JESSICA HOFFER KAYLOR, Plaintiff- Respondent, vs. TERESA BACALLAO, EMPIRE MANAGEMENT GROUP LLC, and TERESA SANCHEZ, Defendant- Appellants	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3740-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-1481-20 Sat Below: Hon. Kalimah H. Ahmad, J.S.C. Hon. Veronica Allende, JSC Submitted November 4, 2024

Brief on behalf of
Teresa Bacallao, Empire Management Group, LLC and Teresa Sanchez

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PROCEDURAL HISTORY

Plaintiff Jessica Kaylor filed a complaint on April 13, 2020. JA6. The parties proceeded through discovery. After the close of discovery, Defendants all filed motions for summary judgment and/or to dismiss, which motions were denied on December 20, 2021 by Judge Allende. JA80, JA82, JA84. There were then many adjournments. On March 18, 2024, Plaintiff moved for summary judgment on her breach of contract and Consumer Fraud Act ("CFA") claims. Defendants Sanchez and Empire cross-moved for summary judgment, which Defendant Bacallao joined. Judge Ahmad denied Defendants' motion for summary judgment and granted Plaintiff's motion on May 10, 2024. JA95, JA98. Defendants Sanchez and Empire moved for reconsideration. On July 22, 2024, Judge Ahmad denied the motion for reconsideration. JA101. This appeal followed.

STATEMENT OF FACTS

Defendant Teresa Baccalao is the owner of a four-unit residential building located at 612 Bloomfield Street, Hoboken, NJ. ("the Building") JA106. Defendant Empire Management LLC is a property management company owned by Baccalao's daughter, Defendant Teresa Sanchez. *Id.* Empire provides property management services for the Building for Baccalao. *Id.* Plaintiff resided in the building as a tenant from June 15, 2015 to June 30, 2019. JA107.

Outside the Building is a private yard that is accessible only from the exterior sidewalk. JA108. Defendants Sanchez and Bacallao described how to access the backyard in a joint certification to the court:

> To enter the backyard, one must enter a door located under an exterior staircase using a key. This is not the door for the entrance of the building. From that door, one enters the basement vestibule. Then one would walk to another door requiring a key; then one would walk down a hallway and must go through a third door requiring a key to enter the backyard.

Id. Prior to renting the apartment to Plaintiff, Teresa Sanchez consulted with Suzanne Hettman, Hoboken's Rent Regulation Officer at the time, concerning whether yards are regulated by the Rent Control Ordinance. JA107. Defendants certified that Suzanne Hettman confirmed that backyards are excluded from the ordinance. *Id*. Sanchez also certified that she witnessed Diane Nieves, who is the current Rent Regulation Officer, tell her mother's attorney that the rent control ordinances do not apply to outdoor spaces, only the actual building. JA112. Based on these conversations and a resultant belief that the Hoboken RCO does not regulate yards, Baccallao offered apartment tenants use of the furnished backyard pursuant to a separate agreement and in exchange for separate consideration. JA112 (setting forth Defendants' *mens rea*). Teresa Sanchez, who is not an attorney, drafted the agreements. JA10, JA212.

Baccalao furnished and maintained the yard with patio furniture, a grill, fencing, a storage shed, and seasonal landscaping. JA111. Tenants who leased use of the backyard were allowed to use the storage shed, which Baccalao had repaired, repainted, and waterproofed annually. *Id.* Baccalao repaired and replaced the grill and furniture as needed. *Id.*

In July 2015, Kaylor and Baccalao entered into a residential lease for Apartment 2 in the Building ("the Apartment Agreement"). JA113[1] Under the terms of the lease, Baccalao rented the apartment to Kaylor for $1259.48 per month. *Id.*

Separate from the apartment, Baccalao offered to lease use of the yard to Kaylor for $590.52 per month. *Id.* Kaylor accepted this offer and Baccalo and Kaylor entered into a separate agreement for Kaylor's use of the yard. JA 123 ("the Yard Agreement"). [2]

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[1] In her motion for summary judgment Plaintiff's counsel included the Apartment Lease and Yard Leases of two other individuals, not Plaintiff, which was not noticed at the time. On the motion for reconsideration, Defendant's counsel used Plaintiff's summary judgment exhibits, which the judge had relied on, without noticing that they were not the correct leases. During oral argument on the motion for reconsideration, Plaintiff's counsel pointed out that the exhibits were for a different people. 3T5. The record does not reflect whether the language is the same. The transcript on reconsideration shows counsel for Plaintiff represented that the leases submitted with summary judgment were the correct ones. 3T12-13.

Transcripts are identified as follows: 1T December 3, 2021, 2T May 10, 2024, 3T June 20, 2024

[2] The Yard Agreement is also the wrong agreement.

The Apartment Agreement and Yard Agreement are legally and factually distinct and separate agreements. The first page of each agreement shows that they concern separate spaces, provide for their own independent consideration, promises, and obligations by each party concerning use of the separate space, had separate security deposits. *Compare* JA113-114 and JA123-124.[3] The agreements both contain provisions standardly found in leases, including provisions for payment, eviction, and additional rent. JA114-115 and JA124-125. The Apartment Agreement is longer and contains provisions that are not present in the Yard Agreement, like utilities. JA116. The Apartment Agreement contains no reference to the Yard Agreement at all while the only reference to the Apartment Agreement in the Yard Agreement is that if the Apartment Agreement ended, the Yard Agreement would also end. JA113-122 (absence of reference to Yard Agreement) and JA128 (tenant released from Yard Agreement if Apartment Agreement ends). In other words, the Yard Agreement depended on the Apartment Agreement continuing, but not the other way around. *Id.* Each agreement states that it is the complete agreement between the parties concerning the subject matter of that agreement. JA121 and JA129 (stating: "The parties have read this lease. It contains their full agreement. It may not be changed except in writing signed by the landlord and the tenant")

[3] Because these are not the correct agreements, the terms concerning amount of rent and dates are not accurate, but the leases Plaintiff submitted are generally laid out in the same manner as Plaintiff's agreements.

(emphasis added). Payments for the apartment and the yard were always made separately. JA10-235.

Under Hoboken's RCO, the rent regulation officer shall determine "any dispute concerning the legal rent of a particular apartment unit." JA131 (definition of legal rent). The Rent Regulation Officer's determination is appealable to a Board that is empowered to "supply information and assistance to landlords and tenants to help them comply with the provisions of this chapter," "hold hearings and adjudicate applications from landlord/tenants," and exercise a "general power of equity" to "depart from the strict interpretation of the provisions of this chapter." JA136. Despite this regulatory framework, there is no evidence that Plaintiff ever requested or obtained a finding of rental overcharge or legal rent calculation from the Hoboken Rent Leveling Office. There is no evidence that Plaintiff ever sought or obtained a legal rent calculation for the yard or apartment and yard to substantiate her theory that yards are regulated as housing space under the rent control ordinance. There is no evidence that the City of Hoboken interprets its rent control ordinance to reach outside buildings.

LEGAL ARGUMENT

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THERE IS NO UNLAWFUL ACT TO SUPPORT A CONSUMER FRAUD ACT CLAIM (2T20)

An appellate court reviews "the grant of summary judgment in accordance with the same standard as the motion judge." *Globe Motor Co. v. Igdalev*, 225 *N.J.* 469, 479 (2016) (internal citations omitted). Summary judgment should 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).

The Consumer Fraud Act ("CFA") is remedial legislation designed to protect consumers from deceptive business practices. The CFA "allows a private cause of action only to those who can demonstrate a loss attributable to conduct made unlawful by the CFA." *Thiedemann v. MercedesBenz USA, LLC*, 183 *N.J.* 234, 246 (2005). There are three categories of unlawful practices under the CFA, "affirmative acts, knowing omissions, and violations of regulations promulgated pursuant to statute." *Heyert v. Taddese*, 431 N.J. Super. 388, 412 (App. Div. 2013). NJ Courts have held that overcharging rent in violation of a local rent control ordinance is an affirmative act that, if proven, may be the basis for recovery under the CFA without showing intent. *Id.* at 414.

To determine whether there has been a rental overcharge in violation of a rent control ordinance it is necessary to know: 1) the legal rent under the ordinance and 2) the rent that was actually charged. If 2 is larger than 1, then the difference is the

overcharge. In precedential CFA cases alleging rent overcharges, the legal rent has been established by the municipal rent leveling regulation officer and/or board prior to the tenant instituting a CFA claim. Here, that process was not followed. Because no legal rent calculation was requested or obtained, it is impossible to determine that there was an overcharge of a legal rent. Furthermore, Plaintiff's failure to obtain a legal rent calculation before proceeding with her CFA claim avoided the process set forth in Hoboken's Rent Control Ordinance for resolving disputes over the legal rent for her housing space. This deprived the landlord of the due process set forth in the ordinance and also deprived the City of Hoboken of the right to have its ordinance interpreted and administered in the manner it has legislated.

Finally, the RCO only regulates dwellings and housing spaces in dwellings. JA130. Dwellings includes only four things: buildings, structures, trailers, and land used a trailer park. JA131. Yards are excluded from this definition and cannot be a dwelling under this definition. Housing spaces are a "portion of a dwelling," by definition. JA131. Because yards are literally outside of dwellings, they cannot be housing space and they are not connected with the use of the occupancy of the housing space like "light, heat, hot water, maintenance, painting, elevator service, air conditioning, storm windows, screens, superintendent service," which the ordinance lists as services connected to the use and occupancy of a housing space. JA131-132. Yards are excluded from regulation and property owners are permitted

to let their yards to anyone they wish within the laws of zoning, including tenants and former tenants.

A. Summary judgment should have been entered in Defendants' favor because it is impossible to prove a rental overcharge without performing a legal rent calculation and no legal rent calculation exists for the yard because it is not regulated by the RCO

The establishment of the legal rent through the Rent Regulation Officer and/or Rent Leveling Board is a non-dispensable step on the way to proving a rent overcharge because knowing the legal rent is necessary to establish an overcharge and these are the only entities authorized to determine the legal rent. JA131. (stating that "[a]ny dispute as to the legal rent of a particular apartment unit is to be determined by the Rent Regulation Officer, subject to appeal to the Rent Leveling and Stabilization Board"). Hoboken created a carefully crafted system for setting and calculating legal rents, including "[c]riteria to be considered by the Rent Regulation Officer in rendering legal rent calculations." JA135. The process allows for notice, landlord and tenant participation, a right to appeal to the Board, and a further right to appeal to the Superior Court. Other CFA rent overcharge cases highlight the importance of this process in establishing the legal rent and protecting due process. For example, in *Heyert*, which also arose from Hoboken's Rent Control Ordinance, tenants who were paying $3,900 a month in rent requested that the Rent Leveling Office perform a legal rent calculation for their apartment. 431 N.J. Super. at 407. The Rent Leveling Office calculated that the legal rent for the apartment was

$2,086 and notified the landlord of its calculation *Id*. The landlord appealed the legal rent calculation to the rent leveling board, which denied the appeal was as untimely. *Id.* at 406-07. The landlord then appealed to the Superior Court by filing an action *in lieu* of prerogative writs and the Superior Court held that the Board had acted in accordance with its ordinance. *Id.* at 427. Similarly, in *Wozniak v. Pennella*, 373 *N.J. Super.* 445 (App. Div. 2004) the tenant filed a complaint with the rent leveling board, the board held a hearing, the board determined there was an overcharge, and the board passed a resolution memorializing its finding of overcharge *Id.* at 452; *see also Ryan v. Gina Marie, L.L.C.,* 420 *N.J. Super.* 215, 221 (App. Div. 2011) (involving a CFA claim arising from Hoboken Rent Leveling Office calculation of rent and affirmation of Board). Pursuant to this process, both landlord and tenant are afforded due process, which is especially important when property rights protected by the Constitution are implicated.

Here, neither the Rent Leveling Board nor the Rent Regulation Officer ever made a finding that Plaintiff was overcharged rent. Plaintiff did not provide a legal rent calculation for the yard because she cannot. It is not possible to obtain a legal rent calculation for something that is not subject to rent regulation, as discussed in Part IB. Nor is there any evidence that Plaintiff ever queried the Rent Leveling Office about whether the rent control ordinance prohibited her and her landlord from entering into a separate agreement for her to use a yard on the property or whether it

would consider payments pursuant to such an agreement to be regulated rent. Instead, Plaintiff came directly to court alleging that based on her interpretation of the ordinance, payments she had made pursuant to the Yard Agreement she entered were rent overcharge and that she should get all that money back three times over.

Baccalao moved for summary judgment based on Plaintiff's inability to prove rent overcharge without a legal rent calculation, but it was denied by the Superior Court. The Court distinguished *Glynn v. Park Tower Apartments*, 213 *N.J.Super.* 357 (App. Div. 1986), a case wherein the appellate division held that the court lacked jurisdiction to order a rebate on an allegedly invalid rent increase because the ordinance provided the exclusive remedy for ordering a rebate to be through the local municipal board. Judge Allende found this case was distinguishable because Plaintiff brought a different type of action than rent rebate:

> Plaintiff's action is for breach of contract, including a breach of the covenant of good faith and fair dealing by charging to and collecting from Plaintiff rent for the backyard that Defendant did not report or disclose on the registration statements, and also common law fraud, in that Defendants misrepresented to Plaintiff that the backyard could be rented separately from the apartment and that rent for the backyard could be charged to and collected from Plaintiff separately and in addition to the rent for the apartment.

However, none of these things are unlawful under any theory unless required or prohibited by the RCO.[4] It cannot be unlawful for Baccalao to "not report" payments for the yard to the City if the City does not consider such payments reportable. It is not a misrepresentation to say that the backyard can be rented separately from the apartment for separate consideration if it can be. These issues raised by the court are not questions of fact. Determining whether the RCO requires reporting of something or prohibits agreements for yards requires interpretation of the ordinance, so they are questions of law that should have been resolved at the summary judgment stage. *Bubis v. Kassin*, 184 *N.J.* 612, 878 *A.2d* 815, 824 (2005) (stating that "the meaning of an ordinance's language is a question of law that we review *de novo*" and holding that a berm is a fence under a local zoning ordinance).

The material facts here are all undisputed: Bacallao and Kaylor entered into an agreement wherein Bacallao provided access to a furnished yard and Kaylor paid for access to and use of the yard. Bacallao and Kaylor also entered into an agreement wherein Bacallao provided housing space and Kaylor paid for the housing space. Plaintiff's claims all depend on her legal argument that the Rent Control Ordinance prohibited the agreement for the yard because Plaintiff also rented housing space at

[4] Further, as discussed in Part IV, the RCO regulations also must be constitutional on their face and in application concerning property and contract rights.

the same time. Whether that legal argument is correct is a question of law because it requires interpreting the ordinance.

Moreover, while the question of law can be resolved by the Court, it should have been decided by the Rent Regulation Officer and Rent Leveling Board, the entities that Hoboken created specifically to interpret and administer its ordinance, including any dispute over legal rent. The Board's interpretation of Hoboken's ordinance would have been entitled to deference if subsequently appealed to a Superior Court. *Fallone Properties, L.L.C. v. Bethlehem Twp. Plan. Bd.,* 369 *N.J. Super.* 552, 562 (App. Div. 2004) (stating that "although we construe the governing ordinance *de novo*, we recognize the board's knowledge of local circumstances and accord deference to its interpretation"). The process Hoboken provides for resolving disputes concerning legal rent preserves not only the rights of the landlords and tenants affected by the ordinance, but also Hoboken's right to interpret its own ordinance and have it administered in accordance with the process Hoboken adopted and by the people that Hoboken appointed to act in that capacity.

The Consumer Fraud Act claim should have been dismissed at the summary judgment stage because obtaining a legal rent calculation is a condition precedent to proving that the legal rent was exceeded (overcharge) and overcharge is the only rent control claim that the courts have allowed to proceed on strict liability under the CFA. Plaintiff's interpretation of the RCO should have been substantiated (or not)

by proceeding through the rent regulation officer and Board who have original jurisdiction over any dispute over legal rent under the ordinance.

B. Summary judgment should have been entered in Defendants' favor because the Hoboken Rent Control Ordinance only regulates dwellings and yards are excluded from the definition of dwelling under the ordinance

Hoboken's Rent Control Ordinance applies to dwellings and concerns the "rents between landlords and tenants in housing spaces in dwellings." JA134. (emphasis added). "Dwelling," "housing space," "Rent," and "Service" are all defined in the ordinance:

> DWELLING- Any building or structure or trailer or land used as a trailer park, rented or offered for rent to one or more tenants or family units.
>
> HOUSING SPACE- Includes that portion of a dwelling rented or offered for rent for living and dwelling purposes, with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such portion of the real property.
>
> SERVICE- The provision of light, heat, hot water, maintenance, painting, elevator service, air conditioning, storm windows, screens, superintendent service and any other benefit, privilege or facility connected with the use or occupancy of any dwelling or housing space.
>
> RENT- Any price for the use of a housing space. It includes any charge, no matter how set forth, paid by the tenant for the use of any service in connection with the housing space. Security deposits and charges for accessories, such as boats, mobile homes and

> automobiles not used in connection with the housing space, shall not be construed as "rent."

See JA130-131.

Yards are excluded from regulation under Hoboken's RCO under the plain language of these definitions. Housing spaces are a "portion of a dwelling." A dwelling is a "building or structure or trailer or land used as a trailer park." A yard is none of these things. A yard is therefore not a dwelling under Hoboken's RCO. Because a yard is not a dwelling, it cannot be a "portion of a dwelling" and therefore cannot be a housing space. Indeed, the appellate division has recognized this before. *Heyert*, 431 *N.J. Super.* at 425-26 (noting that "giving the language of the ordinance its ordinary meaning, an average person would be able to understand" that a "condominium *unit* is a housing space within a condominium *building*"). Because yards are not housing spaces in dwellings, they are not regulated by the Hoboken RCO and there can be no overcharge of rent for a yard in violation of the RCO. The CFA claim should have been dismissed and summary judgment should have been entered in Defendants' favor for this reason.

Judge Allende denied Defendants summary judgment stating "this court finds that a genuine issue of material fact exists regarding whether Defendants were permitted to lease the backyard separately from the apartment, and consequently, whether Defendant Bacallao is liable for the damages sought by Plaintiff." JA91. However, this was error because whether the ordinance regulates space outside a

dwelling is a matter of interpreting the ordinance, not applying facts to the ordinance. For the reasons set forth in Part IA, above, this is a question of law and, because the yard is not housing space, it is a question of law that should have been resolved in Defendants' favor. In addition, the way the Superior Court framed the purported disputed fact, "whether Defendants were *permitted* to lease the backyard" shifted the burden of proof concerning unlawful conduct from Plaintiff to Defendant. Baccalao is not required to prove that she is permitted to rent out a non-dwelling portion of her real property without violating the local rent control ordinance. Individuals have a constitutional right to enter into contracts concerning their property. *Inganamort v. Borough of Fort Lee,* 131 *N.J. Super.* 558, 565 (Ch. Div. 1974) (noting that "the right of a landlord to freely contract with a tenant falls within the protection accorded private property by the United States and New Jersey Constitutions. U.S.Const., Amend. V; N.J.Const. Art. 1"). Because Plaintiff's claim depends on showing that the contract to rent the yard was unlawful due to government regulation, it is Plaintiff's burden to prove that the contract was unlawful, not the Defendants' burden to prove it is permitted.

Nor can the yard be shoehorned into the ordinance by calling it a privilege, facility, benefit, or service connected with the use or occupancy of a housing space because it is literally not a part of the dwelling and is literally not connected to the literal use or occupancy of the housing space. The housing space is a portion of a

dwelling and includes the physical space and the services connected with the use or occupancy of the living portion of the dwelling. The ordinance's examples of such services are all physical features of a living space that concern access and habitability like "light, heat, hot water, maintenance, painting, elevator service, air conditioning, storm windows, screens, [and] superintendent service." JA131-132. There is no language in any of these definitions that even suggests that the RCO seeks to regulate spaces wholly outside the dwelling, not accessible from the building, and totally independent from the physical use or occupancy of the apartment.

The plain language of the ordinance excludes yards from regulation because the ordinance only regulates dwellings and housing spaces, which are by definition, portions of dwellings. The yard is a separately accessed space that is literally and legally not housing space. It could be offered to tenants or not offered to tenants and the housing space is unaffected. Summary judgment should have been granted in favor of Defendants because the Hoboken RCO does not regulate spaces outside dwellings as a matter of law.

II. IT WAS ERROR TO GRANT PLAINTIFF SUMMARY JUDGMENT ON THE BASIS OF A FACT THAT PLAINTIFF DID NOT ALLEGE, WHICH DEFENDANTS WERE NOT GIVEN A CHANCE TO DENY OR DISPUTE, AND WHICH IS CONTRADICTED BY DOCUMENTARY EVIDENCE (3T13-3T21)

The Superior Court erred in granting Plaintiff summary judgment based on findings of fact that were not alleged by Plaintiff in her pleadings or her statement

of undisputed material facts and which Defendants would have denied and disputed if they had been alleged. Specifically, the Court found that "[t]he landlord offered tenants the use of the yard by charging 'additional rent'." JA96 (quotation marks in original). "Additional rent" is a legal term of art that landlords include in leases because it is required if they wish to recover late fees and attorneys fees. *Cmty. Realty Mgmt., Inc. for Wrightstown Arms Apartments v. Harris*, 155 *N.J.* 212, 234 (1998) (explaining that "written lease, however, must expressly permit a landlord to recover reasonable attorneys' fees and damages in a summary dispossess proceeding before a landlord/tenant court may consider those expenses as additional rent"). Plaintiff never alleged that the payments made for use of the yard were "additional rent" for the apartment in her complaint or statement of undisputed material facts. JA6-33 and JA138-142.

Referring to the additional rent provision on page two of the Yard Agreement, the Superior Court found as a matter of fact that the "provision clearly identifies the yard lease payment as additional rent." JA97. This finding is contradicted by the documentary evidence and was not alleged by Plaintiff. JA124. The Agreement simply does not say anything like that. It contains an additional rent provision, but the apartment is not mentioned at all. Moreover, while the Court found that payments made were "additional rent," the court never identified what they were supposedly additionally rent *for*. Ultimately, the court concluded that Defendants violated the

RCO by "charging additional rent for housing space," but the opinion does not state whether the court found that the "housing space" for which additional rent was charged was the apartment or the yard.

The Court also found that "[t]he purpose of the rent control ordinance is to protect tenants from evictions that violate the ordinance." JA97. There is no evidence in the record concerning the purpose of the RCO, but the name of the ordinance and its contents suggest that its purpose is rent control.

Based on this fact-finding, the Court reasoned that because the additional rent provision on page two of the Yard Agreement allows for eviction for failure to pay additional rent incurred pursuant to that agreement and based on the Court's erroneous factual conclusion that payments made pursuant to the Yard Agreement were "additional rent," the Court concluded that "Defendants are subject to the rent control ordinance, they violated that ordinance, and the Defendants are subject to the Consumer Fraud Act." JA97. The Court then held that "charging additional rent for housing space" was unlawful conduct under the CFA and that the entirety of Plaintiff's payments made pursuant to the Yard Agreement were "illegal yard rent." The Court entered judgment for $83,853.84, treble the amount of the "rent overpayment" over the term of Plaintiff's tenancy. *Id.*

This opinion erred in multiple ways. One was that the Court erred in making findings of fact that were material to the Court's decision, but not alleged by either

party. Plaintiff never alleged that "[t]he landlord offered tenants the use of the yard by charging 'additional rent'," a legal term of art. Plaintiff never alleged that the additional rent provision in the yard agreement "identifies the yard lease payment as additional rent." These were all findings of fact that were never alleged by Plaintiff and which Defendants would have denied and disputed if they were. 3T23. The term "additional rent" does not appear in the Complaint or Plaintiff's statement of undisputed material facts in support of summary judgment. JA6-33 and JA138-142.

Defendants moved for reconsideration based on the erroneous findings of fact that Defendants were not provided an opportunity to dispute. However, on reconsideration the Court made the same erroneous findings of fact that Plaintiff had never alleged. Specifically, the court found that "the landlord offered tenants the use of the yard by charging 'additional rent'," and that the additional rent provision in the Yard Agreement "identifies the yard lease payment as additional rent." JA104. The Court again found that "Defendants are subject to the rent control ordinance, Defendants violated that ordinance, and the Defendants are subject to the Consumer Fraud Act." JA105. The Court found Defendants' alleged "charging additional rent for housing space" violated the rent control ordinance and was unlawful conduct under the CFA. *Id.*

Disputed material facts cannot be resolved on summary judgment. The facts on which the Court based its decision are material to the outcome. Here, the Court

granted Plaintiff summary judgment by creating a new material fact that the payments made pursuant to the Yard Agreement were "additional rent" and applying it to a new legal theory about how the additional rent provision in the Yard Agreement somehow created a risk of eviction from the apartment. These alleged facts and this legal theory concerning eviction were never advanced by Plaintiff. It was wholly an invention of the Court after oral argument. The words "additional rent" and "eviction" were not mentioned at all during oral argument and the judge posed no questions to either litigant about whether the Yard Lease "identifies the yard lease as additional rent" or whether the Plaintiff could have been evicted if she breached the yard agreement. 2T. Defendants did not even have a chance to dispute the material facts the court decided the case on before the Court resolved them in Plaintiff's favor. Moreover, the facts, as asserted and resolved by the Court, are contradicted by the documentary evidence.

The grant of summary judgment to Plaintiff depends on the Court's conclusion that the additional rent provision in the Yard Agreement "identifies the yard lease payment as additional rent." However, it does not do that. The Agreements speak for themselves. Each one has an additional rent provision that applies to <u>that</u> lease. JA114 and JA124. Rent under the Yard Agreement was due as rent for the yard, not additional rent for the apartment. The Yard Agreement contains an additional rent provision, but additional rent that would become due under the

Yard Agreement would arise from and relate to the Yard Agreement, not the apartment and Plaintiff never alleged otherwise. Each agreement is a complete agreement unto itself and neither agreement allowed for payments due under the Yard Agreement to be considered additional rent for the Apartment Agreement. Payments for each agreement were made separately. Plaintiff did not allege in her Complaint or summary judgment motion that the Apartment Agreement depended on the Yard Agreement in any way. If she had, Defendants would have disputed that allegation because it is untrue. The Court's conclusion of fact that payments due under the Yard Agreement were "additional rent" that could be the basis for eviction from the apartment is contradicted by the documentary evidence and was never alleged as a fact by Plaintiff.

In addition, the court erred in finding that *"Defendants* are subject to the rent control ordinance." People are not subject to rent control ordinances, housing spaces are. To grant summary judgment in Plaintiff's favor the Court needed to find that the yard was a housing space subject to the RCO, not that Defendants were subject to the RCO. The Court did not make this finding or do this analysis. Because it is not possible to find that the payments pursuant to the yard agreement were for housing space without finding that the yard is housing space, summary judgment should not have been granted to the Plaintiff and should have been granted to Defendant.

Finally, the ultimate unlawful act on which the Superior Court based the CFA judgment, "charging additional rent for housing space," is not unlawful and the judge did not say how or why it is unlawful under the RCO. It was not and cannot be an "overcharge" of rent because the Court made no findings concerning what the legal rent was. "Charging additional rent for housing space" is not a cognizable unlawful act to support a CFA claim.

The summary judgment decision was based on the resolution of material facts that were not advanced by Plaintiff, unsupported by documentary evidence, and which Defendants dispute based on competent evidence. In addition, it improperly applied the RCO to Defendants rather than housing space and the underlying unlawful act is not unlawful. For these reasons, the order granting Plaintiff summary judgment should be reversed and summary judgment should be entered in favor of Defendants.

III. THE AWARD CONFLICTS WITH THE HOBOKEN RENT CONTROL ORDINANCE'S STATUTE OF REPOSE (JA368)

Hoboken's Rent Control Ordinance includes a two year statute of repose on the recovery of rent overcharges under the ordinance. JA135. Because the RCO is the reason there is maximum legal rent that can be the basis for an overcharge claim in the first place, the legislative decision to limit recovery on rent overcharges is a material part of the overall rent control statute and should limit Plaintiff's recovery to the extent the award is not reversed.

IV. PUBLIC POLICY AND CONSTITUTIONAL QUESTIONS RAISED BY THE SUPERIOR COURTS' DECISIONS

Rent Control Ordinances implicate the constitutional rights to property and to contract. *Mayes v. Jackson Twp. Rent Leveling Bd.,* 103 *N.J.* 362, 367, 511 (1986) (stating that "a rent control ordinance must permit an efficient landlord to realize a 'just and reasonable return' on the property") (cleaned up). The constitutionality of rent control ordinances has been litigated thoroughly and they are upheld when they properly balance the public interest and are not confiscatory. *See id.* The fact that Hoboken's definition of "dwelling" excludes yards is part of this careful crafting and should not be lightly pushed aside.

Bacallao's private and furnished yard has independent value and use, especially in an urban area. The Superior Court's holding that the consideration paid by Plaintiff for access and use of the yard were "illegal yard rent" is an intrusion on Bacallao's property rights associated with the yard. Bacallao's yard is hers to do with what she wishes within the rules of zoning. She could have turned it into a private garden for herself, divided it into sections and allowed tenants to access some parts but not others, built a giant shed to store a treasured private collection, or leased it out to another person, such as former tenants or neighbors, for any amount they are willing to pay. She can still do all these things *except* that if a current tenant who is paying the legal rent for the apartment wishes to have regular access to the yard she must either give them access for no cost or refuse them access. This outcome

does not make sense. Functionally, it lowers the leasing value of Defendants' yard to $0 for building tenants who cannot lease it for any amount of money without violating the RCO and an unlimited amount for an outsider who highly values private yards. This outcome is nonsensical and it casts Hoboken's RCO into a constitutional gray area. Is the RCO constitutional if expanded to real property outside the dwelling, such as yards or garden patches, or anything else outside the dwelling. Can the City of Hoboken interfere in the rights of landlords and tenants to contract with each other concerning the use of a private yard when that landlord can bargain freely with others for the same thing?

The question of whether yards are encompassed in Hoboken's RCO is not an idle question of statutory interpretation and the answer to that question affects more than just this case. Rent Control Ordinances burden constitutional property rights and the constitutional right to contract. The constitutionality of these carefully crafted ordinances has been upheld by NJ Courts, but expanding it to non-dwelling parts of the property that have their own uses and value constitutes a drastic expansion of the ordinance that raises constitutional issues.

In addition, finding that Plaintiff could advance an "overcharge" of rent claim without first establishing the legal rent through the process provided in the ordinance deprived Hoboken of the right to interpret its own ordinance and deprived the landlord to the due process afforded by the ordinance when a dispute arises

concerning the legal rent of an apartment. In fact, failure to request a legal rent calculation for the yard avoided the possibility of a written response from Hoboken that yards are not rent regulated under its ordinance, which would have ended this case before it started.

V. THE JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF WHEN SHE DID NOT ALLEGE A SINGLE FACT THAT WOULD CONSTITUTE A BREACH OF CONTRACT

The Superior Court granted Plaintiff summary judgment on her breach of contract claim without making a single finding of fact concerning that claim. This was error and should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an order:

1) Reversing the grant of summary judgment in favor of Plaintiff;

2) Remand with instruction to enter summary judgment for Defendants.

Law Offices of Dana Wefer, LLC
Attorney for Defendants/Appellants

BY: s/Dana Wefer

DANA WEFER, ESQ.

Dated: November 1, 2024

JESSICA HOFFER KAYLOR, Plaintiff-Respondent, vs. TERESA BACALLAO, EMPIRE MANAGEMENT GROUP LLC, and TERESA SANCHEZ, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3740-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART HUDSON COUNTY DOCKET NO.: L-1481-20 Sat Below: Hon. Kalimah H. Ahmad, J.S.C. Hon. Veronica Allende, J.S.C.

BRIEF FOR PLAINTIFF-RESPONDENT, JESSICA HOFFER KAYLOR

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Date: December 4, 2024

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PRELIMINARY STATEMENT

In their dogged persistence of a now four-year long deliberate posture of avoidance, the Appellants misguidedly and beguilingly continue to present contrived arguments to lead the court astray from the simple and fundamental consumer fraud that they as professional landlords committed against various tenants, and further delay justice to the Respondent. After the trial court finally entered judgment against the Appellants for treble damages, the Appellants now regurgitate the same arguments on appeal that they made in 2021. Rather than an honest assessment of rudimentary provisions in a standard rent control ordinance, the Appellants instead foist a crabbed interpretation of a law intended to protect unsuspecting tenants, and contort words in the ordinance in contravention of their plain, ordinary meaning to suit their nefarious ends.

The Appellants knew exactly what they were doing when they devised their scheme to circumvent the rent control ordinance and illegally charge tenants market rent by inducing them to sign two lease agreements: one for their apartment, and another for the common backyard. Charging additional rent under the thinly veiled guise of the privilege of a common backyard, a practice plainly contemplated by the ordinance, the Appellants illegally collected tens of thousands of dollars over several years from the tenants in their four-unit apartment house.

PROCEDURAL HISTORY

The Respondent filed the Complaint in April, 2020 (006a).

The Appellants, Empire Management Group, LLC ("Empire"), and Teresa Sanchez ("Sanchez"), filed an Answer on September 29, 2020 (034a). the Appellant, Teresa Bacallao ("Bacallao"), represented by separate counsel, filed an Answer on September 30, 2020 (075a).

On October 22, 2020, Bacallao filed a Motion to Dismiss the Complaint, which was denied by Judge Espinales-Maloney, on December 24, 2020.

On October 8, 2021, Empire and Sanchez filed a Motion to Dismiss the Complaint, and Bacallao filed a Motion for summary Judgment. Both motions were denied by Judge Allende on December 20, 2021 (082a; 084a).

On March 18, 2024, the Respondent filed a Motion for Summary Judgment, which was ultimately made returnable on May 10, 2024.

On April 29, 2024, a substitution of attorney was filed on behalf of Empire and Sanchez. Bacallao, however, continued to be represented by the same attorney.

At 10:45 p.m. on April 30, 2024, Empire and Sanchez filed a Cross Motion for Summary Judgment. Neither notice of nor access to the filing was given until 4:00 a.m. on May 1, 2024, fewer than ten days before the return date.

Bacallao did not oppose the Respondent's Motion for Summary Judgment.

On May 10, 2024, the trial court granted the Respondent's Motion for Summary Judgment and entered a judgment for treble damages against the Appellants on the first and fourth counts of the Complaint for breach of contract and violation of the New Jersey Consumer Fraud Act ("CFA") (095a). Further, the trial court denied the Cross Motion for Summary Judgment by Empire and Sanchez (098a).

On June 4, 2024, Empire and Sanchez moved to reconsider summary judgment.

On June 12, 2024, the Respondent filed a Cross Motion to Amend the Judgment.

On July 19, 2024, the trial court amended the judgment for costs, attorney's fees, and pre-judgment interest, and denied the Motion to Reconsider by Empire and Sanchez (101a).

Trial was scheduled on December 7, 2021, May 11, 2022, October 25, 2022, April 25, 2023, October 2, 2023, November 27, 2023, January 30, 2024, April 2, 2024, May 21, 2024, May 28, 2024, and July 30, 2024.

On July 30, 2024, all of the Appellants – now all apparently represented by present counsel – filed a Notice of Appeal (001a).

Specifically, Empire and Sanchez appeal from the December 20, 2021 Order denying their Motion to Dismiss the Complaint (082a; 084a); the May 10, 2024

Orders granting the Respondent's Motion for Summary Judgment, and denying their Cross Motion for Summary Judgment (095a; 098a).

Because she did not oppose or otherwise seek relief from it in the trial court, Bacallao could not and has not appealed from the May 10, 2024 Order granting Summary Judgment (095a), but only the December 20, 2021 Order denying her Motion for Summary Judgment (082a).

Although Bacallao was represented by separate counsel in the trial court, it now appears that all Appellants are represented by one attorney.

STATEMENT OF FACTS

The Respondent recites the following facts pertinent to the Appellants' arguments on appeal, nearly all of which were admitted by the Appellants in the trial court on summary judgment. While the Respondent submitted additional facts in support of her Motion for Summary Judgment pertaining to the Appellants' liability as sellers under the CFA, the Respondent's ascertainable loss under the CFA, and piercing Empire's corporate veil to hold Sanchez individually liable, the Appellants did not challenge these points on summary judgment and do not raise them now on appeal.

Bacallao is the former owner in fee and landlord of the real property at 612 Bloomfield Street, Hoboken, New Jersey ("the property"). The property has four

residential rental units, making it subject to the jurisdiction of the City of Hoboken, Department of Human Services, Division of Rent Leveling ("the City") and Hoboken, New Jersey, Municipal Code §155 ("the ordinance"). The property has a backyard that, during the Respondent's tenancy, was accessible to all tenants at the property through a door in the basement of the building (138a).

Bacallao enlisted her daughter, Sanchez, and Sanchez' company, Empire, to manage the property, including the leasing of the apartments. Id. Sanchez prepared and executed two lease agreements with the Respondent: one for the apartment, and one for the backyard. Id. The leases called for separate rents, and even separate security deposits, for the apartment and the backyard, which Sanchez directed Respondent to pay in separate checks to Empire. Id.

On the annual registration statements that the Appellants filed with the City pursuant to the ordinance, the Appellants listed the rent that they charged and collected for the apartment, but did not include the separate additional rent that they charged and collected for the backyard. Id.; 361a. Not including the rent that the Respondent paid to Empire for the apartment in the amount that the Appellants reported to the City, Empire separately and additionally charged and collected $27,951.28 from the Respondent for the backyard, which the Appellants did not report to the City. Id.

The Appellants employed the same unlawful tactics used on the Respondent on tenants in two other apartments. Id.; 113a; 123a; 337a. Both before and during the Respondent's tenancy from 2015-2019, the Appellants simultaneously executed written lease agreements with other tenants at the property for both other apartments and the backyard. Id. As with the Respondent, the other tenants were asked to sign a lease agreement for the apartment, which set forth a monthly rent equivalent to the amount that the Appellants reported on the annual registration statement filed with the City, and a second lease agreement for the very same backyard that the Appellants leased to the Respondent. Id. Accordingly, over her four-year tenancy during which the Respondent was paying separate and additional rent for access to the backyard, so were Bacallao's tenants in two other units at the property. Id. The Appellants did not report the additional rents that they charged and collected for the backyard on any of the annual rent registration statements that they filed with the City. Id.; 361a.

The Respondent vacated the property in June, 2019. Id.

No discovery was propounded by the Appellants, and no parties were deposed. Id.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT.

A. The doctrine of exhaustion of administrative remedies applies only to prerogative writ actions brought pursuant to Rule 4:69, not actions for damages for breach of contract and violations of the New Jersey Consumer Fraud Act.

(Raised below: Respondent's Opposition to Appellants' Motions to Dismiss and/or for Summary Judgment)

Nothing in the ordinance, the CFA, or Wozniak v. Pennella, 373 N.J. Super. 445 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005) and its progeny supports the Appellants' meritless contention that the Respondent was required to make any administrative request from the City before her causes of action could accrue. Simply put, an administrative body need not "calculate" rent before a court may find as fact that a landlord overcharged a tenant. Moreover, even if such an administrative determination were a prerequisite, there is no authority that places the onus on the Respondent to make such a request; certainly, nothing has prevented the Appellants over the last four years from requesting a legal rent calculation from the City themselves.

As she did three years ago when Judge Allende denied her application, Bacallao now again sightlessly blows by the stark reality that the Respondent never

challenged the amount of the base legal rent for the apartment, and thus had absolutely no need for a rent calculation. Her utter ignorance of the basis for establishing the overcharge evidences her fundamental misunderstanding of the gravamen of this action, which is that the Appellants defrauded her by unlawfully charging rent for a benefit, privilege, service, or facility in connection with the housing space — specifically, the backyard — which exceeded the rent that the Appellants registered with the City.

Rather, the Respondent's damages are based upon the difference between the total monthly rent that Empire collected from the Respondent for the apartment and the backyard, and the amount that the Appellants reported to the City. Based on this arithmetic, the only conceivable way that the Respondent could not have overpaid would be if the Appellants had been underreporting the amount of rent that they were collecting to the City, and the legal rent was actually higher. This is absolutely not the case, and the Appellants' failure to even allege as much is a clear indicator of their disingenuousness in making this frivolous argument.

Bacallao also ignores Brunetti v. New Milford, 68 N.J. 576, 601 (1975), which established that the doctrine of exhaustion of administrative remedies applies only in actions brought pursuant to Rule 4:69. The legal issue presented in this case in no way implicated the administrative expertise of a local governing body or the necessity for taking evidence and making factual determinations, as the outcome

turns solely on the interpretation of the ordinance, which is purely a matter of law. Thus, even if the Respondent had proceeded to seek some kind of administrative relief from the City, the trial court could have simply interpreted the ordinance *de novo* to decide the issue of whether the backyard was a benefit, privilege, service, or facility in connection with the housing space.

Moreover, as Judge Allende astutely recognized three years ago, unlike Glynn v. Park Tower Apartments, 213 N.J. Super. 357 (App. Div. 1986), the Respondent here sought damages for breach of contract and CFA violations, not an administrative remedy in an action in lieu of prerogative writs.

> "Here, Plaintiff's action is for breach of contract, including a breach of the covenant of good faith and fair dealing by charging to and collecting from Plaintiff rent for the backyard that Defendant Sanchez did not report or disclose on the registration statements, and also common law fraud, in that Defendants misrepresented to Plaintiff that the backyard could be rented separately from the apartment and that rent for the backyard could be charged to and collected from Plaintiff separately from and in addition to the rent for the apartment. Additionally, the Hoboken Rent Control Ordinance does not include an exclusive administrative remedy – or any remedy at all for that matter – for any alleged violation of a regulation under the ordinance. For these reasons, the court does not find that Plaintiff was obligated to file a complaint with the Hoboken Rent Control Board before filing this action in court."

084a.

B. The ordinance's two-year period of repose does not preclude an action for damages based on breach of contract and the New Jersey Consumer Fraud Act.

(Raised below: Respondent's Opposition to Appellants' Motions to Dismiss and/or for Summary Judgment)

First, the Appellants have never established that they served the Respondent with the disclosure statement required by § 155-4(B), a prerequisite to the running of the ordinance's two-year period of repose. The Appellants' reliance on the ordinance's period of repose is also misplaced for two additional substantive reasons.

Knight v. City of Hoboken Rent Leveling & Stabilization Bd., 332 N.J. Super. 547 (App. Div. 2000) invalidated a regulation identical to § 155-4(B) and (C), and held that the City could not limit tenants' rights to a refund or credit while simultaneously granting tenants the right to recoup rent overpayments. As argued hereinabove, the Respondent did not seek administrative relief from the City under the ordinance. Instead, she has sued for treble damages under the CFA, and a municipality has no authority to determine her ascertainable loss under that statute.

Most importantly, even were the period of repose applicable to the Respondent's claims, New Jersey State law would preempt it. The statute of limitations applicable to the Respondent's claims is six years. See N.J.S.A. 2A:14-1; Belmont Condominium Ass'n. v. Geibel, 432 N.J. Super. 52, 82 (App. Div. 2013);

DiIorio v. Structural Stone & Brick Co., Inc., 368 N.J. Super. 134, 142 (App. Div. 2004) (citing D'Angelo v. Miller Yacht Sales, 261 N.J. Super. 683, 688 (App. Div. 1993). While the Appellants seemingly argue that the ordinance bars the Respondent's State law contract and CFA claims, they disregard the axiomatic principle that an ordinance may not forbid what a statute expressly authorizes, Brunetti, 68 N.J. at 601. Further, a municipality may not regulate a subject if the State intended its own action to be exclusive. State v. Crawley, 90 N.J. 241, 250 (1982) (quoting State v. Ulesky, 54 N.J. 26, 29 (1969). In fact, a statute may invalidate an ordinance even if the statute does not completely occupy the field or facially conflict with the ordinance. Id. at 250. Brunetti held that the New Jersey Anti-Eviction Act preempted an ordinance that provided for independent grounds for eviction, even though there was no apparent conflict between the two laws. See also Wein v. Town of Irvington, 126 N.J. Super. 410 (App. Div.), certif. den., 65 N.J. 287 (1974); Ulesky, supra, 54 N.J. 26; Chester Tp. v. Panicucci, 116 N.J. Super. 229, 234-35 (App. Div. 1971), aff'd 62 N.J. 94 (1973); Coast Cigarettes Sales v. Mayor, Coun., Long Branch, 121 N.J. Super. 439, 446 (Law Div. 1972); Dimor, Inc. v. Passaic, 122 N.J. Super. 296 (Law Div. 1973); Barry Gardens v. Passaic, 130 N.J. Super. 369, 380 (Law Div. 1974).

Certainly, neither the intent nor the effect of the ordinance could be to alter New Jersey statutes or CFA case precedent. Application of the ordinance under the

Appellants' interpretation would undercut N.J.S.A. 2A:14-1, overrule CFA case law, and produces varying results in CFA claims depending on the municipality. It is an absurd argument that was properly rejected by the trial court.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST THE APPELLANTS ON THE RESPONDENT'S CLAIMS FOR BREACH OF CONTRACT AND VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT.

A. The ordinance's definitions of "housing space" and "service" include the backyard.

(Raised below: Respondent's Motion for Summary Judgment and Opposition to Appellants' Cross Motion for Summary Judgment)

In lock step with their jejune and incomplete legal arguments to the trial court, the Appellants again offer nothing other than their unqualified and doctrinaire opinion about the ordinance's applicability to the backyard. They provide no legal analysis, and completely fail to address the expansive definitions in the ordinance of the terms housing space, dwelling, and rent. Instead, they vacuously pronounce, with no legal authority, that a backyard could not possibly fit within the expansive and catchall definitions of a benefit, privilege, or facility connected with the use or occupancy of any dwelling or housing space.

The Appellants conveniently misdirect the Court's attention on the physical layout of the property, and blithely ignore the ordinance's liberal scope. The ordinance does not confine itself to the tenant's living quarters, but appropriately extends its reach to include benefits, privileges, services, and facilities connected with the rental. The ordinance regulates the rent for the rental and use of "housing space," which is defined as

> "that portion of a dwelling rented or offered for rent for living and dwelling purposes, ***with all privileges,*** **services,** furnishings, furniture, equipment, ***facilities*** and improvements ***connected with the use or occupancy of such portion of the real property.*****"**

Hoboken, New Jersey, Municipal Code § 155-1 (emphasis supplied).

Rent is defined as "any charge, no matter how set forth, paid by the tenant for the use of ***any service in connection with the housing space."*** Id. (emphasis supplied). The ordinance defines "service" as the

> "provision of light, heat, hot water, maintenance, painting, elevator service, air conditioning, storm windows, screens, superintendent service and ***any other benefit, privilege or facility connected with the use or occupancy of any dwelling or housing space."***

Id. (emphasis supplied).

In the instant case, the Respondent entered into two separate lease agreements for the apartment and backyard, each with different rental amounts. The apartment lease called for a monthly rent equivalent to the amount registered by Sanchez with

the City of Hoboken, but in combination with the backyard rent, the total monthly amount paid by the Respondent exceeded the rent that Sanchez reported to the City.

While the terms "yard" or "backyard" do not appear anywhere in the ordinance, they certainly fall within the catchall definitions of housing space and service. A backyard, directly behind a building of four rental units, that may only be accessed from inside the building, seems entirely, almost necessarily, appropriate for use by the residents. Even if it could be accessed otherwise, a backyard is most certainly a privilege, facility, benefit, or service connected with the use and occupancy of the real property. The Appellants have offered nothing to indicate that the backyard has a special or intrinsic value, or possesses some unique commercial benefit or use, independent from the building. Certainly, it would be highly unusual for a non-resident of the property to use the backyard, and the Appellants have not alleged that anyone other than residents accessed the backyard during the Respondent's tenancy.

This point has been made even more obvious by the Appellants themselves in the lease agreements that Sanchez drafted. The yard lease specifically states that it will terminate simultaneously with the apartment lease (123a). Thus, regardless of the physical logistics of the backyard in relation to the building, the two leases should be viewed as a single contract because the conditions of both leases are not mutually exclusive. The yard lease's contingency on the term of the apartment lease clearly

signifies that the Respondent's right to use and enjoy the backyard was dependent upon her tenancy. Were it not, she could have continued renting the backyard after she vacated the apartment. For those reasons, the backyard clearly constitutes housing space as defined by the ordinance, and the extra rent that Empire collected from the Respondent for the backyard without registering it with the City is a violation of the ordinance that constitutes unlawful conduct under the CFA.

That the interdependency of the apartment lease and the yard lease somehow favors their interpretation of the ordinance is yet another clear example of the Appellants' dishonesty to the tribunal. The overt, transparent fraud that they perpetrated upon their various tenants cannot now be ratified by this Court. The Appellants disingenuously continue to foist the phony fiction of the divisibility of the housing space as having an ounce of merit, when it is abundantly clear that they knew exactly what they were doing from the start. The Appellants anticipated that, if they did not condition the backyard lease on the apartment lease, they would be left with the possibility of a tenant who had vacated the apartment continuing to return to the property to use the backyard. For this reason, they specifically provided in the backyard lease that it would terminate upon the apartment tenancy. This critical fact is undoubtedly the linchpin in the connection to and the relatedness of the backyard to the apartment. The Appellants proceeded with exactly the same deceptive and unconscionable commercial practices with other tenants at the

property during precisely the same period, registering only the apartment rent with the City and simultaneously collecting additional rent for the backyard.

Perhaps because permitting landlords to craftily label additional charges to tenants would so obviously defeat the policy goal of municipal rent regulation, there is sparse caselaw on the issue. However, Central Towers Co. v. Fort Lee, 160 N.J. Super. 546 (Law Div. 1978) supports a finding that the backyard does qualify as a benefit, privilege, or facility. Central Towers held that parking spaces were covered by the definitions of dwelling, housing space, and rent under Fort Lee's rent control ordinance because the parking spaces were offered specifically in connection with the use and occupancy of the residence. As such, the court found that parking did constitute a privilege or service. The Respondent made precisely this same point about the backyard, the lease for which terminates upon termination of the apartment lease.

B. The Appellants failed to establish a dispute as to any genuine issue of material fact to defeat the Respondent's Motion for Summary Judgment.

(Raised below: Respondent's Opposition to Appellants' Cross Motion for Summary Judgment)

A mere allegation alone is insufficient to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in its favor." Invs. Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018), aff'd and modified, 243 N.J. 25 (2020). Neither insubstantial arguments based on assumptions

or speculation nor conclusory and self-serving assertions by one party will defeat a motion for summary judgment. Brill v. Guardian Life Ins. Co., Inc., 142 N.J. 520, 529 (1995).

Nearly every single one of the facts hereinabove was admitted by Empire and Sanchez – the only Appellants who opposed the Respondent's Motion for Summary Judgment. Neither they, nor especially, Bacallao, who stood on the sidelines at the trial court below – may now attempt to rewrite the factual record upon which the trial court based its decision. Their laziness below cannot be remediated, and certainly, not rewarded, on appeal.

In an even staggeringly scanter factual submission than they made to Judge Allende in 2021, Sanchez's eight-paragraph certification in the Cross Motion for Summary Judgment shockingly contained no certification in lieu of oath, in violation of Rule 1:4-4(b). This was not the first time that the boilerplate provision that must precede the affiant's signature in any certification was inexplicably absent from Sanchez's statement.

Far from raising a genuine issue as to any material fact, they did not even comment on the Respondent's thirteen exhibits. Sanchez included no exhibits of her own, and neither her four-paragraph statement of facts nor the brief made any citations to the extensive factual record set forth by the Respondent. Although the trial court did not specifically address the issue, the Respondent's Motion for

Summary Judgment should have been properly deemed uncontested pursuant to Rule 1:6-2, as she filed no opposition. The Cross Motion for Summary Judgment by Empire and Sanchez should likewise have been deemed uncontested pursuant to Rule 1:6-2 because it was served and filed later than ten days before the return date, in violation of Rule 4:46-1. As the Cross-Motion was not available in eCourts until May 1, 2024, the Respondent's time to prepare opposition was truncated by one day. Accordingly, Bacallao has no standing on appeal to challenge the trial court's entry of judgment – whether she is represented by appellate counsel or not.

The Appellants' pathetic insistence on raising undated, undocumented, and unsubstantiated conversations with unidentified out-of-court declarants who purportedly worked for the City is nothing short of laughable. Even if they occurred, such conversations would have absolutely no legal import whatsoever on this litigation. As Judge Allende appropriately recognized three years ago, "[t]he motion record is devoid of any admissible, reliable, non-hearsay evidence to corroborate this representation." 084a. The Appellants' failure to recognize the baselessness of this trifling argument on appeal only shows their lack of seriousness and good faith, and continuous efforts to delay justice to the Respondent.

CONCLUSION

For the foregoing reasons, the Orders of the trial court ought properly be affirmed, and the Respondent permitted to apply for an award of attorney's fees incurred in this appeal.

LAW OFFICES OF PETER W. TILL
Attorneys for the Plaintiff-Appellant,
Jessica Hoffer Kaylor

Date: December 4, 2024

s/ John V. Salierno
John V. Salierno, Esq.

JESSICA HOFFER KAYLOR,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff- Respondent,	:	Docket No. A-3740-23
	:	
vs.	:	
	:	CIVIL ACTION
TERESA BACALLAO, EMPIRE	:	
MANAGEMENT GROUP LLC,	:	ON APPEAL FROM
and TERESA SANCHEZ,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: HUDSON COUNTY
Defendant- Appellants	:	Docket No. HUD-L-1481-20
	:	
	:	Sat Below:
	:	Hon. Kalimah H. Ahmad, J.S.C.
	:	
	:	Submitted December 18, 2024

Reply Brief and Supplemental Appendix on behalf of Teresa Bacallao, Empire Management Group, LLC and Teresa Sanchez

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LEGAL ARGUMENT

I. PLAINTIFF CANNOT SHOW A RENT OVERCHARGE, WHICH IS FATAL TO THE CFA CLAIM

Plaintiff cannot overcome the simple fact that it is impossible to calculate an alleged rental overcharge without establishing the legal rent. Two numbers are required for the calculation: the legal rent and the paid rent. Plaintiff is not able cite a single case where a court found a rental overcharge without those two numbers. Indeed, this case stands in stark contrast to the cases set forth in Defendants' opening brief, all of which based a finding of rental overcharge on a legal rent determined by the municipality. Here, the amount of the legal rent was not alleged by Plaintiff in her pleading or statement of undisputed material facts and the judge made no finding concerning what the legal rent for the apartment was. The legal rent for the apartment is nowhere in the record.

Plaintiff tries to get around this by saying that the court itself could calculate the legal rent, but again cites no authority for this argument and it is in contradiction to Hoboken's Rent Control Ordinance, which designates the Rent Regulation Officer and Rent Leveling Board as the two entities with authority to set the legal rent. (Defendant's opening brief at pg. 5; JA131-132). Moreover, even if the court did have authority to determine legal rent on the apartment, it was not done here. Judge Ahmad did not find that there was an overcharge of

the legal rent, she just declared that any and all rent for the yard was unlawful regardless of whether it exceeded legal rent for the apartment.

Plaintiff tries to magic away the fact that there is no evidence of what the legal rent is by claiming she "never challenged the amount of the legal rent." (Plaintiff's opposition brief at Pg. 8). This is irrelevant. The issue is that Plaintiff never *established* the legal rent. It is impossible to determine whether the legal rent was exceeded when it has not been established. Indeed, as Plaintiff concedes, it is possible the legal rent on the apartment exceeds what the landlord was charging and registering with the City. *Id.* Plaintiff asserts "[t]his is absolutely not the case," but there is no evidence one way or the other because Plaintiff did not obtain a legal rent calculation and has not established the legal rent. *Id.* Plaintiff also asserts that even if such a calculation were necessary, "there is no authority that places the onus on the Respondent to make such a request." *Id.* This ignores that the onus is not on Plaintiff due to any "authority," it is on Plaintiff because it is an essential part of proving her case. Plaintiff did not *have* to request a legal rent calculation, but she cannot maintain a CFA claim for rent overcharge without one as a matter of logic. It is literally impossible to do the necessary math.

II. PLAINTIFF'S ASSERTION THAT YARDS ARE HOUSING SPACE REGULATED BY THE RENT CONTROL ORDINANCE CONFLICTS WITH THE PLAIN LANGUAGE OF THE ORDINANCE AND THERE IS NO EVIDENCE THAT ANY PERSON OR ENTITY OTHER THAN PLAINTIFF HAS EVER INTERPRETED THE ORDINANCE TO REGULATE NON-DWELLING SPACES

Plaintiff's reading of Hoboken's RCO to include yard space as part of housing space is singular to her, conflicts with the plain language of the ordinance, and is unsupported by any other authority. To support the unique interpretation Plaintiff makes unfounded assertions concerning how the RCO should be interpreted. For example, Plaintiff asserts that RCO's definition of service is an "expansive and catchall" definition and that the ordinance has a "liberal scope." *Id.* at pg. 12-13. However, there is no evidence that any part of that definition is expansive or a catchall, there is no evidence that Hoboken or its Rent Leveling Board have ever interpreted the definition of "service" as expansive or a catch-all, and there is no evidence that the ordinance itself has a "liberal scope" as Plaintiff asserts. This is just Plaintiff's singular, and motivated, interpretation of the ordinance, which depends entirely upon the word "connected" being defined and interpreted as figurative rather than literal. The Court can take judicial notice that common first definitions of the word "connected" use the word "connected" in a physical, literal way while second definitions typically relate to an associational definition. For example, Merriam

Webster's first definition is "joined or linked together"[1] and Cambridge dictionary's first definition is "to join or be joined with something else."[2] Merriam Webster and Cambridge Dictionary define "join" as a literal connection in the first definition as well.[3,4] Here, as relayed in Defendants' opening brief, the context of the word "connected" in the Hoboken RCO and the examples given for services and privileges connected with the living space in the Hoboken RCO involve services physically connected with the use of the living space or ability to access the living space only. Def. br. at pg. 7 and JA131-132.

Other arguments raised by Plaintiff in her opposition defy blackletter law. For example, Plaintiff argues that the Yard Agreement and Apartment Agreement "should be viewed as a single contract because the conditions of both leases are not mutually exclusive." Pl. br. at pg. 14. However, the plain language of each document states it is the entire agreement between the parties concerning the subject matter of that document and the language of the contract governs. *Perkins v. Daimler Chrysler Corp*., 383 N.J. Super. 99, 113 (App. Div. 2006). (noting that "[c]ourts do not rewrite contracts into which parties have freely and

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[1] https://www.merriam-webster.com/dictionary/connected
[2] https://dictionary.cambridge.org/dictionary/english/connect
[3] https://www.merriam-webster.com/dictionary/join (defining join as "to put or bring together so as to form a unit" and "to connect (separated items, such as points) by a line" in the first definition).
[4] https://dictionary.cambridge.org/dictionary/english/joined (defining join as "to connect or fasten things together" in the first definition).

voluntarily entered"). Moreover, if non-mutually exclusive contracts were viewed as a single documents, then every contract in the world could be viewed as the same as every other contract that does not contradict it. This is absurd.

Plaintiff argues that the fact that the Yard Agreement ended if the Apartment Agreement ended (but not vice versa), "signifies that the Respondent's right to use and enjoy the backyard was dependent upon her tenancy" because "[w]ere it not, she could have continued renting the backyard after she vacated the apartment." Pl. br. at pg. 15. This argument is specious because there is no evidence that Plaintiff could not continue renting the backyard, it just would have required a different agreement. Indeed, the fact that if the parties chose, they could enter into a new agreement for *just* the backyard proves that the backyard is not "housing space." It can easily be rented independently of the housing space to a non or former tenant.

The single case that Plaintiff cites in support of her legal argument that yards are subject to rent control is easily distinguished. Specifically, Plaintiff says that in *Cent. Towers Co. v. Borough of Ft. Lee*, 160 N.J. Super. 546 (Law. Div. 1978), the law division held that "parking spaces were covered by the definitions of dwelling, housing space, and rent under Fort Lee's rent control ordinance because the parking spaces were offered specifically in connection with the use and occupancy of the residence." However, in *Cent. Towers Co.*,

the law division was called upon to decide whether Fort Lee Rent Leveling Board was properly interpreting its own governing ordinance to include parking spaces. *Id.* at 549 (stating "[t]he Fort Lee Rent Leveling Board charged Central Towers, Le Cross Associates and Mediterranean Towers with violations"). Fort Lee's interpretation of its own ordinance was entitled to deference and the fact that Fort Lee interpreted its ordinance to include parking spaces was indisputable because Fort Lee brought the charges. That is in stark contrast to this case where there is nothing from the City of Hoboken suggesting it ever interpreted its ordinance to include yards. Moreover, the court's finding in *Cent. Towers* was explicitly based on the fact that "[a]utomobiles are a necessity and not a luxury in the suburbs where mass transit facilities are not as readily available to residents as they are to city dwellers." *Id.* at 550-51 (emphasis added). *Cent. Towers Co.* is not applicable here because there is no evidence that Hoboken has ever interpreted yards to be subject to rent control and yards are indisputably a luxury, not a necessity.

Finally, the attorney for Defendant Bacallao filed a motion joining Defendants Empire and Sanchez's opposition to Plaintiff's motion for summary judgment and cross-motion for summary judgment. SA1. It is notable that Plaintiff herself did not oppose Empire and Sanchez's initial motion for to dismiss, so under Plaintiff's reasoning, the case should have been dismissed

against them in December 2021. JA85 (Judge Allende's opinion stating "plaintiff did not file an opposition to Defendants Empire or Sanchez's motion").

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an order:

1) Reversing the grant of summary judgment in favor of Plaintiff;

2) Remand with instruction to enter summary judgment for Defendants.

Law Offices of Dana Wefer, LLC
Attorney for Defendants/Appellants

By: */s/Dana Wefer*
Dated: December 18, 2024 Dana Wefer, Esq.