Superior Court of New Jersey

Appellate Division

Docket No. A-003385-23T2

INVEL CAPITAL LLC, *Plaintiff-Respondent,* vs. 45 WILLIAM URBAN RENEWAL LLC A/K/A 45 WILLIAM STREET URBAN RENEWAL LLC, *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-4297-22 Sat Below: HON. KEITH E. LYNOTT, J.S.C.

BRIEF ON BEHALF OF DEFENDANT APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from the trial court's decision granting Plaintiff-Respondent Invel Capital LLC's ("Invel") motion for partial summary judgment in a commercial real estate contract dispute. At issue is whether Invel was entitled to terminate the Purchase and Sale Agreement ("PSA") and recover its deposit from Defendant-Appellant 45 William Urban Renewal LLC ("45 William") based on its receipt of what it deemed to be an non-compliant estoppel certificate.

The trial court's ruling improperly rewrites the plain terms of the PSA, allowing Invel to terminate the agreement upon receiving a non-compliant estoppel certificate before the closing date. This decision contradicts the unambiguous language of the PSA, under which termination is only permissible if 45 William fails to deliver an acceptable estoppel certificate by the time of closing.

The PSA clearly establishes that the seller's obligation to deliver an acceptable estoppel certificate is a condition precedent to closing, and that Invel's termination rights are contingent upon the failure to meet this condition by the closing date. The trial court's interpretation improperly conflated the estoppel certificate with Invel's due diligence rights, disregarding the clear separation between the two processes under the agreement.

This appeal seeks to reverse the trial court's decision, restore the proper interpretation of the PSA's terms, and clarify that Invel's right to terminate the

agreement is strictly limited to the failure to deliver an acceptable estoppel certificate at closing, not upon receipt of an objectionable certificate prior to that date.

PROCEDURAL HISTORY

This Action concerns a contract of sale under which Defendant-Appellant 45 William was to sell and Plaintiff-Respondent Invel was to purchase a property in Newark, NJ.

Invel commenced the Action with the filing of a complaint on July 25, 2022, in the Law Division, Essex County. (Da29-Da36[1].) The Complaint alleged that Invel had validly terminated the contract, but that 45 William had failed to return Invel's downpayment. (*Id.*) The Complaint set forth a cause of action for breach of contract and a cause of action for specific performance compelling 45 William to return the downpayment. (*Id.*) 45 William filed an Answer on August 20, 2022. (Da62-Da68.)

Invel filed a partial motion for summary judgment on June 29, 2023 (the "Motion"). (Da40-Da335.) The Motion sought summary judgment only as to the specific performance cause of action, and sought an order compelling 45 William to return the downpayment to Invel. (Da40.) The Motion requested that the court certify its ultimate order and judgment as final pursuant to R. 4:42-2. (*Id.*) The Motion also sought other interlocutory relief not yet ripe for review on this Appeal. (Da40-41.) 45 William opposed the Motion. (Da339-360.)

[1] Citations to Da refer to Defendant/Appellant's Appendix.

The trial court heard oral argument on the Motion on October 5, 2023. (T1-T48[2].) In an Order and Final Judgment and accompanying Statement of Reasons, dated June 27, 2024, the trial court granted the Motion, ordered 45 William to release the downpayment to Invel, and certified the Order and Final Judgment as final pursuant to R. 4:42-2 as to those matters (the "Order and Judgment").(Da1-Da4).[3]

45 William timely filed a Notice of Appeal of the Order and Judgment on July 2, 2024, along with the necessary accompanying documents. (Da17-Da18.) This Appeal follows.

STATEMENT OF FACTS

Defendant-Appellant 45 William is the owner of a mixed-use building commonly known as 45 William Street, Newark, NJ (the "Property"). (Da29.) On or about November 15, 2023, 45 William entered into the PSA with Plaintiff-Respondent Invel under which 45 William was to sell the Property to Invel for $32,800,000. (Da30.)

The TLE Lease

Four years prior to entering into the PSA, in or about July 2017, 45 William's predecessor entered into a commercial lease with TLE at Newark, LLC ("TLE") under which TLE leased certain commercial space at the Property. (Da282-312.) The

[2] Citations to T refer to the transcript of oral argument on the Motion.
[3] The Order and Judgment also granted those interlocutory portions of the Motion which are not yet ripe for review.

"Commencement Date" under the lease was originally set as August 1, 2019. (Da282.) However, the Commencement Date was subsequently moved back by three successive amendments to December 1, 2020. (Da316-321.) The first of these amendments also changed the financing contingency date from March 1, 2018, to January 31, 2020. (Da316.) The amendments did not change any substantive provision of the lease. (Da282-312.)

In or about the first half of 2021, 45 William and TLE had a dispute concerning the beginning of rent payments under the lease, and 45 William's obligation to provide certain parking spots to TLE, with TLE insisting, contrary to the terms of the lease, that the parking spots were required to be immediately outside the building. (Da341.)

Accordingly, in early November 2021, and prior to 45 William entering into the PSA with Invel, 45 William commenced an action against TLE, substantially for the purposes of forcing TLE to commence rent payments. (*Id*.) That action was settled in April 2022, by way of a settlement agreement (the "Settlement Agreement"). (Da328.) The Settlement Agreement did not amend the lease in any way. (*Id*.) Rather, the settlement agreement required TLE to make certain defined rent payments and specified that actions taken by 45 William with respect to parking had, indeed, complied with and satisfied the lease.

The PSA

45 William and Invel entered into the PSA on November 15, 2021. (Da190.) Pursuant to the PSA, Invel deposited $1,640,000 as a down payment with a third-party escrow agent. (Da30.) The PSA initially called for a closing on January 14, 2022, however, time was not made of the essence. (Da191-192.) The closing date was subsequently amended to February 15, 2022. (Da275.) The closing date under the PSA was again pushed back from February 15 without a specific date or a formal amendment to the PSA. (Da185.) Again, time was never made of the essence.

Of particular importance to this appeal, Article 13 § 13.10 of the PSA provided for the provision of an estoppel certificate by 45 William to Invel (the "Estoppel Provision").

The Estoppel Provision provided, in relevant part

> Seller shall, **within ten (10) days after the date of this Agreement**, **prepare and submit to any commercial tenant under the Leases an estoppel certificate**, in the form attached to or contemplated under each such Lease.... Seller shall use **commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant prior to the Closing**. Upon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser. Subject to the provisions hereof, Purchaser's obligation to close title hereunder is conditioned upon any commercial tenant under the Leases delivering to Purchaser an estoppel certificate which conforms in all material respects to the form attached to or contemplated under each such Lease… (an "Acceptable Estoppel Certificate"). The failure of Seller to obtain an Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default by Seller, it being agreed that **the sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate from the Required Tenant shall be**

> **to terminate this Agreement** and receive a refund of the Down Payment. An estoppel certificate received from a Required Tenant shall not be an Acceptable Estoppel Certificate if such Required Tenant discloses a default on the part of landlord or tenant under its Lease or discloses another Material Matter (as hereinafter defined). As used herein, a "Material Matter" shall mean a default or other matter relating to a Lease which, in each case, would subject the landlord thereunder to any liability, or otherwise adversely affect the rent, additional rent or other revenue that Purchaser will receive under a Lease after the Closing Date or contain a discrepancy with the information shown on the Rent Roll.

(Da211) (internal parentheticals omitted, emphasis added).

Notably the Estoppel Provision only required the "Acceptable Estoppel Certificate" to be obtained "prior to the Closing" and did not provide Invel with an option to cancel the PSA simply upon receiving an estoppel certificate it deemed not be an "Acceptable Estoppel Certificate" but only if Invel ultimately "does not obtain an Acceptable Estoppel Certificate from the Required Tenant." (*Id*.)

The Estoppel Certificates

In response to 45 William's prior request to execute an estoppel certificate relative to the sale of the Property to Invel, TLE provided an estoppel certificate dated June 7, 2022, that purported to disclose a default with respect to 45 William's obligations to provide TLE with parking as well as regarding a payment of a broker's commission. (Da323.) 45 William promptly forwarded the certificate to Invel. (Da342.)

In response, in a letter dated July 1, 2022, Invel's counsel purported to cancel the PSA. (Da332-334.) The grounds for canceling the PSA were (i) the fact that the estoppel certificate alleged that 45 William was in breach of the lease for failing to provide necessary parking, and (ii) as an alternative, that the execution of the Settlement Agreement with TLE constituted an amendment of the lease with TLE in breach of the PSA. (Da333.)

45 William promptly reached out to TLE and pointed out that the items set forth as purported defaults in the estoppel certificate were in fact not defaults, and that TLE was required to provide a compliant estoppel certificate pursuant to its lease. (Da342.) In response, on August 12, 2023, TLE duly forwarded a new estoppel certificate which confirmed that it was unaware of any defaults under the lease. (Da336-337.) A copy of the certificate was promptly forwarded to Invel. (Da342.)

However, Invel had already decided that it had no interest in consummating the purchase under the PSA because some of its mortgage funding had fallen through (although the PSA had no mortgage contingency). (*Id.*)

On September 20, 2022, Jordan Sobel of Kushman & Wakefield, Invel's broker, sent 45 William an email stating as follows:

> Invel Capital is officially walking away from acquiring 45 William St. The reason for them backing out is 100% related to the current economic conditions, specifically the fast rise in interest rates. Due to the rise in interest rates, Invel's lender reduced the amount of proceeds they would lend on the property. This made it very challenging for Invel to raise the necessary equity to close.

(Da345)

For the reason set forth below, the trial court erred in granting Invel partial summary judgment.

LEGAL ARGUMENT

The trial court's decision granting summary judgment in favor of Plaintiff-Respondent Invel fundamentally misinterpreted the PSA. The trial court erred in holding that Invel had an immediate right to terminate the PSA upon receiving a non-compliant estoppel certificate. However, the PSA clearly establishes that receipt of an Acceptable Estoppel Certificate is simply a condition precedent to Invel's obligation to close. The PSA afforded 45 William until the closing date to provide an Acceptable Estoppel Certificate and did not make any provision for the cancellation of the PSA simply because Invel received a non-compliant estoppel certificate prior to closing.

The PSA expressly limits Invel's right to terminate the agreement to circumstances in which 45 William fails to deliver an Acceptable Estoppel Certificate at the time of closing. Moreover, the risk allocation negotiated between the parties should be respected. Invel knowingly accepted the possibility that an Acceptable Estoppel Certificate might not be provided until closing, and the PSA

clearly limits Invel's remedy to termination and the return of its down payment in such circumstances.

The trial court's ruling not only misinterpreted the plain language of the PSA but also introduced inequitable results by undermining the risk allocation established in the PSA. Accordingly, the Order and Judgment must be reversed.

I. THE PLAIN TERMS OF PSA DO NOT ALLOW INVEL TO TERMINATE THE PSA BASED ON RECEIPT OF A NON-ACCEPTABLE CERTIFICATE.

(Raised Below: Da11)

The trial court erred in granting Plaintiff-Respondent, Invel summary judgment on its specific performance claim because the plain terms of the PSA do not provide Invel the right to terminate upon receipt of a non-compliant estoppel certificate. Rather, the PSA makes receipt of an Acceptable Estoppel Certificate a condition precedent to closing and allows Invel to terminate if such condition precedent is not satisfied by closing.

The general standard in contract dispute cases where the agreement is unambiguous is that the Court is required to give effect to the plain meaning of the relevant text of the parties' agreement. The polestar of interpretation is the parties' intention as manifested by such text. *Lederman v. Prudential Life Ins. Co. of Am., Inc.*, 385 N.J. Super. 324, 339 (App. Div.) (2006) cert. denied, 183 N.J. 353 (2006). The court is not permitted to rewrite the agreement or provide one party or the other

party with a better contract than it obtained for itself. *Hartford Fire Ins. Co. v. Riefolo Constr. Co*., 161 N.J. Super. 99, 114-115 (App. Div.) (1978).Instead of giving effect to the PSA's plain meaning, the trial court effectively rewrote the contract by holding that Invel has a right to immediately terminate the agreement upon receiving a non-compliant estoppel certificate prior to closing although such a provision is to be found nowhere in the PSA and is, in fact, contradictory to the PSA's actual provisions.

i. *Invel's Right to Terminate is Contingent on Failure to Deliver an Acceptable Estoppel Certificate at Closing, Not on Immediate Receipt of a Non-Compliant Certificate.*
(Raised Below: Da11)

The trial court's primary error lies in its suggestion that the Estoppel Provision in the PSA permitted cancellation of the agreement upon receipt of a non-compliant estoppel certificate. This interpretation misreads the Estoppel Provision and the PSA as a whole. The provision does not allow for cancellation of the PSA based on receipt of a non-compliant certificate. Instead, it permits cancellation if 45 William fails to provide an "Acceptable Estoppel Certificate" before the closing.

The crux of Invel's underlying Motion and this appeal relates to the following language in Section 13.10: "Purchaser's obligation to close title hereunder is conditioned upon any commercial tenant under the Leases…delivering to Purchaser an estoppel certificate…**the sole remedy of Purchaser in the event Seller does not**

obtain an Acceptable Estoppel Certificate…shall be to terminate this Agreement." (Da211.)

The plain meaning and operation of the phrase "in the event Seller does not obtain an Acceptable Estoppel Certificate" is allow Invel to terminate the PSA only if 45 Williams is ultimately unable to fulfil the condition precedent of supplying an Acceptable Estoppel Certificate at closing. The very word of the provision categorically does not grant Invel an affirmative right to terminate the PSA simply upon receipt of a non-compliant estoppel certificate

And indeed, the entirety of the four corners of the PSA do not provide Invel with a right to terminate the agreement and claim the down payment upon receiving a non-compliant estoppel certificate. Instead, the PSA allows Invel to terminate the agreement only to the extent that an Acceptable Estoppel Certificate is not received by the time of closing. A careful review of the relevant language of the PSA, specifically §§ 9.1 and 13.10 makes this abundantly clear.

Section 9.1 – Closing Obligations

Article 9 of the PSA, entitled "Closing Obligations" sets forth the various obligations of 45 William and Invel at closing. (Da204-207.) Section 9.1 provides that "[A]t the closing, Seller shall execute and/or deliver the following….(xix) if obtained by Seller, a duly executed Acceptable Estoppel Certificate (as defined in Paragraph 13.10)." (Da205) (emphasis added).

Critically, 45 William is obligated to deliver an Acceptable Estoppel Certificate "at the closing." (*Id.*) As the substantive requirement for providing the Acceptable Estoppel Certificate is explicitly timed for the closing itself, it necessarily follows that 45 William has the opportunity to provide the Acceptable Estoppel Certificate up until as well as on the closing date as its obligation to deliver the Acceptable Estoppel Certificate is specifically tied to the closing itself. While other contractual provisions require 45 William to act promptly in attempting to obtain the estoppel certificate and forward anything received to Invel, ultimately 45 William (assuming it has otherwise acted promptly) can obtain and present the final Acceptable Estoppel Certificate right up until or even at closing.

Section 13.10 – Estoppel and SNDA.

The substantive obligation to obtain an Acceptable Estoppel Certificate comes from § 13.10(a) of the PSA. (Da211.)

Section 13.10(a) requires that "seller shall, within (10) says of this Agreement, prepare and submit to any commercial tenant under the Leases an estoppel certificate…. Upon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser." (*Id.*)

This provision requires 45 William to initiate the process of obtaining an estoppel certificate within a specific timeframe — namely, "within 10 days of this

Agreement." The 10-day provision governs when 45 William must initially request the certificate, not when an Acceptable Estoppel Certificate must be delivered.

Once 45 William receives an executed estoppel certificate from any commercial tenant, it is obligated to promptly provide a copy to Invel. This is a separate requirement from 45 William's substantive requirement to provide an Acceptable Estoppel Certificate at the closing as a condition precedent to Invel's obligation to close. Notably, the provision does not suggest that Invel has a right to terminate the PSA based on the quality of a timely delivered non-compliant estoppel certificate.

ii. *The Trial Court Misconstrued the Purpose and Meaning of the Estoppel Provision.*
(Raised Below: Da11-13)

However, the trial court contended that this provision's purpose was to ensure prompt delivery of the executed certificate in order to allow Invel to exercise its right to terminate the PSA if the initially forwarded certificate was non-complaint.

> Although the Court agrees with 45 William that it was not obligated to deliver an Acceptable Estoppel Certificate within 10 days of execution – the agreement plainly required it only to seek the certification within such time -- the agreement also explicitly required 45 William Street to deliver any certificate it recovered from the tenant. The obvious purpose of such provision was to ensure prompt delivery of what the tenant provided to enable Invel to exercise would what become its immediate right to terminate the agreement if the certificate recorded adverse information.

(Da11)

The trial court's conclusion that the provision ensures Invel's immediate right to terminate the PSA if the certificate promptly delivered contains adverse information misinterprets the timing and purpose of the provision. While the trial court correctly noted that 45 William is required to promptly deliver any certificate it receives from the tenant, the purpose of this requirement was not to allow Invel to immediately terminate the PSA upon receipt of a non-compliant certificate. Rather, it was intended to ensure that Invel was informed of the status of the estoppel process as it unfolded. Requiring prompt delivery of any received estoppel certificate allowed Invel sufficient time to inform 45 William if the provided estoppel certificate was deemed an Acceptable Estoppel Certificate, and if not, allowed 45 William sufficient time to remedy any claimed deficiencies in the estoppel certificate to address Invel's concerns and obtain an Acceptable Estoppel Certificate prior to closing.

45 William's obligation was to continue its efforts to secure a compliant estoppel certificate within the timeline leading up to the closing, not to provide Invel with grounds for early termination based solely on prompt delivery of an initial non-compliant certificate.

And indeed, § 13.10(a) requires that 45 William "shall use commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant prior to the Closing." (Da211) (emphasis added). The language requiring 45 William to

use "commercially reasonable efforts…. prior to the Closing" to obtain an Acceptable Estoppel Certificate makes it clear that this effort is required throughout the period before closing, that is to say a continuing obligation so long as an Acceptable Estoppel Certificate has not yet been obtained.

In the context of Section 13.10(a), this obligation implies that 45 William is not simply required to make a single request or take minimal action; rather, it must engage in a proactive effort to ensure that it obtains an Acceptable Estoppel Certificate. This includes following up with the tenant, addressing any issues that arise, and exploring all reasonable avenues to secure the Acceptable Estoppel Certificate before the closing date.

And this directly dovetails into the requirement for prompt delivery of any received estoppel certificate, which allows Invel to notify 45 William of any issues with the estoppel certificate and provide well in advance of closing.

Thus, the mere receipt of a certificate, regardless of its content, does not trigger Invel's right to terminate. Rather, the purpose behind the provision is to ensure 45 William delivers an Acceptable Estoppel Certificate by the time of closing, preserving the Invel's obligation to proceed unless 45 William fails to meet that specific requirement.

Section 13.10(a) goes on to elaborate on 45 William's responsibilities and Invel's remedies in the event of a failure to obtain an Acceptable Estoppel Certificate:

> The failure of Seller to obtain an Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default by Seller, it being agreed that the sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate from the Required Tenant shall be to terminate this Agreement and receive a refund of the Down Payment.

(Da211.)

It is critical to note that § 13.10(a) explicitly states that 45 William's failure to obtain an Acceptable Estoppel Certificate from the tenant does not constitute a default. That 45 William's failure to obtain an Acceptable Estoppel Certificate is not categorized as a breach is significant because it directly influences 45 William's rights regarding termination of the PSA.

Under the PSA, a breach or default by 45 William provides Invel with a list of potential remedies. Section 8.2 of the PSA provides,

> in the event of any material breach by Seller of any representation, warranty, covenant, or other obligation of Seller contained herein discovered prior to the Closing Date, which is not fully cured or corrected prior to the Closing Date, Purchaser's sole remedy under this Agreement with respect thereto shall be to terminate the Agreement prior to the Closing Date and receive a refund of the Down Payment and receive from Seller a reimbursement for the actual, out-of-pocket costs and expenses incurred by Purchaser as a result of the Purchaser title, survey, and diligence efforts in connection with this Agreement and the transaction contemplated hereby (but expressly excluding costs or expenses incurred by Purchaser in connection with any financing

> sought to obtained by Purchaser in connection wit the transaction contemplated hereby)…(the 'Diligence Expense Reimbursement').

(Da203-204.)

In the event that 45 William materially breaches any representation, warranty, covenant, or other obligation specified in the PSA prior to the Closing Date, Invel has a defined course of action. This provision grants Invel the right to terminate the PSA immediately upon discovering a material breach by 45 William and seek a refund of the Down Payment, along with reimbursement for certain incurred expenses.

In contrast, § 13.10(a), by stating 45 William's failure to obtain an Acceptable Estoppel Certificate is "not deemed a default," explicitly excludes 45 William from being deemed in breach of contract for this particular failure. Instead, the provision establishes that the only remedy for Invel if the 45 William fails to obtain an Acceptable Estoppel Certificate by closing is to terminate the PSA and receive a refund of the down payment. This is a limited remedy separate from the Invel's remedies in instances of breach, indicating that the parties have specifically agreed that termination is not an automatic right but potential recourse under certain conditions.

Since the seller's potential inability to produce an acceptable certificate by closing does not constitute a default, the automatic right to terminate set forth in § 8.2 does not apply. The right to terminate under the Estoppel Provision is

conditioned on the explicit terms of §13.10 rather than inherent under §8.2 as in the case of a breach.

The PSA thus reflects the parties' intent to allow for a situation where 45 William cannot obtain an acceptable estoppel certificate and still does not face penalties for breach. This intent underscores a negotiated understanding that acknowledges potential limitations in securing the certificate while still allowing Invel the option to terminate the PSA, albeit under specific delineated circumstances.

In sum, a thorough analysis of Sections 9.1 and 13.10 of the PSA confirms that Invel does not have an immediate right to terminate the agreement upon receiving a non-compliant estoppel certificate. Section 9.1 explicitly ties the obligation to deliver an Acceptable Estoppel Certificate to the closing date, providing 45 William the opportunity to fulfill this condition precedent up until and including the day of closing.

Furthermore, Section 13.10 reinforces that 45 William must use commercially reasonable efforts to secure an acceptable certificate, but it does not stipulate that any initial, non-compliant certificate triggers an automatic right of termination. Instead, the PSA clearly provides that Invel's sole remedy is to terminate the agreement only if 45 William fails to deliver an Acceptable Estoppel Certificate by the time of closing. This framework reflects the negotiated intent of the parties, allowing for flexibility in obtaining the required certificate while protecting Invel's

right to terminate only in the event that the seller fails to meet the condition at the appropriate time—at closing.

Crucially, Section 13.10(a) also establishes that the failure to obtain an Acceptable Estoppel Certificate does not constitute a default or breach by 45 William, thereby limiting Invel's remedies to termination and return of the down payment. This underscores the fact that the PSA contemplates termination only upon failure to meet the condition precedent at closing, not upon earlier receipt of a non-compliant certificate.

The trial court's decision improperly rewrote the PSA by permitting early termination simply upon Invel's receipt of an initial non-compliant certificate, which contradicts the clear, unambiguous terms of the PSA. Invel's termination rights are tied solely to the failure to deliver an Acceptable Estoppel Certificate at the closing, not to the receipt of any non-compliant certificate prior to that time.

II. The Trial Court Misinterpreted the Estoppel Certificate and Its Role as a Condition Precedent, Not a Tool for Due Diligence.

(Raised Below: Da11-13)

The trial court erred in its interpretation of the role of the estoppel certificate, asserting that its purpose is that of a due diligence device. This conclusion conflates the distinct functions of due diligence and the estoppel certificate and undermines the contractual intent clearly articulated by the parties. In fact, PSA's structure and

text explicitly separates the role of the estoppel certificate from the wholly separate due diligence process.

45 William's potential inability to provide an Acceptable Estoppel Certificate by the closing date is a condition precedent to Invel's right to terminate the PSA, while the PSA contemplates a due diligence process completed well before the issuance of the estoppel certificate. This misinterpretation led to the trial court's erroneous decision since it conflated the two separate remedies provided for each of: (i) Invel's right to immediately terminate the PSA upon the discovery of adverse information during the due diligence period; and (ii) Invel's potential right to terminate the PSA if an Acceptable Estoppel Certificate was not produced by 45 William by closing.

i. *The Trial Court's Misinterpretation of the Condition Precedent and 45 William's Obligations Regarding the Estoppel Certificate.*
(Raised Below: Da11-13)

The trial court's failure to recognize the estoppel certificate's role as a condition precedent to Invel's obligation to close led to it conflating the purpose of an estoppel certificate with the broader concept of Invel's due diligence rights under the PSA.

As set forth above, §13.10(a) clearly establish the provision of an Acceptable Estoppel Certificate as a condition precedent to Invel's obligation to close under the PSA. "Purchaser's obligation to close title hereunder is conditioned upon any

commercial tenant under the Leases delivering to Purchaser an estoppel certificate." (Da211.)

The trial court, however, incongruously looked to whether the PSA provided 45 William with a "right to cure" an initial non-compliant estoppel certificate. (Da12.) "If the parties had intended to permit the Seller to cure an initially deficient Estoppel Certificate prior to the closing date ... they could have and surely would have provided explicitly the right to cure." (*Id*.) In doing so, the trial court fundamentally misinterpreted the nature of 45 William's obligations, failing to recognize that no breach occurs if an estoppel certificate provided before closing is deemed non-compliant — without a breach, there is nothing to "cure" and therefore no contractual right to cure on part of 45 William was necessary.

As discussed above, the PSA directly provides that 45 William's failure to deliver an Acceptable Estoppel Certificate does not constitute a default. Instead, it is merely the absence of a condition precedent to Invel's obligation to close under the PSA. The PSA further underscores this point by specifying that the only remedy available to Invel in such an event is termination of the PSA and a refund of the down payment, rather than any recourse related to breach.

The trial court's assertion that 45 William had no "right to cure" a non-compliant estoppel certificate prior to the closing date is meaningless concept. When a non-compliant estoppel certificate is produced, there is no breach to cure. All there

is, is a condition precedent that remains unfulfilled. 45 William no more needs to "cure" following the submission of a non-compliant estoppel certificate than it needs to "cure" prior to the submission of no estoppel certificate at all. In both cases, there is simply a condition precedent that has not yet been met.

However, the trial court misconstrued the entire purpose of the estoppel certificate and seemingly viewed the Estoppel Provision as an extension of the due diligence provisions of the PSA, as evidenced by the trial court's references to a right to cure in its decision (Da12) and its assertion that the Estoppel Provision was intended for the purpose of appraising Invel of "adverse information" so it could terminate the PSA. (Da11.)

ii. *An Estoppel Certificate has a Distinct Purpose and is not a Due Diligence Mechanism.*
(Raised Below: Da11)

Estoppel certificates and due diligence are distinct concepts, differentiated by their purposes, timing, and contractual implications. However, when coming to its decision, the trial court erroneously interpreted the Estoppel Provision as a mechanism for Invel to reassess due diligence, suggesting that it provides "additional protection" beyond the warranties in the contract. (Da11.) This view conflates the distinct purposes of an estoppel certificate and due diligence**.**

In arriving at its final conclusion, the trial court reasons as follows:

> Although the Court agrees with 45 William that it was not obligated to deliver an Acceptable Estoppel Certificate within 10 days of execution

> – the agreement plainly required it only to seek the certification within such time -- the agreement also explicitly required 45 William Street to deliver any certificate it recovered from the tenant. The obvious purpose of such provision was to ensure prompt delivery of what the tenant provided to enable Invel to exercise would what become its immediate right to terminate the agreement if the certificate recorded adverse information. The obvious reason for a requirement of this nature was to enable the purchaser to learn from the tenant, in a formal matter, the status of a leasehold and to afford the purchaser the essentially unfettered right to terminate if the information provided was adverse, as it was here. Such a requirement provides additional protection to the purchase, beyond reliance on the Seller's representations concerning the status of leases in a tenanted property.

(*Id.*)

This interpretation is deeply flawed. First, an estoppel certificate's primary function is to affirm certain facts for the purpose of preventing the certifying party from later contradicting those facts.

> Estoppel certificate. 1. A signed statement by a party (such as a tenant or a mortgagee) certifying for another's benefit that certain facts are correct, such as that the lease exists, that there are no defaults, and that rent is paid to a certain date. A party's delivery of this statement estops that party from later claiming a different state of facts.

Black's Law Dictionary (Abridged Eight ed. 2005).

Unlike due diligence, which involves investigating potential risks or obligations prior to a transaction, the estoppel certificate provides certainty and protection after specific facts are confirmed, safeguarding the recipient against future legal claims by the maker of the certificate.

While New Jersey courts to not yet appear to have addressed the purpose of this commonly used transactional document, other courts have done so. One clearly worded explanation of the purpose of an estoppel certificate comes from the Illinois Appellate Court.

> Estoppel certificates are widely used in commercial real estate transactions and are important in preserving and enhancing the marketability of commercial property. A party's delivery of this statement estops that party from later claiming a different state of facts. A purpose of an estoppel certificate is to give assurance that the party making the estoppel statement at a later date will not make claims that are inconsistent with the statements contained in the estoppel certificate.

Urban Sites of Chi., LLC v Crown Castle USA, 979 NE2d 480, 490 (Ill App Ct 2012) (internal markings omitted).

The purpose of requiring an Acceptable Estoppel Certificate in this case follows the same logic. It is a confirmation of the lease, designed to protect Invel from future claims of breach by the tenant TLE. Its purpose is not to give Invel a pretext for terminating the PSA based on newly discovered adverse information, but to protect Invel from future claims.

In contrast to an estoppel certificate, due diligence here was completed within the first 30 days following the effective date of the PSA. (Da195.)

However, the trial court's interpretation suggests that the estoppel certificate was intended to act as a tool for Invel to terminate the PSA based on unfavorable information. This runs contrary to the terms of the PSA and commercial reality as to

the purpose of estoppel certificates. In conflating the role of the estoppel certificate with due diligence, the trial court fundamentally misconstrued the estoppel certificate's function.

III. THE TRIAL COURT'S REASONING CONCERNING AN "UNFAIR ADVANTAGE" FOR 45 WILLIAM MISINTERPRETS THE CONTRACTUAL RISK ALLOCATION

(Raised Below: Da14)

The trial court, in arriving at the conclusion that Invel was entitled to immediately terminate the PSA, relied upon the misplaced reasoning that 45 William would have an "unfair advantage" by being allowed to produce the Acceptable Estoppel Certificate at closing. This reasoning fundamentally misinterprets the PSA's direct allocation or risk between the parties.

The trial court reasoned that,

> to read the related provision in the manner claimed by the Defendant is to permit the seller an unfair advantage of taking a chance on securing a cured certificate by the time of Closing, knowing that if it does not do so, it only risked having to return the Down Payment. Meanwhile, if the Seller were unsuccessful in securing a complaint Estoppel Certificate by the Closing Date, the Purchaser would then be put in the position of having to determine whether to terminate after continuing to incur costs to prepare for Closing without any recourse other than return of the deposit. Absent text whereby the parties agreed to such a result, such outcome hardly seems to have been within their contemplation.

(Da14.)

However, it was the PSA itself which established the date by which provision of an Acceptable Estoppel Certificate was ultimately required. The PSA —

negotiated between two sophisticated parties — directly provided 45 William until the closing date to provide an Acceptable Estoppel Certificate as a closing deliverable.

And the PSA itself provides that Invel's sole remedy if 45 William cannot obtain an Acceptable Estoppel Certificate as of the closing is limited to termination of the PSA and the return of its down payment.

This dynamic is not only present if Invel gets an initial non-compliant estoppel certificate but is present right from the inception of the PSA by its very terms. As soon as Invel entered into the PSA, it was in the position of having to prepare for closing while 45 William only risked having to return the down payments if it could not get an Acceptable Estoppel Certificate. And the PSA allowed that dynamic to remain in place up until the closing.

Invel, a sophisticated commercial entity entering into a $20 million real estate transaction, understood the risks and costs associated with preparing for closing. Invel entered into a contract that directly provided the potential that it would not receive an Acceptable Estoppel Certificate until the eve of closing and would still needing to prepare for that closing. This was the allocation of risk that the PSA set forth — not an allocation of risk only when a non-compliant estoppel certificate is received, but under all circumstances.

Sophisticated commercial parties are permitted to allocate risks and remedies through negotiated contracts. The courts "let experienced commercial parties fend for themselves and do not seek to introduce intolerable uncertainty into a carefully structured contractual relationship by balancing equities." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 182 N.J. 210, 230 (2005) (internal markings omitted).

The parties to this transaction clearly allocated risks between themselves through the PSA, and the trial court's attempt to impose additional protections for Invel is inconsistent with this principle. The parties' explicit allocation of risk as expressed in the PSA governs.

CONCLUSION.

In light of the foregoing, the trial court erred in granting Plaintiff-Respondent Invel summary judgment on its specific performance cause of action. Accordingly, the Order and Judgment should be reversed.

Dated: October 2, 2024

Respectfully submitted,

/s/ Dov Medinets

Dov Medinets, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-003385-23T2

INVEL CAPITAL LLC, *Plaintiff-Respondent,* vs. 45 WILLIAM URBAN RENEWAL LLC A/K/A 45 WILLIAM STREET URBAN RENEWAL LLC, *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-4297-22 Sat Below: HON. KEITH E. LYNOTT, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

Plaintiff/Respondent, Invel Capital LLC ("Plaintiff"), respectfully submits this brief in opposition to the appeal by Defendant/Appellant, 45 William Urban Renewal LLC (a/k/a 45 William Street Urban Renewal LLC) ("Defendant"). Defendant appeals from the trial court's decision granting partial final summary judgment to Plaintiff. The trial court agreed with Plaintiff's construction the contract had but one interpretation, i.e., Plaintiff's.

Under Plaintiff's interpretation Defendant was to seek and if obtained promptly deliver to Plaintiff a contractually defined tenant estoppel certificate. The obtained estoppel certificate was then to be measured against the separately defined acceptable estoppel certificate. A disclosed default per the contract's terms meant the delivered estoppel certificate was not an acceptable estoppel certificate. If the one delivered estoppel certificate did not qualify as an acceptable estoppel certificate Plaintiff need not proceed and could terminate. Since the estoppel certificate the Defendant did obtain disclosed a default the Plaintiff had the right to and properly did terminate the contract. Therefore, the $1,640,000 deposit was to be released to Plaintiff. Due to this ruling, the sole issue on appeal is whether Defendant's contract construction is reasonable and supported by the contract terms. If not, the decision below should be affirmed.

Defendant interprets the contract as requiring it to deliver an acceptable estoppel certificate by closing. While it admits it was required to promptly provide the estoppel certificate upon receipt, that requirement, it contends, was to keep Plaintiff apprised of the process so any issues could be addressed in furtherance of Defendant fulfilling the obligation of delivering an acceptable estoppel certificate by the closing. Therefore, Defendant was permitted to submit multiple iterations of an estoppel certificate and Plaintiff could only terminate if on the closing date the one delivered did not meet the definition of an acceptable estoppel certificate.

Defendant criticizes the trial court for not recognizing these factors. Also, it deems the trial court's analysis flawed. In Defendant's view the trial court improperly conflated the estoppel certificate requirement to a due diligence element. To demonstrate the error, Defendant contends the timing requirements of both differ, the purpose of an estoppel is not informational, and temporally due diligence operates presently but estoppel certificates work prospectively. Lastly, Defendant claims the trial court erred when it deemed Defendant's interpretation afforded it an unfair advantage since this impermissibly modified the risk allocation as written in the contract. Defendant's arguments are misguided, have multiple flaws, and fail to provide any basis for reversal.

First, Defendant misread the contract. Nowhere is Defendant required to deliver the defined acceptable estoppel certificate. Rather, the obligation was only to seek the defined estoppel certificate, and if obtained deliver it promptly upon receipt. Second, there was to be only one delivered estoppel certificate not multiple. Third, the timing argument is wrong. Securing the estoppel began in due diligence and but for Defendant's actions would have been completed in the due diligence timeline. Also, as noted the proposition delivery was to be by the closing date is wrong. Fourth, the authorities cited by the Defendant actually prove that an estoppel certificate serves two functions - to inform and to preclude a subsequent change of position. As such temporally it is both present and prospective. Fifth, Defendant's contention that the trial court improperly granted Plaintiff rights not afforded by the agreement is based on a misreading of the court's analysis. The court was addressing the logical flaw in the Defendant's position as it negated the requirement of prompt delivery. The court also rejected the notion that multiple estoppels could be supplied, as accepting Defendant's contrary position would provide Defendant with an unfair advantage not evident in the parties' agreement.

For the reasons that follow the judgment below should be affirmed in all respects.

PROCEDURAL HISTORY

Plaintiff relies on the Procedural History set out by Defendant. (Pb2-3.)

COUNTER STATEMENT OF FACTS

Plaintiff's Counter Statement of Facts highlights overlooked or downplayed facts and presents them as revealed during the actual transaction.

A. The Property and TLE Commercial Lease

Defendant offered for sale its mixed-use property located in Newark, New Jersey comprised of two offices, 63 apartments and a commercial space leased to a school. (Da5, Da44, Da347.) The school, TLE at Newark, LLC ("TLE") had a lease signed on July 13, 2017. (Da283.) The rent accounted for approximately 17.65% of the gross rental income. (Da45, Da347.)

The TLE lease ("Lease") consisted of two parts, one labeled "PART I: GENERAL LEASE INFORMATION" the other "PART II: TERMS AND CONDITIONS". (Da282-315.) It had a term beginning in approximately 2019 running to 2034, with two possible extensions to 2044. (Da282 PART I, subpart II BASIC LEASE PROVISIONS ¶¶(c), (d), (e) and (f).) Rent was fixed for 5-year intervals during the initial term and any option periods, subject to a 12% increase occurring in years 6 and 11, and at the start of the first and second option periods, if exercised. (Id.) The greater of ten parking spaces, or as

required by law, with at least five being in the off-street parking lot, were to be provided and Defendant was to use commercially reasonable efforts to obtain approval for a dedicated drop off and pickup area directly in front. (Id. at ¶(j).) A financing and approval contingency would sunset March 31, 2018. (Id. at (l.))

B. The Property Sale Agreement and Amendments

The Property Sale Agreement ("PSA") between Plaintiff and Defendant was signed November 15, 2021. (Da.190.) The sale price was $32.8 Million Dollars, with a $1,640,000 deposit. (Da191.) The PSA Effective Date was November 15, 2021 (Da190 at second line from top) and it established a due diligence period "until 5:00 pm (Eastern Time) on the thirtieth (30th) day after the Effective Date", i.e., December 15. (Da195 at ¶7.1.)

The PSA was amended twice.[1] First extending due diligence to December 22. (Da270-273.) The second, made as of December 23, 2021 (Da275-280), addressed several more substantive changes:

[1] As is discussed infra pp. 12 and 14, when the amendments were made Defendant failed to disclose it filed a lawsuit against TLE before signing the PSA, that the lawsuit was pending when the amendments were delivered, nor as that the lawsuit was to establish a rent start date. (Da186-187.) Also, when the PSA was signed Plaintiff was only given the Lease and not any amendments. Defendant did not reveal the amendments even though it represented in the PSA "[t]he information concerning written leases (which together with all amendments and modifications thereof are collectively referred to as 'Leases')" and "all of the Leases are in full force and effect and none of them have been

- It modified the closing date to February 15, 2022.
- It replaced the former Section 3.2(c) with a more detailed provision regarding the PILOT[2] agreement.
- It added two new sections, 3.2(d) and 3.2(e), regarding, in part, rent commencement and an exemption from rent control.

(Id.)

C. The Estoppel Provision in the Property Sale Agreement

Defendant was subject to three specific requirements regarding an estoppel certificate. (Da211.) Within 10 days of when the PSA was signed on November 15, the Defendant was required to request an estoppel certificate from TLE. (Id.) It was then obligated to use commercially reasonable efforts to secure the estoppel certificate prior to closing. (Id.) Finally, if obtained the Defendant was required to promptly deliver it to Plaintiff. (Id.) These requirements were detailed in Paragraph 13.10 of the PSA which states:

(a) Seller shall, within ten (10) days after the date of this Agreement,

---

modified, amended or extended, except as provided in Rent Schedule [sic] annexed hereto" (Da201at ¶8.1(l)(ii).) Plaintiff only received the Lease amendments, disclosure of the lawsuit and the claim the suit related to rent commencement when on June 27, 2022, Defendant delivered the Estoppel Certificate dated June 9. (Da47 (Plaintiff's Statement of Material Facts at ¶28), Da186, Da349 (Defendant's Response to Statement of Material Facts at ¶28).)

[2] PILOT is an acronym for Payment In Lieu of Tax. See Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 422 (App. Div. 2021), aff'd, 250 N.J.550 (2022).

prepare and submit to any commercial tenant under the Leases an estoppel certificate, in the form attached to or contemplated under each such Lease, if any, or if no form was previously contemplated, in substantially the form attached hereto as **Schedule H** ("Estoppel Certificate"). Seller shall use commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant prior to the Closing. Upon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser. Subject to the provisions hereof, Purchaser's obligation to close title hereunder is conditioned upon any commercial tenant under the Leases (the "Required Tenant") delivering to Purchaser an estoppel certificate which conforms in all material respects to the form attached to or contemplated under each such Lease, if any, or if no form was previously contemplated, the estoppel certificate set forth in **Schedule H** (an "Acceptable Estoppel Certificate"). The failure of Seller to obtain an Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default by Seller, it being agreed that the sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate from the Required Tenant shall be to terminate this Agreement and receive a refund of the Down Payment. An estoppel certificate received from a Required Tenant shall not be an Acceptable Estoppel Certificate if such Required Tenant discloses a default on the part of landlord or tenant under its Lease or discloses another Material Matter (as hereinafter defined). As used herein, a "Material Matter" shall mean a default or other matter relating to a Lease which, in each case, would subject the landlord thereunder to any liability, or otherwise adversely affect the rent, additional rent or other revenue that Purchaser will receive under a Lease after the Closing Date or contain a discrepancy with the information shown on the Rent Roll.

(Da211.)

Review of paragraph 13.10 reveals several key points. The paragraph defines two terms separately – "Estoppel Certificate" and "Acceptable Estoppel Certificate." (Id.) The Defendant was only required to deliver "the executed Estoppel Certificate", not an Acceptable Estoppel Certificate. (Id.)

Further, discovering any default was key. The types of certificates within the definition of Estoppel Certificate were (1) that contemplated by the Lease, or (2) that contemplated in Schedule H. (Id.) Each required disclosure of any default by landlord, tenant, or both. (Lease, Article VIII, Paragraph 8.2 Da289-290) (Schedule H Da262-263.) The PSA also emphasized default as "an estoppel certificate . . . shall not be an Acceptable Estoppel Certificate if [TLE] discloses a default on the part of landlord or tenant". (Da211.)

If obtained, the one Estoppel Certificate was to be promptly delivered so it may be examined to see if it qualified as an Acceptable Estoppel Certificate. (Id.) If a default was disclosed, it would not be an Acceptable Estoppel Certificate. (Id.) Ultimately, Defendant's failure "to obtain an Acceptable Estoppel Certificate from [TLE] shall not be deemed a default by [Defendant], it being agreed that the sole remedy of [Plaintiff] in the event [Defendant] does not obtain an Acceptable Estoppel Certificate from [TLE] shall be to terminate this Agreement and receive a refund of the Down Payment." (Id.)

There is no requirement, clause, or inference in paragraph 13.10 or the PSA that (1) Defendant must provide an Acceptable Estoppel Certificate, and (2) must deliver same at any point in time let alone by the closing date. (Id.; Da190-224.) If anything, the PSA proves the contrary. Paragraph 9.1(xix) states that the closing is not conditioned on delivering the Acceptable Estoppel Certificate, only that one be provided "if obtained by [Defendant]."[3](Da205.)

Nothing in the PSA supports the notion multiple Estoppel Certificates may be submitted. The contrary is true. The directive uses the definite article when it states "[u]pon receipt of **the** executed Estoppel Certificate, Seller shall promptly". (Da211) [Emphasis added]. The impact of this is underscored by the fact a shift occurs from the indefinite article 'an' used in the two sentences preceding the delivery directive, to the definite article 'the'. (Id.)

The language, grammar and structure in paragraph 13.10 describes a specific process for obtaining an estoppel certificate, what and how many are to be delivered and the remedy if a supplied estoppel certificate discloses a default. (Id.) It begins with requiring Defendant to request "an estoppel certificate"

[3] Paragraph 9.1 states "At the Closing, Seller [Defendant] shall execute and/or deliver the following" and in subparagraph (xix) states "if obtained by Seller [Defendant], a duly executed Acceptable Estoppel Certificate (as defined in Paragraph 13.10)." (Da205.)

within 10 days of when the PSA is signed, well within the 30 days of due diligence also running from contract execution. (Id.) Next it describes the two estoppel certificates included in the definition of "Estoppel Certificate". (Id.) Then it requires Defendant to use commercially reasonable efforts to obtain "an Estoppel Certificate". (Id.) The obligation imposed on Defendant ends requiring it to "promptly" deliver "the executed Estoppel Certificate". (Id.)

This is followed by a discussion of Acceptable Estoppel Certificate. (Id.) That discussion does not require Defendant to provide an Acceptable Estoppel Certificate, either before closing or at any other time. (Id.) Rather it only says an Acceptable Estoppel Certificate cannot disclose any defaults. (Id.) Finally, it specifies that a disclosed default in a certificate means it is not an Acceptable Estoppel Certificate and Plaintiff's only recourse is to terminate. (Id.)

D. What Plaintiff Knew on Signing the PSA; Closing Delayed to June

On November 15, when the PSA was signed, Plaintiff knew only: The TLE lease would run through 2034 or 2044, with 4 scheduled rent increases; Defendant was required to request an estoppel certificate by November 25, well before the due diligence period ended on December 15; Defendant had to use commercially reasonable efforts to obtain the estoppel certificate and then "promptly deliver" it on receipt; to be an Acceptable Estoppel Certificate no

default can be disclosed; and if there is no Acceptable Estoppel Certificate Plaintiff's sole remedy was to terminate. (Da186-188)

However, none of this occurred as expected. (Id.) The February 15 closing date in the second amendment was delayed because the Defendant failed to fulfill certain obligations under the PILOT agreement. (Da185 at ¶6) The PILOT originally required Defendant to build affordable housing units, but Defendant was seeking a modification or alternative to that requirement. Ultimately, in June 2022 the Defendant negotiated a deal with the City of Newark to make a lump sum payment instead. (Id. at ¶6) With this new agreement in place, the parties then began preparing for the closing. (Da 185 at ¶6.)

E. On the Eve of the June Closing Defendant Delivered the Estoppel that Disclosed Defaults; Plaintiff Terminates and Files Suit

On June 27, 2022, in anticipation for the closing, the Defendant finally delivered the Estoppel Certificate (Da186.), which was dated June 7. (Da323-325.) Significantly, the Estoppel Certificate revealed the existence of a previously undisclosed lawsuit against TLE, as well as a settlement agreement and release between the Defendant and TLE. (Id.) It stated:

> There are no other agreements or understandings, whether written or oral, between Tenant and Landlord with respect to the Lease, the Leased Premises or the Building except for a Settlement Agreement and Release dated April 28, 2022.

(Da323 ¶2.)

This was the first time the Plaintiff became aware of the lawsuit between the Defendant and TLE, a lawsuit filed before the PSA was signed, and that was pending but remained concealed when the PSA was twice amended. (Da186.) Overarching that was the statement in paragraph 6:

> Landlord [Defendant] is currently in default of Section II.j of the Lease which requires Landlord to furnish to Tenant dedicated drop off and pickup areas directly in front of the Leases Premises ("Drop Off Area") upon Landlord obtaining such required approvals ("Drop Off Area Approvals"). Tenant has received notice that Landlord obtained the Drop Off Area Approvals but as of the date hereof, Landlord has failed to furnish the Drop Off Area to Ten-ant. Additionally, Landlord has not paid the first installment of Real Estate Commission ("Commission") to ComRealty Associates, LLC of $31,148.88 which was due upon Rent Commencement Date.
>
> (Da323-324.)

The Estoppel Certificate also said in paragraph 8:

> Except to the extent arising from the Landlord defaults set forth in Section 6 above, Tenant has no claim against Landlord and no offset or defense to enforcement of any of the terms of the Lease.
>
> (Da324.)

Not only had there been issues regarding the rent commencement letter addressed in the second amendment (Da275-280), but now it was revealed the commercial tenant TLE – a tenant representing 17.65% of the rent receipts – claimed the Defendant breached the Lease, was involved in a lawsuit, and

entered a settlement (Da328-330) which modified the Lease. (Da186-187) It also revealed there were three Lease amendments (Da316-321) that were of material significance. (Da186-187)

Instead of a term from 2019 to 2034, and with extensions to 2044, the Lease would run from 2022 to 2037 and if extended to 2047. (Da282, 316-321.) Duration was increased by 20% on the 15-year term and 12% on the 25-year term, where escalations were limited to one in each of year 6, 11 and if extended 16 and 21. (Id.) Instead of rent being set for the years 2019-2044, now it was from 2022-2047 (id.) and was insubstantial as Defendant suggests. (See Pb4.)

On July 1, 2022, Plaintiff terminated. (Da186.) Its termination was based on, as confirmed in its counsel's letter, the fact the Estoppel Certificate disclosed a default by the Defendant. According to the PSA, "an estoppel certificate . . . shall not be an Acceptable Estoppel Certificate if such... discloses a default on the part of the landlord." (Da186, Da332-334.) Therefore, the presented Estoppel Certificate was unacceptable, and authorized termination. (Id.)

Further, and as stated in the termination letter, the Estoppel Certificate disclosed a settlement agreement (id.) that modified the Lease (Da328-330.). However, the Defendant failed to provide this to Plaintiff, which meant it had breached the representations in the PSA under paragraph 8.1(l)(ii). (Id.)

Consequently, Plaintiff claimed it was also authorized to terminate under paragraph 15.2[4] as revised per the second PSA amendment. (Id.)

Plaintiff later learned that prior to Defendant signing the November 15 PSA (Da190) Defendant already sued TLE. (Da186.) Specifically, the Defendant filed a complaint dated November 3, 2021, and submitted it on November 11, 2021. (Da51; Da54-60) In this complaint, the Defendant alleged it had issued a notice of default to the tenant on July 17, 2021, and was seeking $2.5 million in damages as well as $102,310 in unpaid and future rent. (Da54-60 at ¶¶17,19 and 29.) These facts directly contradicted the representation in paragraph

[4] 15.2 If Seller defaults, or breaches any of its representations, under this Agreement, or if Seller fails to satisfy any aspect of the conditions obligation Purchaser [sic] to close as set forth in Sections 4.2() (ii), 3.2(d) and 3.2(e) above (and Purchaser does not elect to close the transactions contemplated hereby in accordance with those provisions in their sole and absolute discretion), the Purchaser may either (i) terminate this Agreement upon written notice to Seller, in which event (i) Escrow Agent shall promptly return the Down Payment to Purchaser, (ii) Seller shall immediately reimburse Purchaser in an amount equal to Purchaser's Diligence Expense Reimbursement, and (iii) upon Purchaser's receipt of the Down Payment, plus the amount owed to Purchaser pursuant to the immediately preceding clause (ii), this Agreement and all rights and obligations of the parties hereunder will be null and void, except for those rights and obligations that expressly survive the termination of this Agreement; or (b) file an action for specific performance. Notwithstanding the foregoing, if the remedy of specific performance is not available due to the conveyance by Seller of any portion of the Premises to a third party, then Purchaser will be entitled to pursue any remedies available at law or in equity. (Da277.)

8.1(l)(ii) of the November 15 PSA that all leases were "in full force and effect." (Da201.) The law firm representing Defendant in the suit against TLE was the same law firm representing Defendant in the PSA. (Da54-60; Da214.)

When Defendant refused to consent to release the deposit the Plaintiff filed a lawsuit against the Defendant on July 25, 2022. (Da29.) The complaint included two causes of action: A breach of contract claim, and a claim for specific performance seeking to compel the Defendant to consent to releasing the deposit to the Plaintiff. (Id.) Defendant answered the complaint on August 24, 2022. (Da62-68.) It denied the material allegations, raised as affirmative defenses failure to state a cause of action, set-off from settlements or agreements, and failure to mitigate damages, but did not assert any counter-claims, third-party claims, or a certification of possible additional claims or parties. (Id.) Also, in August Defendant forwarded another estoppel. (Da336-337.) That estoppel again, referenced the settlement agreement being a modification to the Lease. (Id.)

The Court Ordered mediation never occurred with the mediator informing on April 26, 2023 "Defense counsel has been unresponsive to the most recent inquiries regarding participating in mediation". (Da69, Da69-81.) The motion appealed from followed.

F. Plaintiff's Partial Summary Judgment Motion; Defendant Intentionally Argues Only Plaintiff's Construction is not Reasonable; and Court Grants the Motion Certifying it as Final

Plaintiff filed for partial summary judgment to compel release of the deposit, to amend to add causes of action for fraud in the inducement, adding Defendant's counsel for aiding and abetting the fraud, and extend the discovery end date. During argument Defendant's attorney made two concessions. (Da9-10, Da15-16) First, Defendant did not "contest the first estoppel certificate was unacceptable". (T24-4-6.) Second, "[f]rom defendant's perspective, we don't read the provision as ambiguous and, therefore, I didn't make such an argument. I don't think I could make a good faith argument that the provision is ambiguous. I think it's very clear." (T30-21-25.) Also, although the record was devoid of any response to Plaintiff's counsel's letter of July 1, let alone one that construed the PSA as being argued in opposition to the summary judgment motion, Defendant was invited to supplement the record and never did. (T41-47.) On June 27, 2024, Judge Lynott issued his decision. (Da1-16.)

In his comprehensive opinion he summarized the relief sought by Plaintiff. As to returning the deposit it was based on (i) the default stated in the delivered Estoppel Certificate and (ii) breach of the representation in the Lease. (Da9-10.) Also, Plaintiff sought to amend its complaint adding a claim for fraud in the

inducement due to the misrepresentation regarding the Lease, litigation and settlement (id., and at Da15-16), and to add as defendants Defendant's counsel for aiding and abetting by both prosecuting the lawsuit against TLE while also representing Defendant in the PSA with the misrepresented disclosures. (Id.) Also Plaintiff sought to extend discovery. (Id.)

The trial court summarized Defendant's opposition. Defendant argued it did not breach the estoppel provision. (Da10.) It emphasized it need only give an Acceptable Estoppel Certificate by closing and may submit multiple iterations so long as the final one before closing was an Acceptable Estoppel Certificate. (Id.) Also, it did not breach the representations. Last per an email by a real estate professional there was an ulterior motive for the cancellation. (Id.)

As to the request for release of the deposit the trial court granted the motion solely on the issue of the estoppel certificate and did not reach the issue as to the misrepresentation. (Da11-14) Judge Lynott began by analyzing the language. (Da11.) He reasoned the purpose for requiring prompt delivery of any estoppel received was to enable Plaintiff to exercise "its immediate right to terminate the agreement if the certificated [sic] recorded adverse information." (Id.) This requirement allowed Plaintiff "to learn from the tenant, in a formal manner, the status of a leasehold" and that "provides additional protection to the

[Plaintiff], beyond reliance on the [Defendant's] representations concerning the status of leases". (Id.) The language that refers to delivery of 'an' Acceptable Estoppel Certificate as opposed to 'the' did not mean the Defendant could deliver multiple estoppels. (Da12) "As an initial matter, the use of the article "an" was necessary as a syntactical matter, because if the certificate delivered by the tenant were not acceptable, there would be no Acceptable Estoppel Certificate." (Id.) More fundamentally had the parties agreed a prior deficient Estoppel Certificate could be corrected by a later one, or if the parties agreed it was proper to wait to closing for delivery of the certificate, they would (i) not have provided for prompt delivery and (ii) would have provided for the right to deliver a further estoppel up to closing. (Id.) Since the former point was included, and the latter was not, accepting Defendant's argument would "impermissibly re-write the parties' agreement in a manner as to confer a right on the [Defendant] that it did not secure in negotiations." (Id.)

The trial court then examined the practical aspects of Defendant's position which, it said, exposed the "logical flaw" in its "textual argument". (Id.) If after delivering a certificate revealing a landlord default Defendant could, up to closing, deliver an Acceptable Estoppel Certificate, that "would require the [Plaintiff] – in a state of obvious uncertainty – to continue to prepare for such

Closing, including incurring the expense of such preparation, such as legal expense and arranging for title work, insurance and other customary steps, on the possibility the Seller would be able to cure and deliver an Acceptable Estoppel Certificate". (Id.) That would defeat the purpose of and negate the obligation to promptly deliver a certificate "which purpose was to permit an immediate termination and avoidance of such expense and uncertainty". (Da13)

The trial court considered the claim that the termination was due to changed economic conditions, which were disputed.[5] (Da13-14) The court observed the implied covenants of good faith and fair dealing cannot override an express, negotiated contract provision. (Id.) Giving effect to Defendant's

[5] As again Defendant has included this issue (Pb7), predicated on an email not authenticated by the author, it is necessary to briefly address why it is meritless. The email itself is hearsay, its content is hearsay, its unattributed conclusion on why the deal was being scuttled by Plaintiff is hearsay, as is that purportedly Plaintiff informed of what it was told by the lender, i.e., a fourth level of hearsay. As such it cannot be relied upon on this motion. Sellers v. Schonfeld, 270 N.J. Super. 424, 427 (App. Div. 1993) [On summary judgment "affidavits in support are limited to the affiant's personal knowledge of such facts as he is competent to testify to and as are admissible in evidence." (citations omitted)] Indeed, the multiple hearsay layers show it cannot be used even if, incorrectly, Defendant tries to claim it is a statement of an agent which is excepted from hearsay under 803(b)(4). The supposed author was Defendant's real estate agent not Plaintiff's, and even if he were Plaintiff's agent the agency ended with the June termination. As the email is dated September it did not issue during the alleged agency. Moreover, it is irrelevant. See infra at pp. 23-25 [unambiguous termination provisions are enforced even if there are other motives for the action.]

contention would violate this principle. (Da13-14) The trial court noted the Plaintiff only had termination as its remedy and could not seek any other relief, adding "[i]t bears observing" the Defendant had the ability in advance to confer with TLE to receive an Estoppel Certificate excluding any qualification or reference to default. (Id.) It was in this context the trial court said Defendant would have "an unfair advantage of taking a chance on securing a cured certificate," which "only risked having to return" the deposit, while the Plaintiff "would have to determine whether to terminate" where its only recourse was "return of the deposit." (Id.) The court concluded this outcome "hardly seems to have been within [the parties'] contemplation" absent express contractual language. (Da14.)

ARGUMENT

POINT I

THE CONTROLLING STANDARD OF REVIEW IS DE NOVO, AND THE TRADITIONAL SUMMARY JUDGMENT PRINCIPLES APPLY INCLUDING THE RECOGNITION CONTRACT DISPUTES ARE PARTICULARLY SUITED FOR SUMMARY JUDGMENT AND WHERE AN UNAMBIGUOUS TERMINATION CLAUSE EXISTS AND IS INVOKED THE COURT WILL NOT INTERCEDE

A. Standard of Review

In reviewing grants of summary judgment New Jersey Appellate Courts

use "the same standard that governs the motion judge's decision". Crisitello v. St. Theresa Sch., 465 N.J. Super. 223, 236 (2023) (quoting RSI Bank v. Providence Mut. Fire Ins., 234 N.J. 459, 472 (2018)). Thus, summary judgment is to be granted "if 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." R. 4:46-2(c) This occurs "only if, considering the burden of persuasion at trial, the evidence submitted by the parties, on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. See Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995).

The party seeking accelerated relief has the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact" regarding the claims. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954) (citations omitted). If that happens the opponent is to "make an affirmative demonstration, where the means are at hand to do so, that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581(App. Div.), certif. denied, 37 N.J. 229 (1962). If both submissions are presented in proper form, the Court, giving the opponent all reasonable

inferences, examines whether a reasonable fact finder could reach a decision in the opponent's favor, and if not, summary judgment will be entered. Brill v. Guardian Life Ins. Co. of America, supra, 142 N.J. at 529.

B. Summary Judgment Particularly Suited for Contract Disputes

Generally, contract interpretation is "a purely legal question that is particularly suitable for decision on a motion for summary judgment." Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 4:46-2 (2024). Accord EQR-LPC Urb. Renewal N. Pier, LLC v. City of Jersey City, 452 N.J. Super. 309, 319 (App. Div. 2016) ["Contractual interpretation is a legal matter ordinarily suitable for resolution on summary judgment" quoting Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009)]; Khandelwal v. Zurich Ins. Co., 427 N.J. Super. 577, 585 (App. Div.), cert. denied, 212 N.J. 430 (2012).

> Courts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118, 85 A.3d 947 (2014) (quoting Caruso v. Ravenswood Dev., Inc., 337 N.J. Super. 499, 506, 767 A.2d 979 (App. Div. 2001)). Whether a contract term is clear or ambiguous amounts to a question of law. Nester v. O'Donnell, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997). A contract is ambiguous if it is reasonably susceptible to two interpretations. Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 425 N.J. Super. 305, 324, 41 A.3d 586 (App. Div. 2012). Contract terms must be given their plain and ordinary

> meaning. Nester, 301 N.J. Super at 210, 693 A.2d 1214. Courts should not "torture the language of a contract to create ambiguity." Stiefel v. Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651, 577 A.2d 1303 (App. Div. 1990).
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> Sullivan ex rel. Sylvester L. Sullivan Grantor Retained Income Tr. v. Max Spann Real Est. & Auction Co., 465 N.J. Super 243, 265-266 (App, Div. 2020), aff'd as modified, 251 N.J. 45 (2022).

The Court's analysis is to discern the parties' intent, initially as revealed by the language in the contract. Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 339 (App. Div.), cert. denied, 188 N.J. 353 (2006). Where that language is unambiguous "then the words presumably will reflect the parties' expectations." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). Even if there is an ambiguity summary judgment may still be ordered if intent is not a disputed fact. In re Teamsters Indus. Emps. Welfare Fund, 989 F.2d 132, 136-37 (3d Cir. 1993).

C. Unambiguous Termination Clauses are Enforced Regardless of Ulterior Motive.

"The law is clear that where the right to terminate a contract is absolute under the wording in an agreement, the motive of a party in terminating such an agreement is irrelevant to the question of whether the termination is effective." Karl's Sales Serv. v. Gimbel Bros, 249 N.J. Super. 487, 495 (App. Div.), cert. denied, 127 N.J. 548 (1991). In Karl's Sales plaintiff operated its business at six Gimbel store locations under six separate license agreements. When Gimbel's

decided to close altogether including those six stores it terminated all the licensing agreements pursuant to a clause that provided for termination if "Gimbels shall discontinue or dispose of the business conducted by it in the store." Id. at 490. The trial court determined the agreement did not give Gimbel the right to go out of business entirely without incurring liability. Following the bench trial plaintiff was awarded $850,000 in damages. On appeal this Court reversed. It found the subject clause to be "clear and unambiguous; there is no room for interpretation or construction". Id. at 494 Gimbel had the "absolute right" to terminate "regardless of the reason". Id. See also Vieser v. Leventhal, No. A-4526-10 (App. Div. August 25, 2010) [Allegation motive of cancellation was desire to move to Texas irrelevant as unambiguous termination clause allowed for termination due to unacceptable radon test results]. (Da83-95.[6])

This rule has only been tempered where there is a claim and factual allegations supporting the claim of a breach of the implied covenants of good faith and fair dealing. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396 (1997); Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123 (1976). The implied covenants are deemed applicable in cases involving termination clauses only

[6] In conformity with R. 1:36-3 a copy of the unpublished opinion was presented below and appears now in the record on appeal.

where the claim is made and facts are alleged a contracting party "acts with ill motives and without any legitimate purpose" Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 226 (N.J. 2005) (citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001) or if the one claiming breach "relies to its detriment on a defendant's intentional misleading assertions". Brunswick Hills Racquet Club, supra, 182 N.J. at 226 (citing Bak-A-Lum Corp., supra, 69 N.J. 129-130). Taken together, Karl's Sales, Sons of Thunder, Bak-A-Lum Corp., Wilson and Brunswick Hills Racquet Club direct that an unambiguous termination clause will be enforced even if there is a different motive by the party terminating, unless the opponent comes forward asserting a claim and alleging facts of bad motives, ill intentions and no legitimate purpose to its action. Absent that, and even if there is a stated alternative purpose to termination, the termination decision will be upheld by a court on summary judgment.

Here there are no allegations regarding breach of the implied covenants. Moreover, the record is devoid of any fact from which the allegations could be made. Consequently, the issue here is whether Defendant's construction is reasonable or unreasonable, and if unreasonable the PSA as described by Plaintiff is to be enforced and the decision affirmed.

POINT II

BECAUSE COURTS JUDICIALLY ENFORCE UNAMBIGUOUS CONTRACT TERMINATION PROVISIONS, AND HERE THE TERMINATION PROVISION WAS UNAMBIGUOUS, SUMMARY JUDGMENT ON PLAINTIFF'S SPECIFIC PERFORMANCE CLAIM WAS PROPER

Defendant's Brief at Point One argues the trial court incorrectly decided that delivery of the Estoppel Certificate that did not qualify as an Acceptable Estoppel Certificate permitted immediate termination. That conclusion was incorrect, the Defendant contends, because the terms of the PSA do not provide for this, and the trial court misconstrued the purpose and meaning of the estoppel provision. Point Two has Defendant arguing the trial court erred as it did not recognize a condition precedent to termination was the failure to deliver at closing an Acceptable Estoppel Certificate and it did not appreciate an estoppel certificate is not a mechanism for collection of information. Last, in Point Three Defendant contends the trial court was incorrect when it noted that Defendant's interpretation gave Defendant an unfair advantage.

Central to its arguments is Defendant's contention it was obligated to present a defined Acceptable Estoppel Certificate. To do so it could present multiple disqualifying estoppel certificates provided the last to be delivered as late as the closing was an Acceptable Estoppel Certificate. This interpretation

disregards the express language of the PSA, fundamentally rewrites the estoppel provision, and grants the Defendant rights it did not possess.

Conversely, the Plaintiff contends that the PSA permits only one Estoppel Certificate, not multiple. Plaintiff contends that its view is supported by the PSA's explicit language, the timing provisions regarding the estoppel certificate in relation to other time periods specified in the PSA, as well as the overall circumstances. Consequently, once the errors in Defendant's construction are exposed it becomes evident that the arguments miss the mark. Moreover, the same process makes patently clear that Plaintiff's PSA interpretation is reasonable as the trial court concluded and thus the decision below should be affirmed.

Notably, Defendant omits any claim both its and Plaintiff's interpretations are reasonable which direct summary judgment should be denied. Because this Court reviews the decision below and does not do so on a blank slate, Estate of Doerfler v. Fed. Ins. Co., 454 N. J. Super. 298, 201-02 (App. Div. 2018) [noting that the function of an appellate court is to review the decisions of the trial court, rather than to decide applications *tabula rasa*], if it concludes Defendant's PSA construct is reasonable then given the trial court decision that Plaintiff's view is reasonable this Court would be constrained to remand for a trial. As will be

shown the proper result is to affirm the trial court's decision.

i. Only the Estoppel Certificate was to be Delivered, not an Acceptable Estoppel Certificate. If the Delivered Certificate Disclosed Default, it was not an Acceptable Estoppel Certificate and Termination was Allowed. (Answering Defendant's Argument at Point I(i) (Pb10-13.)

Defendant's first assigned error under Point I argues the PSA permits cancellation only if Defendant fails to deliver an Acceptable Estoppel Certificate at closing. (Pb10-13.) However, the whole of the argument is based on a complete misreading of the PSA. Reading the PSA – as written – undeniably proves the termination was allowed and summary judgment properly granted.

Throughout, Defendant misconstrues the PSA as requiring it to provide an Acceptable Estoppel Certificate "before closing". (Pb10.) This misstatement is made repeatedly where Defendant argues: Termination can only occur if it fails to satisfy the "condition precedent" of supplying an Acceptable Estoppel Certificate at closing (Pb11); termination can only occur if "an Acceptable Estoppel Certificate is not received by the time of closing" (id.); "providing the Acceptable Estoppel Certificate is explicitly timed for closing itself" (Pb12); promptly obtaining the estoppel is "a separate requirement from [Defendant's] substantive requirement to provide an Acceptable Estoppel Certificate at closing as a condition precedent" to Plaintiff closing. (Pb13.)

Defendant premises these arguments on its proposition "[t]he crux of

[Plaintiff's] underlying Motion and this appeal relates to the following language in Section 13:10: 'Purchaser's obligation to close title hereunder is conditioned upon any commercial tenant under the Leases . . . delivering to Purchaser an estoppel certificate . . . the sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate . . . shall be to terminate this Agreement.'" (Pb10-11.) Defendant's whole premise misses the mark.

A key PSA estoppel provision is the one in paragraph 13 stating "[u]pon receipt of ***the*** executed Estoppel Certificate, **Seller shall promptly deliver a copy** thereof to Purchaser:" (Da211) [Emphasis added] Plaintiff submits this explicit language, using the definite article 'the' not the indefinite article 'an', and referencing only the defined Estoppel Certificate, and not the separately defined Acceptable Estoppel Certificate, is significant in interpreting the contract and proves the Defendant misreads the PSA. When read properly, the PSA termination clause is unambiguous and Plaintiff's decision to terminate was proper as was the decision to grant partial summary judgment.

The analysis begins with the syntax. The indefinite article 'an' is "equivalent to 'one' or 'any'". Black's Law Dictionary 84 (6th ed.1990). However, 'the' is "[a]n article which particularizes the subject spoken of. In construing [a] statute, definite article 'the' particularizes the subject which it

precedes and is [a] word of limitation as opposed to indefinite or generalizing force [of] 'a' or 'an'." Id. at 1477. The distinction between the definite article and indefinite article has been relied upon by this Court as a tool for interpretation. N.J. Mfrs. Ins. Grp. v. Holger Trucking Corp., 417 N.J. Super. 393, 398 (App. Div. 2011) ["Legislature's use of the definite article undoubtedly was intended to describe one event clearly distinguishable from all others."]; Sun Co. v. Zoning Bd. of Adjustment of Avalon, 286 N.J. Super. 440, 447 (App. Div.), certif. denied, 144 N.J. 376 (1996) ("[U]se in Avalon's ordinance of the singular article 'the' modifying the term 'principal use' reflects an intent that there be but one principal use on the property."] See also Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 310-11 (App. Div. 1998) ["In Ellis v. Caprice, 96 N.J. Super. 539, 549, 233 A.2d 654 (App. Div.), certif. denied, 50 N.J. 409, 235 A.2d 901 (1967), we reversed a judgment in favor of defendants when the trial court used the definite article 'the' in defining proximate cause for the jury. We conclude the same charge mistake here requires reversal."]

Standing alone this language delivers a fatal blow to Defendant's argument. Had the parties intended there be multiple iterations the language would have read the Seller shall promptly deliver 'an' estoppel certificate. But the PSA specifically says to deliver 'the' Estoppel Certificate.

Added is the fact the PSA defines 'Estoppel Certificate' and 'Acceptable Estoppel Certificate' separately. It only requires the Defendant to use commercially reasonable efforts to obtain an Estoppel Certificate, and if obtained to promptly deliver it to Plaintiff. There is no such directive for an Acceptable Estoppel Certificate. In fact, nowhere is there even a requirement for one to be obtained and delivered to Plaintiff. Paragraph 9.1(l), relied upon by Defendant (Pb11,18), only requires delivery at closing of an Acceptable Estoppel Certificate "if obtained." Had the PSA required the Defendant to obtain an Acceptable Estoppel Certificate, this clause would have been mandatory, which it is not.

Defendant cannot seek safe harbor by relying on the indefinite article 'an' estoppel certificate contained in the sentences preceding the one requiring prompt delivery of "the executed Estoppel Certificate". There are two sentences in paragraph 13.10 appearing immediately before the mandate of prompt delivery. The first states in part: Defendant "shall, within ten (10) days after the date of this Agreement, prepare and submit . . . an estoppel certificate, in the form attached to or contemplated under each such Lease, if any, or if no form was previously contemplated, in substantially the form attached hereto as **Schedule H** ("Estoppel Certificate")." The second says in part: Defendant shall

"use commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant prior to the Closing." The use in the first sentence of the indefinite article "an estoppel certificate" is correct as it is not referring to a defined term and goes on to define 'Estoppel Certificate' as being one of two possibilities: (1) as stated in the Lease, or (2) substantially in the form of Schedule H. The second sentence is the command to use commercially reasonable efforts to obtain "an Estoppel Certificate". Here again the indefinite article 'an' is correctly used since the defined term is one of two possibilities so the proper syntax is the indefinite article. Therefore, Defendant cannot seek to claim the use of the indefinite article in these two sentences somehow supports its arguments. If anything, the use of the indefinite article in these two sentences followed by the definite article 'the' in the third sentence – "upon receipt of the executed Estoppel Certificate, Seller shall promptly deliver a copy thereof" – buttresses Plaintiff's construction only one estoppel certificate is to be provided.

Likewise, and as was recognized by the trial court, the use of the indefinite article 'an' in relation to Acceptable Estoppel Certificate provides no support for Defendant's argument. Defendant argued per paragraph 13.10 Plaintiff's obligation to close was contingent on receiving an Acceptable Estoppel Certificate. This meant multiple estoppel certificates could be provided, as long

as the one presented at closing was an Acceptable Estoppel Certificate. Judge Lynott properly observed "As an initial matter, the use of the article "an" was necessary as a syntactical matter, because if the certificate delivered by the tenant were not acceptable, there would be no Acceptable Estoppel Certificate." (Da12.) For that same reason the Defendant cannot now rely upon the use of the indefinite article.

The plain language of the PSA read as a whole requires Defendant to (1) begin within 10 days to seek an estoppel certificate, (2) use reasonable efforts to secure same and (3) if received promptly deliver the Estoppel Certificate. Upon delivery the Estoppel Certificate is then judged against the defined term of an Acceptable Estoppel Certificate. If it does not satisfy the requirement Plaintiff is entitled to terminate.

"A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v Abdul-Matin, 198 N.J. 95,103 (2009). The construction offered by Defendant fails to do that. Defendant's entire argument attempts to make the failure to receive an Acceptable Estoppel Certificate by the closing date a prerequisite for termination. It emphasizes the language that says Plaintiff's "obligation to close title hereunder is conditioned upon [TLE] delivering . . . an 'Acceptable

Estoppel Certificate'". But in doing so Defendant incorrectly examines that language in a vacuum. It ignores the fact that very clause does not even have a time element, i.e., delivering an Acceptable Estoppel Certificate at the closing or even by the closing. Likewise, Defendant makes no mention of the fact the PSA mandates supplying 'the' executed estoppel as opposed to 'an' executed estoppel. Similarly, though it discusses paragraph 9.1(l) (Pb11,18) it completely overlooks the Acceptable Estoppel Certificate is to be delivered "if obtained." More importantly, Defendant underplays the importance of the required prompt delivery equating that with being a mechanism to keep Plaintiff informed. However, that very proposition is patently unsupportable, a point now addressed.

ii. Defendant Incorrectly Argues the Prompt Delivery Requirement's Purpose and Meaning was so it could Fulfill its Obligation to Deliver an Acceptable Estoppel Certificate at Closing. Prompt Delivery was Required to Allow Termination if the Delivered Estoppel Certificate Disclosed Adverse Information. (Answering Defendant's Argument at Point I(ii) (Pb13-19.)

Defendant's second assigned error in Point I argues the trial court misinterpreted the purpose and meaning of the "prompt delivery" requirement in paragraph 13.10. The Defendant quotes the trial court's decision, where Judge Lynott determined the purpose of this provision was "to ensure prompt delivery of what the tenant provide to enable [the Plaintiff] to exercise its immediate right

to terminate the agreement if the certificate recorded adverse information." (Da11) (Pb13.) Defendant contends this is a flawed reading, as the "prompt delivery" language, when considered alongside other provisions, is intended to allow for any defects to be corrected so the Defendant can fulfill its obligation to deliver an "Acceptable Estoppel Certificate" at closing. (Pb14.) Significantly, in making this argument Defendant misinterpreted several aspects of the PSA.

The Defendant claims that the reason for the prompt delivery was not to allow immediate termination. Rather it was to keep the Plaintiff "informed of the status of the estoppel process as it unfolded." (Pb14.) Its argument begins with a quote from the PSA's paragraph 13.10, to wit: "[Defendant] 'shall use commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant prior to the Closing.'" [Emphasis in original] (Pb14.) Next Defendant unashamedly rewrites that very language saying: "The language requiring [Defendant] to use 'commercially reasonable efforts . . . prior to the Closing' ***to obtain an Acceptable Estoppel Certificate*** [Emphasis added] (Pb14-15) Defendant, having rewritten the PSA, concludes this obligation in conjunction with the prompt delivery requirement supports the notion the prompt delivery language exists to keep the Plaintiff informed so that corrective action can be taken, and serves to ensure the Defendant delivers an Acceptable

Estoppel Certificate by the closing date. (Pb15) This, the Defendant claims, is the proper reading of the paragraph.

The Defendant's argument is based on multiple misreadings, misinterpretations and outright rewrites of the PSA. One, and major as already addressed (supra at 28-34), is there was no obligation on Defendant to provide an Acceptable Estoppel Certificate, instead it was to promptly deliver the executed Estoppel Certificate if obtained. Another is that Defendant ignores the is syntax and organization of paragraph 13.10 which prove only one Estoppel Certificate was being used. Finally, Defendant did not just misinterpret the PSA but chose to rewrite it altogether.

Another error in Defendant's argument is misstatement of the PSA's paragraph 8.2. Defendant begins by quoting the following from the PSA's paragraph 13.10:

> The failure of Seller to obtain an Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default by Seller, it being agreed that the sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate from the Required Tenant shall be to terminate this Agreement and receive a refund of the Down Payment.
>
> (Pb16.)

The Defendant then juxtaposes this against paragraph 8.2 which Defendant quotes and says gave Plaintiff "the right to terminate the PSA immediately upon

discovering a material breach" by Defendant. (Pb17.) As best as can be discerned Defendant then makes two points.

First, the Defendant appears to argue that because paragraph 8.2 discusses default as permitting immediate termination, and the failure to obtain an Acceptable Estoppel Certificate does not constitute a default, it follows the failure to provide an Acceptable Estoppel Certificate does not allow for immediate termination. Second, the Defendant seems to contend that since paragraph 8.2 explicitly allows for immediate termination, the absence of such a provision in paragraph 13.10 indicates the parties knew how to draft provisions allowing for immediate termination and since it is not included in paragraph 13.10 it was incorrect to permit immediate termination in this case. (Pb17-19.) However, there are flaws in the Defendant's positions.

Paragraph 8.2 does not provide an immediate right to terminate. It states that termination is allowed only if there is an uncured material breach prior to the closing date: "In the event of any material breach . . . discovered prior to the Closing Date, which is not fully cured or corrected prior to the Closing Date". (Da203.) Paragraph 8.2's inclusion of a cure provision negates Defendant's reading that it permits an immediate termination due to a material default. Furthermore, as addressed Defendant rewrites paragraph 13.10 by contending

Defendant was required "to use 'commercially reasonable efforts...prior to the closing' to obtain an ***Acceptable Estoppel Certificate***." (Pb14-15) [emphasis added]. The fact is the language makes no reference to compel Defendant to obtain same prior to closing, or at any time. So despite the repetition by Defendant (Pb14, 15, 17, 18, 19.), there exists no requirement on Defendant to provide an Acceptable Estoppel Certificate at closing which, most succinctly, is demonstrated by paragraph 9.1(xix), which requires delivery of an Acceptable Estoppel Certificate "if obtained".

Notwithstanding Defendant's misreading and rewrite of the PSA, examination of other PSA provision show the error in Defendant's interpretation of the prompt delivery language, while proving Plaintiff's interpretation is correct. One pertains to the requirement for providing a Subordination and Non-Disturbance and Attornment Agreement. Within the same paragraph requiring the estoppel, 13.10(a), is paragraph 13.10 (b) and it stated:

> Seller shall send to any required Tenant under the Leases, and request that such Required Tenant execute and return, a subordination, non-disturbance and attornment agreement ("SNDA") as may be required by Purchaser or Purchaser's lender. Seller shall commercially [sic] reasonable efforts to obtain an SNDA from the commercial tenant under the Leases prior to the Closing. Provided Seller uses diligent and good faith efforts to obtain the SNDA from the commercial tenant under the Leases, Seller shall not be deemed in default of this Agreement in the event

> such Required tenant does not deliver the SNDA as required hereunder, it being agreed that the sole remedy of Purchaser in the event Seller does not the [sic] SNDA shall be to terminate this Agreement and receive a refund of the Down Payment.

Conspicuously absent is any requirement that the SNDA be delivered upon receipt, either promptly or otherwise. This further shows the purpose of prompt delivery was not to facilitate Defendant securing an Acceptable Estoppel Certificate by closing, rather it was intended to be informational and when submitted if it showed a default, that by definition was not an Acceptable Estoppel Certificate, Plaintiff could terminate.

Likewise, paragraph 8.2 relied upon by Defendant is revealing. It shows the parties had the ability to, and did, include a provision allowing them to avoid termination by permitting corrective action. Notably, this concept is absent from paragraph 13.10, a fact acknowledged by the trial court. (Da12.)

The PSA language does not support the idea that the promptly delivered requirement was intended to allow for corrective action so the Defendant could provide an Acceptable Estoppel Certificate by closing. If the sole purpose were to identify a defective estoppel, it would be unnecessary to even include any delivery provision. Per the PSA an Acceptable Estoppel Certificate is one that does not reveal the existence of a default. The Defendant alone could review and determine if the estoppel were acceptable. If it did not meet the defined term

Acceptable Estoppel Certificate Defendant could unilaterally take steps to obtain a proper certificate and there would be no need for prompt let alone any delivery. In fact, Defendant through counsel admitted the "the first estoppel certificate was unacceptable". (T24-4-6.)

In summary, Defendant repeatedly misread and misstated the clear language of the PSA in making its arguments at Point I. Its positions are unfounded. Consequently, its contract interpretation is unreasonable and unenforceable. Partial summary judgment was properly granted.

iii. An Estoppel Certificate not an Acceptable Estoppel Certificate was to be Delivered. Defendant's Condition Precedent Argument is Meritless. Also, Estoppels have Two Purposes: One Being to Inform the other to Preclude. As Such the Trial Court did not Misinterpret the Role of an Estoppel. (Answering Defendant's Argument at Point II. (Pb19-25.)

Under Point II of Defendant's brief it argues there is a difference between due diligence and delivery of the estoppel. (Pb19-25.) This, Defendant claims, was misunderstood by the trial court and resulted in an erroneous conclusion since the court improperly conflated the two.

To prove the difference Defendant argues the due diligence provision permitted immediate termination upon finding adverse information, while termination due to a deficient estoppel was only permitted if Defendant failed to provide an Acceptable Estoppel Certificate by closing. (Pb21-24.) It

buttressed this temporal distinction pointing out the due diligence process is completed "well before issuance of the estoppel certificate". (Pb20) Added is that due diligence was concluded within thirty days of contract execution, but delivery of the estoppel could, according to Defendant's interpretation, occur as late as the closing. Also, the trial court's discussion of "cure" further shows its misunderstanding (Pb 21-22) since cure was a "meaningless concept" because failure to provide a proper estoppel certificate is not a default meaning there would be nothing to cure. (Pb21.)

As further proof of the distinction, Defendant states the due diligence process and estoppel certificate serve different purposes - the former to assess risks prior to the transaction, and the latter solely to safeguard against post-transaction claims. These separate purposes mean the estoppel delivery obligation is not a fact-finding tool. (Pb22-25.)

These distinctions, the Defendant claims, were misunderstood by the trial court, leading it to incorrectly view the estoppel requirement as allowing termination "based on unfavorable information," which was "contrary to the terms of the PSA and commercial reality". (Pb24.) As a result "the trial court fundamentally misconstrued the estoppel certificate's function." (Pb25.)

Defendant's argument is flawed in several significant ways. First, the PSA

placed delivery of the estoppel certificate within the due diligence timeline. Due diligence lasted for 30 days following signing, and Defendant was to submit the estoppel for signature within 10 days of signing and use commercially reasonable efforts to secure it. If secured, Defendant was obligated to promptly deliver it to the Plaintiff. Certainly, it was within the parties' contemplation, especially due to the required prompt delivery, this would occur within the due diligence timeline. But for Defendant's concealed litigation with TLE, the estoppel process would have been completed within the 30-day due diligence period. The fact this ultimately happened as it did, as Judge Lynott observed, "does not nullify the right the parties contemplated the Purchaser would have in the event of a non-compliant Estoppel Certificate at any time." (Da11.)

Second, Defendant's characterization of the estoppel certificate's purpose does not accurately reflect it has two – not one as Defendant says – functions. In fact, the definition from Black's Law Dictionary quoted by Defendant (Pb22) shows there are two purposes: A first being

> "certifying for another's benefit that certain facts are correct, such as that the lease exists, ***that there are no defaults***";

and as a second purpose being it

> "estops that party from later claiming a different state of facts".

> (Pb22 quoting Black's Law Dictionary (Abridged Eighth ed. 2005) [Emphasis added].)

Indeed, this two-nature concept of an estoppel is expressed by other authorities:

> The purpose of an estoppel statement is twofold: (1) to give a prospective purchaser or lender information about the lease and the leased premises and (2) to give assurance to the purchaser or lender that the lessee at a later date will not make claims that are inconsistent with the statements contained in the estoppel.'
>
> Alvin L. Arnold & Jeanne O'Neill, Real Estate Leasing Practice Manual, § 35:1 (West Online 2005)

Pointedly, the first purpose, which is giving information to a purchaser, has also been acknowledged by this Court albeit in an unpublished decision.

In Dunkins v. 447 South 13th Street Holdings, LLC, No. A-0058-21 p.4 n.3 (App. Div. June 8, 2022)[7] this Court stated "[a]n estoppel certificate is a statement certifying the current status and terms of the lease agreement between the tenant and the landlord for a prospective purchaser of property." This has also been judicially recognized elsewhere. Icehouse, Inc. v. Geissler, 636 NW2d 459, 461 (SD 2001) ["Prior to the sale, Icehouse signed an 'Estoppel Certificate.' The purpose of this certificate was to inform potential buyers of the rights and obligations held by the owner of Manor House."]; Greaseoutlet.com, LLC v. MK

[7] In conformity with R. 1:36-3 a copy of the unpublished opinion was presented below and appears now in the record on appeal. (Da378.)

South II, LLC, 892 S.E.2d 68, 75 (2023), disc. rev. denied, 895 S.E.2d 863 (2024) ["An estoppel certificate is a document routinely required by a purchaser of real estate to be signed by the existing tenants of the real estate being sold. . . . As such, it is not uncommon for a purchaser, as part of its due diligence, to require each tenant to make representations regarding its lease by signing an estoppel certificate."]

Fundamentally Plaintiff, as a purchaser, is an outside party to the relationship between the landlord and tenant. Its only insight is through the seller, Defendant, and the tenant through the estoppel certificate. By necessity the certificate must be informative.

A seller is just that, a party seeking to conclude the transaction. Relying on information only from the seller is ill-advised. A tenant estoppel certificate serves the salutary purpose of giving transparency from a party not beholden to the transaction, i.e., the tenant, of the state of affairs.

Judge Lynott's decision is aligned with the informational purpose of an estoppel certificate. He determined "[t]he obvious reason for a requirement of this nature was to enable the purchaser to learn from the tenant, in a formal matter, the status of a leasehold and to afford the purchaser the essential unfettered right to terminate if the information provided was adverse, as it was

here." (Da11.) In this case, TLE, the tenant from whom the estoppel was promptly delivered accounted for 17% of the property's income - a vital factor.

A third misstatement is Defendant was not required to deliver an Acceptable Estoppel Certificate as it repeatedly says. Paragraph 9.1 states it is a deliverable only "if obtained".

Lastly, Defendant takes the trial court's cure discussion out of context. Judge Lynott was addressing the Defendant's contention it had a right to submit multiple estoppels and could do so up to closing. In assessing the argument on the purpose of prompt delivery the trial court wrote "[m]ore fundamentally, if the parties had intended to permit the [Defendant] to cure an initially deficient Estoppel Certificate prior to the Closing Date – and thereby vitiate or even negate a termination by [Plaintiff] – or if they agreed simply to wait to the Closing Date for delivery of a certificate in the first instance (i) they would not have provided for a prompt delivery of whatever certificate as the tenant provides the text of the agreement actually establishes; and (ii) they could have and surely would have provided explicitly for a right to cure". The trial court was obviously saying that the agreement does not confer on Defendant the ability to make multiple submissions once a deficient one is delivered. The Defendant plainly is looking to exploit the use of the word cure without

informing of the full context in which the trial court used the term.

The Defendant's arguments fail to show its interpretation is reasonable or that the trial court erred in granting summary judgment. Therefore, the lower court's decision should be affirmed.

iv. The Trial Court did not Misconstrue the PSA Risk Allocation. The Unfair Advantage Statement Read in Context Described the Logical Flaw in Defendant's Interpretation. (Answering Defendant's Argument at Point III. (Pb25-27.)

The Defendant claims in Point III of its Brief the trial court erred by concluding that the Defendant's interpretation of the PSA would give Defendant an unfair advantage to the Plaintiff's detriment. (Pb25-27.) The Defendant argues that this misinterpreted the risk allocation in the PSA. According to the Defendant, since it had until the closing date to supply an Acceptable Estoppel Certificate as a "closing deliverable," the risk to Plaintiff of Defendant not doing so existed from contract inception. (Pb26.) Therefore, the trial court was wrong in determining there would be an unfair advantage if the Defendant's construction were given effect. The Defendant concludes this "impose[d] additional protections" for the Plaintiff not included in the PSA. (Pb27.)

However, the Defendant is again incorrectly relying on an obligation to deliver an Acceptable Estoppel Certificate at closing referring to it as a closing deliverable. Additionally, the Defendant is reading the trial court's points out of

context. The reference to an "unfair advantage" was made as a last point on the court's discussion of the "logical flaw" in the defendant's position.

The trial court began by considering what would happen if the estoppel could be delivered at the closing, despite a previously delivered estoppel revealing a default. Plaintiff, in a state of "obvious uncertainty," would be required to prepare and pay for a closing on the "possibility" Defendant could produce an Acceptable Closing Certificate. This, however, defeated the purpose of requiring prompt delivery of whatever estoppel was received. (Da12.)

Continuing, the trial court observed that the implied covenants of good faith and fair dealing cannot override an express, negotiated contract provision. Allowing the Defendant's construction would violate this principle. The trial court noted the Plaintiff only had termination as its remedy and could not seek any other relief, adding "[i]t bears observing" the Defendant had the ability in advance to confer with TLE to receive an Estoppel Certificate excluding any qualification or reference to default. (Da13-14.)

It was in this context that the trial court stated the Defendant would have "an unfair advantage of taking a chance on securing a cured certificate," which "only risked having to return" the deposit, while the Plaintiff "would have to determine whether to terminate" where its only recourse was "return of the

deposit." The court concluded this outcome "hardly seems to have been within [the parties'] contemplation" absent express contractual language. (Da15.)

The trial court was obviously analyzing how the Defendant's construction was logically flawed, not imposing additional protections for the Plaintiff. The court's reasoning becomes even clearer when considering the actual circumstances that unfolded, including the timing and implications of the Estoppel Certificate delivery. When the Estoppel Certificate was delivered it was on the eve of the rescheduled closing. As of then Plaintiff's costs exceeded $275,000 making the decision to terminate a difficult one. (Da185.) And the Defendant was controlling the narrative. Certainly, it could have as part of its TLE settlement had direct conversation on what the estoppel would look like. Instead, it chose to send what it received knowing all it had to lose was the return of the deposit. Being a sophisticated party, it knew of the costs incurred by Plaintiff to that point, and termination decision was a difficult one to say the least. That, combined with the fact the disqualified estoppel did not amount to a default played into Defendant's thinking.

Plainly the trial court did not "impose additional protections" for Plaintiff as Defendant argues. Rather, the trial court showed how if implemented the Defendant's interpretation would create a radically different balance then that

put forward in the PSA. Putting a finer point on this are the facts as they actually transpired. The whole of the argument here, as was the case throughout, fails to prove the Defendant's interpretation is reasonable and, therefore it was proper to grant partial summary judgment, and the decision should be affirmed.

CONCLUSION

Defendant's decision to rely solely on the PSA, and to not seek to argue the PSA is ambiguous because it is reasonably susceptible to two interpretations, focuses the issue on this appeal as to whether Defendant's interpretation is reasonable. If it is – and it is submitted it is not – given the trial court decision determining Plaintiff's construct is correct then a remand for a trial is the outcome. However, Defendant has misstated the PSA's language, incorrectly defined the role of estoppel certificates, mischaracterized the trial court decision and reasoning, and from this complex of distorted facts and principles attempted to piece together an interpretation at odds with the plain unambiguous language of the PSA. Defendant's view is logically flawed when viewed from the perspective of how it would operate if given effect. If Defendant's interpretation were correct Plaintiff, although having received an estoppel showing a landlord default, would have to appear at a closing table just to wait in the hoped for production by Defendant of an acceptable estoppel certificate. Such an outcome

eviscerates the purpose of requiring prompt delivery. Succinctly, an estoppel certificate request was to be made, good faith efforts used to obtain it, if obtained promptly deliver it to Plaintiff and if it revealed a default, as it did, it was not an acceptable estoppel certificate relieving Plaintiff of any need to close and triggered Plaintiff's only remedy – terminate the PSA. That is precisely how the trial court viewed it, and what happened.

Accordingly, based on the arguments made, and to be made, and the authorities cited, Plaintiff respectfully requests the decision be affirmed.

Dated: November 4, 2024

Respectfully submitted,
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Superior Court of New Jersey

Appellate Division

Docket No. A-003385-23T2

INVEL CAPITAL LLC, *Plaintiff-Respondent,* vs. 45 WILLIAM URBAN RENEWAL LLC A/K/A 45 WILLIAM STREET URBAN RENEWAL LLC, *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-4297-22 Sat Below: HON. KEITH E. LYNOTT, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT APPELLANT

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PROCEDURAL HISTORY

Appellant relies on the procedural history set forth in its opening brief.

STATEMENT OF FACTS

Appellant relies on the statement of facts set forth in its opening brief.

LEGAL ARGUMENT

I. The PSA's Plain Language Precludes Invel's Interpretation.
(Raised Below: Da11)

The PSA[1] provides that 45 William must attempt to obtain an estoppel certificate "prior to the closing." (Da211). The PSA provides that the date on which the Acceptable Estoppel Certificate must be delivered is the date of the closing. (Da205). "[A]t the closing, Seller shall execute and/or deliver … a duly executed Acceptable Estoppel Certificate." *Id*. Nowhere does the PSA provide or even hint that Invel may cancel the PSA if receives an estoppel certificate that it does not deem compliant. Rather, the right to cancel is explicitly provided "in the event [45 William] does not obtain an Acceptable Estoppel Certificate." (Da211).

Invel devotes 50 pages of its Brief attempting to evade the plain language of the PSA and justify the trial court's decision which read an entirely new provision into the PSA — that the receipt of a non-compliant estoppel certificate gives Invel the right to immediately terminate the PSA. Invel's failure to engage

[1] All capitalized terms have the same meaning as in the principal Brief.

directly with the crucial provisions of the PSA highlight the deficiencies in its argument and its reliance on half-hearted textual interpretations that fall far short of supporting its position or overcoming the plain text of the PSA.

The PSA is not cryptic about the time frame during which 45 William is required to obtain an estoppel certificate. "Seller shall use commercially reasonable efforts to obtain an Estoppel Certificate from the commercial tenant **prior to the Closing**." (Da211) (emphasis added). The PSA says nothing about this timeline ending merely because 45 William obtains a non-compliant Estoppel Certificate.

The PSA is not cryptic about the date by which the Acceptable Estoppel Certificate must be delivered. "**At the Closing**, Seller shall execute and/or deliver … a duly executed Acceptable Estoppel Certificate (as defined in Paragraph 13.10)." (Da205) (emphasis added). The Estoppel Provision is clearly defined as a normal condition precedent to closing — and nothing more. "Purchaser's obligation to close title hereunder is conditioned upon any commercial tenant under the Leases delivering to Purchaser an estoppel certificate in the form attached hereto as Exhibit C (the 'Acceptable Estoppel Certificate')." (Da211).

Nor is the language giving Invel the right to terminate ambiguous. "The sole remedy of Purchaser in the event Seller does not obtain an Acceptable Estoppel Certificate from the Required Tenant shall be to terminate this

Agreement." (Da211). The language is unequivocal. Invel's right to terminate arises if Defendant fails to deliver an Acceptable Estoppel Certificate. Invel's right to terminate does not arise simply upon receipt of a non-compliant estoppel certificate.

a. What the PSA Does Not Say

Critically, Invel's Brief fails to cite any provision of the PSA that grants it the right to terminate upon receipt of a non-compliant estoppel certificate. Such a right is simply nowhere to be found in the PSA.

Had the PSA intended to grant such a right it could easily have done so — "In the event that an estoppel certificate discloses a material matter, Invel may terminate this Agreement." But the PSA has no such provision to be found anywhere. The absence of this language is not an oversight—it reflects the negotiated terms of the PSA, which explicitly provides that: (1) 45 William must use commercially reasonable efforts to obtain an estoppel certificate prior to closing, (2) 45 William must promptly deliver the executed estoppel certificates received from tenants, and (3) Invel's obligation to close is conditioned upon any required tenant delivering an Acceptable Estoppel Certificate, which is to be provided at closing.

Invel instead resorts to piecemeal textual arguments that do not amount to a coherent reading of the PSA. For example, Invel conflates the prompt delivery requirement with an accelerated deadline for compliance, ignoring that the

PSA's use of "prompt delivery" applies only to the estoppel certificate received from the tenant — not to the ultimate requirement of delivering an Acceptable Estoppel Certificate at the closing. Invel also conflates these two separate provisions when it mischaracterizes the purpose of the Acceptable Estoppel Certificate, attempting to repurpose it as a due diligence tool contrary to its clearly stated function as a condition precedent.

b. Plaintiff's Half-Hearted Textual Interpretations Fail

It is telling that Invel's Brief fails to reconcile its contractual interpretation with the PSA's actual text. Instead, it relies on strained readings and selective citations to craft an argument that contradicts the plain terms of the contract.

For instance: (1) Invel repeatedly suggests that 45 William's obligation to deliver an Acceptable Estoppel Certificate is tied to the due diligence period. However, the PSA clearly separates the due diligence timeline from the Acceptable Estoppel Certificate delivery timeline, which extends to the closing date; (2) Invel misconstrues a central element of 45 William's argument, which hinges on the fact that 45 William was not required to deliver an Acceptable Estoppel Certificate; and (3) Invel focuses on what it perceives to be the estoppel certificate's broader role but fails to engage with the specific and distinct contractual mechanics that govern termination rights. In sum, Invel provides no textual basis for its claim that receipt of a non-acceptable estoppel certificate triggers an automatic right to terminate.

II. Invel Misconstrues 45 William's Position Concerning the Requirement to Deliver an Acceptable Estoppel Certificate. (Responding to Invel's Argument at Point II(i) (Pb 28-29)).

(Raised Below: Da11-13)

Invel misconstrues a core element of 45 William's position. Contrary to Invel's assertion, 45 William's position does not rest on the contention that it was obligated to present a "defined acceptable estoppel certificate." To the contrary, 45 William was explicitly not "required" to present a defined Acceptable Estoppel. "The failure of Seller to obtain an Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default by Seller." (Da211).

Rather, as 45 William directly articulated in its opening Brief, 45 William obtaining an Acceptable Estoppel Certificate is simply a condition precedent to Invel's obligation to close, and if it could not be obtained, Invel was permitted to terminate the PSA.

However, Invel asserts in its Brief, "Defendant misread the contract. Nowhere is Defendant required to deliver the defined acceptable estoppel certificate. Rather, the obligation was only to seek the defined estoppel certificate, and if obtained deliver it promptly upon receipt." (Pb 3). This statement not only misconstrues 45 William's position but also ignores the core of 45 William's argument, which is entirely consistent with Invel's own interpretation that 45 William was not obligated to deliver an Acceptable

Estoppel Certificate. Instead, 45 William has consistently maintained that failure to deliver an Acceptable Estoppel Certificate by the closing date does not constitute default but merely triggers the Invel's sole remedy of termination.

III. The PSA's Structure Demonstrates That the Seller's Obligations Extend Until Closing, Refuting Plaintiff's Overreliance on the Definite Article "The" and Mischaracterization of Key Contractual Distinctions. (Answering Invel's Argument at Point II(i) (Pb 29-34).

(Raised Below: Da11-13)

At the core of this dispute is the absence of language in the PSA (1) imposing a deadline for delivering an Acceptable Estoppel Certificate before the closing date, or (2) providing Invel the right to terminate the agreement upon receipt of an estoppel certificate deemed non-compliant. Aware of this, Invel attempts to create such a deadline by focusing on the distinction between the words "the" and "an" in the PSA, arguing that the use of "the" in the sentence, "Upon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser," provides that (1) Seller was only allowed to deliver a singular estoppel certificate and (2) therefore allows Invel to immediately termination right the PSA if that estoppel certificate is deemed non-compliant.

This strained interpretation, however, isolates specific terms without considering the PSA as a whole, contradicting the principles of proper contractual interpretation, which require giving effect to all provisions and avoiding contradictions or redundancies. Indeed, it stubbornly focuses on one single use of the phrase "the executed Estoppel Certificate" in an irrelevant

context and ignores that in the critical relevant language — and indeed seven times in the PSA the phrase "an estoppel certificate" or "an acceptable estoppel certificate" is used.

Invel's reliance on the word "the" in the sentence "[u]pon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser" ignores the context of that specific sentence as well as the PSA's broader structure, which separates procedural obligations from substantive conditions tied to closing.

The sentence in question is set in the following context: "[45 William] shall use commercially reasonable efforts to obtain **an** Estoppel Certificate from the commercial tenant prior to the Closing. Upon receipt of **the** executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser. (Da211) (emphasis added).

The reason the definite article "the" is used here is apparent. It is "the" executed certificate that 45 William received from a tenant that was just mentioned in the sentence above. And indeed, the very sentence above requires efforts to obtain the certificate uses the indefinite article "an."

More pointedly though, this sentence is not the critical one to examine as it is not the clause which gives Invel the right to terminate. The critical sentence — where Invel's right to terminate is provided — limits termination to the "failure of Seller to obtain **an** Acceptable Estoppel Certificate."

(Da211)(emphasis added).

Not just here but again and again the PSA uses the indefinite "an" to describe the provision of an estoppel certificate.

- "Seller shall … submit … **an** estoppel certificate." (Da211) (emphasis added);
- "Seller shall use commercially reasonable efforts to obtain **an** Estoppel Certificate." (Da211) (emphasis added);
- "Purchaser's obligation to close title hereunder is conditioned upon … delivering to Purchaser **an** estoppel certificate"; (Da211) (emphasis added);
- "An estoppel certificate received from a Required Tenant shall not be **an** Acceptable Estoppel Certificate if such Required Tenant discloses a default." (Da211) (emphasis added).
- "The failure of Seller to obtain **an** Acceptable Estoppel Certificate from the Required Tenant shall not be deemed a default." (Da211) (emphasis added).
- "the sole remedy of Purchaser in the event Seller does not obtain **an** Acceptable Estoppel Certificate" (Da211) (emphasis added).
- "An estoppel certificate received from a Required Tenant shall not be **an** Acceptable Estoppel Certificate if such Required Tenant discloses a default." (Da211) (emphasis added).

The actually relevant termination clause uses the indefinite article "an", the PSA uses the indefinite article "an" seven times with respect to an estoppel certificate. But Invel, without any asserted logical explanation, asserts that the one single use of the definite article "the" in a sentence not dealing with its term termination rights, established that under the PSA only one single estoppel certificate can ever be circulated.

The PSA read as a whole, establishes two distinct elements: (1) 45 William's procedural duty to promptly deliver any Estoppel Certificate it receives from a tenant (where the failure to do so would likely constitute a breach); and (2) the substantive condition precedent to closing of delivering an Acceptable Estoppel Certificate by closing, the absence of which allows the Invel to terminate the PSA (but is explicitly not a breach).

In stressing the article "the" in the clause, "Upon receipt of the executed Estoppel Certificate, Seller shall promptly furnish a copy thereof to Purchaser," Invel erases the PSA's distinction between the "Estoppel Certificate" and an "Acceptable Estoppel Certificate", incorrectly imposing an immediate requirement to deliver an Acceptable Estoppel Certificate. Invel conflates two distinct responsibilities and disrupts the PSA's structure.

IV. The PSA Distinguishes the Purpose and Timing of Estoppel Certificates from Due Diligence. (Answering Invel's Argument at Point II(iii) (Pb 40-46).

(Raised Below: Da11)

Invel's suggests that the Estoppel Provision was a part of the due diligence provisions of the contract.

> the PSA placed delivery of the estoppel certificate within the due diligence timeline. Due diligence lasted 30 days after signing, during which the Defendant was required to submit the estoppel for signature within 10 days of signing and use commercially reasonable efforts to secure it. If secured, the Defendant was obligated to promptly deliver it to the Plaintiff**. Certainly, it was within the parties' contemplation—especially given the required prompt delivery—that this would occur within the due diligence timeline**.

(Pb 41-42) (emphasis added).

This suggestion is the antithesis of interpreting a contract based on its express terms. The PSA had a diligence period that lasted 30 days from execution. The PSA separately required 45 William to (i) submit an estoppel certificate to its commercial tenant within 10 days of execution, (ii) then use "reasonable efforts" to have it returned "from the commercial tenant prior to the Closing," and finally (iii) promptly furnish the certificate upon receipt, to Invel. (Da211).

To suggest, as Invel does, that this clearly contemplates an estoppel certificate being delivered to Invel during the 30 due diligence period is nothing short of a flight of fancy. Indeed, it flies directly in the face of the actual text which provides that the only timing obligation in this process is that 45 Willam make efforts to obtain the certificate "prior to the Closing" and provide it to Invel "at the Closing." (Da204-205, 211).

Invel's attempt to align the Estoppel Provision's purpose with the due diligence timeline misrepresents both the contractual language and the commercial realities of such transactions.

V. The Trial Court Erred in Concluding that the Purchaser would have an "Unfair Advantage", and Invel's Argument Ignores the Logical Flaws in Its Own Interpretation. (Answering Invel's Argument at Point II(iv) (Pb 46-49).

(Raised Below: Da14)

Invel argues that the trial court properly concluded that 45 William would have an "unfair advantage" if Invel could not cancel the PSA immediately upon receipt of any non-compliant estoppel certificate. (Pb at 46-49). But Invel does not and cannot address the core issue: the PSA explicitly contemplated that an Acceptable Estoppel Certificate might not be available until the closing date. The trial court erred by imposing obligations not found in the contract.

The PSA— negotiated by sophisticated commercial parties — deliberately allocated the risk to Invel that an Acceptable Estoppel Certificate might very well not be delivered until the closing date. (Da205, 211). Indeed, the PSA does not even make it 45 William's obligation to try to obtain the executed estoppel certificate in an expedited fashion. While 45 William was required to promptly submit the certificate to the tenant, it was then only required to "use commercially reasonable efforts" to get the executed certificate back from the tenant "prior to the closing." (Da211). This is an express term of the PSA. There is no getting around the fact that the PSA, by its very terms, allows for Invel to remain in, what it characterizes as, a state of uncertainty until the closing.

Invel throws up a straw man argument by suggesting that disallowing it to cancel the PSA immediately upon obtaining a non-compliant estoppel certificate

would lead to them ultimately sitting at a literal closing table unaware if an Acceptable Estoppel Certificate is going to be produced. Of course, this suggestion is absurd.

If Invel was concerned that no Acceptable Estoppel Certificate could be obtained, it had every right to make time of the essence, set a closing date, and request that 45 William produce copies of all closing deliverables in advance of the closing. This is part of the normal process of preparing for closing and, of course, Invel could never be forced to attend a closing without 45 William having first demonstrated that it had or would have an Acceptable Estoppel Certificate to deliver at the closing.

Ultimately, the costs Invel incurred while preparing for closing were risks inherent to the PSA. These costs do not justify prematurely terminating the PSA, especially when it explicitly allowed 45 William to provide an Acceptable Estoppel Certificate by the closing date — a provision Invel agreed to. (Da205). The PSA did not authorize termination upon receiving a non-compliant certificate; instead, it limited termination to cases where an Acceptable Estoppel Certificate could not be delivered within the time frame set forth in the PSA; that is by the time of Closing. (Da205). Imposing additional obligations on 45 William to alleviate "uncertainty" conflicts with both the PSA's express terms and New Jersey law.

CONCLUSION

In light of the foregoing, the trial court erred in granting Plaintiff-Respondent Invel summary judgment on its specific performance cause of action. Accordingly, the Order and Judgment should be reversed.

Dated: November 20, 2024

Respectfully submitted,

/s/Dov Medinets
Dov Medinets, Esq.