SEBASTIANO PISCIOTTA AND LINDA PISCIOTTA, **PLAINTIFFS/APPELLANTS** **V.** **5 TERRE, LLC, NICOLA DIPALMA, MARIA DIPALMA AND STEFANO BOSSETTI** **DEFENDANTS/RESPONDENTS**	**SUPERIOR COURT OF NEWJERSEY** **APPELLATE DIVISION** **Docket No. A-4138-23** **CIVIL ACTION** **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: BERGEN COUNTY** **Docket No. BER-5608-18** **SAT BELOW:** **Hon. David Nasta, J.S.C.**

BRIEF OF PLAINTIFF/APPELLANTS SEBASTIANO PISCIOTTA AND LINDA PISCIOTTA

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TABLE OF CONTENTS

Table of Judgments, Orders And Rulings Being Appealed	2
Table of Authorities	2
Procedural History	2
Statement of Facts	3
Legal Argument	12
Point 1 DEFENDANTS FAILED TO DEMONSTRATE THE ELEMENTS OF CONSTRUCTIVE EVICTION. *(Issue raised below in Ja610-613)*	12
1. There Was No Deprivation Of Defendants' Rights To Use the Rental Space.	14
2. Defendants Failed To Move Out Of The Rental Space.	15
3. The Length Of Time To Make The Repairs Was Not Material Because Defendants Had Already Vacated.	15
4. Defendants Constructive Eviction Claim Was A Subterfuge.	16
POINT 2 EVEN IF DEFENDANTS' CONSTRUCTIVE EVICTION CLAIM IS UPHELD, THE TRIAL COURT UTILIZED AN IMPROPER METHODOLOGY TO DETERMINE DEFENDANTS' DAMAGES. *(Issue raised below in Ja613-615 and 7T60, 6-25 and 7T-1,1)*	17
Conclusion	21

TABLE OF AUTHORITIES

Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293 (App. Div. 1955)	12
Ellis v McDermott, 7 N.J. Misc. 757 (Dist. Ct. 1929)	12
Harel Associates v. Cooper Healthcare, 271 N.J. Super 405, 408 (App. Div. 1994).	13
JS Properties, LLC v. Brown and Filson, Inc., 389 N.J. Super. 542 (App Div. 2006).	13
Reste Realty v. Cooper, 53 N.J. 444, 457 (1969)	12, 13
Schwartz v Menas, 251 N.J. 556 (2022)	18, 19
Weiss v. Revenue Building and Loan Association, 116 N.J.L. 208, 212 (E&A 1936)	18

JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Judgment or Order Being Appealed	Location
Final Judgment dated July 2, 2024	Ja1
Order dated August 16, 2024 Denying Reconsideration	Ja40

PROCEDURAL HISTORY

Plaintiffs brought this action by filing a complaint in the Chancery Division seeking to impose a landlord's lien on Defendants' equipment located in the rental space and to recover back rent for defendant 5 Terre's breach of the lease. ***Ja 48***. In addition, Plaintiffs asserted liability against the individual Defendants as guarantors of the lease. ***Ja 48***. Defendants denied liability and asserted a counterclaim for, among other things, constructive eviction. ***Ja 66***. Plaintiffs denied liability. ***Ja 86***. The matter was transferred to the Law

Division for further proceedings. ***Ja 608***.

The matter proceeded to discovery and eventually was assigned for a non-jury trial. Trial took place over 8 days in December, 2023 and January , 2024.[1] Following post-trial submissions, the trial court entered its decision rejecting Plaintiffs claim and finding that Defendants were constructively evicted and awarded Defendants damages of $408,000. ***Ja 1***. Plaintiffs' motion for reconsideration was denied. ***Ja 40***. This appeal followed. ***Ja 44***.

STATEMENT OF FACTS

Plaintiffs are the owners of the real property located at 15 Park Avenue, Rutherford, New Jersey 07070 (the "Rental Space"). ***1T-8, 7-10.*** Plaintiffs previously leased the first floor and basement of the Rental Space to an entity to operate an Italian restaurant. In or about March of 2017, Defendant 5 Terre LLC purchased that restaurant. ***1T-14, 22-23***.

At that time, Defendant 5 Terre requested that Plaintiffs enter into a new lease with 5 Terre rather than assigning the previous lease. Plaintiffs agreed. ***1T-14, 24-25***.

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[1] There are 9 volumes of transcripts in this matter: 1T dated December 11, 2023; 2T dated December 12, 2023; 3T dated December`14, 2023; 4T dated January 2, 2024: 5T dated January 3, 2024; 6T dated January 4, 2024: 7T dated January 5, 2024: and 8T dated January 16, 2024; and 9T dated August 16, 2024.

In March, 2017 Plaintiffs entered into a Lease with Defendant 5 Terre, LLC for the first floor and basement of the Rental Space for a term of 5 years ending March 31, 2022 (the "Lease") to permit Defendant 5 Terre, LLC to operate a restaurant. ***1T-11, 5-8***. ***Ja 91***.

5 Terre is a New Jersey LLC limited liability company. ***1T-100, 18-21***.At the time the Lease was entered into, the members of the LLC were Nicola DePalma (as to 15%), Maria DePalma (as to 15%) Stefano Bossetti (as to 40%) and Ruggerio Pucci (as to 30%). ***2T-118, 8-17***.

In or about March, 2017, Defendants Nicola DePalma, Maria DePalma and Stefano Bossetti each entered into a Guaranty of the Lease. ***Ja 97.*** Ruggiero Pucci ("Pucci") did not guarantee the Lease.

The Lease required Defendants to, among other things, pay a base monthly rent which, as of April, 2017 through March, 2019 was $4,177 per month (the "Base Monthly Rent") and from April, 2019 to March, 2020 was $4,302 per month, ***Ja 91***, and Paragraph 36 of the Lease provides for a late charge of $150 for each rent payment not paid within five (5) days of the due date. ***Ja 95***. In addition, Defendant was to make all repairs to the Rental Space, except structural repairs, including all code compliance actions. ***Ja 93.***

Defendant 5 Terre opened and operated an Italian restaurant at the Rental Space. Defendant 5 Terre's restaurant failed to produce a profit during its

operations. It lost $114,495 through December 31, 2017, ***6T-144, 6-12***, and an additional $141,080 through June 2018, ***6T144, 13-20***, totaling $255,575 of losses during its operations. Pucci determined to modify the operations of the restaurant. Pucci retained the services of a restaurant manager, Dina Caraccio ("Caraccio") , to manage operations. Pucci claimed that Caraccio had experience in marketing and running websites and the like. ***2T-133, 6-25***.

Caraccio did not get along with the other members of 5 Terre (other than Pucci). ***2T-126, 12-25***. Therefore, in or about January, 2018 Pucci purchased the 70% interests of the other members in 5 Terre as described in the following table:

Name of Selling Member	**Percentage Interest Purchased by Pucci**	**Price Paid by Pucci**
Nicola DePalma	15%	$20,000.
Maria DePalma	15%	$20,000.
Stefano Bossetti	40%	$40,000

Pucci and each of the other members agreed that the price paid to each by Pucci was a "fair and reasonable estimate" of the value of 5 Terre. ***3T-65, 5-11.*** Following those transactions, Pucci owned 100% of the membership interests of Defendant 5 Terre. Notwithstanding that, however, Pucci was not a guarantor of the lease and did not agree to indemnify against loss any of the former members.

Pucci had extensive experience in manufacturing dessert products for restaurants and other outlets. He sold these dessert products to restaurants on a

wholesale basis. Later, Pucci took an ownership interest in restaurants. Because of this experience, he believed that he could turn around the fortunes of Defendant 5 Terre. Notwithstanding that, Defendant 5 Terre continued to fail, losing $141,080 through the date 5 Terre abandoned the Rental Space. ***6T-144, 13-20.***

Defendants' restaurant manager Caraccio believed that the electric utility charges billed to Defendant 5 Terre LLC were excessive and that other tenants in the building of which the Rental Space was located were using electricity at the cost of Defendant 5 Terre. Caraccio contacted PSE&G to look into the matter. PSE&G refused to work on the electric meter because of water in the basement in the vicinity of the electric panel.

Defendant 5 Terre then commissioned the services of a number of engineers, architects and construction consultants.

Defendant 5 Terre never informed Plaintiffs, as landlords of the Rental Space, of its concerns or that it had retained consultants. ***1T-16, 19-23***.

Defendant 5 Terre produced two consultants at trial: Matthew Shupenko ("Shupenko"), an engineer, ***4T***, and Salvatore Corvino ("Corvino"), an architect. ***5T***.

Shupenko was retained by 5 Terre prior to May, 2018. ***4T-8, 11-17***. Defendant 5 Terre never informed Plaintiffs that Shupenko was retained. On

May 10, 2018, Shupenko conducted an inspection of the Rental Space, including the basement. Defendant 5 Terre never informed Plaintiffs, as landlords, of Shupenko's inspection. ***1T-16, 19-23, 3T-78, 10-14.***.

During that inspection, Shupenko noted matters which he described as structural defects in the building and/or the Rental Space. He orally reported those findings to Defendant 5 Terre on that date, May 10, 2018. ***5T-23, 5-15***. Despite receiving that oral report on that date, Defendant 5 Terre never informed Plaintiffs, as landlords, of that report. ***1T-16, 19-23, 4T-16, 3-11***.

On June 8, 2018, Shupenko delivered a written report to Defendant 5 Terre outlining the matters he believed to be problematic. Defendant 5 Terre only shared that report with Plaintiffs, as landlords, along with its June 8, 2018 letter claiming constructive eviction. ***1T-16, 19-23***. At the same time, Shupenko provided a copy of that report to the Borough of Rutherford Construction Official and to the Borough of Rutherford Fire Marshall. ***4T-16, 17-21***.

While Shupenko did advise that repairs should be made, at no time did Shupenko advise Defendant 5 Terre that the building or Rental Space was unsafe or that Defendant 5 Terre should not carry on its business operations at the Rental Space. ***4T-17, 15-20***.

On April 30, 2018, Corvino conducted an inspection of the Rental Space, including the basement. ***5T-9, 21-23, 5T-14, 20-22***. Defendant 5 Terre never

informed Plaintiffs, as landlords, of Corvino's inspection, instead Plaintiffs learning of the inspection un receipt of the June 8 letter claiming constructive eviction. ***Ja .***

During that inspection, Corvino noted matters which he described as structural defects in the building and/or the Rental Space. He orally reported those findings regarding safety to Defendant 5 Terre on April 30, 2018. ***5T-40, 7-22***. Despite receiving that oral report on that date, Defendant 5 Terre never informed Plaintiffs, as landlords, of that oral report.

On May 9, 2018, Corvino delivered a written report to Defendant 5 Terre outlining the matters he believed to be problematic. Defendant 5 Terre never shared that report with Plaintiffs, as landlords, until June 8, 2018 along with its letter asserting a constructive eviction. ***Ja637.***

Corvino advised that occupancy should be avoided, ***5T-23, 11-13***. Despite that, Defendant 5 Terre continued its business operations at the Rental Space. Like Shupenko, Corvino provided a copy of that report to the Borough of Rutherford Construction Official and to the Borough of Rutherford Fire Marshall.

On top of that, Corvino later admitted that the restaurant sold could remain open during repairs. ***5T-46, 15-19***. Despite receiving the repost of Shupenko and Corvino, 5 Terre continued its business operations until June 8.

3T-85, 14-21, 3T-87, 21-25, 3T-88, 1-5. All during that time, Defendants never asked the Plaintiffs, as Landlord, to make any repairs. ***3T-93, 23-25, 3T-94, 1-3.***

Despite the oral report from Corvino on April 30, 2018, and receipt of the written report from Corvino on May 9, 2018, and despite the oral report from Shupenko on May 10, 2018, and his written report on June 8, 2018, Defendant 5 Terre never informed Plaintiffs, as landlords, of the contents of the report or their concerns until June 8.

Defendant 5 Terre failed to make the June, 2018 rent payment, or any other thereafter, ***Ja 331***, and, on June 8th, Defendant 5 Terre unilaterally declared that it had been constructively evicted from the Rental Space. ***Ja637***

Despite the declaration that it was constructively evicted, Defendant 5 Terre did not vacate the Rental Space. In fact, Defendant 5 Terre maintained control over the Rental Space for months by retaining the only keys to the Rental Space, refusing to deliver the keys to Plaintiffs, as landlord. Caraccio provided access to Corvino in July, almost a month after the constructive eviction. ***5T-33, 6-8.***

Both the Rutherford Construction Department and the Rutherford Fire Marchall inspected the building and the Rental Space, both before and after receiving the Shupenko and Corvino reports. At no time did the Construction

Official or the Fire Marchall determine that the building was in any way unsafe for occupancy. ***3T-103, 11-17, 5T-51, 13-16, 5T-53, 23-25, 5T-54, 1-8, 5T-59, 13-18.***

In making its unilateral declaration that it has been constructively evicted, Defendant 5 Terre ignored the findings of the Rutherford Construction Official and Rutherford Fire Marshal.

Notwithstanding the absence of any reliable finding that the Rental Space was unsafe, upon receipt of the June 8th notice, Plaintiffs promptly contacted their own architect who evaluated the allegations of Shupenko and Corvino and ultimately made plans to make those repairs. Plaintiffs architect retained a structural engineer to assist in those plans. The repair work was completed over a period of months primarily due to delays caused by interactions with United Water (which needed to repair pipes in the street) and Public Service (which needed to repair its conduit). In addition, plan-related delays also prevented a more rapid response.

Notwithstanding those delays, however, Defendant 5 Terre was unaffected because it had already shut down its operations.

Defendant 5 Terre would not have been affected in any significant way by the repairs. Plaintiffs' expert testified that there was no impediment to use of sidewalk, ***8T-14, 19-24***, and no reason not to continue to use the Rental Space.

8T-22, 13-25, 8T-23, 1-5.

Defendant 5 Terre asserted that the alleged constructive eviction destroyed its business, thus claiming damages for those losses. In seeking to establish those damages, Defendant 5 Terre produced Robert Valas ("Valas"), who was recognized as an expert in business valuation. ***6T***.

Despite the fact that Pucci and his fellow members agreed only a few months earlier that the business of Defendant 5 Terre was worth between $114,000 as evidenced by the buyout by Pucci of the other members of Defendant 5 Terre ($80,000 total purchase price for 70% of the business) and despite the history of losses produced by Defendant 5 Terre, Valas determined that the value of Defendant 5 Terre into the future was over $1,000,000. ***Ja 506.***

The opinion of Valas was based primarily upon internally prepared financial statements which significantly differed from the Defendant 5 Terre tax returns filed with the Internal Revenue Service, and upon the opinions of Pucci rather than industry standards and or objective testing. ***6T-12, 15-24***. The trial court rejected Valas' valuation. ***Ja13***.

In contrast, Plaintiffs' valuation expert Anthony Prinzo utilized traditional business valuation principles, made appropriate adjustments to the financial statements and refused to utilize Pucci's personal observations, instead relying upon objective criteria. In doing so, Prinzo determined that the business of

Defendant 5 Terre had a value of $18,000. ***7T-50, 2-3.***

Prinzo testified that a proper business valuation does not include the value of loans to or investments in the business because that is what is recovered when and if the business is sold, agreeing that it is double counting. ***7T60, 6-25, 7T-61, 1***

The trial court found a constructive eviction had occurred and awarded damages of $408,000 including $390,000 which was the investment of the members into Defendant 5 Terre. ***Ja13.***

LEGAL ARGUMENT

POINT 1

DEFENDANTS FAILED TO DEMONSTRATE THE ELEMENTS OF CONSTRUCTIVE EVICTION.

(Issue raised below in Ja610-613)

Construction eviction requires that a landlord does some act which deprives a tenant of beneficial enjoyment of the rental space, that is, a substantial breach of the tenant's rights. ***Reste Realty v. Cooper, 53 N.J. 444, 457 (1969).*** The so-called bad act of the landlord must be of a grave and permanent character, not temporary or transitory. ***Ellis v McDermott, 7 N.J. Misc. 757 (Dist. Ct. 1929).*** Research discloses no reported case where a constructive eviction was found where the tenant did not notify the landlord and provide an opportunity for repair. In fact, in ***Reste Realty***,

the tenant gave the landlord repeated opportunities to make the necessary repairs. ***Id. at 461.*** In this case, no notice or repair opportunity was provided.

In ***Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293 (App. Div. 1955)*** the court held the temporary obstruction of a driveway was not equivalent to constructive eviction. Similarly here, repairs which might temporarily obstruct building access, such as sidewalk repair, would not rise to the level of constructive eviction.

In addition, the tenant must actually move out of the premises, and that move must be total. ***Reste Realty, supra. at 461***, ***Harel Associates v. Cooper Healthcare, 271 N.J. Super 405, 408 (App. Div. 1994).*** A tenant which remains in possession after the alleged constructive eviction waives the right to make that claim. ***JS Properties, LLC v. Brown and Filson, Inc., 389 N.J. Super. 542 (App Div. 2006).*** In this case, Defendants retained the only key to the Rental Space and in fact entered the Rental Space after the alleged constructive eviction, removing ceiling tiles.

Defendants' constructive eviction claim was a smoke screen designed to obscure the desire of Defendant 5 Terre to escape liability on the lease. At the time the constructive eviction claim was made, Defendants' restaurant was failing, having suffered significant operating losses prior to the claim. Defendant Guarantors had transferred control of 5 Terre, LLC to Pucci. Defendants faced the prospect

paying the balance due on the lease, over $200,000 (actually $78,886 due to Plaintiffs mitigation efforts), in addition to maintaining $255,575. losses.

1. THERE WAS NO DEPRIVATION OF DEFENDANTS' RIGHT TO USE THE RENTAL SPACES.

Neither of the experts produced by Defendants at trial advised Defendants to vacate the Rental Space. Neither expert told Defendants that it was unsafe to continue to operate the business of the Rental Space. Instead, they simply reported that repairs should be promptly made. Defendants operated the restaurant for 13 months without interference.

The Borough of Rutherford inspectors did not advise Defendants or Plaintiffs that the Rental Space was unsafe. Those inspectors took no action to require the Rental Space to be vacated. Frank Recanati, the Borough Construction Official and Paul Dansbach, the Borough Fire Marshall, each testified bluntly that there was nothing that prevented the operation of Defendants' restaurant.

Not only did Defendants fail to show that there was a defect of sufficient impact to cause interference with Defendant's business, but Defendants failed to give Plaintiffs a reasonable opportunity to repair those claimed defects. Instead, Defendants, who had knowledge of the alleged defects for at least a month before telling Plaintiffs, suddenly sprang the alleged defects upon the Plaintiffs and claimed it was moving out because of them.

2. DEFENDANTS FAILED TO MOVE OUT OF THE RENTAL SPACE.

Not only did Defendants fail to show a defect, and not only did Defendants fail to provide an opportunity to the Plaintiffs to make the necessary repairs, but Defendants did not timely move out of the Rental Space. Failure to move out destroys a constructive eviction claim.

The fact that Defendant 5 Terre may have ceased its business operations does not mean it moved out. Defendants maintained control over the Rental Space for months following the alleged constructive eviction.

3. THE LENGTH OF TIME TO MAKE THE REPAIRS WAS NOT MATERIAL BECAUSE DEFENDANTS HAD ALREADY CEASED OPERATIONS.

In finding a constructive eviction, the trial court pointed to the fact that it took over one year for the repairs to be made, apparently relying on that to determine that the restaurant operations of Defendant 5 Terre could not be continued. The trial court's finding overlooks the fact that Defendant 5 Terre had already ceased operations at the Rental Space and therefore Plaintiffs had no reason to hurry the repairs since the Defendants had already moved out and were not returning.

Be that as it may, Plaintiffs' expert Peter Svoboda testified, without dispute, that it would take approximately 2 weeks to repair the claimed deficiencies. There was no reason to rush to do so since Defendant 5 Terre had already left. Nevertheless, had the Defendants communicated with the Plaintiffs provided the notice and opportunity to repair, none of this would have been necessary.

4. DEFENDANTS CONSTRUCTIVE EVICTION CLAIM WAS A SUBTERFUGE.

Defendants' actions were deliberate and calculated. Defendants commissioned studies by design professionals well prior to Defendants' default to attempt to justify Defendants' scheme to avoid future liability. Despite that, Defendants did not provide notice to Plaintiffs until they asserted the alleged constructive eviction and ceased paying rent.

The absence of a defect which would prevent operation of Defendants' business, the failure of Defendants to follow the proper process to obtain "constructive eviction" relief and the perceived need to blame others for Defendants' failing business combine to defeat Defendants' constructive eviction claim.

POINT 2

EVEN IF DEFENDANTS' CONSTRUCTIVE EVICTION CLAIM IS UPHELD, THE TRIAL COURT UTILIZED AN IMPROPER METHODOLOGY TO FIND DEFENDANTS' DAMAGES.

(Issue raised below in Ja613-615 and 7T60, 6-25 and 7T-61,1)

Even if Defendants' constructive eviction claim is valid, Defendants' damage award is grossly inflated. Defendants' business lost hundreds of thousands of dollars during its operations. Pucci bought out the 3 guarantors for a combined $80,000 for 70% of the company. Despite that, the trial court awarded $___ in damages on Defendants' counterclaim.

The trial court properly rejected the opinion of Defendants' damages expert as to the quantum of damages. However, the trial court than applied a unique measure, the investment into Defendant 5 Terre, and then added to that the value of Defendant 5 Terre's business, as the trial court found the testimony of Plaintiffs' expert.

This measure of damages ignores the well-established standards for damage calculation, ignores the losses incurred in the failing business of 5Terre and indeed provides for a duplicate recovery.

It is undisputed that Defendant 5 Terre operated a restaurant at the Rental Space for approximately 13 months. It is also undisputed that the condition of the building did not change in those 13 months. It is undisputed that, according

to Defendant 5 Terre's tax returns (in evidence) during its business operations Defendant 5 Terre lost $255,575. in its operations. Finally, it is undisputed that Plaintiffs had no role in the 5 Terre's operating business losses.

Notwithstanding those undisputed facts, the trial court awarded Defendants the value of the investments made by its members in Defendant 5 Terre. The trial court's award did not consider the fact that Defendant 5 Terre's business losses had consumed much of Defendants' investment prior to the claim of the constructive eviction. By overlooking the business losses suffered by Defendant 5 Terre, the trial court unjustly rewarded 5 Terre for its business losses.

On top of that, the trial court then added to the award the value of 5 Terre's business determined as of the date of the alleged constructive eviction. That resulted in a double recovery. The court awarded Defendants' investment, which investment is the basis for the company's value, and then the Court also awarded the company value. The investment is an inherent part of the company value. Awarding both is akin to awarding the value of a car plus the value of the parts making up the car.

Defendants had already lost much of their investment through 5 Terre's own business operating losses incurred during its months of business operations. By awarding both, the Court ignored those losses.

In ***Weiss v. Revenue Building and Loan Association, 116 N.J.L. 208, 212 (E&A 1936)*** the Court determined that prospective profits of a new business are too remote and speculative to meet the legal standard of reasonable certainty and therefore cannot be used to support a damage claim. That per se rule was modified in ***Schwartz v Menas, 251 N.J. 556 (2022)*** where the Supreme Court held that the claim for lost profits type damages is governed by a standard of reasonable certainty. The Supreme Court said that the trial court should carefully scrutinize a new business claim that a breach prevented the new business from profiting from an enterprise, and should deny the claim, unless it is proven with reasonable certainty.

The trial court did not properly apply the ***Schwartz v. Menas*** standard by failing to apply the actual historic results of 5 Terre and making unsupported assumptions. Valuation of a business is based on anticipated profits. The proof of lost profits must be based on projections within reasonable certainty. The past performance of the business of Defendant 5 Terre was nothing but losses. Historically, there is no support for lost profits, as there were none.

Defendants' expert Valas relied heavily upon his interviews with Pucci regarding the daily operations and determining the revenue generating capacity of the business. He did this without considering factors which would affect the performance of Defendant 5 Terre, such as its weaknesses, threats, competition, or success rates. None of these factors were considered. Defendants did not show the reasonable certainty required by ***Schwartz v. Menas, supra***.

The trial court appears to have given credence to Pucci's claim that the business of 5 Terre would turn around and become profitable. That conclusion was a leap of faith with no support. New Jersey law does not permit a short-term business with losses to manufacture future value.

In contrast, Plaintiffs' expert Prinzo, utilizing generally acceptable valuation methodologies, determined that Defendants suffered no damages; or at most the business of 5 Terre was worth $18,000. The trial court's award of an additional $390,000 as recovery of investment and loans is "double counting."

CONCLUSION

For the foregoing reasons, the court should reverse the trial court and dismiss Defendants' counterclaim.

Respectfully submitted.

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SEBASTIANO PISCIOTTA AND, LINDA PISCIOTTA,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiffs/Appellants,	:	APPELLATE DIVISION
v.	:	Docket No. A-4138-23
5 TERRE, LLC, NICOLA DIPALMA, MARIA DIPALMA AND STEFANO BOSETTI,	:	**On Appeal From:** Law Division Bergen County Docket No. BER-L-5608-18
Defendants/Respondents.	:	**Sat Below:** Hon. David V. Nasta, J.S.C.

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TABLE OF CONTENTS

Table of Transcript Citations. ii

Table of Judgments, Orders and Rulings iii

Table of Authorities iv

Preliminary Statement 1

Procedural History 3

Statement of Facts 4

Standard of Review 14

Legal Argument 15

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT 5 TERRE LLC WAS CONSTRUCTIVELY EVICTED (Ja1; Ja40; 9T13:11-17:8) 15

A. The Trial Court's Decision is Supported by Substantial, Credible Evidence 15

B. Alleged Failure to Move Out of Rental Space 21

C. That It Took Plaintiff 20 Months to Complete Repairs and Obtain a Certificate of Occupancy is Absolutely Material and Relevant 23

POINT II

THE TRIAL COURT'S DAMAGE AWARD WAS PROPER (Ja1; Ja40; 9T21:15-23:12) 25

Conclusion 29

TABLE OF TRANSCRIPT CITATIONS

December 11, 2023 Transcript of Bench Trial 1T

December 12, 2023 Transcript of Bench Trial 2T

December 14, 2023 Transcript of Bench Trial 3T

January 2, 2024 Transcript of Bench Trial 4T

January 3, 2024 Transcript of Bench Trial 5T

January 4, 2024 Transcript of Bench Trial 6T

January 5, 2024 Transcript of Bench Trial 7T

January 16, 2024 Transcript of Bench Trial 8T

August 16, 2024 Transcript of Motion for Reconsideration..... 9T

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order of the Hon. David V. Nasta, J.S.C.
Law Division, Docket No. HUD-L-5608-18
Dated July 2, 2024 .....Ja1

Decision of the Hon. David V. Nasta, J.S.C.
Law Division, Docket No. HUD-L-5608-18
Dated July 2, 2024 .....Ja2

Order of the Hon. David V. Nasta, J.S.C.
Law Division, Docket No. HUD-L-5608-18
Dated August 16, 2024 ..... Ja40; 9T

TABLE OF AUTHORITIES

American Sanitary Sales v. Purchase & Prop. Div.,
178 N.J. Super. 429 (A.D. 1981) 26-27

Berzito v. Gambino,
63 N.J. 460, 470 (1973)..... 18-20

Cary v. Lovett,
132 N.J. 66 (1993)..... 25

Endress v. Brookdale Community College,
144 N.J. Super. 109 (App. Div. 1976) 25

Fort Lee v. Banquet National De Paris,
311 N.J. Super. 280 (App. Div. 1998) 25

Gittleman v. Central Jersey Bank & Trust Co.,
103 N.J. Super. 175, 179 (App. Div. 1967),
rev'd on other grounds, 52 N.J. 503 (1968)..... 14

Gottdiener v. Mailhot,
179 N.J. Super. 286 (App. Div. 1981) 16

Kozlowski v. Kozlowski,
80 N.J. 378 (1979)..... 25

Reste Realty Corp. v. Cooper, 53 N.J. 444 (1969) 16, 21

Rova Farms Resort v. Investors Ins. Co. of Am.,
65 N.J. 474 (1974)..... 14

Tessmar v. Grosner,
23 N.J. 193 (1957)..... 28

Viviano v. CBS, Inc.,
251 N.J. Super. 113 (App. Div. 1991) 25

PRELIMINARY STATEMENT

Plaintiffs commenced the underlying action for breach of a commercial lease on or about July 19, 2018 after receipt of Defendants' notice of constructive eviction dated June 8, 2018. Defendants counterclaimed for damages due to breach of contract and constructive eviction. The matter was tried to conclusion before the Hon. David V. Nasta, J.S.C. over the course of eight days in December 2023 and January 2024 with testimony from nine witnesses and dozens of documents received into evidence.

In March 2017, Plaintiffs and Defendant, 5 Terre, LLC, entered into a commercial lease for the first-floor restaurant space and basement located at 15 Park Avenue, Rutherford, New Jersey. Defendant, 5 Terre, LLC, operated a restaurant at the location for almost a year when it was forced to vacate the premises in June 2018 due to discovery of structural deficiencies, corroded water lines, rusted electrical boxes and other safety concerns caused by years of water infiltration rendering the premises unsafe. Prior to entering into the lease, Plaintiffs, the Landlords, were aware of systematic and continuous water intrusion into the basement, which extended under the sidewalk and street. Plaintiffs never disclosed the water condition to 5 Terre, LLC. Plaintiffs knew or should have known the premises was unsafe or unsuitable for its intended purpose when it leased it to 5 Terre LLC.

The conditions were located in a separate portion of the basement beyond the area utilized by 5 Terre, LLC and shielded from view. It is undisputed that following 5 Terre LLC's notice of constructive eviction the Plaintiffs' experts immediately designed structural repairs to remediate building, which they recommended be done "as expeditiously as possible." It is undisputed that PSE&G shut the gas to the building on June 18, 2018 and required the main gas line to be replaced due to corrosion. It is undisputed that gas was not restored until October 24, 2018. It is undisputed that the structural work recommended by Plaintiffs' own experts was not completed until May 2019 and that a TCO was not issued until June 12, 2019 and the CCO was not issued until February 21, 2020. It is undisputed that the Borough of Rutherford would not permit occupancy until the structural repairs were completed.

As a result of the significant corrosion of the main sprinkler line and main gas line, the structural deficiencies and other required repair work, 5 Terre LLC was constructively evicted from 15 Park Avenue. As a result of the constructive eviction, 5 Terre LLC suffered money damages.

By Order dated July 2, 2024, the trial court dismissed Plaintiffs' claim, entered judgment in favor of Defendants on their counterclaim for constructive eviction and awarded Defendant 5 Terre, LLC damages in the amount of $408,000 representing the capitalization and conceded lost profits. Ja1. Judge Nasta's decision included

thirty-four individual findings of fact, twenty-two numbered conclusions and an addendum with one-hundred twenty-five numbered paragraphs summarizing the trial testimony and evidence. The decision was well-reasoned and comprehensive and should be affirmed on appeal.

PROCEDURAL HISTORY

After receipt of 5 Terre LLC's[1] notice of constructive eviction dated June 8, 2018, Plaintiffs commenced the underlying action for breach of a commercial lease on or about July 19, 2018. Ja98; Ja48. Defendants counterclaimed for damages due to breach of contract and constructive eviction. Ja66. The matter was tried to conclusion before the Hon. David V. Nasta, J.S.C. over the course of eight days in December 2023 and January 2024 with testimony from nine witnesses and dozens of documents received into evidence. 1T-8T; Ja2-39.

By Order and Decision dated July 2, 2024, the trial court dismissed Plaintiffs' claim and entered judgment in favor of Defendants in the amount of $408,000. Ja1; Ja2. Plaintiffs filed a motion for reconsideration that was denied by the trial court. Ja40; 9T. This appeal followed.

[1] Defendant 5 Terre LLC was the commercial tenant. References to "Defendant" in this Brief are references to 5 Terre LLC. The other Defendants, Nicola DiPalma, Maria DiPalma and Stefano Bosetti executed a Guaranty of Lease. (Ja97).

STATEMENT OF FACTS

In March 2017, 5 Terre LLC (Tenant) leased the first floor and a portion of the basement in a building owned by Plaintiffs (Landlords) located at 15 Park Avenue, Rutherford, NJ. Ja2¶1, 6; Ja91. The trial court found that Plaintiffs were aware of water intrusion into the basement of 15 Park Avenue in a vault area of the basement under the street and the sidewalk where the building's electrical panels, gas line, main water line and main sprinkler line were located for years and never attempted to abate the water condition. Ja2 ¶4-5, Ja15-Ja17 ¶¶1-10. Plaintiffs never disclosed the condition to Defendants. Ja3 ¶8. 1T25:23-26:16; 1T27:17-28:10; 1T29:4-7; 1T29:15-35:3.

Defendant, 5 Terre LLC, commenced operations in or about May, 2017 as "Trattoria Giotto". Ja4 ¶10. At the time it was owned by four individuals. Ja3-4 ¶9; 2T117:14-120:17. In or about October/November 2017, Ruggero Pucci bought out his partners and became the sole owner of 5 Terre LLC. Ja4 ¶11; 2T126:1-21; 2T128:1-14; 2T131:12-20. He paid them a total of $80,000; $40,000 to one partner in a lump sum and $20,000 each to two other partners over 2 years at 3% interest, representing their respective initial investments. 2T132:2-9; 2T130:3-11.

Mr. Pucci had extensive restaurant industry experience. Ja4 ¶14; 2T96:2-107:1. He owns and operates Blue Eyes in Hoboken with two of the former members

of 5 Terre LLC. 2T95:24-97:10. In addition, Mr. Pucci had an ownership interest in several other successful restaurants. 2T96:16-107:1.

After he decided to buy out his partners in 5 Terre LLC, Mr. Pucci brought in a manager, implemented many changes to the menu, hosted more private events, engaged with the community, built a social media presence, created relationships with local church and liquor store, and developed the business. Ja4 ¶12; 2T133:6-18; 2T134:25-137:7; 3T8:7-14; Ja441-462. Business increased immediately. Ja4 ¶13; 3T17:14-27:23. Mr. Pucci testified: "I remember that in October when I got it, we were making $15,000. In November, I think $24,000. In December $35,000. And in January $45,000 -- $45,000? No, 41, 42 in January. So basically in three months the revenue (indiscernible) was almost three times higher. Three and a half times higher." 3T:16:7-13; Ja503.

Mr. Pucci testified that based on his experience with other restaurants, the gas and water bills at 5 Terre appeared too high. Ja5 ¶17; 3T16:21-17:14. In February 2018, Mr. Pucci contacted PSE&G and Suez to have the meters changed; however, they refused to do so citing the conditions in the basement of 15 Park Avenue, namely standing water on and near the electrical boxes. Ja5 ¶18; Ja20 ¶¶29-32; 3T17:14-27:23; Ja463-479; Pb6. Mr. Pucci hired an electrician to assess the electrical panel and make repairs so that Suez and PSE&G would return to change

the meters. The electrician refused to touch the electrical panel. Ja5 ¶20; Ja21 ¶¶33-35; 3T27:24-28:2; 3T30:22-34:19; Ja480.

After he met with the electrician, Mr. Pucci contacted an architect (Salvatore Corvino), an architect/professional engineer (John Inglese), and a structural engineer (Anthony Shupenko). Ja5 ¶21; 3T35:11-19; 3T38:17-25; 3T40:2-11. All inspected the premises and identified dangerous conditions with the building, including but not limited to: water infiltration, wet walls, standing water, water in the electrical panel, and rust and corrosion on steel beams and columns, corroded sprinkler lines, deteriorated gas line, notched beams, notched floor joists under the restaurant, cracks in the rear foundation wall, exposed rebar and spalling concrete. Ja5 ¶21. The trial court heard testimony live from Mr. Corvino and Mr. Shupenko who each detailed their observations and opinions to the Court. Ja28¶¶70-76; Ja31¶¶84-88. 4T11:6-13:6; 4T15:14-16:2; 4T18:4-19:19; 5T11:1-20:23. In addition, the Court saw color photographs taken by Mr. Corvino. Ja490; 5T14:4-20:23.

Mr. Pucci testified that he hoped the problems could be easily rectified but realized they were too severe. 3T45:2-7; 9T10:1-11:9. On June 8, 2018, 5 Terre LLC declared constructive eviction and transmitted the written reports of the above-mentioned architect and engineers to Plaintiffs. Ja5 ¶22; Ja637; 3T40:20-41:2; Pb7. In June 2018, after receipt of Defendant's correspondence, Plaintiffs engaged the services of their licensed architect and a licensed engineer, who generally agreed

with Respondents' experts' observations and who prepared design drawings to address the deficiencies noted by Respondents' experts as confirmed by their own personal inspections. Ja5 ¶22; Ja22 ¶¶43-46; Ja29 ¶78, Ja33 90-91; 1T54:19-55:1; 1T57:1-59:20; 1T62:3-63:8; 1T66:4-67:12; 1T71:17-72:11; 1T76:24-79:3; 1T90:13-21; 4T18:20-26:5; 5T27:8-28:5.

Rather than inform Defendants that their experts agreed with Defendants and Defendants' experts or that their experts opined that the work needed to be done as "expeditiously as possible", Plaintiffs immediately commenced a dispossess action and asserted a Landlord's lien on 5 Terre LLC's property. 1T58:4-23; 1T89:5-97:5; Pb2. An order granting possession to Plaintiffs was entered July 27, 2018 and 5 Terre LLC was precluded from removing its property from the premises. Ja11 ¶15; Ja22 ¶42; Ja25 ¶63; Ja608.

Based on the same unsafe conditions identified by Mr. Corvino and Mr. Shupenko and confirmed by Plaintiffs' professionals, PSE&G terminated gas to 15 Park Avenue from June 18, 2018 to October 24, 2018, **a period of 128 days**, until the main gas pipe was replaced. Ja6 ¶¶23-26; Ja9 ¶¶7-8; Ja23¶48-49; 1T108:9-109:14; 1T110:3-113:3; Ja633. Also based on the same conditions, the Borough of Rutherford issued a Notice of Violation that, among other things, required to Plaintiffs to "**replace** all corroded piping, fittings and the main O.S. & Y. valves." Decision at ¶25; Ja23¶51; Ja24 ¶¶54-57; Ja110; Ja485; Ja489; 1T116:4-117:13;

4T68:11-69:9; 4T76:14-77:14. By email dated December 13, 2018, the Borough Fire Official informed Plaintiffs that the abatement date for the sprinkler line and valve violation would be extended to February 15, 2019 "**providing the first floor and basement tenant space remains vacant**. In the event a new tenant desires occupy [sic] the tenant space **violation #1 will be required to be abated prior to a Certificate of Occupancy or a Continued Certificate of Occupancy being issued for the tenant space.**" Ja6 ¶27; Ja117 (emphasis in original); 1T123:4-16; 1T125:5-126:12; 4T83:23-87:22; 4T97:19-101:22.

In addition to the gas line replacement and the main sprinkler line and OS&Y valve issue, the Borough of Rutherford required the Landlord to make structural repairs to the basement and sidewalk, which were characterized by the Borough of Rutherford as an "unsafe structure," requiring abatement before a certificate of occupancy would be issued. Decision at ¶¶28-30; 2T7:2-11:8; 4T109:12-111:25; 4T121:4-122:20; 4T125:7-126:8; Ja139. By email dated September 24, 2019 the Borough of Rutherford Building Inspector, Frank Recanati, wrote to Plaintiffs' counsel: "Dick the following permits remain open. **As you can see the first permit listed was for an unsafe structure**. Therefore no CO exists for this space. Until permits are closed we cannot issue a UCCCO for that space. **Since no CO exists for that space no one is allowed to occupy that space until a CO is secured.**" Ja7 ¶30; Ja139; Ja120 (emphasis in original); 4T110:3-111:16.

The main sprinkler line and valves were replaced and the violation was abated on or about January 7, 2019. Ja489; 4T87:87:8-14. The sidewalk and structural repair was not completed by Plaintiffs until May 2019. Ja120. 1T137:19-143:11. The Temporary Certificate of Occupancy was issued on June 12, 2019; however, the TCO stated "No occupancy allowed until all UCC violations have been abated" because all UCC violations had not yet been abated. Ja212; 2T22:17-24:11. The Certificate of Occupancy was not issued until February 21, 2020. Ja211; 1T24:13-25:20. As a result, the Court concluded that from June 2018 through February 21, 2020, the restaurant space at 15 Park Avenue could not be occupied by anyone. Ja7 ¶¶32.

Plaintiffs presented the testimony of Peter Svoboda as an engineering expert. Mr. Svoboda testified that although it took Plaintiffs almost a year to complete the required repairs to the property, the repair work could have been completed in "a day maybe two." 8T26:5-10; 8T27:10-14; 8T:62:15-23; 8T82:22-83:7. Mr. Svoboda, however, never observed the condition of the property in June 2018. Ja34¶97; 8T35:21-24. Indeed, he did not inspect the property until 2020, after all repairs were completed by Plaintiffs. Ja34 ¶97; 8T3525-36:5. In addition, at the time he prepared his report, he had not reviewed the files of Plaintiffs' architect, Mr. Elkin, or Plaintiffs' engineer, Allied Engineering, including the drawings prepared for the repair work. Ja34 ¶98; 8T39:13-40:10. Further, Mr. Svoboda was unaware

of the building was without gas from June 18, 2018 through October 24, 2018. 8T59:8-60:12.

The Court also heard extensive testimony from Defendant's economic expert, Robert Valas, CPA/ABV, CEE and Plaintiffs' economic expert, Anthony Prinzo. 7T; 8T. Mr. Valas testified that Defendant suffered damages of $1,263,658 under forecast model where the lease term expires March 31, 2022 and $1,776,222 under a second model where the lease term expires December 31, 2023. Pa500; Pa504. Mr. Prinzo valued the "present value of lost revenue" at $14,000 through March 31, 2022 and $18,000 through December 31, 2023. Ja555; Ja556.

Mr. Valas analyzed the monthly income and expenses for the restaurant, selected the period of time when Mr. Pucci was most involved with the restaurant to determine the growth rate and then used the growth rate to forecast lost earnings over the model timeframes, which he then discounted to present value. 6T16:12-18:15; 6T22:16-23:15; 6T27:2-30:13. Mr. Prinzo agreed with the approach and methodology employed by Mr. Valas but disagreed as to the time period to be used to calculate the growth rate and disagreed about the discount rate to be applied. 7T:112:18-115:19. Mr. Prinzo testified: "I agree with his [Mr. Valas's] methodology and the process." 7T115:16-19.

Mr. Valas used a four-month period of October 2017, November 2017, December 2017, and January 2018 to calculate the growth rate. Mr. Valas testified

that he selected this period because it was the time period when Mr. Pucci implemented changes to the daily operations of the restaurant. 6T27:2-30:13. Mr. Prinzo testified that utilizing a three- or four-month period to calculate the growth rate for a restaurant in operation for 12 months is appropriate. 7T:70:6-75:12. Mr. Prinzo utilized a three-month period (March, April, May of 2018) himself to calculate the growth rate. 7T:75:13-23. He selected the last three months of operation without regard to what was happening with the business at that time. 7T:70:6-75:12. Mr. Prinzo testified that he selected that period simply because he thought it would be reflective of the "stabilization period" because it was near the end of the business's operations. He did not consider that the business was unwinding at that time. 7T:70:6-75:12.

The growth rate during the four month period utilized by Mr. Valas was 38%. 6T31:25-32:24. The growth rate during the three-month period selected by Mr. Prinzo was 4.54%. 7T:70:6-75:12. Mr. Prinzo testified that the growth rate for the restaurant over the 12 months of operation was 9.05%. 7T:70:6-75:12. He testified that he did not use the 9.05% growth rate because utilizing a three-month period was more appropriate. 7T:70:6-75:12; 7T135:4-136:3. He also testified that using a 9.05% growth rate would have resulted in greater damages to 5 Terre LLC. 7T84:19-85:4.

Both Mr. Valas and Mr. Prinzo agreed that the ultimate lost earnings figure had to be discounted to present value. 6T41:14-19; 6T42:8-43:4; 7T97:13-98:6. Mr. Valas utilized the Capital Asset Pricing Model and calculated a discount rate of 10.5%. 6T43:5-51:15. Mr. Prinzo utilized the build up method and calculated a discount rate of 27%. 7T97:7-8; 6T51:16-54:1. Both methods include four components, three of which are the same. 7T97:13-98:6. Mr. Valas's method uses a Beta while Mr. Prinzo's method incorporates a "specific company risk" factor, which drove Mr. Prinzo's discount rate as he selected a 12% "specific company risk" factor. 7T97:13-98:6; 7T102:14-24.

Both experts testified that the "specific company risk" factor is a subjective figure whereas the Beta is more objective. 6T51:16-54:1; 7T:33:20-34:4. Both experts also testified that to utilize the "specific company risk" factor, the valuator should have a strong understanding of the specific business being evaluated. 6T53:11-54:9; 7T98:7-25. Mr Prinzo conceded that he knew nothing specific about 5 Terre LLC, its business model or Mr. Pucci's experience and expertise, which "possibly" would impact his analysis. 7T99:15-101:5; 7T102:20-104:13. Mr. Prinzo testified that he never read any deposition testimony from Mr. Pucci or interviewed him. Mr Prinzo testified that he "would have liked to" because the experience of management is an important factor in evaluating business valuation. 7T73:8-24; 7T79:16-82:4.

The Court's decision reflects that the Court struggled to reconcile the dual damages experts' testimony: "The variance in opinion caused this Court to pause in determining lost profits." Ja13 ¶22. The experts drew divergent conclusions as to the damages. The Court found Mr. Pucci and both experts credible. Ja13 ¶20; ¶22. The Court noted that 5 Terre claims damages ranging from $1.263 million to $1.776 million and Plaintiffs claim lost profits in the range of $18,000 to $20,000. Ja13 ¶21.

Unable to reconcile both experts' testimony but recognizing that Defendants were damaged, in an effort to make 5 Terre, LLC whole, the Court awarded the initial capitalization and additional capitalization amounts as well as the amount of lost profits Plaintiffs' conceded: "As a result, this Court hereby enters judgment in favor of Defendant 5 Terre, LLC and against the Plaintiff in the sum of $408,000 ($120,000 – initial capitalization + $270,000 additional capitalization + 18,000 admitted lost profits). Ja13-14. As the Court noted during Plaintiffs' motion for reconsideration: "I certainly weighed what's fair and just and equitable here based upon the evidence. That's what I'm supposed to do." 9T21:5-7.

STANDARD OF REVIEW

The judgment of the trial court must be affirmed as it is based on findings of fact adequately supported by the evidence. R. 2:11-3(e)(1)(A). A trial judge's factual findings following a non-jury trial are "binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

This Court has long recognized that a trial judge's findings will not be disturbed unless "they are so wholly insupportable as to result in a denial of justice." Id. citing Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div. 1960) aff'd o.b. 33 N.J. 78 (1960). As noted, "appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. (citing Fagliarone v. Twp. of No. Bergen, 78 N.J. Super 154, 155 (App. Div. 1963)). "The question is only whether the trial judge pursues a manifestly unjust course." Gittleman v. Central Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503 (1968).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT 5 TERRE LLC WAS CONSTRUCTIVELY EVICTED (Ja1; Ja40; 9T13:11-17:8)

The trial in this matter was conducted over the course of eight days. 1T-8T. There were dozens of documents admitted into evidence. 1T-8T. Testimony was taken from nine witnesses. 1T-8T. The trial court's decision was well-reasoned and fully supported by the record. Ja2-38. The trial court's decision included 34 separate findings of fact, 22 conclusions of law and an exhibit with 126 additional paragraphs concerning the testimony and evidence received at trial. Ja2-38.

A. The Trial Court's Decision is Supported by Substantial, Credible Evidence

The trial judge's findings granting 5 Terre's claim of constructive eviction are adequately supported by substantial, credible evidence in the record and should not be disturbed.

The crux of Plaintiffs' claims are that: (1) no one "advised the Defendants or Plaintiffs that the Rental Space was unsafe" and (2) Defendants failed to give Plaintiffs a reasonable opportunity to repair the deficiencies. Pb14. Plaintiffs are wrong. Plaintiffs' claim that Defendants provided no opportunity for Plaintiffs to make repairs was not raised during trial and was only raised during the Motion for Reconsideration.

First, Defendants were not required to prove that the premises were unsafe. The legal standard is not whether the space was "safe" but, rather, the legal standard to be applied (which the Court applied) is whether the space was "substantially unsuitable for the purposes of operating a restaurant or that Plaintiffs' actions seriously interfered with the beneficial enjoyment of the premises." Ja7 ¶¶3-12. "Any act or omission of the landlord …, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant." Reste Realty Corp. v. Cooper, 53 N.J. 444, 457 (1969). "What amounts to a constructive eviction is a question of fact." Gottdiener v. Mailhot, 179 N.J. Super. 286, 293 (App. Div. 1981). New Jersey law imposes an implied warranty against latent defects not reasonably apparent to the ordinary prospective tenant. Reste, 53 N.J. at 452. The years of water intrusion caused latent defects that, according to Plaintiffs' own architect, required repair "as expeditiously as possible." Ja22 ¶45; Ja37 ¶111.

Second, Tenants are not required under Reste and its progeny to provide Landlords with an opportunity to cure before declaring a constructive eviction. Under Reste, a tenant may vacate a leased premises when there has been a breach of the covenant of quiet enjoyment and the premises are not suitable for the intended purposes. The case law does not require a tenant to provide an opportunity to cure.

Notwithstanding, Plaintiffs could not repair the deficiencies without substantial disruption to Defendants' business. When considering the Motion for Reconsideration, the trial court rejected this very argument and stated on the record that the testimony from Defendant showed Defendant wanted the issues resolved by Plaintiffs, that Defendants wanted to remain in the premises but "felt as if they had to, because their quiet enjoyment was breached." 9T10:1-11:9.

As the trial testimony and trial court's decision show, there was significant testimony about water intrusion (known for years to Plaintiffs) that caused corrosion to the main gas line and main sprinkler OS&Y valves requiring replacement of both. As the result of the conditions, third parties refused to change meters or perform services and PSE&G ultimately terminated gas to the building for a period of 128 days until the main gas line was replaced. A restaurant cannot operate without gas.

The conditions were not minor and could not be ignored. Mr. Pucci testified that based on his experience, the water and gas bills were high and in February 2018, contacted PSE&G and Suez to have the meters changed, who refused to do so because of the conditions in the basement. Ja5 ¶¶17-18; Ja20 ¶¶29-32; 3T16:21-27:23; Ja463-479; Pb6. Mr. Pucci hired an electrician to make repairs to the electrical panel so that PSE&G and Suez would return. The electrician refused to touch the electrical panel. Ja5 ¶20; Ja21 ¶¶33-35; 3T27:24-28:2; 3T30:22-34:19; Ja480. Mr. Pucci then contacted an architect and engineer to assess the problems

and determine if repairs could be easily made. Ja5 ¶21; 3T35:11-19; 3T38:17-25; 3T40:2-11. When the scope of the problem was determined, 5 Terre LLC informed the Landlord that it was declaring a constrictive eviction. Ja5 ¶22; Ja637; 3T40:20-41:2; Pb7.

Plaintiffs engaged the services of their licensed architect and a licensed engineer, who generally agreed with Respondents' experts' observations and who prepared design drawings to address the deficiencies noted by Respondents' experts as confirmed by their own personal inspections. Ja5 ¶22; Ja22 ¶¶43-46; Ja29 ¶78, Ja33¶¶90-91; 1T54:19-55:1; 1T57:1-59:20; 1T62:3-63:8; 1T66:4-67:12; 1T71:17-72:11; 1T76:24-79:3; 1T90:13-21; 4T18:20-26:5; 5T27:8-28:5. It took Plaintiffs over 20 months to complete all repairs to the building and for the Borough of Rutherford to issue a certificate of occupancy for the restaurant space, which was done on February 21, 2020. Ja11 ¶17; Ja139; Ja120; Ja211; 1T24:13-25:20; 4T110:3-111:16; 4T133:12-134:11; 4T135:10-136:4; 4T147:24-148:24.

The Supreme Court in Berzito v. Gambino, 63 N.J. 460, 470 (1973) suggested several factors for a court to consider in evaluating a constructive eviction claim, including:

1. Has there been a violation of any applicable housing code or building or sanitary regulations?
2. Is the nature of the deficiency or defect such as to affect a vital facility?

3. What is its potential or actual effect upon safety and sanitation?

4. For what length of time has it persisted?

5. What is the age of the structure?

6. What is the amount of the rent?

7. Can the tenant be said to have waived the defect or be estopped to complain?

8. Was the tenant in any way responsible for the defective condition?

The Supreme Court stated that "This list is intended to be suggestive rather than exhaustive. Each case must be governed by its own facts." Id. at 471.

Here, applying the Berzito factors to the testimony and evidence at trial reflects that 5 Terre LLC was constructively evicted from the property:

1. There were violations of the uniform construction code including water on the electrical box, standing water in front of the electrical box. 1T:29:4-7; 1T35:17-22; 4T11:24-12:4; 4T124:3-8.

2. The building contained conditions that affected vital facility including but not limited to: corroded sprinkler main line; corroded OS&Y valves for the sprinkler system; corroded main gas pipe requiring gas shut down; Ja6 ¶25; Ja23¶51; Ja24 ¶¶54-57; Ja110; Ja485; Ja489; 1T116:4-117:13; T123:4-16; 1T125:5-126:12; 4T68:11-69:9; 4T76:14-77:14; 4T83:23-87:22; 4T97:19-101:22.

3. As a result of the conditions, PSE&G terminated gas to the building for a period of 128 days from June 18, 2018 to October 24, 2028 until such time as the corroded main gas pipe was replaced. Ja6 ¶¶23-26; Ja9

¶¶7-8; Ja23¶48-49; 1T108:9-109:14; 1T110:3-113:3; Ja633.

4. The Borough of Rutherford required the main sprinkler line and OS&Y valves to be replaced, which was not completed until January 2019. Ja110; Ja117; Ja489; Ja38 ¶119-124; Ja6 ¶¶25-27; Ja9 ¶9; 4T78:20-79:1; 4T83:23-86:19; 87:1-20.

5. Both Plaintiffs' and Defendants' Architects and engineers identified safety concerns such as compromised structural columns and beams, floor joists and foundation wall cracks as well as potential electrical shock and fire hazards and hazards associated with compromised gas lines. Ja5 ¶¶21-22; Ja5 ¶¶43-46; 1T54:19-55:1; 1T57:1-59:20; 1T62:3-63:8; 1T66:4-67:12; 1T71:17-72:11; 1T76:24-79:3; 1T90:13-21; 4T11:6-13:6; 4T15:14-16:2; 4T18:4-26:25; 5T11:1-20:23; 5T27:8-28:5.

6. The Borough of Rutherford required the "unsafe conditions" relating to the sidewalk and basement structural components to be repaired. Ja120; Ja1392T7:2-11:8; 4T109:12-111:25; 4T121:4-122:20; 4T125:7-126:8.

7. There is no dispute that it took Plaintiff almost a year to complete the repairs and almost **20 months** for the Certificate of Occupancy to be issued so that the space could be occupied. Ja11 ¶17; Ja139; Ja120; Ja211; 1T24:13-25:20; 4T110:3-111:16; 4T133:12-134:11; 4T135:10-136:4; 4T147:24-148:24.

8. The Landlord testified that he was aware for years of the water intrusion into the area under the sidewalk where the main water line, main gas line and electrical box were located dry and that he never disclosed same to 5 Terre LLC. Ja2 ¶4-5, Ja15-Ja17 ¶¶1-10; Ja3 ¶8. 1T25:23-26:16; 1T27:17-28:10; 1T29:4-7; 1T29:15-35:3.

9. There was no testimony to support that the conditions were created by 5 Terre LLC. Ja11 ¶17.

The trial court's findings of facts are extensive and reflect that the testimony and evidence submitted at trial support the Court's constructive eviction determination. Ja2-39.

B. Alleged Failure to Move Out of Rental Space

Plaintiffs assert that 5 Terre LLC "failed to move out of the rental space." Pb.15. The legal standard is that the party must "remove from the premises within a **reasonable** time." Reste, 53 N.J. at 457 (emphasis added). "A court must engage in a fact-sensitive inquiry to determine what constitutes an unreasonable period of time because "what constitutes a reasonable time depends on the circumstances of each case." Id. at 461. Applying this standard, here, the trial court properly found that 5 Terre LLC vacated the premises and that Plaintiffs, not Defendants, retained 5 Terre LLC's property at the premises. Ja11 ¶15; Ja22 ¶42; Ja25 ¶63; 1T58:4-23; 1T89:5-97:5; Pb2; Ja608.

According to Plaintiffs, 5 Terre LLC failed to "timely" move from the premises and "maintained control over the Rental Space for months following the notice of constructive eviction. Pb15. This is false and unsupported by the record and evidence. Throughout the trial, Plaintiffs asserted that Defendants remained in possession until Defendants' equipment was removed from the premises.

Defendants put forth a contrary position and submitted evidence to support their position.

The Court heard testimony and evidence that Plaintiffs' response to the June 8, 2018 correspondence was to file a dispossess action, even though Plaintiffs' experts agreed with Defendants' experts observations. Ja5 ¶22; Ja11 ¶15; Ja22 ¶¶44-46; Ja25 ¶63; Ja29 ¶78, Ja33 90-91; 1T54:19-55:1; 1T57:1-59:20; 1T62:3-63:8; 1T66:4-67:12; 1T71:17-72:11; 1T76:24-79:3; 1T90:13-21; 4T18:20-26:5; 5T27:8-28:5; Ja608. The written conclusion of the Court demonstrates that the Court considered the parties' positions and found Defendants' testimony and evidence credible:

> 15. Plaintiffs claim that 5 Terre LLC did not vacate the premises within a reasonable time. 5 Terre LLC served notice of constructive eviction on June 8, 2018 and ceased operations at that time. 5 Terre LLC had equipment, supplies and property at 15 Park Avenue. The evidence shows that the Landlords immediately commenced a dispossess action and asserted a Landlord's lien on 5 Terre LLC's property. The Court entered an order granting possession as of July 27, 2018 and ruled that 5 Terre LLC was precluded from removing its property from the premises. The Court takes judicial notice of Orders entered by the Hon. James J. DeLuca, J.S.C. on July 25, 2018 and October 2, 2018. The Court also takes judicial notice of 5 Terre LLC's efforts through counsel to conduct the auction and/or sell the property commencing on October 24, 2018 and terminating with the July 26, 2019 motion. (D-72 [Ja220-327).
>
> Ja11 ¶15.

The Court found that Plaintiffs' claims that Defendants left property at the restaurant and delayed vacating were rejected by the Court based on the testimony and evidence presented:

> 63. When Plaintiffs filed for possession of the premises in July 2018, Plaintiff sought a "landlord's lien" on Defendant's property. . . . .
>
> 64. Plaintiffs' reference to the equipment and possessions left in the restaurant and "delay" in conducting the auction are excused by Plaintiffs, who asserted a Landlord's Lien and refused to schedule the auction prior to September 2019.
>
> Ja25 ¶63-64.

Here, based on the circumstances, the trial court properly found that 5 Terre LLC vacated the premises and that Plaintiffs, not Defendants, retained 5 Terre LLC's property at the premises. Ja11 ¶15; Ja22 ¶42; Ja25 ¶63; 1T58:4-23; 1T89:5-97:5; Pb2; Ja608.

C. That It Took Plaintiff 20 Months to Complete Repairs and Obtain a Certificate of Occupancy is Absolutely Material and Relevant

Plaintiffs allege that the trial court's findings concerning how long it took for Plaintiffs to effectuate the repairs is immaterial because Defendants had already ceased operations. Pb15. This argument is non-sensical. First, Plaintiffs in their affirmative case, sought unpaid rent for this period of time alleging that Defendants remained in possession until the space was re-leased. Second, "Mr. Pisciotta testified that as a result of what Mr. Elkin and the engineer told him, he attempted to

perform the recommended repairs as quickly as possible but that everything took time." Ja22 ¶46.

The trial court rejected Plaintiffs' argument (made for the first time in the Motion for Reconsideration after trial) because it is contrary to the testimony and evidence presented at trial:

> There's no evidence in the record or there was no evidence put into the record to indicate that there was some immediate fix here. The evidence was to the contrary. I know counsel argues that well it's all post, but post was telling. The Court mentioned earlier that it could not envision a landlord who would -- would seek to mitigate his damages by virtue of reletting the premises. I trust that he wanted to rent it out as soon as he could; right? So this idea that he had no real reason to do anything quickly just falls short. **The Court just does not buy that.**
>
> 9T29:5-16 (emphasis added).

Plaintiffs claim that Mr. Svoboda testified "without dispute that it would take approximately 2 weeks to repair the claimed deficiencies." Pb.16 It is precisely this testimony that makes the actual amount of time that it took to effectuate the repairs relevant and material. Moreover, it demonstrates the true extent and nature of the deficiencies and conditions that caused Defendants to determine that the premises were not suitable for the operation of a restaurant. Mr. Svoboda, however, never observed the condition of the property in June 2018. Ja34¶97; 8T35:21-24. In addition, at the time he prepared his report, he had not reviewed the files of Plaintiffs' architects and engineers, including the drawings prepared for the repair work. Ja34

¶98; 8T39:13-40:10. Further, he was unaware that the building was without gas from June 18, 2018 through October 24, 2018. 8T59:8-60:12.

POINT II

THE TRIAL COURT'S DAMAGE AWARD WAS PROPER (Ja1; Ja40; 9T21:15-23:12)

It is well settled under New Jersey law that an award of damages is left to the sound discretion of the trier of fact. See Endress v. Brookdale Community College, 144 N.J. Super. 109, 142 (App. Div. 1976). The Appellate Division will not disturb a damages award unless it is plainly wrong, constitutes manifest injustice or shocks the Court's conscience. See Cary v. Lovett, 132 N.J. 66 (1993). If the record supports "a reasonable estimate of damages, based upon more than mere speculation, a damage award can be affirmed." Fort Lee v. Banquet National De Paris, 311 N.J. Super. 280, 291 (App. Div. 1998). Damages awards will be affirmed when evidence is adduced that "affords a basis for estimating damages with some reasonable degree of certainty." Viviano v. CBS, Inc., 251 N.J. Super. 113, 129 (App. Div. 1991). "While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery — courts will fashion a remedy even though the proof on damages is inexact." Kozlowski v. Kozlowski, 80 N.J. 378, 388 (1979).

In a breach of contract case damages are awarded to put the innocent party in as good a monetary position as the party would have been in had the contract been performed as promised. The Court acknowledged this standard at Paragraph 18 of the Conclusions of Law. Ja12 ¶18. Both experts used historical data and arrived at vastly different results as to where 5 Terre LLC would have been. The Court's decision reflects that the Court struggled to reconcile the dual damages experts' testimony: "The variance in opinion caused this Court to pause in determining lost profits." Ja13 ¶22. The trial court noted that both experts were credible. Ja13 ¶22. The trial judge acknowledged that the question of damages and balancing the equities was difficult: "And, I – again I was weighing that and – and it was a bit of a struggle because it was a qualified individual who opened this restaurant. He ran a restaurant and may still run a restaurant, I believe it was called Blue Eyes in Jersey City and appears to be running that successfully. He had a background in the industry." 9T22:12-18. "[W]hat I simply did was try to restore the defendants to the position that they were in prior to taking occupancy." 9T30:20-22.

The trial judge acknowledged that constructive eviction is an equitable remedy and, as a court in equity, the trial court must look at "what's fair, just and equitable here." 9T19:8-21:14. In American Sanitary Sales v. Purchase & Prop. Div., 178 N.J. Super. 429, 435-436 (A.D. 1981), this Court recognized the need for fairness and "essential justice" in fashioning damages awards:

> The ideal of a judicial system is perfect justice. However, in a case where, as here, absolute precision in fixing damages may not be attainable, we should not hesitate to seek essential justice. It would be a travesty to deny a plaintiff essential justice because the absence of means for precision precludes perfect justice.
>
> There are numerous areas in the law where damages cannot be unmistakably assessed to the dollar. Juries deal with this routinely in negligence actions where compensation is fixed for pain and suffering despite the fact that there is no gauge to measure nor scale to weigh pain and suffering. Similarly, in comparative negligence cases juries assess percentages of negligence on the parts of plaintiffs and defendants although there is no scientific method for appraising or fixing relative culpability. In such cases, as in the case we are now considering, a common sense approach based upon the evidence must be depended on to lead the factfinders to the assessment of damages with some reasonable degree of certainty.
>
> We emphasize that we do not expect nor ask the trial judge to engage in mere speculation. For this reason we shall deal with the situation in the event that the data of the critical path method should not become available or the judge is of the opinion that he cannot in good conscience fix damages without resort to pure speculation. In that event he should make a finding of fact as to whether the causes of delay for which he has found defendant chargeable constitute a "substantial factor" in causing the injury within the doctrine quoted above from *Corbin on Contracts.* If he does, he should award plaintiff judgment in full for the loss it incurred through all the delays. If he does not, he should award judgment in favor of defendant. We acknowledge that the result of a judgment for plaintiff for all of its damages, although defendant was not the cause of all but only a substantial part of these damages, carries with it an element of unfairness. However, the alternative of no judgment at all for plaintiff under these circumstances is palpably more unfair.

"If the evidence affords a basis for estimating the damages with some reasonable degree of certainty, it is sufficient." Tessmar v. Grosner, 23 N.J. 193, 203 (1957). "The rule relating to the uncertainty of damages applies to the uncertainty as to the fact of damage and not as to its amount, and where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." Id.

In an effort to make Respondent 5 Terre, LLC whole, the Court awarded 5 Terre, LLC the initial capitalization and additional capitalization amounts as well as the amount of lost profits Plaintiffs admitted. Ja 13-14; 9T. The definition of profits infers sums earned or to be earned after any investment/capitalization. The present value of lost revenue figure conceded by Plaintiffs' expert was not as of "the date of the alleged constructive eviction." It was as December 31, 2023, which was several years after Respondents had been constructively evicted. Ja556. Respondents were deprived the opportunity to continue to operate their business. The Court did not double count in its damages analysis. Rather, the Court determined the amount required to put 5 Terre in the position it would have been but for the breach. Ja12-13 ¶¶18-19; 9T. Notwithstanding, if this Court were to conclude that by awarding capitalization ($390,000) and lost profits ($18,000), the trial court double counted, this Court could reduce the judgment by the $18,000 lost profits to $390,000.

Further, Plaintiffs' reliance on the figures that the members used to effectuate the buy out as the "value" of the business is misplaced. There was no testimony that this figure was selected based on the members' valuation of the business. It was not an arms-length negotiation. Ja39 ¶126. Rather, the testimony was that Mr. Pucci intended to return the other members' initial investment to them. 2T118:8-17; 126:1-21; 2T128:1-14; 2T130:3-132:9.

CONCLUSION

The trial court's decision and judgment are supported by substantial, credible evidence and should be affirmed.

Respectfully submitted,

Jennifer Alampi /s/

Jennifer Alampi

Dated: April 17, 2025