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**ROUTE 22 NISSAN, INC.,**

*Respondents*,

vs.

**EUROPEAN AUTO EXPO, LLC**, **2 LIONS REALTY LLC**, and **LENNY SHALABY A/K/A MOHAMED SHALABY**,

*Appellants.*

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

DOCKET NO.: **A-003504-23 T1**

ON APPEAL FROM:
UNION COUNTY SUPERIOR COURT
LAW DIVISION - CIVIL PART

DOCKET NO.: **UNN-L-3598-21**

SAT BELOW:
HON. JOHN G. HUDAK, J.S.C.

# APPELLANT'S LEGAL BRIEF

*On the brief:*

GERALD R. SALERNO, ESQ., 022821982
STEVEN R. VANDERLINDEN, ESQ., 075932015

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## PRELIMINARY STATEMENT

This appeal arises from competing motions for partial summary judgment resulting in the grant of Summary Judgment in favor of Plaintiff/Respondent Route 22 Nissan, Inc. (hereinafter "Nissan") against Defendants/Appellants European Auto Expo, LLC, 2 Lions Realty LLC, and Lenny Shalaby a/k/a Mohamed Shalaby (hereinafter collectively "European") for an alleged breach of a lease agreement related to unpaid rent.

For nearly five years, European, an auto dealership, consistently and timely paid its rent to Nissan. In April 2020, Nissan unilaterally reduced European's rent without any reservation and continued accepting those reduced payments through December 2020. Less than a week after European notified Nissan that it would not renew the lease beyond its February 2021 expiration, Nissan precipitously demanded nearly $190,000 in alleged rental arrears dating back to 2017.

European contends that the trial court erred as a matter of law in granting summary judgment as Nissan's ongoing acceptance of these rental payments, without reservation and with full awareness of any purported discrepancy, clearly constitutes a waiver of its claim for pre-December 2020 arrears and its unilateral action to reduce Nissan's rent, along with its continued acceptance of that reduced rent, ratified same. The trial court

compounded this error by issuing an order without any reasoning as to how it arrived at the dollar amount it awarded or providing any factual findings to support its decision.

The trial court's ruling also ignored the fact that Nissan failed entirely to respond to European's counterstatement of material facts submitted in support of European's cross-motion for summary judgment, thereby creating genuine issues of material fact that should have automatically precluded summary judgment being entered in Nissan's favor. The trial court similarly failed to offer any rationale for awarding costs and fees in its Final Judgment, in clear contravention of the Rules of Court.

At the very least, there were sufficient genuine disputed facts in the record presented below to preclude summary judgment in Nissan's favor. The trial court's summary judgment ruling—issued without addressing these glaring deficiencies—creates a grave injustice. The lower court's decision not only misapplied the applicable standards for summary judgment but also failed to adhere to procedural and substantive fairness mandated by law. European respectfully submits that the Judgment should be vacated and the summary judgment Orders reversed, ensuring that judicial outcomes are based on a reasoned, consistent application of the law.

## PROCEDURAL HISTORY

On October 19, 2021, Plaintiff/Respondent Route 22 Nissan, Inc. ("Nissan") filed a Complaint alleging breach of contract against Defendants/Appellants European Auto Expo, LLC, 2 Lions Realty LLC, and Lenny Shalaby a/k/a Mohamed Shalaby ("European"). (Pa9). On January 26, 2022, European Answered Nissan's Complaint and asserted counterclaims for Breach of the Duty of Good Faith and Fair Dealing, and for declaratory relief pursuant to the Uniform Declaratory Judgments Act (the "Act"), N.J.S.A. 2A:16-15 et seq. (Pa89).

Following a period of discovery, the parties participated in mandatory non-binding Arbitration on September 27, 2024. (Pa108). On October 27, 2024, Nissan filed a notice and demand for Trial *de novo*, seeking to reject the arbitration award in its favor and restore the matter to the active trial calendar. (Pa110).

On or about November 17, 2023, Nissan moved for partial summary judgment. (Pa111). In response, European cross-moved for partial summary judgment seeking an Order precluding Nissan from seeking claims for damages for rental arrears arising out of any purported breach of the Assignment and Assumption of Lease Agreement allegedly occurring before December 15, 2020. (Pa129).

On January 19, 2024, Nissan's motion was granted and European's cross-motion denied. (Pa3; Pa5). Nissan ultimately withdrew their remaining claims seeking comparatively nominal damages for purported 'clean-up' costs and acknowledged the offset amount of $59,850 in European's favor—a credit for the deposit payment unaccounted for in the summary judgment orders—as set forth in the May 29, 2024, Final Judgment. (Pa7). Upon entry of Final Judgment, a Notice of Appeal was filed on July 12, 2024. (Pa142).

## STATEMENT OF FACTS

European and Nissan entered into a certain Assignment and Assumption of Lease ("Assignment") dated March 22, 2016, which assigned a certain Lease Agreement for the premises located at 399 Route 22, Hillsdale, N.J. (the 'Leased Premises"). (Pa18; Pa30).

The term of the Assignment was five years ending on February 28, 2021, with an option to renew the Assignment for an additional five-year term. (Pa18). European commenced occupancy under the Assignment in or about March of 2016, investing significant sums of money improving the Leased Premises in connection with its use as an Auto Dealership. (Pa114¶7; Pa11¶16; Pa91¶16 Pa98¶3; ). At all relevant times, European timely paid its rental payments to Nissan under the terms of the Assignment. (Pa98¶4; Pa115¶12; Pa132¶8; Pa135¶4; Pa136¶12).

In or about April 2020, Nissan advised European of a reduction in its rental obligation, in light of a taking by way of Eminent Domain by the NJ Department of Transportation. (Pa11¶17; Pa12¶18; Pa91¶17-18; Pa115¶8; Pa132¶8). Nissan thereafter affirmatively requested reduced rent from European, reducing the outstanding obligation from $37,998 to $32,300, which reduced sum was promptly and regularly paid by European. (Pa11¶17; Pa12¶18; Pa91¶17-18; Pa98¶4; Pa115¶8-9, 12; Pa132¶8).

On or about October 5, 2020, in accordance with the terms of the Assignment, European notified Nissan that it did not intend to extend the Assignment Term which would expire on February 28, 2021. (Pa98¶5; Pa116¶8; Pa124; Pa135¶7; Pa136¶8-11). Thereafter, on December 10, 2020, Nissan acknowledged European's notice of nonrenewal, which acknowledgement did not include a reservation of rights for unpaid rental obligations, nor did it contain a notice of breach of the Assignment that might indicate in any way that there were any monies purportedly due and owing under the Assignment. (Pa119; Pa98¶6; Pa131).

Through December 2020, European paid and Nissan accepted in full, without reservation or notice of breach, the following 51 rent payments:

| | | | |
|---|---|---|---|
| ✓ October 2016 | $37,798.86 | ✓ December 2018 | $37,998.00 |
| ✓ November 2016 | $37,799.00 | ✓ January 2019 | $37,799.00 |
| ✓ December 2016 | $37,799.00 | ✓ February 2019 | $37,799.00 |
| ✓ January 2017 | $37,799.00 | ✓ March 2019 | $37,998.00 |
| ✓ February 2017 | $37,799.00 | ✓ April 2019 | $37,998.00 |
| ✓ March 2017 | $37,998.00 | ✓ May 2019 | $37,998.00 |
| ✓ April 2017 | $37,998.00 | ✓ June 2019 | $37,998.00 |
| ✓ May 2017 | $37,998.00 | ✓ July 2019 | $37,998.00 |
| ✓ June 2017 | $37,998.00 | ✓ August 2019 | $37,998.00 |
| ✓ July 2017 | $37,998.00 | ✓ September 2019 | $37,998.00 |
| ✓ August 2017 | $37,998.00 | ✓ October 2019 | $37,998.00 |
| ✓ September 2017 | $37,998.00 | ✓ November 2019 | $37,998.00 |
| ✓ October 2017 | $37,998.00 | ✓ December 2019 | $37,998.00 |
| ✓ November 2017 | $37,998.00 | ✓ January 2020 | $37,998.00 |
| ✓ December 2017 | $37,998.00 | ✓ February 2020 | $37,998.00 |
| ✓ January 2018 | $37,799.00 | ✓ March 2020 | $37,998.00 |
| ✓ February 2018 | $37,799.00 | ✓ April 2020 | $32,300.00 |
| ✓ March 2018 | $37,998.00 | ✓ May 2020 | $32,300.00 |
| ✓ April 2018 | $37,998.00 | ✓ June 2020 | $32,300.00 |
| ✓ May 2018 | $37,998.00 | ✓ July 2020 | $32,300.00 |
| ✓ June 2018 | $37,998.00 | ✓ August 2020 | $32,300.00 |
| ✓ July 2018 | $37,998.00 | ✓ September 2020 | $32,300.00 |
| ✓ August 2018 | $37,998.00 | ✓ October 2020 | $32,300.00 |
| ✓ September 2018 | $37,998.00 | ✓ November 2020 | $32,300.00 |
| ✓ October 2018 | $37,998.00 | ✓ December 2020 | $32,300.00 |
| ✓ November 2018 | $37,998.00 | **TOTAL**: | **$1,884,824.86** |

(Pa89; Pa115¶12 Pa122-124; Pa131; Pa133¶12; Pa135¶4; Pa136¶12).

Five days after acknowledging the notice of non-renewal, on or about December 15, 2020, Nissan retaliated by notifying European for the first time of an alleged discrepancy of rents and other amounts due, claiming that European owed Nissan the additional sum of $189,895.28 dating back to March 2017. (Pa82; Pa98¶7-9; Pa124; Pa133¶13; Pa135¶5-6; Pa138¶13-16).

Prior to December 15, 2020, Nissan never communicated that there was any deficiency whatsoever in the amounts paid by European, which amounts were accepted by Nissan despite European's regular communication with Nissan and its representatives, and despite having reduced European's rent by more than $5,000 only nine (9) months earlier. (Pa82; Pa98¶7-9; Pa124; Pa133¶13; Pa135¶5-6; Pa138¶13-16).

On or about November 17, 2023, Nissan's moved for partial summary judgment seeking a judgment in the amount of $189,895.28; European cross-moved for partial summary judgment seeking an Order precluding Nissan from seeking claims for damages for rental arrears arising out of any purported breach of the Assignment and Assumption of Lease Agreement allegedly occurring before December 15, 2020. (Pa111; Pa129).

European, in conjunction with its Cross-Motion for Summary Judgment, submitted a Statement of Additional Material Facts in Support of its Cross-Motion for Summary Judgement and in Further Support of its Opposition to Plaintiff's Motion for Summary Judgment (the "Counterstatement of Undisputed Facts")(Pa135). Nissan failed to respond in any way to European's Counterstatement of Undisputed Facts. T9-21:10-1.

On January 19, 2024, Nissan's motion was granted and European's cross-motion denied. (Pa3; Pa5). Nissan ultimately withdrew their remaining

claims seeking damages for certain clean-up costs and acknowledged the offset amount of $59,850 for European's deposit payment. (Pa7). Upon entry of Judgment, this appeal followed.

## LEGAL STANDARD

The Appellate Court applies the same standard as the trial court when reviewing a decision to grant summary judgment. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (app. Div. 1998). It first decides whether there was a genuine issue of fact, and if not, whether the lower court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 2016 N.J. Super. 255, 258 (App. Div. 1987).

The summary judgment rule set forth in Rule 4:46-2 "serve[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a *bona fide* cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thus saving the resources of the parties and the court. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541-42, (1995) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). In light of the important interests at stake when a party seeks summary judgment, the motion court must carefully evaluate the record in light of the governing law and determine the facts in the light most favorable to the non-moving party. R. 4:46-2(c).

Only, "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).

Rule 4:46-2(c)'s "genuine issue [of] material fact" standard mandates that the opposing party do more than point to a solitary fact in dispute in order to defeat summary judgment. Brill, *supra*, 142 N.J. at 529. (*emphasis supplied*). Under this standard, once the moving party presents sufficient evidence in support of the motion, the opposing party must "demonstrate by competent evidential material that a genuine issue of fact exists[.]" Robbins, *supra*, 23 N.J. at 241; *see also* Brill, *supra*, 142 N.J. at 529.

A court deciding a summary judgment motion does not draw inferences from the factual record as does the factfinder in a trial, who "may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created." Id. at 536 (quoting R. 4:49-1(a)). Instead, the court draws all legitimate inferences from the facts in favor of the non-moving party. R. 4:46-2(c); *see also* Durando v. Nutley Sun, 209 N.J. 235, 253 (2012) (noting "courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion") (quoting Costello v. Ocean

Cty. Observer, 136 N.J. 594 (1994)); Brill, *supra*, 142 N.J. at 536 (explaining the court must grant all the favorable inferences to the opposing party).

The court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Bhagat, *supra*, 217 N.J. at 40; Davis v. Devereux Found., 209 N.J. 269, 286 (2012); *see* Davidson v. Slater, 189 N.J. 166, 187 (2007). Thus, "neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, *supra*, 217 N.J. at 38; *see*, *e.g.*, Id. at 47-48 (reviewing grant of summary judgment in light of elements of valid and irrevocable gift and clear and convincing standard of proof); Durando, *supra*, 209 N.J. at 253-57 (applying clear and convincing evidentiary standard to grant of summary judgment in defamation action); Brill, *supra*, 142 N.J. at 542-45 (evaluating motion court's summary judgment determination in light of substantive standard and requisite burden of proof governing the cause of action). With the factual record construed in accordance with Rule 4:46-2(c), "the court's task is to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party[.]" Perez v. Professionally Green, LLC, 215 N.J. 388 (2013); *see also* Bhagat, *supra*, 217 N.J. at 39

(noting when deciding summary judgment motion, court determines whether reasonable jury could rule in favor of non-moving party).

Accordingly, when the movant is the plaintiff, the court must view the record with all legitimate inferences drawn in the defendant's favor and decide whether a reasonable factfinder could determine that the plaintiff has not met its burden of proof. *See, e.g.,* Bhagat, *supra*, 217 N.J. at 38; Durando, *supra*, 209 N.J. at 253; Brill, *supra*, 142 N.J. at 523. If a reasonable factfinder could decide in the defendant's favor, then the plaintiff has not demonstrated that it is "entitled to a judgment or order as a matter of law" and the court must deny the plaintiff's summary judgment motion. R. 4:46-2(c); *see, e.g.,* Bhagat, *supra*, 217 N.J. at 47-49 (reversing grant of summary judgment because genuine issues of fact exist); Lyons v. Twp. of Wayne, 185 N.J. 426, 434-37 (2005) (reversing grant of summary judgment because record was inconclusive as to whether dispute exists).

# ARGUMENT

## POINT 1

### THE TRIAL COURT ERRED BY IGNORING NISSAN'S FAILURE TO RESPOND TO EUROPEAN'S COUNTERSTATEMENT OF UNDISPUTED FACTS, PRECLUDING SUMMARY JUDGMENT IN NISSAN'S FAVOR AS A MATTER OF LAW (Pa3-6; T9-21:1-1; T15-4:17-1)

A party must file opposition to a motion, or cross-motion for summary judgment. When such a motion is made, the opposing party "bears the affirmative burden of responding. **That burden is not optional, and it cannot be satisfied by the presentation of incompetent or incomplete proofs**." Polzo v. County of Essex, 196 N.J. 569, 586 (2008) (citations omitted) (*emphasis supplied*).

As Nissan did not provide a responding statement, all supported facts in European's Counterstatement of Undisputed Facts should have been deemed admitted by the trial court:

> MR. VANDERLINDEN: As an initial matter, I want to point out that we did submit a counter statement of facts and [additional counter]statement of material facts, which were not addressed in [reply] papers. And pursuant to Rule 4:46-2, those facts should be deemed admitted for the purposes of the cross-motion.

(T9-21:10-1)

Instead, the lower court did not even consider this glaring deficiency.

The plain language of R. 4:46-2(b) does not permit the trial court, as it did here, to ignore entirely a party's failure to comply with the Rules. In the

same way, R. 4:46-2(b) does not permit the trial court to simply assume that each of the facts alleged in the moving party's statement of undisputed facts is undisputed without examining the record, or making any findings in regards to same.

In this respect, the Rule is stated in mandatory terms; the requirements of R. 4:46-2(a) and (b) for filing statements of material facts by parties to a motion for summary judgment are designed to focus attention on the areas of actual dispute and facilitate the court's review of the motion. Those requirements are critical and entail a relatively undemanding burden. Here, the trial court misapplied the summary judgment standard, because it failed to view the record in the light most favorable to European and to draw inferences that supported European's arguments. *See* Globe Motor Co. v. Igdalev, 225 N.J. 469 (2016).

In Globe, the New Jersey Supreme Court reversed the Appellate Division's decision affirming a trial court's grant of summary judgment on similar competing motions. In reversing, the Globe Court found that genuine issues of material fact were improperly resolved at the summary judgment stage. Id. at 484. The trial court in Globe, just like the trial court here, did not address the individual parties' motions, only rendering its decision on a conclusion of law. The Supreme Court's reversal in Globe underscores the

principle that all legitimate inferences must be drawn in favor of the non-moving party when reviewing such motions.

Similarly, in European's case, the trial court failed to address disputed facts and drew its conclusions in favor of Nissan, the moving party. However, in order to accurately "make such a determination, the court was required to view the record with all legitimate inferences drawn in defendants' favor, and to determine if there was no genuine issue of material fact". Id., *see also* R. 4:46-2(c); *see also* Durando, *supra*, 209 N.J. at 253; Brill, *supra*, 142 N.J. at 536. Here, just like in Globe, this misapplication of the summary judgment standard warrants reversal as,

> the "**record did not adequately support the motion court's conclusion**[…]**that plaintiffs were entitled to summary judgment on their breach of contract claim. When all legitimate inferences are drawn in defendants' favor, the record presents a genuine issue of material fact**". Id. at 484 (*emphasis supplied*).

In this case, the trial court failed to appreciate what the Summary Judgment standard makes clear: when "the opposing party offers no affidavits or matter in opposition […they] will not be heard to complain if the court grants summary judgment, **taking as true the statement of uncontradicted facts in the papers relied upon by the moving party**[.]" Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954) (citations omitted) (*emphasis supplied*). Nissan was required to "file a responding statement either

admitting or disputing each of the facts in the [cross-]movant's statement." R. 4:46-2(b). Since Nissan failed to do so, the trial court should have "deemed admitted" all material facts in cross-movant European's Counterstatement of Undisputed Facts. Id.

While the lower court disregarded it entirely, Nissan's wholesale failure to respond to the Counterstatement of Undisputed Facts, should have established, 1) that Nissan's Motion, viewed in the light most favorable to European, would lead a rational factfinder to find in European's favor, and 2) that there are no genuine factual disputes standing in the way of ruling in favor of European's Cross-Motion for Partial Summary Judgment. Here, despite an unrebutted Counterstatement of Undisputed Facts, the trial court incomprehensibly found *against* European.

The Brill standard required the trial court to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in the non-moving party's favor. Under this backdrop, regardless to which motion the lower court applied the standard, the outcome inherently supported a finding in European's favor, whether it be to deny Nissan's summary judgment in light of the disputed facts of their motion or to grant summary judgment in

European's favor in light of the undisputed facts of that cross-motion, or both. At a minimum, the facts were in sufficient dispute to warrant sending this matter to trial. As a result, the Judgment should be vacated, and the trial court's Orders should be reversed.

## POINT 2

### THE TRIAL COURT ERRED BY IGNORING THE PERTINENT DISPUTED FACTS WHEN IT FAILED TO PROVIDE ANY BASIS FOR ITS AWARD (Pa3-8; T15-4:17-1)

Rule 1:7-4(a) provides, in relevant part:

> The court **shall**, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right[.] (*emphasis supplied*).

Importantly, this requirement is mandatory, it is "unambiguous and **cannot be carried out by the motion judge by a nebulous allusion to 'the reasons set forth in [the] motion papers**.'" Estate of Doerfler v. Fed. Ins. Co., 454 N.J. Super. 298, 302 (App. Div. 2018)(*emphasis supplied*).

Neither the parties nor the Court can effectively proceed without a clear understanding of the reasoning behind a judge's ruling. Our Supreme Court explained, in Curtis v. Finneran, 83 N.J. 563 (1980), that the absence of an adequate expression of a trial judge's rationale "constitutes a disservice to the litigants, the attorneys and the appellate court." Id. at 569-70 (quoting Kenwood Associates v. Board of Adjustment, 141 N.J. Super. 1, 4 (App. Div.

1976)) (*Accord*, Gnall v. Gnall, 222 N.J. 414, 428 (2015); Estate of Doerfler, *supra*; State v. Lawrence, 445 N.J. Super. 270, 276-77 (App. Div. 2016); Raspantini v. Arocho, 364 N.J. Super. 528, 533 (App. Div. 2003); In re Farnkopf, 363 N.J. Super. 382, 390 (App. Div. 2003); T.M. v. J.C., 348 N.J. Super. 101, 106 (App. Div. 2002)).

The obligation to make specific findings on summary judgment motions in accordance with R. 1:7-4 has been explicitly stated in R. 4:46-2 for more than fifty years. Clearly, neither the parties nor the Courts of New Jersey are well-served by an opinion devoid of analysis. In the same way, cross-motions for summary judgment do not preclude the existence of fact issues.

The trial court granted summary judgment and entered Final Judgment without providing any factual findings, without addressing the disputed facts, and without providing any details to support its determinations. As a result, European disputes the methodology, calculation, and underlying basis for the trial court's ruling, including the amount determined in the Order granting summary judgment, as well as the determination to award costs and fees in the Final Judgment. (Pa5-8).

Rule 1:7-4(a) states that the court must provide a clear explanation of the basis for its decision, particularly in situations such as this when they are resolving contested issues. Similarly, Rule 4:42-8(a) governs the awarding

of costs in civil litigation. While this Rule allows for an award of costs, it does not relieve the trial court of its obligation to explain its reasoning when, as here, costs are disputed and the basis for awarding them is not clear.

Here, the trial court's conclusory ruling fails to address how it determined the exact amount of $189,895.28 was awarded to Nissan, nor did it address how it resolved the apparent factual disputes about payment history or waiver. (Pa3-8; T15-4:17-1). By failing to explain how it calculated its award and ignoring the disputed facts, the trial court overlooked critical evidence and, at a minimum, failed entirely to account for European's nearly sixty-thousand-dollar deposit. Id. This failure should also entitle European to a full and fair adjudication of its claims and defenses, including equitable defenses such as waiver. As a result, the Judgment should be vacated, and the trial court's Orders should be reversed.

## POINT 3

## THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THAT NISSAN'S CONTINUED ACCEPTANCE OF RENT CONSTITUTES WAIVER OF PAST BREACHES (Pa3-6; T15-4:17-1)

As explained herein, our Supreme Court has held that a landlord waives its right to enforce past breaches when it knowingly accepts rent payments without objection. For four (4) years, Nissan cashed every single check from European and continued to do so even after it unilaterally lowered the rent in 2020. Contrary to the trial Court's ruling, the continued acceptance of rent despite a breach of the lease provisions, constitutes a waiver of prior breaches. East Orange v. Bd. of Water Com'rs, etc., 41 N.J. 6, 18 (1963); Plassmeyer v. Brenta, 24 N.J. Super. 322, 330-331 (App. Div. 1953). Importantly, the waiver upon acceptance and continued acceptance of rent applies regardless of whether the lease agreement includes provisions for failure of the landlord to insist upon strict performance of its covenants. Carteret Props. v. Variety Donuts, Inc., 49 N.J. 116, 129 (1967).

In Carteret Props., our Supreme Court articulated critical principles applicable to European's claims of waiver and ratification. Specifically, the Supreme Court rejected the exact same argument the trial court accepted in this matter regarding a landlord's reliance on the specific terms of a lease provision that contains language purporting to abolish a waiver defense in its

entirety, without limitation. (Carteret Props., at 129)(finding waiver still applied even where the lease states that the landlord's silence or failure to adhere to "strict performance of lease covenants in one or more instances" shall not be interpreted as a waiver of any breach). Importantly, the Court explicitly found, that despite such 'non-waiver' language appearing in a lease,

> [**t]here is no doubt that acceptance of rent with knowledge of the breach, if any, constitutes a waiver of all past breaches**. Id. (*emphasis supplied*).

In accordance with Carteret Props., any allegedly past due rental payments and/or taxes were waived because Nissan expressly disclaimed them upon its acceptance, reduction, and then continued acceptance of European's monthly rent obligation. Well-settled contract law provides that "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**.'" In re Cty. of Atlantic, 230 N.J. 237, 254 (2017) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)(*emphasis supplied*)). The trial court's ruling contravenes these established principles by ignoring the surrounding facts and circumstances of the reality of the Assignment and Nissan's conduct.

Moreover, our courts have long held that,

> [t]he situation of the parties, the attendant circumstances, and the objects they sought to attain are all necessarily to

> be considered by the trial court in its inquiry as to the intention of the parties. When the meaning of an integrated contract is ambiguous, the surrounding circumstances may be introduced for the purpose of elucidation. Schnakenberg v. Gibraltar Sav. & Loan Asso., 37 N.J. Super. 150, 155 (App. Div. 1955)(citing N.Y. Sash & Door Co. v. Nat'l House & Farms Ass'n, 131 N.J.L. 466 (1944)).

But, the trial court's ability to entertain the surrounding circumstances does not end there: "**even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation**." Id. (*emphasis supplied*). The trial court failed to appreciate, let alone acknowledge, the surrounding circumstances of the parties. Here, not only were European's facts undisputed by Nissan, but the trial court failed to consider the surrounding circumstances and, in turn, whether those circumstances constituted waiver under the facts.

Importantly, the trial court's ruling is belied by the fact that during the time period of the alleged breach, Nissan notified European of a *reduction* in rents pursuant to a DOT taking and accepted the reduced rent for nine (9) consecutive months, from April–December 2020. (Pa113). Without question, the reduced amount was specifically calculated by Nissan and accepted each and every month. Id. Moreover, Nissan's affirmative reduction and subsequent acceptance of reduced rent as payment in full, without reservation

and without notice of a purported breach, is an affirmative act that ratifies the contract with respect to waiver of any allegedly past due rents.

Ratification occurs when an individual affirms a prior act that initially did not bind them, treating the act as if it had been authorized by them from the outset. Thermo Contracting Corp. v. Bank of N.J., 69 N.J. 352, 361 (1976) (quoting Restatement (Second) of Agency § 82 (1957); Goldfarb v. Reicher, 112 N.J.L. 413 (Sup. Ct. 1934); Passaic-Bergen Lumber Co. v. United States Trust Co., 110 N.J.L. 315 (E. & A. 1933)(Ratification requires intent to ratify plus full knowledge of all the material facts).

Ratification may be express or implied, and intent may be inferred from the failure to repudiate an unauthorized act, such as Nissan's failure here. East Orange v. Bd. of Water Comm'rs. of East Orange, 73 N.J. Super. 440 (Law Div. 1962), aff'd 40 N.J. 334 (1963); Johnson v. Hospital Service Plan of N.J., 25 N.J. 134 (1957).

Importantly, a ratification, once effected, cannot later be revoked, even where the ratification may have been induced by the anticipation of benefits which fail to accrue. Thermo Contracting Corp., *supra,* at 361, citing American Cast Iron Pipc Co. v. American R. Co., 87 F. 2d 250 (1st Cir. 1936). By knowingly reducing European's rent and continuing to accept those reduced payments without objection, Nissan not only waived its claims of

past breach, but also ratified the reduced rent it unconditionally accepted as valid and binding. European's notice of non-renewal does not permit Nissan to revoke this waiver.

Accordingly, when viewed in the light most favorable to European, who competently opposed Nissan's Motion for Partial Summary Judgment, sufficient evidence was presented in the record to permit a rational factfinder to resolve the disputed issues in favor of European, and summary judgment should not have been granted in Nissan's favor. Brill, *supra*, 140 N.J. at 540. Indeed, either 1) the facts were sufficiently disputed, and this issue was more appropriate for the jury who can consider testimony, weigh credibility, and draw reasonable inferences to determine if waiver should apply or, 2) if the affirmative act of ratification and the acceptance of rent and reduced rent is undisputed, then trial court should have found in European's favor on its cross-motion. Regardless, the trial court's ruling ignores these conclusions that logically follow from the materials before it on the motion and cross-motion for partial summary judgment. As a result, the Judgment should be vacated, and the trial court's Orders should be reversed.

## POINT 4

**THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THAT THE DOCTRINE OF LACHES FIRMLY APPLIES TO NISSAN'S FAILURE TO PROVIDE TIMELY NOTIFICATION OF THE PURPORTEDLY UNPAID RENT (Pa3-6; T15-4:17-1)**

Nissan waited years to raise its alleged claims of unpaid rent. By the time it did, European was blindsided because it had operated for nearly five (5) years on the reasonable assumption that all rental payments were in full compliance with the lease. The doctrine of laches exists to prevent this kind of inequitable ambush, and the trial court should have applied it here, and permitted European to present its meritorious defense to the factfinder.

The doctrine of laches "is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012) (quoting County of Morris v. Fauver, 153 N.J. 80, 105 (1998)). Here, the prejudice to European is obvious. The trial court failed to consider or apply this equitable remedy that our Supreme Court has found may be "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Id. at 418 (quoting Knorr v. Smeal, 178 N.J. 169, 180-81 (2003)).

Situations such as these are precisely the situations the Supreme Court envisioned warranting an application of the doctrine at the trial court level:

> **Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned**. Knorr, *supra*, 178 N.J. at 181. (*emphasis supplied*).

Nissan's abrupt demand for nearly $190,000 in arrears—following years of acquiescence— in response to European's nonrenewal of the Lease, undermines equitable principles of good faith and fair dealing. European acted in reliance upon Nissan's conduct and reasonably believed its payments satisfied its obligations. The trial court's failure to recognize these principles as a matter of law was in error. Allowing Nissan to claim arrears after this delay would be inequitable. As a result, the Judgment should be vacated, and the trial court's Orders should be reversed.

## CONCLUSION

European therefore respectfully asks that this court reverse the trial court's order granting summary judgment to Nissan, finding that as a matter of law the doctrine of waiver precluded Nissan's claim and that there were sufficient material disputed facts that the trial court failed to consider warranting denial of Nissan's motion.

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| ROUTE 22 NISSAN, INC.,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>EUROPEAN AUTO EXPO, LLC, 2 LIONS REALTY LLC, and LENNY SHALABY a/k/a MOHAMED SHALABY,<br><br>Defendants-Appellants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>Docket No. A-003504-23 T1<br><br>Civil Action<br><br>On Appeal From:<br>SUPERIOR COURT, LAW DIVISION<br>UNION COUNTY<br>Docket No. L-3598-21<br><br>Hon. John G. Hudak, J.S.C. |

# RESPONDENT'S AMENDED BRIEF

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Submitted: January 22, 2025

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## PRELIMINARY STATEMENT

Defendants-Appellants, European Auto Expo ("Euro Auto"), LLC, 2 Lions Realty LLC, and Lenny Shalaby a/k/a Mohamed Shalaby (collectively, "Defendants"), appeal from a final judgment entered subsequent to the award of partial summary judgment in favor of Plaintiff-Respondent Route 22 Nissan, Inc. At issue was an assignment of a lease, pursuant to which Euro Auto was to make monthly payments to Plaintiff over the course of the five-year term. It was discovered, however, that though Euro Auto had made payments, since the first anniversary of the contract it had failed to pay the proper amounts. Plaintiff brought the issue to Euro Auto's attention via letter more than two months before the termination of the agreement. Defendants failed to rectify the deficiency, and so Plaintiff brought suit.

Plaintiff sought to enforce the clear terms of the contract between the parties, which provides unambiguous payment calculation terms that Defendants did not follow. In defense, Defendants claimed that by accepting partial payment without complaint, Plaintiff had implicitly waived its right to collect the full amount. Plaintiff argued, and on competing motions for summary judgment, the trial court agreed, that another unambiguous contractual provision precluded the very waiver argument that Defendants asserted in defense. Regardless of the contract language precluding them, Defendants also failed to present a factual

basis to support their affirmative defenses sufficient to survive summary judgment. Therefore, either on the basis provided by the trial judge, or on any alternative basis, this Court should affirm the decision of the trial court below granting summary judgment in favor of Plaintiff.

## PROCEDURAL HISTORY

On October 19, 2021, Plaintiff-Respondent filed a Complaint alleging breach of contract against all Defendants-Appellants. (Pa9).[1] On January 26, 2022, Defendants answered the Complaint and asserted counterclaims for breach of the duty of good faith and fair dealing and for declaratory relief pursuant to the Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-50 to -62. (Pa89-102 (citing N.J.S.A. 2A:16-15)). Plaintiff answered Defendants' Counterclaims on March 2, 2022. (Pa104).

Following discovery, the parties participated in mandatory non-binding arbitration on September 27, 2023. (Pa108). On October 27, 2023, Plaintiff filed a notice and demand for trial de novo, rejecting the arbitration award and restoring the matter to the active trial calendar. (Pa110).

[1] Defendants numbered their appendix pages with the prefix "Pa_" despite not being Plaintiff. Plaintiff will refer to the pagination in the format already present in the appendix, such that "Pa_" refers to Defendants' appendix and the "_a" as suffix refers to Plaintiff's appendix. See R. 2:6-1(b); R. 2:6-8.

On or about November 17, 2023, Plaintiff moved for partial summary judgment for contractual damages up to the contract's termination date of February 28, 2021. (Pa111). In response, Defendants cross-moved for partial summary judgment as to Plaintiff's claims that had accrued up to December 15, 2020, the date Plaintiff provided notification of amounts due. (Pa129).

On January 19, 2024, Judge John G, Hudak, J.S.C. granted Plaintiff's summary judgment motion and denied Defendants' cross-motion, for reasons stated on the record. (Pa3; Pa5). On May 19, 2024, Plaintiff and Defendants stipulated to the withdrawal of Plaintiff's remaining claims accruing after the contractual termination date, while stipulating that Defendants were entitled to an offset in the amount of $59,850, representing Defendants' security deposit under the contract. (163a). Subsequently, Final Judgment was proposed via "5-day order," see R. 4:42-1(c), and on May 29, 2024, was entered as proposed. (Pa7). Defendants filed their Notice of Appeal on July 12, 2024, which they amended on July 22, 2024. (Pa142; Pa147).

## COUNTERSTATEMENT OF FACTS

The parties are and were largely in agreement as to the facts. Euro Auto and Plaintiff entered into an Assignment and Assumption of Lease ("Assignment") dated March 22, 2016, which assigned a Lease Agreement ("Lease") for possession of property located at 399 Route 22, Hillside, New

Jersey ("Leased Premises"). (Db4; compare Pa112 ¶ 3, with Pa131 ¶ 3 (admitting); see also Pa19-80 (Assignment with Lease)). Defendants 2 Lions Realty LLC and Shalaby guaranteed the Assignment. (Compare Pa116 ¶ 16, with Pa133 ¶ 16 (referring to terms of Assignment); see also Pa28 (guaranty)).

The term of the Assignment was five years ending on February 28, 2021. (Db4; compare Pa114 ¶ 4, with Pa131 ¶ 4 (admitting); see also Pa20 ¶ 6). The Assignment required Euro Auto to pay rent with two-percent annual increases, as well as property taxes for the Leased Premises. (Compare Pa114-15 ¶¶ 5-6, 10-11, with Pa131-32 ¶¶ 5-6, 10-11 (referring to terms of Assignment, while denying due to "Plaintiff's acceptance of fifty-one rental payments without notice of a purported breach and/or satisfies the constructive condition precedent to the tenant's obligation to pay such purported increases"); see also Pa19-20 ¶¶ 3, 6 (Assignment setting forth such obligations)).

There was no evidence in the record for the conclusory proposition that Defendants paid "under the terms of the Assignment." (See Db4 (citing, inter alia, Pa135 ¶ 4 (no pin cite provided))); see also R. 4:46-2(a) ("The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on"). Instead, throughout the five-year term, Euro Auto paid a single flat amount monthly, except for an adjustment due to a taking by the Department of Transportation ("DOT") – these facts are not

in dispute. (Db6; compare Pa115 ¶¶ 8-9, 12, with Pa132-33 ¶¶ 8-9, 12). There was no evidence that Plaintiff "advised" or "affirmatively requested" the reduced rent amounts arising from the DOT takings. (See Db5 (citing, inter alia, Pa132 ¶ 8 (Defendants' response to Plaintiff's Statement of Undisputed Material Facts ("SOMF"), admitting Plaintiff's facts therein, while rephrasing facts as "Plaintiff notified Defendant" without citation)). Contra Pa115 ¶ 8 ("the Rent was therefore reduced proportionately"); accord Pa11-12 ¶¶ 17-18 (complaint); Pa91 ¶¶ 17-18 (answer admitting without reservations)).

Though Euro Auto had an option to renew the Assignment, Euro Auto declined. (Db5; compare Pa116 ¶ 18, with Pa133 ¶ 18 (admitting)). Consequently, on or about December 15, 2020, Plaintiff notified Euro Auto that a total deficiency had accrued under the Assignment in the amount of $189,895.28. (Db6; compare Pa116 ¶¶ 13, 15, with Pa133 ¶¶ 13, 15 (admitting existence of letter with calculations, while denying that any amount was due on basis that Plaintiff "accepted Fifty-One (51) rental payments as payment in full")). Ultimately, Euro Auto did not pay the deficiency amount, which included non-payment for January and February 2021. (Compare Pa115-16 ¶¶ 12, 14-15, with Pa133 ¶¶ 12, 14-15 (admitting amounts paid, while denying that any amount was due on basis that Plaintiff "accepted Fifty-One (51) rental payments as payment in full")).

Significantly, the Lease expressly provides that receipt of partial payment does not waive the right to enforce:

> No term of this lease shall be deemed to have been waived by the Landlord unless such waiver is in writing, signed by the Landlord or the Landlord's agent duly authorized in writing. Receipt or acceptance of rent or additional rent by the Landlord shall not be deemed to be a waiver of any default under this lease, or of any right which the Landlord may be entitled to exercise under this lease.
>
> [(Pa54-55 § 12.2; compare Pa116 ¶ 19, with Pa133 ¶ 19 (referring to terms of Lease, while denying amounts due on basis of "Plaintiff's acceptance of fifty-one rental payments without notice of a purported breach and/or satisfies the constructive condition precedent to the tenant's obligation to pay such purported increases")).]

The Assignment incorporates the terms of the Lease, and to the extent the terms of the Lease and Assignment conflict, those in favor of Plaintiff govern. (Pa25 ¶ 30; compare Pa116 ¶¶ 20-22, with Pa134 ¶¶ 20-22 (referring to terms of Assignment, while denying with same objection regarding waiver and constructive condition)).

## ARGUMENT

### I. The Court Provided a Basis for its Award

The trial court below decided the competing motions for summary judgment pursuant to well-worn standards. Indeed, the standard for summary

judgment is well settled. See R. 4:46-2; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); see also Shelcusky v. Garjulio, 172 N.J. 185, 199-201 (2002) (reaffirming Brill's interpretation of the standard). A court must grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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; see also Brill, 142 N.J. at 528-29.

"If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill, 142 N.J. at 540. Moreover, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

The trial judge below properly grasped what was at issue on the competing motions for summary judgment. Though the transcript is garbled, the judge's

ruling was clear.[2] At issue was whether Plaintiff had waived its right to collect the full amount of the rental payments despite accepting partial rental payments from Euro Auto without contemporaneous notice of breach.

In forming its opinion, the trial court recited section 12.2 of the Lease in stating that under the Lease all waivers must be in writing and that "[r]eceipt or acceptance of rent or additional rent by the Landlord shall not be deemed to be a waiver of any default under this lease, or of any right which the Landlord may be entitled to exercise under this lease." (See Pa54-55 § 12.2, quoted at T15:17-25; see also Pa116 ¶ 19). The trial judge further listed the terms of the Assignment: the Assignment expressly includes the terms of the Lease, (T16:1-3; accord Pa25 ¶ 30; see also Pa116 ¶ 20), and under the Assignment, Euro Auto "agrees to perform any and all of the duties of the assignment as tenant," (T16:3-4; accord Pa19 ¶ 3; see also Pa115 ¶ 10).

Lastly, the trial judge referenced the language in paragraph 30 of the Assignment, which states that "[s]hould the terms and conditions of this Assignment be in conflict with any terms and conditions specified in the Lease, the terms more favorable to the Assignor shall control." (See Pa25 ¶ 30, quoted

[2] To the extent the recording allows the transcript to be clarified and corrected, Plaintiff would welcome a clearer transcribing of the trial court's opinion. See R. 2:5-5 (permitting correction of the record below sua sponte or on motion).

at T16:5-8; see also Pa116 ¶ 22). According to the trial judge, the language of the Assignment and Lease thereby "implicitly precludes Euro Auto from complaining [of] waiver of [the] vast deficiency." (T16:9-10). The court's holding was based on the premise that an unambiguous writing should be enforced as written. (T16:12-16 (citing Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991) ("[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written.")).

In other words, the trial court set forth an adequate explanation for its decision in holding that the purely legal issue of the application of contractual language governed. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 4:46-2 (2025) ("An issue regarding interpretation of a contract clause presents a purely legal question that is particularly suitable for decision on a motion for summary judgment." (citing, e.g., Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020))). The meaning and interpretation of the anti-waiver clause in the Assignment was never disputed – the only dispute was that Defendants' purported facts supporting waiver should overcome that provision.

Beyond arguing that Plaintiff was not entitled to the payments through inaction and the lapse of time, there was no question about the amounts otherwise due. (See T11:9-14:5; see also 153a-162a (Defendants' brief below

failing to raise such issue)); R. 2:6-1(a)(2) (permitting inclusion of brief in appendix as to "whether an issue was raised in the trial court"). Not having disputed the *amounts* set forth by Plaintiff in the first instance, this Court should not entertain the argument that the trial court failed to address the issue. See Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 234 (App. Div. 1988) ("[A]n opposing party who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers."). Regardless, Plaintiff did provide a basis for the amounts owed. (Pa83-84 (accounting of amounts paid compared to amounts due and owing)).

On appeal, the appellate court reviews "the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). "If there is no genuine issue of material fact, [the appellate court] must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). Further, "to avoid any unnecessary litigation delay," and where the "record provided allows [the appellate court] to determine whether the trial court" was in error, an appellate court can exercise jurisdiction to make

its own determination without remand. Lakhani v. Patel, 479 N.J. Super. 291, 298 (App. Div. 2024); cf. Leeds v. Chase Manhattan Bank, 331 N.J. Super. 416, 420-21 (App. Div. 2000) (affirming grant of summary judgment even though order merely stated "denied").

Thus, the trial court's determinations are adequately stated and should be affirmed. To the extent the trial court did not address a particular issue, the record is complete so as to allow the appellate court to make a decision.

## II. Waiver Cannot Be Found Here as a Matter of Law

As already stated, the issue of waiver was squarely addressed by the trial court. The trial judge held that the language of the Assignment and Lease "implicitly precludes Euro Auto from complaining [of] waiver of [the] vast deficiency." (T16:9-10). The judge reached that conclusion because the Lease contains an anti-waiver provision permitting waiver only in writing, the Lease expressly states that acceptance of partial rent does not constitute a waiver, and the Assignment incorporates the Lease to Plaintiff's benefit. (T15:17-16:8; see Pa54-55 § 12.2; Pa25 ¶ 30).

### A. The Clear Language of the Assignment Precludes a Finding of Waiver

Defendants' argument to set aside the express language of the Assignment and undertake an independent analysis on waiver rests heavily on the holding of Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116 (1967), and earlier case

law. (Db19 (also citing E. Orange v. Bd. of Water Comm'rs, 41 N.J. 6 (1963); and Plassmeyer v. Brenta, 24 N.J. Super. 322 (App. Div. 1953))). Not only has the central holding of Carteret since been limited to its particular circumstances, those particular circumstances are not present here.

In Carteret, the tenant had been selling bus tickets for six years in apparent violation of a lease provision requiring consent of the landlord to perform such business; subsequently, the landlord, without prior notice, served a notice to terminate the lease based on the sales of the bus tickets. Carteret, 49 N.J. at 122-23. Thus, in Carteret the Court was dealing with a statutory summary dispossess action, resolving whether the landlord could evict the tenant on such a slim basis, particularly when the landlord had assumed the lease after purchasing the property. Id. The Court held that, notwithstanding the contract language that precluded waiver in the event the landlord failed "to insist upon strict performance of lease covenants in one or more instances," the landlord's "acceptance of rent with knowledge of the breach, if any, constitutes a waiver of all past breaches." Id. at 129.

The Supreme Court later recognized that the holding of Carteret was the result of its circumstances and noted favorably that the Appellate Division in Jasontown Apartments v. Lynch, 155 N.J. Super. 254 (App. Div. 1978), had limited Carteret to its facts. A.P. Dev. Corp. v. Band, 113 N.J. 485, 498 (1988)

(undermining Carteret by holding that in context of statutory dispossess statute, "the Legislature did not intend that a landlord's acceptance of late payments of rent and a late charge constitutes a waiver of the right to evict a tenant . . . ."). In fact, the Appellate Division in Jasontown Apartments reasoned that "despite the generality of the language used [in Carteret], the court was simply concluding that under the stipulated facts of that case waiver had been shown as a matter of law." Jasontown Apartments, 155 N.J. Super. at 261.

Significantly, the factual and procedural predicates of Carteret were substantially different from those presented in this case. This appeal does not arise from a statutory summary dispossess action, and possession is not at issue in this case. Plaintiff's claim is for money damages. Even the contractual language precluding a finding of waiver is different – the Assignment's is specific to the circumstances presented here, as opposed to the vague provision in Carteret relating to "lease covenants" generally.

Instead, this case resembles County of Morris v. Fauver, 153 N.J. 80 (1998), where Morris County contracted with the New Jersey Department of Corrections ("DOC") to house state prisoners at variable rates set by contract. Id. at 88-91. For nearly seven years, the DOC paid a consistent rate despite contractual calculations requiring fluctuations, resulting in overpayments and

underpayments. Id. at 92-93. Upon discovering a net deficit, Morris County sued. Id. at 93.

The State raised various common law defenses similar to those presented by Defendants, namely abandonment, modification, mutual mistake, estoppel, waiver, and laches. Id. at 95-105. The Court stated that "where the terms of a contract are clear, . . . the court must enforce it as written[, and] where both parties to a contract have erred in the construction of that contract, courts will generally not require that the parties continue in that mistaken construction, but will instead insist on a return to the written provisions of the contract." Id. at 103 (citing first Koshliek v. Bd. of Chosen Freeholders, 144 N.J. Super. 336, 344 (Law Div. 1976); then Bellisfield v. Holcombe, 102 N.J. Eq. 20, 31 (Ch. 1927)). In accord with those principles, the Court denied the State's common law defenses to enforcement of the contract, concluding that "[a]s a result of both parties' lack of research regarding the accuracy of the payment rates, no party was misled, but both parties acted upon mistaken assumptions and mutually erred in the construction of their contract." Id. (discussing mutual mistake).

Regarding the doctrine of waiver specifically, the Court held that the County had not waived the right to insist on payment of the proper amounts for the same reasons expressed in relation to mutual mistake. Id. at 104-05 ("[T]here

is no showing that the County voluntarily and knowingly waived its right to complete payment under the terms of the contract."). The Court's decision turned on the County's lack of knowledge that payments were incorrect:

> While the County could have, and should have, researched or inquired into the propriety of the [improper] amount, the County did not actually know at the time that [the amount paid] was not the appropriate rate of reimbursement. Without that knowledge, the County could not have intended, by insisting on those incorrect terms, to repudiate[, modify, or waive] the outstanding provisions of the contract.
>
> [Id. at 98.]

In short, County of Morris v. Fauver held that clear contract terms prevail, and mistaken payments over time, accepted in error, do not constitute waiver.[3] The facts of this case are certainly more similar to County of Morris than Carteret. Thus, the issue of waiver can be, and was, properly decided based on the clear language of the Assignment.

B. The Facts on Record Regarding Waiver Were Insufficient to Survive Summary Judgment

Furthermore, Defendants' argument that there was sufficient evidence of waiver to both overcome the terms of the Assignment and to prevent entry of

[3] The Court's final holding ultimately rested on unrelated grounds regarding notice provided pursuant to the New Jersey Contractual Liability Act, N.J.S.A. 59:13–1 to –10. County of Morris, 153 N.J. at 111.

summary judgment against them is belied by the factual record, particularly considering that Defendants bear the burden of proof. Waiver requires proof of an "intentional relinquishment of a known right." County of Morris, 153 N.J. at 104 (quoting W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152 (1958)). "Waiver must be voluntary and there must be a clear act showing the intent to waive the right. Furthermore, waiver 'presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact.'" Id. at 104-05 (quoting W. Jersey Title & Guar., 27 N.J. at 153). "Waiver must be evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based." Petrillo v. Bachenberg, 263 N.J. Super. 472, 480 (App. Div. 1993), aff'd, 139 N.J. 472 (1995). Waiver is an affirmative defense requiring that the defendant supply the necessary proofs. See Model Jury Charges (Civil), 4.10N(1)(d), "Bilateral Contracts - Affirmative Defenses" (approved Nov. 1999).

Defendants argue that Plaintiff's "affirmative reduction and subsequent acceptance of reduced rent as payment in full, without reservation and without notice of a purported breach, is an affirmative act that ratifies the contract with respect to waiver of any allegedly past due rents." (Db21-22). Setting aside the language regarding ratification, which as discussed infra is inapplicable, Defendants' purported proofs are not supported by the record.

Specifically, the claim that Plaintiff "advised" or "affirmatively requested" the reduced rent amounts arising from the DOT takings, (Db5), hangs on a single cursory rephrasing of Plaintiff's SOMF. Plaintiff's SOMF asserted that "the Rent was therefore reduced proportionately" to the DOT taking, (P115 ¶ 8), to which Defendants responded that they "[a]dmit[] that the Plaintiff notified Defendant" of the rent reduction, without any citation to the record, (Pa132 ¶ 8 (emphasis added)). Closely examining the record does not elucidate any of the attendant circumstances such that it could be inferred that Plaintiff performed any such affirmative act. (See Pa11-12 ¶¶ 17-18 (complaint with same language as SOMF); Pa91 ¶¶ 17-18 (answer admitting without reservations); Pa124-25 at No. 4 ("Assignee received a rent adjustment")). In other words, there were no facts to support the theory that Plaintiff affirmatively requested the rent reduction of Defendants.

Moreover, applying the logic of County of Morris, Defendants were obligated to provide evidence that Plaintiffs knew that the amount being paid was incorrect; only then would Plaintiff's purported inaction result in an inference of implied waiver of that right. As the Court held in County of Morris, however, mere receipt of incorrect payments does not necessarily impute knowledge of the incorrectness. 153 N.J. at 98. Defendants presented no

evidence suggesting or inferring that Plaintiff knew, at the time the payments were being made, that the amounts were not in accord with the Assignment.

In contrast, the record supports an inference that Plaintiff was unaware that the amounts were incorrect until around the time it issued the December 15, 2020 letter notifying Defendants of the deficiency:

> [T]he Assignor has conducted an audit of the rents and assessments under the lease for the above referenced Demised Premises against remitted payments by European Auto Expo, LLC. Apparently, there is a very large discrepancy between the amounts due and what was actually paid.
>
> [(Pa81 (emphasis added)).]

In other words, Defendants presented an insufficient amount of evidence in support of their waiver argument to pass muster on a motion for summary judgment. They needed to demonstrate that Plaintiff knew that the amounts were incorrect, not merely that Plaintiff was silent in the face of incorrect payments; Defendants failed to provide such facts. Compounding Defendants' deficiencies, the waiver issue is precluded by the Assignment's clear terms. Consequently, the trial court's holding should be affirmed.

## III. Ratification Is Different than Waiver and Is Not Supported By the Record (not raised below)

Though Defendants introduce the issue of ratification in their discussion of waiver, (Db22-23), Defendants did not raise the issue of ratification below,

(see 153a-162a). "Issues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2025) (citing, e.g., Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 396-97 (2016); Zaman v. Felton, 219 N.J. 199, 226-27 (2014); Cnty. of Essex v. First Union, 186 N.J. 46, 51 (2006)). Ratification is a separate doctrine from waiver. See Garden State Bldgs., L.P. v. First Fid. Bank, 305 N.J. Super. 510, 526-27 (App. Div. 1997) (distinguishing between ratification and waiver). Consequently, ratification being neither jurisdictional nor in the public interest, this Court should not address the issue of ratification raised for the first time on appeal.

Even were the Court to address the issue of ratification on appeal, it is inapplicable here. "Ratification, which involves a determination of whether the party had 'intent to ratify plus full knowledge of all the material facts' . . . relates to acts professed to have been performed on a person's behalf." Ibid. (quoting first Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361–62 (1976); then citing Martin Glennon, Inc. v. First Fidelity Bank, 279 N.J. Super. 48, 60 (App. Div. 1995)). "Although ratification principles are similar to the waiver of breach principles," in New Jersey, ratification involves either "a principal-agent relationship" or "unauthorized" acts or writings, such as

endorsements. Id. at 526; see also, e.g., Maltese v. Twp. of N. Brunswick, 353 N.J. Super. 226, 246 (App. Div. 2002); Martin Glennon, Inc., 279 N.J. Super. at 60; Am. Photocopy Equip. Co. v. Ampto, Inc., 82 N.J. Super. 531, 540 (App. Div. 1964). "Ratification may be express or implied, and intent may be inferred from the failure to repudiate an unauthorized act, from inaction, or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." Thermo Contracting, 69 N.J. at 361 (citations omitted) (emphasis added).

As case law has made clear, ratification is not only a different doctrine than waiver, but its application is also not factually appropriate here. There are no facts here invoking principal-agent concerns. At most, Defendants make a vague assertion that Plaintiff "knowingly reduc[ed] European's rent and continu[ed] to accept those reduced payments without objection," (Db22), which is patently insufficient to undertake a ratification analysis.

Most significantly, as already demonstrated, there is no support for Defendants' assertion that Plaintiff actively participated in the rent reduction because no facts surrounding that subject were developed in the record. Indeed, there are insufficient facts in the record to describe how it came to be that the rent was reduced after the DOT taking. As such, because Defendants did not

raise ratification below, and there being no factual issues about an agent acting on behalf of Plaintiff, Defendants' argument regarding ratification must fail.

## IV. Defendants' Counterstatement of Facts Was Immaterial

As argued, the crux of the issue below was whether Plaintiff had waived, as a result of receiving partial rent, its right to collect amounts due and owing and whether language of the Assignment was determinative on that issue. Despite claiming that there was no rebuttal to Defendants' "Statement Of Additional Material Facts In Support Of Its Cross-Motion For Summary Judgement And In Further Support Of Its Opposition To Plaintiff's Motion For Summary Judgment" ("Counterstatement"), Defendants do not once cite their Counterstatement where it would contain determinative information that would or should have changed the outcome. (See Db12-16). The reason Defendants fail to cite to the contents of the Counterstatement is because all of the facts are immaterial or are merely a recasting of facts already contained within Plaintiff's SOMF.

For example, paragraphs 1 through 3 of the Counterstatement reiterate foundational facts about the Assignment, while adding the irrelevancy that Euro Auto had "invested significant sums of money improving the Lease Premises." (Pa135 ¶¶ 1-3). Similarly, whether Defendants paid their amounts "timely" is immaterial. (See Pa135 ¶ 4). Also immaterial are the existence and dates of Euro

Auto's notice of nonrenewal and Plaintiff's acknowledgment of the nonrenewal. (Pa135-36 ¶¶ 7-8). Separately, Defendants' listing of amounts paid confirms Plaintiff's contention of the near uniformity of the amounts that Defendants paid, notwithstanding the clear contractual provision requiring annual two-percent increases to the rental amount, in addition to the payment of property taxes for the Leased Premises. (Compare Pa136-38 ¶ 12, with Pa115 ¶ 12; see Pa19-20 ¶¶ 3, 6 (annual increases and property taxes)).

Moreover, whether Plaintiff did or did not at various points before the December 15, 2020 letter provide notice of a breach of the Assignment or of amounts due does not change the analysis. (See Pa135-36 ¶¶ 5-6, 9-11; Pa138 ¶¶ 13-14). Under the County of Morris rubric, Defendants were required to show that Plaintiff knew of the incorrectness of the amount, not merely whether Plaintiff failed to act; none of the facts that Defendant added in the Counterstatement fill that gap. Defendants' Counterstatement becomes especially immaterial in light of the contractual terms precluding waiver on the same basis that Defendants assert here, namely, receipt of partial payment.

Lastly, Defendants' bare assertion in the Counterstatement that "Plaintiff's continued acceptance of rent constitutes a waiver of all past purported breaches of the Assignment" is not even a fact, it is a legal conclusion. (See Pa139 ¶ 15). It should further be added that the Court Rules do not contemplate a "reply"

statement of material facts such that Plaintiff could get another bite at the apple, especially when the "facts" in the Counterstatement completely overlap with those in Plaintiff's SOMF. See R. 4:46-2 (contemplating moving statement and opposing facts, but no reply). It further bears mentioning that the Counterstatement fails to "specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on" to allow a rebuttal. See R. 4:46-2(a).

In sum, none of the "facts" in the Counterstatement change the issue in dispute: whether Plaintiff's mere acceptance of partial rent constituted a waiver of the full amounts. As a matter of law, it does not.

## V. No Facts Support the Application of Laches to Plaintiff's Claims, Which Are Purely Legal

"Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012). It is the "usual rule" that when the suit "was started well within the statute of limitations, and the right asserted being a legal one, the statute [of limitations] controls in equity as well as at law, at least with respect to the demand for a money judgment." Id. at 419 (quoting W. Park Ave., Inc. v. Ocean, 48 N.J. 122, 131 (1966)). Although laches is arguably not even applicable to legal as opposed to equitable claims, see id. at 422 ("were we to

agree in principle" that laches could be applied to purely legal claims), "only the rarest of circumstances and only overwhelming equitable concerns would allow for" a shortening of time before the statute of limitations expires. Ibid. As a matter of policy, extending laches to legal actions where a statute of limitations already applies:

> would replace the regular and predictable time limits fixed by our Legislature through the statutes of limitations with a system in which no lawyer or litigant could be confident of the time that would govern the initiation of litigation. Substituting the equitable doctrine of laches for the clear guidance expressed in statutes of limitations would create a chaotic and unpredictable patchwork in which the only certainty would be the inconsistency of outcomes as different judges or, as in this matter, juries, evaluated timeliness individually. We see no reason to conclude that our regular, predictable, and uniform system of fixing timeliness through application of the statutes of limitations should be replaced with such an approach.
>
> [Id. at 423.]

Additionally, the unreasonable passage of time must have resulted in "undue prejudice" to the party asserting laches. Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121–22 (2002)).

Plaintiff initiated this simple breach of contract suit on October 19, 2021, seeking money damages only. (Pa9-17). The limitations period for breach of

contract is six years. N.J.S.A. 2A:14-1. The Assignment was entered into on March 22, 2016, and the earliest date for which Plaintiff seeks to recover related to Defendants' partial payments is March 2017. (Pa114-15 ¶¶ 3, 13; see also Pa19; Pa83). The entire Assignment and breach thereof are consequently well within the six-year statute of limitations. Further, this case does not present the "rarest of circumstances" and "overwhelming equitable concerns" that would otherwise override the inapplicability of equitable laches to a legal action such as this. Defendants certainly made no such showing, nor any resulting prejudice. Therefore, this Court should reject Defendants' argument for the application of laches.

## VI. An Award of Costs to Plaintiff Is Warranted and Defendants Did Not Timely Object

Lastly, Defendants obliquely question the propriety of the trial court awarding costs in favor of Plaintiff. (Db17-18). The award for costs was provided for in the Final Judgment entered on May 29, 2024. (Pa7).

Rule 4:42-8 provides that "costs shall be allowed as of course to the prevailing party." Pursuant to N.J.S.A. 22A:2-9, costs shall be awarded "[u]pon the entry of judgment final, . . . or upon consent, stipulation, or admissions, . . . or by summary judgment . . ., in all actions or proceedings, to the moving party." It is the denial costs to the prevailing party that requires "special reasons," not

the granting of costs, to which the prevailing party is "[o]rdinarily" entitled. Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 4:42-8 (2025).

Here, the trial court granted partial summary judgment in Plaintiff's favor. (Pa5). Subsequently, the parties stipulated to the dismissal of Plaintiff's remaining claims. (163a).[4] Thereafter, all claims having been resolved, Plaintiff proposed a Final Judgment pursuant to the "5-day rule" under Rule 4:42-1(c). (Pa7 (citing R. 4:42-1(c))). The award for costs was contained in the proposed Final Judgment, and Defendants had five days to object. Defendants failed to do so. As the party having been awarded summary judgment, and a Final Judgment having been entered in favor of Plaintiff, it is unclear how Plaintiff would fail to qualify as a "prevailing party" entitled to costs. Defendants' objection – for the first time on appeal – to costs being awarded to Plaintiff, is misplaced. Therefore, this Court should affirm the trial court's decision below in its entirety.

[4] The stipulation also addressed the issue of the security deposit as an offset, which was not raised in the motions for summary judgment. (163a).

## CONCLUSION

For all of the foregoing reasons, the Court should affirm the trial court's decision below.

Dated: January 22, 2025

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**ROUTE 22 NISSAN, INC.,**

*Respondents*,

vs.

**EUROPEAN AUTO EXPO, LLC, 2 LIONS REALTY LLC**, and **LENNY SHALABY A/K/A MOHAMED SHALABY**,

*Appellants.*

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

DOCKET NO.: **A-003504-23 T1**

ON APPEAL FROM:
UNION COUNTY SUPERIOR COURT
LAW DIVISION - CIVIL PART

DOCKET NO.: **UNN-L-3598-21**

SAT BELOW:
HON. JOHN G. HUDAK, J.S.C.

# APPELLANT'S REPLY BRIEF

*On the brief:*

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## PRELIMINARY STATEMENT

Defendants-Appellants, Auto Expo, LLC, 2 Lions Realty LLC, and Lenny Shalaby (collectively, "*Appellants*"), respectfully submit this reply brief to rebut the arguments set forth in the Amended Brief submitted on behalf of Respondent Route 22 Nissan, Inc. ("*Respondent*"). As set forth in Appellants' moving brief, this appeal arises from the trial court's rulings on competing motions for summary judgment in a contractual dispute concerning a certain Assignment and Assumption of Lease dated March 22, 2016 ("*Assignment*").

Central to this appeal of the trial court's summary judgment ruling, is Appellants' assertion that Respondent's unilateral decision to reduce rent payments, coupled with its acceptance of reduced rent payments without objection or notice of breach, reflected a waiver of strict compliance with the lease terms and as a result modified and ratified the rent arrangement. Respondent, incorrectly asserts that the lease's anti-waiver provisions preclude such claims without the possibility for *any* exception or meritorious defense.

Contrary to Respondent's assertions, the trial court failed to properly apply the summary judgment standard, ignored significant factual disputes,

and misinterpreted relevant legal principles. As a result, the judgment below should be reversed and the matter remanded for further proceedings.

# REPLY ARGUMENT

## POINT 1

## RESPONDENT'S ANTI-WAIVER ARGUMENT IGNORES MATERIAL FACTS AND WELL-SETTLED LAW (Pa3-8; T9-21:101; T15-4:17-1; )

Respondent's reliance on the anti-waiver provision of the Assignment is misplaced as such language is insufficient to negate the factual circumstances of the situation, the conduct of the parties, and the clear evidence of waiver arising from same. As established in Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116 (1967) and similar precedents, a landlord's acceptance of rent with knowledge of a breach constitutes waiver of past breaches, regardless of contractual anti-waiver language. Here, after accepting purported rent underpayments for years, Respondent chose, unilaterally, to further reduce Appellants' rent in April 2020 and continued to accept reduced payments without reservation until December 2020, thereby waiving any claim to past due amounts.

In Carteret, the Supreme Court addressed a landlord-tenant dispute regarding the enforceability of anti-waiver lease provisions in light of the conduct of the parties. The Carteret landlord brought suit due to the tenant's

ongoing (years-long) breach of a certain lease covenant restricting the use of the premises, during which time the landlord consistently accepted rent payments without objection. The Court ruled that the landlord's conduct, including the acceptance of rent with knowledge of the tenant's activities, constituted a waiver of any breach. The Court emphasized that the landlord's acceptance of rent waived all prior breaches, holding that a landlord seeking to enforce a lease provision must provide proper notice of the breach, and such notice must be specific and unequivocal. Id. at 129.

The holding in Carteret supports Appellants' argument by establishing that a landlord waives the right to enforce lease provisions if they accept rent payments with knowledge of a breach. In the present case, Respondent knowingly accepted reduced rent payments for months without objection or any notice of breach. This conduct parallels the facts in Carteret, where the landlord's continued acceptance of rent undermined its attempt to claim a breach retroactively, just like Respondent sought to do here. Notably, the lease agreement in Carteret also included an anti-waiver provision, yet the Court still found that waiver applied. That outcome directly undermines Respondent's reliance on a similar provision in the Assignment here.

Carteret clearly establishes that anti-waiver provisions do not automatically override, without exception, a landlord's conduct

demonstrating intentional or implied waiver. Id. The Court in Carteret found a fact specific analysis is necessary and that the landlord's acceptance of rent constituted a clear waiver of the right to enforce the lease covenant, even when such conduct was not explicitly acknowledged in writing. Similarly, in this case, Respondent's acceptance of reduced rent—without any objection or reservation—represents a waiver of its right to strictly enforce the lease provisions, rendering its claims regarding waiver inconsistent with binding precedent. At a minimum, it demonstrates a fact sensitive approach that was not acknowledged, let alone undertaken, by the trial court.

Respondent's attempt to distinguish Carteret and rely on County of Morris v. Fauver, 153 N.J. 80 (1998) fails because the facts of these cases are materially different. In Fauver, the Supreme Court addressed whether a contract for housing prisoners could be deemed abandoned or modified based on the parties' course of conduct, where the County housed state prisoners for approximately seven years before filing a notice of claim for breach due to underpayment. The County filed a notice of claim in 1992 and a lawsuit, thereafter, arguing for reimbursement. The Supreme Court ultimately held that the contract was not abandoned or modified because, unlike here, there was no mutual assent to alter its terms. Id. at 97, 99-100.

Importantly, the Fauver Court found that the only reason waiver did not apply, was the absence of a "voluntary" and/or "clear act showing the intent to waive" the County's right to complete payment under the contract. Id. 104-105. The Court concluded that without an affirmative act (*i.e*. unilaterally reducing the payments), the underpayments were made by mutual mistake, and the contract must be enforced as written—a situation that does not apply to the facts of this case. Id. at 103. Here, unlike in Fauver, Respondent knowingly, intentionally, and voluntarily reduced Appellants' rent and accepted those reduced payments during a time when Appellants were allegedly in breach of the lease agreement.

Importantly, despite this finding, the County in Fauver was still only entitled to reimbursement for the underpaid amounts accruing *after* it provided notice of the purported breach. Id. 111. The Court found that the County was barred from recovering for periods prior to its notice in 1992, which contravenes the ruling of the trial court in this matter permitting Respondent to recover for amounts allegedly due years before they sent any notice of breach:

> "As a result, we hold that the County is entitled to reimbursement for the difference between what was paid on the contract and what should have been paid under the contract for all invoice periods occurring on or after January 9, 1992 to date, but is barred from

> reimbursement for all periods occurring before that date." Id.

The holding in Fauver supports Appellants' position by affirming that Respondent's conduct—requesting a rent reduction and accepting those payments without providing notice of breach—demonstrates a voluntary alteration of the original lease terms, consistent with waiver and/or ratification of the revised terms. Moreover, the absence of any notice of breach until after Appellants' notice of non-renewal aligns with Appellants' position on its cross-motion for summary judgment, that Respondent should be precluded from seeking claims for damages for rental arrears arising out of any purported breach of the Assignment allegedly occurring before December 15, 2020. (Pa111; Pa129). Here, the Fauver holding remains inconsistent with the Trial Court's ruling as there was a voluntary act in furtherance of waiver, and because the trial court permitted Respondent to be reimbursed for all years prior to the notice of breach.

Further, Respondent's argument that the anti-waiver clause in the lease precludes a finding of waiver is undermined by both Carteret and Fauver, which, as set forth above, establish that anti-waiver provisions cannot override a party's intentional and unequivocal conduct. By requesting and accepting reduced payments, Respondent acted in a manner that waived its right to strict compliance with the original lease terms. Respondent's

subsequent attempt to enforce those terms—after Appellants provided its notice of non-renewal—contradicts its own conduct and cannot be reconciled with the principles articulated by our Supreme Court.

Indeed, Respondent cannot now disavow its own conduct and enforce a strict reading of the lease to the detriment of Appellants; if Respondent's argument is accepted, it would imply that even the reduced rental payments it demanded and accepted would place Appellants in breach, solely because those payments were not received pursuant to a formal written amendment to the Assignment. For these reasons, the fact sensitive analysis necessary when determining whether the application of waiver applies,

> "**are usually questions of intent, which are factual determinations that should not be made on a motion for summary judgment**." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 291 (1988)(*emphasis supplied*); *see also,* Columbia Sav. & Loan v. Easterlin, 191 N.J. Super. 327 (Ch.Div.1983), aff'd, 198 N.J. Super. 174 (App.Div.1985).

Simply put, the undisputed facts before the trial court were sufficient to find in Appellants' favor on summary judgment, but at a minimum, the issue of waiver involves an analysis of the factual circumstances, conduct and intent of the parties that necessitates further factual exploration, making it inappropriate to find in favor of Respondent on summary judgment and warranting reversal of the trial court's ruling.

## POINT 2

## RESPONDENT'S POSITION ON RATIFICATION MISCONSTRUES THE DOCTRINE AND ITS APPLICATION TO THE FACTS (Pa3-6; T15-4:17-1)

Respondent's argument against ratification misconstrues Appellants' position, as Appellants did not assert ratification as an independent legal theory; rather, Appellants argued that Respondent's unilateral reduction of rent constituted an affirmative and voluntary act furthering waiver and, in turn, ratified the contract under the modified terms it created. As explained in detail below, this nuanced position was raised in the trial court and is entirely consistent with established legal principles.

Contrary to Respondent's assertion, ratification does not require an express agreement or a principal-agent relationship but can be implied through conduct. *See* Garden State Bldgs., L.P. v. First Fid. Bank, 305 N.J. Super. 510, 524 (App. Div. 1997)(finding contract clause "may be waived by a written instrument, a course of dealing, or even passive conduct"). Importantly, "[w]here a party fails to declare a breach of contract and continues to perform under the contract after learning of the breach, it may be deemed to have acquiesced in an alteration of the terms of the contract, thereby barring its enforcement. Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 334 (App. Div.1993).

Ratification involves a determination of whether the party had "intent to ratify plus full knowledge of all the material facts," and may be determined as a matter of law. Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361-362 (1976)(*see also*, Shebar, *supra*, 111 N.J. at 291, holding that questions of intent should not be decided on a summary judgment motion). Here, the Respondent's acceptance of reduced rent payments for nearly nine months, without reservation or notice of arrears, constitutes ratification of the modified rent obligation. This is not a new argument but an extension of Appellants' waiver claim, bolstered by Respondent's conduct and the surrounding circumstances.

For example, Appellants' Summary Judgment Brief contained the following arguments in line with the principles of ratification:

> "Considering the circumstances and intent of the parties, and the fact that Plaintiff accepted fifty-one (51) rental payments without acknowledgement of breach, including reduced amounts specifically set by the Plaintiff, there can be no dispute that Plaintiff waived any alleged past breach, by way of acceptance of rents in full." (157a)
>
> "Importantly, the waiver upon acceptance and continued acceptance of rent applies regardless of whether the Lease includes provisions for failure of the landlord to insist upon strict performance of its covenants in one or more instances. Carteret Props. v. Variety Donuts, Inc., 49 N.J. 116, 129 (1967)." (156a)

> "Contrary to Plaintiff's assertions, the continued acceptance of rent despite a breach of the lease provisions will constitute a waiver of prior breaches. East Orange v. Bd. of Water Com'rs, etc., 41 N.J. 6, 18 (1963); Plassmeyer v. Brenta, 24 N.J. Super. 322, 330-331 (App. Div. 1953)." (156a)

Moreover, Respondent's "voluntary act" that Appellants asserts to have ratified the Assignment, was raised in more detail during oral argument when Appellants contended that Respondent set a reduced rent amount at a time when there was a purported default, and that doing so "**is the noted voluntary act**" that confirmed waiver and ratified the contract terms. (T10-4:20)(*emphasis supplied*).

The trial court's failure to address this argument—and Respondent's failure to refute it with substantive evidence—underscores the material factual disputes that should have precluded summary judgment in Respondent's favor:

> *"***by paying rent [to] Plaintiff without acknowledging that additional rents [were] purportedly due [it i]s an intentional act that would waive that right**." (T13-8:11) (*Emphasis supplied*).

Here, Respondent's reduction coupled with its acceptance of rent payments, and silence regarding arrears until Appellants' notice of non-renewal, establishes a subsequent act in furtherance of the waiver, and satisfies the criteria for both waiver and the resulting ratification of the

Assignment. Importantly, as held in Carteret, the acceptance of rent with knowledge of breach, as here, waives the right to enforce the breach, **even in the presence of anti-waiver provisions**.

Respondent's continued reliance on County of Morris v. Fauver, 153 N.J. 80 (1998) is similarly misplaced. Unlike in Fauver, where the parties acted under mutual mistake, Respondent's conduct was deliberate. Respondent's conduct (*e.g.* months of accepting the reduced payments it calculated), supports a finding that Respondent had no contemporaneous intent to enforce the original Assignment terms. Moreover, its deliberate inaction reinforces Appellants' waiver argument, while its voluntary reduction demonstrates ratification of the terms Respondent itself modified.

Thus, Respondent's attempts to compartmentalize waiver and ratification fail to recognize the interconnectedness of these doctrines as applied to the facts of this case. At a minimum, it creates a question of fact that is more appropriate for the fact-finder to resolve than by way of Summary Judgment. As a result, the trial court erred in dismissing Appellants' argument without addressing the legal and factual support provided, warranting reversal.

## POINT 3

## THE TRIAL COURT ERRED BY IGNORING RESPONDENT'S FAILURE TO REBUT APPELLANTS' COUNTERSTATEMENT OF FACTS (Pa3-8; T15-4:17-1)

Respondent's brief fails to adequately address its failure to respond to Appellants' Counterstatement of Undisputed Facts, asserting that it is of no consequence, despite the mandate of Rule 4:46-2(b) requiring that unopposed facts be deemed admitted. (*see also,* Polzo v. County of Essex, 196 N.J. 569, 586 (2008)(holding that, the opposing party's affirmative burden of responding is "not optional")). However, here, the record is devoid of facts supporting Respondent's self-serving analysis, while the trial court's wholesale disregard of this defect improperly skewed the Summary Judgment ruling in favor of Respondent. (*see* Globe Motor Co. v. Igdalev, 225 N.J. 469, 484 (2016) (summary judgment was improper where the record lacked sufficient support for the trial court's conclusion and, when viewed in the defendants' favor, revealed a genuine issue of material fact)).

Respondent's actions—including its failure to issue timely notice of arrears and its express reduction of rent—demonstrated the hallmarks of both waiver and ratification. These undisputed facts preclude summary judgment in Respondent's favor and warrant reversal of the judgment below. As a

result, the Judgment should be vacated, and the trial court's Orders should be reversed.

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the trial court's grant of summary judgment in favor of Respondent, vacate the judgment entered, and remand the matter for further proceedings.

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