Dr. Konigsberg exercising the lease renewal option.

Summary Judgment was appropriate, and the trial court's decision should be affirmed.

LEGAL ARGUMENT

POINT I

DR. KONIGSBERG SATISFIED THE SUMMARY JUDGMENT STANDARD AS IT IS UNDISPUTED THAT DR. KONIGSBERG DID NOT PROVIDE BASELINE WITH WRITTEN NOTICE TO RENEW THE LEASE. (T28-7 to T32-3).

The New Jersey Supreme Court has stated that a party may only defeat a motion for summary judgment if it raises by "competent evidential materials" a genuine issue of material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Only "genuine" issues of material fact may preclude summary judgment. Id. at 530. Disputed factual issues of an "insubstantial nature" do not. Id. A court ruling on a motion for summary judgment must analyze whether "the evidence 'is so one-sided that one party must prevail as a matter of law.'" Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). In making this evaluation, the court should weigh the evidential materials presented to determine if there is a genuine issue for trial. Id. If the evidence reveals that the

movant should prevail, a "trial court should not hesitate to grant summary judgment." Id.

Application of R. 4:46-2 and the Brill standard to the material facts of this action establishes that there are no genuine issues of any material facts in dispute, and the Lease is clear and unambiguous. Baseline fails to present any genuine issue of material fact – indeed, they all appear to be undisputed. Baseline argues that discovery is necessary in order to determine the intent and state of mind of the parties. No amount of discovery will reveal a signed writing evidencing Dr. Konigsberg's intent to exercise the renewal option, as specifically required by the Lease. Payment of rent, at any rate, cannot replace the Lease's requirement of a signed writing to invoke the lease renewal option. Time was made "of the essence" for the receipt of a written notice, and the Lease is clear that absent such written notice, the Lease term would not be extended.

Baseline ignores the clear language of the Lease and relies on questionable interpretation of several unpublished cases in an attempt to establish that Dr. Konigsberg, despite not having provided any notice, written or otherwise, of his intent to renew the Lease, somehow waived his right to rely upon the Lease's requirement of a written notification of the Lease renewal merely though his payment of rent.

Baseline admitted that "defendant never provided written notice to plaintiff evidencing his intent to exercise the renewal option in the Lease." See Ja 59-62 at ¶6. Baseline further admitted that Dr. Konigsberg's office provided Plaintiff with notice in November 2022 that they were considering vacating the leased premises in search of a larger space, and specific notice in April of 2023 that Dr. Konigsberg would be vacating the space in October 2023. See id. at ¶7-10.

No amount of discovery will show that Dr. Konigsberg sent the required written notice via certified mail, return receipt requested, and the Lease is clear that absent such written notice, the renewal periods are deemed not to be exercised. While it is undisputed that Dr. Konigsberg remained on the property beyond the initial lease termination date, that does not establish that any renewal option was exercised. After termination of the Lease, Dr. Konigsberg remained as a holdover month-to-month tenant as a matter of law, and he provided sufficient notice of his intent to vacate the property, and then did so vacate.

Based upon the undisputed facts and the clear language of the Lease, the trial court decision to grant Dr. Konigsberg's Motion for Summary Judgment should be affirmed.

POINT II

DR. KONIGSBERG DID NOT EXERCISE THE LEASE RENEWAL OPTION AND DID NOT WAIVE THE LEASE'S SPECIFIC REQUIREMENT OF A SIGNED WRITING TO EXERCISE THE RENEWAL OPTION. (T28-7 to T33-9).

The undisputed facts confirm that Dr. Konigsberg entered into the commercial Lease, but never exercised the lease renewal and instead became a holdover month-to-month tenant. Indeed, Baseline admitted that there was no written notice by Dr. Konigsberg exercising the renewal option. See Ja 59-62 at ¶6 (emphasis added).

The mere fact that Dr. Konigsberg remained on the property as a holdover month-to-month tenant does not support any finding that he exercised the renewal option under the plain language of the Lease.

Under New Jersey law, a commercial lease is governed by traditional contract principles. See Ringwood Associates v. Jack's of Rte. 23, 166 N.J. Super. 36 (App. Div. 1979). It is also a fundamental proposition that the function of a court is to enforce a lease as it is written, absent some superior contravening public policy. Community Realty Management, Inc. for Wrightstown Arms Apartments v. Harris, 155 N.J. 212, 234 (1998); Marini v. Ireland, 56 N.J. 130, 143 (1970); Gamble v. Connolly, 399 N.J. Super. 130 (App. Div. 2007); Mury v. Tublitz, 151 N.J. Super, 39, 44 (App. Div. 1977).

"Where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales and Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487,493 (App. Div. 1991)(citations omitted). See also County of Morris v. Fauver, 153 N.J. 80, 103 (1998); City of Orange Tp. v. Empire Mortgage Services, Inc., 341 N.J. Super. 216, 224 (App. Div. 2001); Atlantic City Racing Assn. v. Sonic Financial Corp., 90 F.Supp.2d 497, 506 (D.N.J. 2000); and Assisted Living Assocs. of Moorestown, LLP v. Moorestown, 31 F.Supp.2d 389, 398 (D.N.J. 1998).

Here, the terms of the Lease concerning the exercise of the renewal option are explicit and clear. The Lease provides at Paragraph 2:

> Provided this Lease is in full force and effect, the Tenant is not in default of any Lease provision, and has not been terminated pursuant to the provisions hereof, then Tenant may at Tenant's option, extend the term of the Lease for two (2) additional periods of five (5) years, commencing on the date immediately following the expiration of the original term of this Lease, such option [is] to be exercised by Tenant's giving [of] written notice thereof to Landlord not earlier than twelve (12) months but no later than six (6) months prior to the expiration of the original term of the Lease.
>
> Upon the giving by Tenant to Landlord of written notice of the exercise of the five (5) year option by certified mail, return receipt requested, and the compliance by the Tenant with the foregoing provisions of this Paragraph, this Lease shall be deemed to be automatically extended with the same force and effect as if the original term provided therein had commenced on the Commencement Date and to end at midnight of the day immediately preceding the tenth (10th) anniversary of the Commencement Date thereafter upon all the covenants, agreements, terms, provisions and conditions set forth in this Lease except for such

> covenants, agreements, terms, provisions and conditions as shall be inapplicable or irrelevant to or during said extended term.
>
> If Tenant fails or omits to give to Landlord the written notice referred to in this Paragraph 2, it shall be deemed, without further notice and without further agreement between the parties hereto that Tenant elected not to exercise the option granted Tenant pursuant to this Paragraph to extend the term of this Lease for said additional period. Time is of the essence for such notification.

(Ja 26-27).

It is undisputed that Dr. Konigsberg never provided written notice of the exercise of the renewal options and, as a result, he became a month-to-month tenant on December 1, 2015 following the expiration of the original Lease term on November 30, 2015. To exercise the renewal option, Dr. Konigsberg was required to provide notice in a written form.

"It is well-settled law in New Jersey that when a tenant continues to occupy a premises after the termination of a lease, his status becomes that of a month-to-month holdover tenant." Newark Park Plaza Associates, Ltd. v. City of Newark, 227 N.J. Super. 496 (Law. Div. 1987) (citing N.J.S.A. 46:8–10; S.D.G. v. Inventory Control Co., 178 N.J. Super. 411, 414 (App. Div. 1981)). Generally, "the function of a court is to enforce a lease as it is written, absent some superior contrary public policy." Fargo Realty v. Harris, 173 N.J. Super. 262, 265–266, (App. Div. 1980) (citing Marini v. Ireland, 56 N.J. 130, 143 (1970)); Mury v. Tublitz, 151 N.J. Super. 39, 44 (App. Div. 1977).

Additionally, at Section 32, the Lease states:

> **The receipt by Landlord of Rent with knowledge of the breach of any covenant of this Lease shall not be deemed a waiver of such breach.** No provision of this Lease shall be deemed to have been waived by Landlord, unless such waiver be in writing signed by Landlord. No payment by Tenant or receipt by Landlord of a lesser amount than the Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any check nor any letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such Rent or pursue any other remedy in this Lease provided**.**

(Ja 39-40) (emphasis added).

Section 32 shows that the payment of rent by Dr. Konigsberg at a different amount than required by the Lease does not constitute a waiver by Landlord. In other words, the acceptance of rent in an amount greater than required by the Lease would not constitute a waiver by Plaintiff of the requirement for Dr. Konigsberg's written notice of his intent to exercise the renewal option. To hold that Dr. Konigsberg's payment of a higher rate of rent than that required during the initial term constitutes a waiver of the requirement for a signed writing exercising the renewal option, would be contrary to this principle in Section 32 and turn the rest of the Lease terms on its head, and render them meaningless. "A contract should not be interpreted to render one of its terms meaningless." Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (internal quotation and citation omitted).

Here, it is clear that the Lease terminated as a result of the renewal option not being exercised. Baseline chose not to evict Dr. Konigsberg upon termination, and instead accepted the rent payments from Dr. Konigsberg until he vacated the property in October 2023. Dr. Konigsberg never delivered written notice of his intent to exercise the Lease renewal option. Instead, Dr. Konigsberg remained in the leased premises as a holdover month-to-month tenant, provided adequate notice to Baseline of when he would be vacating the Property, and he is not liable for any rent payments after he vacated the property at the end of October 2023. Dr. Konigsberg did not breach any portion of the Lease.

Baseline relies upon Garfield Partners 2, LLC v. Washing Town, LLC, 2023 WL3807163 (App. Div. June 5, 2023) (attached at Ja 80-90). However, that case is inapposite as the Garfield court based its decision not to evict the tenant in that case and found an agreement to extend the term based upon "special circumstances," namely that the tenant had made substantial improvements to the Property and written email exchanges by the parties. No such special circumstances or email exchanges exist here. Importantly, the Garfield court stressed that:

> Whenever a tenant whose original term of leasing shall be for a period of one month or longer shall hold over or remain in possession of the demised premises beyond the term of the letting, the tenancy created by or resulting from acceptance of rent by the landlord shall be a tenancy from month to month in the absence of any agreement to the contrary.

[Id. at *4 (analyzing N.J.S.A. 46:8-10)].

The other cases relied upon by Plaintiff similarly do not support the renewal of the Lease. In Dries v. Trenton Oil Co., Inc., 17 N.J. Super. 591 (App. Div. 1952), the Appellate Division reversed the decision of the trial court to evict the tenant on the grounds that the undisputed testimony at trial demonstrated a verbal agreement between the landlord and the tenant to renew the lease prior to expiration of the 60-day notice requirement there. Here, there was no evidence submitted in opposition to the motion that any such agreement was made here.

Likewise, in Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409 (Ch. 1971), the Court excused a one-month delay in sending a notice to renew a lease. The notice was given by the tenant to the landlord 5 months prior to the end of the term of the lease, instead of prior to 6 months, and there was no prejudice demonstrated by the landlord.

All of these cases stand for the proposition that a court can relieve the tenant of the harsh consequences of their failure to timely send notice seeking to exercise an option to extend a lease on equitable principles or special circumstances. There are no equitable principles or special circumstances at the case at bar.

There being no facts in dispute, and given the clear unambiguous language of the Lease, the trial court's Order granting Dr. Konigsberg's Motion for Summary Judgment should be affirmed.

CONCLUSION

For the foregoing reasons, Dr. Konigsberg respectfully requests that the trial court's Order granting Dr. Konigsberg's Motion for Summary Judgment dismissing Baseline's Complaint be affirmed.

Respectfully submitted,

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Attorneys for Defendant/Respondent,
David E. Konigsberg, MD

By: */s/Darren C. Barreiro*_____
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BASELINE ASSOCIATES, INC.,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001940-23
Plaintiff/Appellant,	:	CIVIL ACTION
v.	:	ON APPEAL FROM ORDER OF THE COURT DATED FEBRUARY 2, 2024 IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY UNDER DOCKET NUMBER BER-L-005660-23
DAVID E. KONIGSBERG, MD,	:	
Defendant/Respondent	:	SAT BELOW: HON. PETER G. GEIGER, J.S.C.

REPLY BRIEF SUBMITTED ON BEHALF OF PLAINTIFF/APPELLANT, BASELINE ASSOCIATES, INC.

Submitted by:
Randal W. Habeeb, Esq.
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Date Submitted: August 22, 2024

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PRELIMINARY STATEMENT

The dispute in this case resolves mainly around one (1) issue: Did the court below err in finding no material issue of fact with respect to the renewal of a written commercial lease despite the following undisputed facts below:

Tenant, David E. Konigsberg, MD (Appellee-Defendant below) never exercised the second five (5) year renewal option in writing but paid to Landlord, Baseline Associates, Inc. (Appellant-Plaintiff below) the enhanced rent called for in the lease for the five (5) year second renewal term for approximately three (3) of those years. Defendant had renewed the first five (5) year option term in the same manner.

In a conversation between the parties in April 2023 (during the disputed second renewal term) Defendant admitted to Plaintiff that he would not have vacated had the roles been reversed with Plaintiff asking Defendant to vacate during the second renewal term.

Plaintiff maintains that the actions of the parties consistent with the past practice of renewal between them as well as the understanding of the parties with respect thereto as confirmed by Defendant in the April 2023 demonstrate that further discovery is required for the Court below to reach any conclusion regarding whether or not a renewal actually occurred. Therefore, Plaintiff maintains that the court below erred in disallowing any discovery on this issue.

STATEMENT OF FACTS

Plaintiff refers to and incorporates herein as if set forth at length the Statement of Facts submitted in its initial Brief. There are, however, some "facts" alleged by Defendant in its Opposition Brief (hereafter the "Opposition") that require a response.

For example, on page 5 of Defendant's Opposition, Defendant acknowledges the existence of language of the Lease which states that Tenant's failure to give written notice of renewal "shall be deemed, without further notice and without further agreement between the parties hereto that Tenant elected not to exercise the option..." (Ja 26-27). After this recitation, Defendant goes on to state that since written notice was not provided, there was conclusively no renewal. Defendant never addresses the elephant in the room, that is the state of mind of the parties at the time of renewal in light of the prior conduct of the parties during the first renewal and the parties' state of mind with respect to the second renewal as evidenced by a conversation between the parties in which Defendant maintained that he had the right to maintain occupancy had Plaintiff sought eviction during the second renewal term.

Indeed, Plaintiff submits that the above undisputed facts are critical to understanding the intent of the parties at the time of the disputed second renewal on November 30, 2020.

At page 5 of the Opposition, Defendant maintains that yet another provision of the lease "specifically requires that any change, modification or amendment to the Lease is ineffective unless the agreement is in writing and signed by the party against whom enforcement of the modification is sought" (JA 40, ¶32). Presumably, Defendant wants the Court to believe that the principles of a joint waiver and estoppel cannot constitute a "further agreement of the parties" which is, in fact, expressly permitted in the lease at Ja 26 - Ja 27.

In fact, Defendant's reference to Paragraph 32 of the lease is misplaced as that provision refers only to protection of Landlord's rights with respect to such matters as Tenant's violation of the lease or Landlord's acceptance of late or partial rent at a time when the Landlord knows that Tenant is in default. The provision reads in full as follows:

> 32. SURRENDER, WAIVER.
>
> No agreement to accept a surrender of the Demised Premises shall be valid unless in writing signed by Landlord. The delivery of keys to any employee of Landlord or of Landlord's agents shall not operate as a termination of the Lease or a surrender of the Premises. The failure of Landlord to seek redress for violation of, or to insist upon the strict performance of any covenant or condition or this Lease, or of any rule or regulation, shall not prevent a subsequent act which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Landlord of Rent with knowledge of the breach of any covenant of this Lease shall not be deemed a waiver of such breach. No provision of this Lease shall be deemed to have been waived by Landlord, unless such waiver be in writing signed by Landlord. No payment by Tenant or receipt by Landlord of a lesser amount than the Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any check nor any letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the

> balance of such Rent or pursue any other remedy in this Lease provided. This Lease contains the entire agreement between the parties, and any agreement hereafter made shall be ineffective to change, modify, or discharge it in whole or in part, unless such agreement is in writing and signed by the party against whom enforcement of the change modification or discharge is sought.
>
> (Ja 39-40)

In short, Defendant has not provided the Court with any "facts" that should lead the Court to find that the lease between the parties required written notice of renewal and conclusively prohibited a "further agreement between the parties" with respect thereto.

LEGAL ARGUMENT

POINT 1

THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT IN THIS MATTER IN THE COURT BELOW (T28-1 to T33-9)

By completely ignoring the facts highlighted in the Statement of Facts and relying solely on the absence of written notice of renewal to support its position, Defendant's Opposition presents no authority that requires a reply. Therefore, Plaintiff relies upon POINT 2 in its initial Brief.

POINT 2

THE CASELAW PERMITS EXERCISE OF LEASE EXTENSION BY CONDUCT (E.G. PAYMENT OF ENHANCED RENT) (T3-4 to T32-21)

In POINT 3 of Plaintiff's Initial Brief, numerous cases are cited to support the proposition that payment of enhanced rent called for in a lease renewal provision may constitute an effective renewal even in the face of a strict requirement of a writing therefore. See Garfield Partners 2, LLC v. Washing Town, LLC, N.J. Super. (App. Div.) 2003 WL3807163; Dries v. Trenton Oil Co., Inc., 17 N.J. Super. 591 (App. Div. 1952); Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409 (Ch. Div. 1971); Wallworth v. Johnson, 25 N.J. Misc. 449 (Sup. Ct. 1947). Defendant's Opposition maintains that the facts in these cases are distinguishable from the facts presently before this Court.

For example, Defendant maintains that there were "special circumstances" in Garfield, supra that did not exist in the case sub judice. This conclusion fails to recognize that the Garfield Court's frame of reference for the "special circumstances" was not a reference to alleged improvements made by the Tenant, but to the "special circumstances" of the emails between the parties and the acceptance of enhanced rent during the renewal term. The Court's full quote regarding "special circumstances" is set forth below:

> As was explained by our Supreme Court more than seventy years ago. "[a] waiver or novation may be made by oral agreement of the parties". Van Dusen Aircraft Supplies v. Terminal Constr. Corp., 3 N.J. 321, 326 (1949). Thus, "[n]o matter how stringently [a contractual clause is] worded, it is always open for the parties to agree orally or otherwise upon proper consideration, that they shall be partially or entirely disregarded[,] and another arrangement substituted." Ibid. (quoting Headley v. Cavileer, 82 N.J.L. 635 (E. & A. 1912)).

> Despite the renewal option provision being clear and unambiguous, defendant did not follow it. Yet, the prior and current landlords accepted rent payments at the higher renewal rate for a year before the eviction action was commenced without obtaining an estoppel certificate from defendant. These "special circumstances" warrant relaxation of the formal renewal requirements. See Sosanie v. Pernetti Holding Corp., 115 N J Super 409, 414 (Ch. Div. 1971) (explaining that the general contractual rule that time is of the essence is modified in regard to renewal options of a lease "so that failure to give timely notice may be relieved ... where there are ... special circumstances which warrant a court of equity to grant relief against the consequences of the [tenant's] failure to notify the lessor within the stipulated time or in the specific form or manner prescribed"). [Emphasis added]
>
> Id. @ p. 5-6

Defendant attempts to distinguish the facts of Dries, supra because the waiver involved a verbal agreement which does not exist in the present case, this despite the court's ruling in that case that "a waiver could be effectuated either by parole agreement or by action of the parties" Id. at 596. In the present case, the actions of the parties and subsequent oral confirmation constituted a waiver.

With respect to Sosanie, supra, Defendant maintains that the court relied upon the fact that there was no prejudice demonstrated by landlord in the court's ruling. While Plaintiff does not agree that the lack of prejudice to the landlord in Sosanie was a critical aspect of the case, the court should know that any prejudice in the within case was only to Plaintiff and was caused by the insistence by Tenant on vacating no matter what the facts were and no matter the Landlord's position with respect to same. I draw the court's attention to the Certification of the parties below and their respective parties Statement of Material Facts Not In Dispute. In

that exchange at Paragraphs 7-9 of Ja15-Ja16 and Paragraphs 7-9 of Ja60 to Ja61, the parties agree that in a November 23, 2023 email from the office of Defendant to a principal of Plaintiff, Defendant informed Plaintiff that he was considering moving out of the property within the next six (6) months as he had outgrown the space. Within one (1) week thereafter, on November 29, 2022, Plaintiff responded in an email that the Lease did not expire until November, 2025 and that an abandonment of the property would constitute a breach of Lease. On April 16, 2023, Plaintiff reminded Defendant of its position that the Lease did not terminate until November 30, 2025 and an abandonment prior thereto would be a breach. Nevertheless, Defendant vacated the property on October 31, 2023 (Paragraph 16 of Ja17).[1]

As for the cases cited by Defendant in his Opposition, none of them resemble the facts and issues in this case. Indeed, although the cases stand for indisputable legal principles, all of them are inapposite. They are:

Ringwood Associates v. Jack's of Rte 23, 166 N.J. Super. 36 (App. Div. 1979) (tenant permitted to vacate premises before end of lease due to landlord's breach); Community Realty Management, Inc. for Wrightstown Arms Apartments v. Harris, 155 N.J. 212, 234 (1998) (court addressed issues relating to consent judgment for possession); Marini v. Ireland, 56 N.J. 130, 143 (1970) (court

[1] Plaintiff did not deny the date of vacation. (Paragraph 16 at Ja61).

addressed habitability issues as defense for eviction order); Gamble v. Connolly, 399 N.J. Super. 130 (App. Div. 2007) (residential tenancy dispute in connection with return of security deposit in which the parties agreed that tenant was in "hold over" status; Mury v. Tublitz, 151 N.J. Super. 39, 44 (App. Div. 1977) (residential security deposit dispute); Karls Sales and Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div. 1991); County of Morris v. Fauver, 153 N.J. 80, 103 (1998) (state prison contract); City of Orange Tp. v. Empire Mortgage Services, Inc., 341 N.J. Super. 216, 224 (App. Div. 2001) (mortgage interest dispute); Atlantic City Racing Assn. v. Sonic Financial Corp., 90 F. Supp.2d 497, 506 (D.N.J. 2000) (breach of contract alleged by vendor of prospective racetrack purchaser); Assisted Living Assocs. of Moorestown, LLP v. Moorestown, 31 F. Supp.2d 389, 398 (D.N.J. 1998) (alleged violation of Fair Housing Act); Newark Park Plaza Associates, Ltd. v. City of Newark, 227 N.J. Super. 496 (Law. Div. 1987) (where tenant held over in the absence of an option to extend and refused to pay portion of real estate taxes as set forth in lease); Fargo Realty v. Harris, 173 N.J. Super. 262, 265-266 (App. Div. 1980) (residential eviction in nonpayment case); Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (suit for attorneys' fees).

Based upon the above, it is respectfully requested that the Count not seek guidance from the cases cited by Defendant in its Opposition and instead rely upon the cases cited in in Plaintiff's Initial Brief.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests entry of an Order reversing the Order of the Court below and returning the case to the trial court for further proceedings.

Respectfully Submitted,

PLESS & HABEEB
Attorneys for Appellant/Plaintiff
Baseline Associates, Inc.

By: Randal W. Habeeb, Esq.

Dated: August 22, 2024