NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5922-08T3

ORLANDO A. MUNOZ,

Plaintiff-Respondent/
Cross-Appellant,

v.

ROBERT P. PERLA, ROBERT L. STEIGER, THE HERITAGE PARTNERSHIP, FOAM TECHNOLOGY, INC., RPMS CONSULTING ENGINEERS,

Defendants-Appellants/
Cross-Respondents.

Submitted December 15, 2010 - Decided December 20, 2011

Before Judges R. B. Coleman, Lihotz and Harris.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Middlesex County, Docket No. C-249-07.

Miller, Miller & Tucker, P.A., attorneys for appellants/cross-respondents (Richard B. Tucker, Jr., of counsel and on the briefs).

Brennan Law Firm, P.C., attorneys for respondent/cross-appellant (Francis J. Brennan, III, of counsel and on the briefs; Robert F. Morris, on the briefs).

PER CURIAM

This matter involves cross-appeals from a July 6, 2009 final judgment entered by Judge Travis L. Francis following a

bench trial in which he determined that defendants Robert P. Perla, Robert L. Steiger, the two active partners in a real estate partnership, and defendant Heritage Partnership (Heritage) breached their fiduciary duties to a third inactive partner, plaintiff Orlando A. Munoz. The trial judge concluded that defendants caused Heritage to charge below market rent to defendant RPMS Consulting Engineers (RPMS) and defendant Foam Technology, Inc. (Foam), entities in which Perla and Steiger had interests, and caused Heritage to pay excessive fees for alleged management services performed by those entities.

The court reformed the leases between Heritage and the related tenant entities and awarded damages in plaintiff's favor. Defendants appeal and plaintiff cross-appeals. On his cross-appeal, plaintiff contends the court erred in granting the partial summary judgment dismissal concluding his claims were untimely. We affirm the judgment of the court.

Plaintiff, Perla and Steiger are all professional engineers. They were principals of RPMS, an engineering firm they started in 1983. On July 21, 1992, they entered into a partnership agreement creating Heritage to "maintain, operate, manage, sell and/or lease" a building. Each of the partners contributed to the capital of the partnership and retained one-third ownership.

Paragraph 1.03 of the Heritage partnership agreement provides that the rights and obligations of the partners are governed by the Uniform Partnership Act, N.J.S.A. 42:1A-1 to -56. Other pertinent provisions of the partnership agreement include paragraph 3.03, which provides that the partnership shall continue until June 30, 2012, unless terminated as set forth in the agreement; paragraph 6.01, which states that all decisions of the partnership are by majority vote of the three partners; paragraph 6.02, which provides that each partner has the right to inspect and examine the books and accounts of the partnership operations at all reasonable times; and paragraph 6.03, which states that no partner shall do any act detrimental to the best interests of the partnership or that would make it impossible to carry on the ordinary business of the partnership.

In August 1992, Heritage paid $1,550,000 to purchase an empty three-story, 39,490-square-foot office building in Monroe Township which contains approximately 22,800 square feet of space (the Heritage building) for rent. Steiger, Perla, plaintiff and RPMS signed a guaranty of payment to cover the $1.3 million mortgage for the building. Plaintiff, Perla and Steiger collectively decided to manage the Heritage building

using RPMS employees.[1] Plaintiff, Perla and Steiger agreed that RPMS would negotiate with its landlord to prematurely terminate its sublease in Princeton and relocate to the Heritage building in Monroe Township. RPMS paid $9,388.37 per month in Princeton for approximately 6,800 square feet of class A space. Initially, Steiger, Perla and plaintiff did not consider what fair market rent in the Heritage building should be; they decided that rent from RPMS should cover the expenses of the building. Steiger testified that from 1992 to 1994, there was no set rent that RPMS paid Heritage. Thus, at first, RPMS paid Heritage $15,800 per month rent.

Starting in 1993, RPMS began to invoice Heritage for management services, computed as the hourly rates of RPMS's employees for services rendered with a markup to cover additional costs such as a share of health insurance and vacation time. Perla testified that RPMS's markup of thirty-five percent was rather low compared to standard business practice, and he believed there was nothing improper about it. RPMS's markup on its invoices to arms' length client accounts such as oil companies was considerably higher.

[1] Heritage had no employees and no separate office space. Indeed, Heritage has never had any employees or separate office space.

In May 1993, plaintiff, Perla and Steiger incorporated Foam, a company that provides fire protection to the oil industry, and located its principal place of business in the Heritage building. At about that time, plaintiff informed Perla and Steiger that he intended to retire in late 1993. Perla and Steiger bought plaintiff out from RPMS, but plaintiff remained a principal of Foam until December 1, 2003. He retained his interest in Heritage, but he moved to Pennsylvania and took no active part in the day-to-day activities of the real estate partnership. Plaintiff did not visit the Heritage building from 1993 to 2005, and while he knew he could look at records at any time, he did not request any information about Heritage during this time period. He did receive tax returns and K-1 forms, but did not look at them thoroughly.

On May 12, 1994, Steiger sent a letter to plaintiff, which plaintiff at first stated that he had never seen until his attorney gave it to him in 2006, but eventually he conceded that he cashed the check that was one of the referred attachments to that letter. The parties disagreed as to what was sent and whether there were later versions of the letter that included attachments, but the court ultimately found that plaintiff had received the letter and the check but not the attachments that included proposed rent calculations.

In any event, the first page of the letter states that there are seven items attached: (1) a vacation check; (2) a 401K plan quarterly report; (3) a 401K newsletter; (4) "RPMS rent calculation for your comment"; (5) "Foam rent calculation for your comment"; (6) "a brief outline of what is going on with Heritage"; and (7) "a brief outline of what is going on with Foam." In the intact iteration, two pages titled, "Rent Calculation," list the square footage of RPMS's area and state the rent is $12,900, and Foam's area, stating the rent is $1,050.

On December 21, 1994, without having received any comments from plaintiff, Steiger and Perla drew up written leases for Heritage that provided basic monthly rent of $12,900 for RPMS and $1,050 for Foam. Steiger and Perla came up with the amounts based on what they thought was reasonable for the spaces; they did not conduct a fair market analysis. The initial term of the lease for Foam ran from January 1, 1995 to December 31, 1997. Perla and Steiger agreed to a total of three leases for Foam, covering the period from January 1, 1998 to December 31, 2008. The initial term for the RPMS lease ran from January 1, 1995 to December 31, 1997, with three leases, covering the period from January 1, 1998 to December 31, 2012. Perla testified that RPMS

would never have paid more than $12,900 per month and would have vacated the building if forced to pay more.

On October 28, 2005, plaintiff sought to withdraw from Heritage. He wrote to Steiger about possibly selling his share, which provoked a communication from Perla and Steiger's attorney to plaintiff's attorney offering $200,000 for plaintiff's share of Heritage. Plaintiff's rejection of that offer led to appraisals of the property, the collection of materials showing cash and liabilities and eventually to this litigation.

From 1992 to 2000, Heritage retained a real estate agent, Linda Cinelli, to rent and attempt to sell the building. Steiger, on behalf of Heritage, signed the listing agreement for sale, and when Cinelli changed companies, Steiger signed a new agreement to continue her services. On January 14, 2002, Mercer Associates submitted an offer to purchase the Heritage building for $3,600,000. The process went back and forth with offers from Mercer for the same price but with different contingencies. On June 3, 2004, Raritan Properties made an offer to purchase the property for $3,650,000. On March 7, 2005, Babu Cherukuri presented an offer with a purchase price of $3,700,000, which Steiger rejected as too low and because it required that RPMS sign a five-year lease. On March 18, 2005, Steiger wrote Cinelli stating they had taken the building off the market.

Nevertheless, on June 21, 2005, Cinelli submitted an offer from Birger Brinck-Lund to buy the property for $4,250,000. That offer required that RPMS remain as a tenant and pay $22 per square foot in rent.[2]

Throughout its tenancy in the Heritage building, RPMS provided management services and submitted invoices for those management services to Heritage that contained little detail. Steiger and Perla both testified that nobody, including plaintiff, ever complained about their format, the amounts or the documentation until the amended complaint was filed after the complaint. Steiger claimed that the amounts charged were reasonable and not all work done for Heritage was invoiced.

In answers to interrogatories, defendants set forth reasons that RPMS and Foam paid lower rent, and a list of work items that Steiger and Perla did for Heritage. Steiger testified one reason for the lower rent was that RPMS's space on the third floor is of lower quality, it has a slanted ceiling and an extremely poor layout. Steiger also testified that RPMS paid more for its space than another tenant, GMAC, and GMAC's space was superior because it was on the first floor.

[2] Steiger and Perla did not contact plaintiff about any of the offers and all were rejected. Plaintiff testified that he would have accepted an offer because he wanted to sell the building.

Steiger acknowledged that RPMS and Heritage did not employ rigorous controls against each other. The checkbook for Heritage was in the same fireproof safe with the checkbook for RPMS. Steiger sat at his RPMS desk to do work for Heritage and answered calls for Heritage on RPMS's phone.

In 2006, plaintiff obtained information that included copies of the leases and an appraisal to see the worth of the Heritage building. At that time, plaintiff saw that the rent had not changed since he retired and that there were renewals of the leases with RPMS and Foam made without his knowledge. Steiger admitted that he did not notify plaintiff about these renewals. Plaintiff concluded that the rent was too low and that RPMS had overcharged Heritage on invoices for performance incentives and maintenance fees. While the invoices did not have details on services charged, plaintiff noticed that there were many different payments to different people and concluded that invoice amounts should have been lowered after the building was fully occupied.

On November 14, 2007, plaintiff filed a five-count complaint, alleging: (1) breach of fiduciary duty, duty of loyalty, and duty of care by Perla and Steiger; (2) breach of the Heritage partnership agreement; (3) minority partner oppression; (4) formation of a constructive trust, an equitable

lien, and unjust enrichment; and (5) conversion and/or wrongful appropriation. In their answer, defendants denied the key allegations and asserted eleven separate defenses, including laches, estoppel, waiver and the statute of limitations.

Plaintiff subsequently filed an amended complaint that added a sixth count seeking an accounting of the income, expenses, and assets of Heritage, based on claims relating to invoices for professional services charged to Heritage and defendants' attempts to sell the building. Defendants filed an amended answer, adding an additional defense.

Defendants moved for summary judgment and on November 7, 2008, Judge Francis ordered partial summary judgment entered in favor of defendants based on laches on all of plaintiff's equitable claims that accrued on or before November 13, 2001, including reformation of the leases, imposing a constructive trust, appointing an independent trustee, imposing an equitable lien, rescission of the leases, dissolution of the partnership, and production of an accounting. He also ordered that all legal claims which accrued on or before November 13, 2001, shall be subject to a Lopez hearing, which was conducted at the start of the trial.[3]

[3] Pursuant to Lopez v. Swyer, 62 N.J. 267, 272-74 (1973), the judge conducts a hearing to determine if the plaintiff's (continued)

Judge Francis ruled that there was no basis for tolling the applicable six-year statute of limitations and barred plaintiff's claims related to below fair market rent that accrued before January 1, 2004, and the balance of his claims that accrued before November 14, 2001.

Peter Sockler, a tax assessor and owner of an appraisal firm, issued an appraisal report in July 2006 appraising the Heritage property at $4,300,000, and he testified as an expert for plaintiff at trial. He issued a second appraisal report dated August 14, 2008, appraising the property at $4,000,000. He also issued a report, dated September 12, 2008, estimating market rent value for the owner-occupied spaces of the Heritage building for the appraisal dates of July 30, 1994 through July 30, 2008, with market rent rates between $14.09 and $23 per square foot. In calculating the rental for RPMS, he applied a twenty percent reduction to the estimated rates, because of the dormers and unusable space on the third floor.

David Stafford, a certified public accountant issued a September 26, 2008 report, setting forth an analysis of plaintiff's damages, in which he concluded that the damages for

---

(continued)
defenses present the right to relief from the bar of the statute of limitations under the discovery rule.

RPMS's overcharging of expenses, RPMS's rental differential, and interest to December 31, 2008, totaled $1,575,137.97, with plaintiff due one-third of the total, or $525,045.99.

Sockler acknowledged that a hypothetical landlord's anticipated tenant expense obligations are a relevant component of a hypothetical tenant's rental rate, as are risk factors such as rent defaults (collection losses) and vacancy losses. One such expense obligation is a tenant fit-up expense, where a tenant asks a landlord to reconfigure an interior space.

Joel L. Krinksy of J.L. Krinsky & Co., defendants' expert in real estate, issued a report, dated October 13, 2008, addressing the valuation of the building, the fairness of rents charged RPMS and Foam, and the charges to Heritage. The report included statistical information on rental rates, capitalization rates, and management fees, as well as summaries of annual rent from each of Heritage's tenants, effective rents based on tenant fit-up, and an analysis of RPMS's fees. Krinsky concluded: (1) the value of the Heritage building has lowered due to prevailing market conditions, not because of the rents being paid by RPMS and Foam; (2) the rents being paid by RPMS and Foam are at market levels when all factors (including usable space, initial tenant fit-up, and ongoing tenant space improvements) are taken

into consideration; and (3) the charges to Heritage for fees and services have been both fair and at market levels.

After considering the evidence presented, Judge Francis concluded that in 1992 and 1993, RPMS paid varying amounts of monthly rent to Heritage, not based on a fair market rental value analysis, but instead based on the amount of rental income Heritage needed to remain solvent. The judge found that there were "several iterations" of Steiger's May 12, 1994, letter. The iteration plaintiff received referred to rents paid by RPMS and Foam in the body of the letter but not in separate attachments. Thus, the judge concluded plaintiff did not receive notice of the rent calculations. Defendants sent plaintiff tax returns, which plaintiff only "browsed" and did not review thoroughly.

Other than plaintiff's request in 2006 for a copy of RPMS's lease agreement, at no time between January 1, 1995, and November 14, 2007, did plaintiff initiate any contact with Perla and Steiger or request any information or records from them pertaining to Heritage. During the same period, plaintiff did not seek to inspect Heritage's financial or other records personally or through any representative.

Judge Francis concluded that plaintiff, Perla, Steiger and employees of RPMS rendered free services to Heritage between

1992 and mid-1993, and then, with plaintiff's knowledge, RPMS began invoicing Heritage for services. Based on Heritage's income tax returns and form K-1 sent to him by defendants, at all times after January 1, 1995, plaintiff had some inferable notice of the rents paid to Heritage by RPMS and Foam, as well as management and other professional services rendered by RPMS and Foam to Heritage.

Judge Francis found the Sockler report credible as to rent valuations. The judge noted that Sockler factored in a twenty percent reduction from market rent for all building spaces due to the dormers on the first and second floors, as well as limited nonusable areas and the physical condition of the building. Both Sockler and Krinsky concluded that management fees based on gross rents should be between four and six percent. The management fees, which included the incentives and administrative fees, that were assessed to Heritage were in excess of six percent. The judge ruled that anywhere between four and six percent was reasonable for management fees, clarifying that the fees should not include payment for repairs of the building.

Judge Francis stated that it was difficult to determine if the comparable properties in Krinsky's report were in buildings of the same age, location and building condition. Nevertheless,

the judge found that Krinsky's statistics buttressed Sockler's conclusion that the building and property were worth about $4,000,000. The judge rejected Krinsky's opinion that the RPMS management fees were reasonable because Krinsky did not provide any industry averages or similar standards to support his conclusion.

Overall, Judge Francis concluded that Perla and Steiger had fiduciary duties as partners of Heritage imposed by law, statutory duties imposed under N.J.S.A. 42:1A-21 and N.J.S.A. 42:1A-24 of the Uniform Partnership Act, and contractual duties under paragraphs 1.02 and 6.03 of the partnership agreement. The Uniform Partnership Act and the partnership agreement imposed continuing affirmative duties on Perla and Steiger to keep plaintiff informed about Heritage business without demand from plaintiff. While N.J.S.A. 42:1A-4 and 42:1A-24 allow a partnership to waive certain duties of partners, Heritage did not waive any fiduciary obligations and, in fact, embraced those duties from the Uniform Partnership Act and included them in the partnership agreement. There was no evidence that these obligations were ever altered, amended or waived.

Perla and Steiger never notified plaintiff about the 2003 renewals of the RPMS and Foam leases despite their duty to do so. Based on plaintiff's testimony, had he been informed, he

would not have agreed to the terms of the leases. Given the overlapping ownership structure of Heritage, RPMS and Foam, any lost profits from Heritage would adversely affect plaintiff, while benefiting Perla and Steiger. Hence, the court ruled that, as agents for Heritage, Perla and Steiger were obligated to seek maximum value for the Heritage leased space. They failed to do so, however, and the leases failed to cover the operating expenses of RPMS's and Foam's share of the building. RPMS's rental was well below market value, and the lease understated the amount of space RPMS actually occupied.

Judge Francis found Sockler's report credible as to the fair market value for RPMS's space for 2004 through 2008. The judge looked at the different calculations of square footage and found shortfalls ranging from $6.66 to $11.19 per square foot. Even the most favorable calculations demonstrated the lease rates were significantly lower than fair market value.

The judge also concluded that Perla and Steiger were required to notify plaintiff about performance incentives and administration fees paid by Heritage to RPMS, pursuant to the Uniform Partnership Act and the terms of the partnership agreement, and they failed to do so. Even though plaintiff was aware of the assessment of fees during the period he was an active member of the partnership, and he had assessed fees

himself as a member of RPMS, he was not apprised of the amount of the fees and the amounts were not reasonable. Based on Sockler's testimony and information in Krinsky's report, four to six percent of gross rents was a reasonable amount.

In spite of Steiger's and Perla's failure to communicate to plaintiff information about offers and rejections related to the sale of the Heritage building, Judge Francis found they did not breach their fiduciary duties of loyalty or the partnership agreement in that regard. More specifically, he reasoned there were no damages to Heritage or to plaintiff for the failure to accept any of the offers because the partnership agreement is for a fixed period of time and the asset can still be sold. Hence, the judge refused to order the dissolution of the partnership and the sale of the building. He noted, in the current market, forcing a sale would not be good for the partners. However, he determined plaintiff is entitled to an accounting, which plaintiff had requested as part of the complaint.

Regarding rent that RPMS currently pays, the judge ordered a reformation of the lease to fair market rent, with the difference being paid to Heritage and distributed to the partners. Also, fees assessed to Heritage by RPMS were ordered to be reduced to not more than six percent of gross rents.

Continuing forward, the judge ordered the RPMS and Foam leases reformed to provide for annual increases of 3.6 percent. Plaintiff's application for a constructive trust on the assets of the partnership was denied. The judge found no minority oppression because although plaintiff demanded to be bought out, he had made no specific demand for information regarding the leases or management fees. The judge concluded that the defenses of laches, waiver and estoppel were not applicable.

On appeal, defendants maintain that Judge Francis erred in ordering reformation of RPMS's and Foam's leases. We disagree.

First, defendants argue that plaintiff's demand to reform the leases to market rent presupposes that the contracting parties had intended and agreed that the rental rates would be fair market rates. Contrary to that supposition, defendants contend that the three partners had agreed that RPMS and Foam would occupy space in the least desirable areas of the Heritage building, and they were more concerned with the certainty of the rental income from RPMS and Foam than they were with whether the rent was at a fair market level. Defendants argue further that it is reasonable to infer that if a fair rental analysis had been done, RPMS would not have prematurely terminated its lease in Princeton where the monthly rent was $9,388.37 in order to move into the Heritage building and occupy vastly inferior

rental space for $15,800 per month. That rationale may have been persuasive when all the parties had the same interests in the various entities. It lost its persuasiveness when the interests of the partners were no longer fully aligned. The question that arose then was whether Steiger and Perla breached their fiduciary duty to Heritage and to plaintiff by not obtaining their expressed consents to the terms of the lease and by allowing RPMS and Foam to benefit at Heritage's expense. The court concluded a breach had occurred.

Defendants also argue reformation is improper because there is no evidence of mistake on the part of Heritage as to the below market rental rates set forth in the leases with RPMS and Foam. In addition, defendants maintain that there is no evidence of mistake by RPMS or Foam, or the individual defendants, as to the rental rates. Thus, defendants argue that plaintiff's reformation claim cannot be sustained on the theory of mutual mistake. It bears repeating that the rental agreements between RPMS, Foam and Heritage did not create a problem while plaintiff was an equal partner in all three companies. However, once plaintiff left RPMS and Foam, Heritage was unfairly subsidizing those tenants. Judge Francis's finding that the contracting parties initially established RPMS's rental rate "not based on any fair rental value analysis, but, rather,

on the amount of rental income Heritage needed in any given month to remain solvent" supports the conclusion that Steiger and Perla subsequently breached their fiduciary duties to Heritage, when they favored their interests and adversely affected the interests of Heritage and plaintiff. The judge's award of damages for underpayment of rent and reformation of the leases to provide annual rent increases starting August 1, 2008 was an appropriate exercise of discretion in the interest of justice.

Reformation of a contract is an equitable remedy, traditionally available when there exists "'either mutual mistake or unilateral mistake by one party and fraud or unconscionable conduct by the other.'" Dugan Constr. Co. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 242-43 (App. Div.) (quoting St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 577 (1982)), certif. denied, 196 N.J. 346 (2008). Mutual mistake exists only when "'both parties were laboring under the same misapprehension as to [a] particular, essential fact.'" Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608 (1989) (emphasis omitted) (quoting Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446 (App. Div. 1979)). Further, "New Jersey law also requires for reformation for mutual mistake that the minds of the parties have met and

reached a prior existing agreement, which the written document fails to express." Ibid. (citing St. Pius X, supra, 88 N.J. at 579). We agree with defendants that none of those requirements for mutual mistake have been met.

On the other hand, where there is no mutual mistake, reformation of a contract may be granted when the facts of the case give rise to equitable fraud. Id. at 609. In Jewish Center of Sussex County v. Whale, the Court set forth the means of distinguishing equitable fraud from legal fraud as follows:

> A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment. The elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom, are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud.
>
> [86 N.J. 619, 624-25 (1981) (citations omitted).]

"[A] party claiming equitable fraud must prove the required elements by clear and convincing evidence." Daibo v. Kirsch, 316 N.J. Super. 580, 588 (App. Div. 1998).

In a situation where there are misrepresentations and reformation is appropriate, its purpose "is to restore the parties to the status quo ante and prevent the party who is

responsible for the misrepresentations from gaining a benefit." Bonnco, supra, 115 N.J. at 612 (citing Enright v. Lubow, 202 N.J. Super. 58, 72 (App. Div. 1985), certif. denied, 104 N.J. 376 (1986)). Here, Judge Francis did not find that there were misrepresentations when the leases were initially signed. Thus, he did not conclude that reformation of the contracts was a proper remedy for the initial contracts period. Rather, the reformation applied to the leases as extended.

Plaintiff points out that the judge awarded monetary damages as a separate remedy from reformation of future rent payments. In his oral decision, the judge states he is ordering reformation of the leases regarding updates, and he does speak of damages. However, he also directs that the leases will be reformed, and the differences between the rent paid and fair market rent will be paid to Heritage and distributed to its partners. The final judgment clearly states that the leases are reformed to provide fair market rent and that plaintiff will be paid his share of the underpayment of rent.

While Judge Francis ordered reformation of the RPMS and Foam leases for the period January 1, 2004 through July 30, 2008, and for periods thereafter to show annual rate increases, this was a remedy that resulted in damages for the difference between fair market rent and what RPMS and Foam had been paying.

Our review of his ruling convinces us that he ordered these damages because defendants breached their fiduciary duty owed to Heritage and violated the Uniform Partnership Act and the partnership agreement. Defendants merely question whether reformation of the leases is a proper remedy for a violation of fiduciary duty. We are satisfied it is a proper remedy.

The New Jersey Supreme Court has described the elements of a claim for breach of fiduciary duty as follows:

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. Restatement (Second) of Torts § 874 cmt. a (1979) . . . . The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Restatement (Second) of Trusts §§ 170, 174 (1959). Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. Restatement (Second) of Torts § 874 (1979).
>
> [McKelvey v. Pierce, 173 N.J. 26, 57 (2002) (quoting F.G. v. MacDonell, 150 N.J. 550, 563-64 (1997)).]

Finding a breach of fiduciary duty, Judge Francis crafted an equitable remedy to adjust the leases to comport with prevailing law. The leases, though they may not have been

mistakes when signed, later, upon plaintiff's withdrawal from RPMS and Foam, offended established standards of fairness and propriety. Circumstances changed that heightened the duty owed by Steiger and Perla. While Judge Francis did not specifically characterize the extensions of the leases without consulting plaintiff as fraud or unconscionable conduct, they may be so characterized, which would establish a basis for reformation of contract.

In arguing that defendants clearly breached their duties to Heritage and committed unconscionable conduct in negotiating the 2003 lease renewals, plaintiff relies on Enea v. Superior Court of Monterey County, 34 Cal. Rptr. 3d 513 (Cal. Ct. App. 2005). In Enea, the California appellate court held that the defendants in a partnership violated their fiduciary duties to another partner by renting the partnership's office building to themselves at below fair market value. Id. at 514. Before the trial court, the defendants moved for summary judgment, arguing that they owed no fiduciary duty to the plaintiff to pay fair market rent. Id. at 515. The trial court granted the motion, ruling that there was no evidence of any agreement to collect market or maximum rents, and that absent such an agreement, or some other evidence giving rise to a duty to pay fair market rent, there can be no fiduciary duty to do so. Id. at 515-16.

The appellate court discussed California partnership law and concluded: "'Partnership is a fiduciary relationship, and partners may not take advantages for themselves at the expense of the partnership.'" Id. at 517 (quoting Jones v. Wells Fargo Bank, 5 Cal. Rptr. 3d 835, 845 (Cal. Ct. App. 2003)).

The Enea court explained:

> Here the facts as assumed by the parties and the trial court plainly depict defendants taking advantages for themselves from partnership property at the expense of the partnership. The advantage consisted of occupying partnership property at below-market rates, i.e., less than they would be required to pay to an independent landlord for equivalent premises. The cost to the partnership was the additional rent thereby rendered unavailable for collection from an independent tenant willing to pay the property's value.
>
> [Ibid. (emphasis added).]

The appellate court determined that the defendants violated a California provision identical to N.J.S.A. 42:1A-24(b)(1), that a partner's duty of loyalty to the partnership and the other partners is "[t]o account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct . . . of the partnership business or derived from a use by the partner of partnership property . . . ." Enea, supra, 34 Cal. Rptr. 3d at 518. Further, it noted that the defendants violated a provision

identical to N.J.S.A. 42:1A-21(g), "A partner shall use or possess partnership property only on behalf of the partnership." Ibid.

The court also rejected the defendants' reliance on the provision identical to N.J.S.A. 42:1A-24(d), "A partner does not violate a duty or obligation under this act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." Ibid. The court explained:

> It does not by its terms authorize the kind of conduct at issue here, which did not "merely" further defendants' own interests but did so by depriving the partnership of valuable assets, i.e., the space which would otherwise have been rented at market rates. Here, the statute entitled defendants to lease partnership property at the same rent another tenant would have paid. It did not empower them to occupy partnership property for their own exclusive benefit at partnership expense, in effect converting partnership assets to their own and appropriating the value it would otherwise have realized as distributable profits.
>
> [Ibid.]

The court also appropriately rejected the defendants' argument that they had no duty to collect market rents in the absence of a contract expressly requiring them to do so, stating that "this turns partnership law on its head." Ibid. The court explained that fiduciary duties are imposed by law and their

breach sounds in tort, specifically called the breach of fiduciary duty. Id. at 519. Thus, the Enea court reversed the lower court's grant of summary judgment, reinstating the plaintiff's claims. Id. at 520.

Though Enea does not determine whether reformation of a lease is a remedy for breach of fiduciary duty, its fact pattern is similar to the one here, and it is instructive that these claims do fall under the Uniform Partnership Act.

As an additional argument, defendants claim that plaintiff presented no evidence of market rates for the period after July 30, 2008, so the judge erred in reforming the lease agreements prospectively and including annual 3.6 percent increases. Defendants argue such prospective rent increases are barred by Rule 4:9-4, as plaintiff did not file supplemental pleadings after he filed his amended complaint around August 4, 2008.

Plaintiff's amended complaint asks for reformation of the leases to provide a fair market value rental. The requested relief includes the full period of the leases, without need for a supplemental pleading. Even though the judge did not state specifically why he determined there should be a 3.6 percent annual increase in the rent after 2008, we note that in Sockler's report, the expert stated "[t]he trend [of full service rentals] is increasing over the 20 years of comparable

rentals analyzed. The average annual increase is 3.64 percent, which is reasonably consistent with the market analysis section of the appraisal and the analysis of the rent roll." We are satisfied that the identification of such a trend served as a sufficient basis for the court to impose that annual incremental increase.[4]

Defendants also contend that plaintiff's proof of reformation damages was improper and insufficient. Again, we disagree, and we return to the established principles that guide our review. An appellate court will "'not disturb the factual findings and legal conclusions of the trial judge unless . . . 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.'" Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div.), certif. denied, 40 N.J. 221 (1963)). This is particularly true where the credibility of expert opinion testimony is involved, because a fact finder is

[4] At another point in his report, in discussing the competitive positioning of the RPMS space, Sockler found a higher annual rental rate increase, as he states: "Rental rates from 1993 to 2008 have ranged from a low of about $17.50 to a high of $30.00 over the 16 year period indicating an average annual rental rate increase of approximately 4.5 percent per year."

never bound to accept the testimony of expert witnesses, even if it is unrebutted by any other evidence. State v. M.J.K., 369 N.J. Super. 532, 549 (App. Div. 2004), appeal dismissed, 187 N.J. 74 (2005). Thus, a judge is entitled to select the expert testimony he or she finds most compelling, and weigh and judge it as any other testimony. Waterson v. Gen. Motors Corp., 111 N.J. 238, 248 (1988); Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 71 (App. Div. 2004), certif. denied, 183 N.J. 213, 214 (2005).

Defendants assert that plaintiff's alleged proof of damages in his reformation claim consisted solely of the appraisal of the market rent report and testimony from Sockler. Defendants argue that the report completely ignored both the historic and ongoing interrelationships between Heritage and RPMS and assumed that their only relationship was that of landlord and tenant, which was no different from outside tenants.

Defendants complain that Sockler's opinions of market rent assumed a competitive and open market, with the rental amount representing the normal consideration for the property leased unaffected by special fees or concessions granted by anyone associated with the transaction. They argue the assumption that Heritage dealt with RPMS at arms' length was incorrect. They point out that none of the other tenants personally guaranteed

Heritage's $1,300,000 mortgage loan or provided Heritage with hundreds of hours of free services, a free reception area, conference room and office space within its rental space, free office equipment, and telephone and internet services, as RPMS had been doing for Heritage since 1992. In short, defendants maintain there was nothing "normal" about the relationship between Heritage and RPMS. Recognizing those complaints or arguments, the trial judge was nevertheless justified in reaching the conclusion he reached.

Defense counsel questioned Sockler about hypothetical concessions provided by a tenant to a landlord, and he admitted that these concessions to Heritage had not been mentioned or measured in his report. Sockler acknowledged that an arms' length landlord would appropriately consider tenant expenses, such as an incoming tenant's fit-up expense, rent defaults or collection losses, vacancy and other risk factors in determining the amount of rent to demand. In spite of these challenges to the expert's perspective, Sockler's report and opinion offered an acceptable and adequate basis for Judge Francis to consider damages owed to plaintiff for the underpayment of market level rent to Heritage. The judge was free to accept or reject defendants' argument that the market level rent figures needed to be adjusted downward due to concessions that Heritage

received from RPMS and Foam. Sockler's opinion was not lacking merely because it did not embrace concessions that RPMS gave to Heritage.

The record includes invoices that appear to include charges for services that defendants now claim were given for free. In addition, Heritage paid RPMS's invoices for services rendered, which included a thirty-five percent markup for hourly service. Judge Francis considered the rent paid, the quality of the building and the space rented by RPMS and Foam, and decided to reform the contracts based on fair market value for the space. We decline to disturb Judge Francis's exercise of discretion in that regard.

Defendants argue in the alternative, that RPMS and Foam have been paying market rents. We reject that argument. Defendants do not present any authority on this issue; they merely claim that their expert testimony should have been accepted by the judge and plaintiff's rejected. They assert that unlike Sockler's hypothetical report, Krinsky's report set forth a fair market value on the actual tenancies that exist between the landlord and tenants, appropriately taking into account all actual terms and conditions. Krinsky stated that approximately one third of RPMS's space was not directly usable for the purposes intended, possibly not even for storage.

Relying on industry standards, Krinsky determined a specific dollar amount for the tenant fit-up expense that Heritage would have incurred for an arms' length tenant but did not incur with RPMS and Foam, and factored that expense savings into their rental rates.

This dispute centered on the amount of usable space in RPMS's area of the building. Defendants explain that by applying Sockler's July 30, 2008, market rent calculation of $22 per square foot to 7,565 usable square feet in the RPMS space, and factoring into the rental rates the financial impact of the tenant fit-up expense saved by Heritage in connection with the RPMS and Foam tenancies, Krinsky concluded that RPMS and Foam are paying market rents.

Judge Francis obviously considered these arguments and decided what square footage figure should be used to calculate fair market rents for RPMS's and Foam's space. He then relied on Sockler's calculations to set the rents and reform the contracts. The judge was free to rely on that testimony and reject recalculating rents paid based on inferior space and services allegedly given free to Heritage.

Defendants argue that plaintiff's claims of below fair market rent are barred by the statute of limitations. We disagree.

Plaintiff alleged in his complaint that Perla and Steiger breached their fiduciary duty to him because, as Heritage partners, they entered into leases that were below fair market. Defendants contend that such claims are governed by the six-year statute of limitations in N.J.S.A. 2A:14-1, and that the statute begins to run when the subject cause of action accrues, which was the day on which plaintiff's right to file the action first arose. Holmin v. TRW, Inc., 330 N.J. Super. 30, 35 (App. Div. 2000), aff'd o.b., 167 N.J. 205 (2001).

Judge Francis appropriately recognized that the discovery rule provides an equitable basis to "avoid the harsh effects" that may result from "a mechanical application of [the] statute of limitations." Szczuvelek v. Harborside Healthcare, 182 N.J. 275, 281 (2005). Under the discovery rule, a cause of action does not accrue "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he [or she] may have a basis for an actionable claim." Ibid. (quoting Lopez v. Swyer, 62 N.J. 267, 273 (1973)). Nevertheless,

> [i]t is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a simple factual determination; it should be made by a judge and by a judge conscious of the

> equitable nature of the issue before him [or her].
>
> [Ibid. (quoting Lopez, supra, 62 N.J. at 275).]

Defendants assert that plaintiff's cause of action first accrued either in December 1994 when the challenged RPMS and Foam leases were entered into, or at the latest, in January 1995 when the tenants remitted the rent payments to Heritage.

Defendants rely on Axelrod v. CBS Publications, 185 N.J. Super. 359, 369 (App. Div. 1982), where we applied a six-year statute of limitations to bar a plaintiff's claim on the grounds that during the limitations period, the plaintiff was in possession of sufficient knowledge that he should have discovered the existence of any fraud. Defendants also rely on Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945-46 (D.N.J. 1978) (citations and internal quotations omitted), rev'd on other grounds, 611 F.2d 450 (3d Cir. 1979), where the federal court held that the limitations period begins to run when a plaintiff "should have been aware of at least the possibility of fraud" and that the running of the limitations period "does not await the leisurely discovery of the full details or full enormity of the fraudulent scheme."

Defendants assert that plaintiff had both actual and constructive knowledge of his claims of below fair market rent,

and of the injuries alleged in his complaint. They claim plaintiff had actual notice of the rents in Steiger's May 12, 1994, letter and in Heritage's tax returns and form K-1, which he received annually thereafter. He had constructive knowledge of the factual basis for the claims in Heritage's business, accounting, and financial books, which were available for his inspection as a partner in Heritage or by his attorneys, accountants or other representatives. Plaintiff admitted at trial that he made no effort to inspect Heritage's books and accounts prior to November 2007, and merely browsed income tax returns and other information sent to him by defendants.

Judge Francis allowed plaintiff's claims to go forward based on the date of the 2003 lease renewals. Plaintiff filed his complaint within the six-year period of those lease renewals. The renewals are separate acts that changed the term of the leases. Defendants admitted that they never notified plaintiff about the extensions through 2008 and 2012, and it is this fact that is sufficient to overcome the statute of limitations.

We find that there is no merit in defendants' argument that plaintiff's claims of below fair market rent on the lease renewals are barred by the statute of limitations.

We also reject defendants' contention that plaintiff's claims of below fair market rent are barred by the equitable doctrines of estoppel, waiver and laches.

Courts define equitable estoppel as:

> The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed . . ., as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse. . . .
>
> [Cnty. of Morris v. Fauver, 153 N.J. 80, 104 (1998) (quoting Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979)).]

"[A] party asserting equitable estoppel may rely upon 'conduct, inaction, representation of the actor, misrepresentation, silence or omission.'" Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 154 (App. Div. 1990) (quoting Fairken Assocs. v. Hutchin, 223 N.J. Super. 274, 280 (Law Div. 1987)). Equitable estoppel "requires a detrimental change in position based on reasonable reliance." Ibid. The party's "reliance must be reasonable and justifiable" with the burden of proof on the party asserting the estoppel. Foley Mach. Co. v. Amland Contractors, Inc., 209 N.J. Super. 70, 75 (App. Div. 1986).

Here, defendants contend that plaintiff lulled RPMS and Foam into inaction regarding the continuation of their tenancies at the Heritage building by failing to give them any indication that at some point in time between his retirement in late 1993 and the commencement of this action in November 2007 that he had decided that the rental rates were inadequate or unfair. Defendants maintain that RPMS and Foam were not able to take appropriate steps to protect their interests, such as vacating the building and finding more suitable and less expensive space, which would have avoided all of the below fair market rent claims.

Defendants did not show that they reasonably relied on plaintiff's conduct and suffered a consequent detrimental change in position. Instead, they renewed leases that were unfair to Heritage. Moreover, plaintiff did not receive notice of the renewals. Hence, his inaction, that is, his failure to contest the rates, cannot be the basis for defendants to succeed on this claim.

A waiver is "the intentional relinquishment of a known right." Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 354 (App. Div.) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-53 (1958)), certif. denied, 179 N.J. 372 (2004). A waiver must be

accomplished by a "clear unequivocal and decisive act," and "[t]he circumstances must show clearly that while the party knew of the right, he or she abandoned the right either by design or indifference." Ibid. (citations and internal quotations omitted).

Here, plaintiff did not waive his right to contest the lease renewals because defendants never notified him of these renewals. Nothing in the record supports the conclusion that plaintiff waived his right to contest the renewals.

"The policy behind [laches] is the discouragement of stale claims." Gladden v. Bd. of Trs. of Pub. Employees' Ret. Sys., 171 N.J. Super. 363, 371 (App. Div. 1979). "The burden of proof is upon the defendant to show that his adversary prejudiced him by delaying the assertion of his claim without excuse or explanation." Enfield v. FWL, Inc., 256 N.J. Super. 502, 520 (Ch. Div. 1991) (citation omitted), aff'd o.b., 256 N.J. Super. 466 (App. Div.), certif. denied, 130 N.J. 9 (1992). "Even if laches should not apply, plaintiffs must be 'reasonably prompt' in asserting their claim." Id. at 520-21.

Defendants rely on Mancini v. Township of Teaneck, 179 N.J. 425, 436 (2004), where the Court explained that the doctrine of laches depends on the facts and circumstances of the particular case and its application rests within the sound discretion of

the trial court. An appellate court reviews a laches determination for an abuse of discretion. Ibid.

Laches is "an equitable defense that may be interposed in the absence of the statute of limitations." Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145, 151 (1982). It is applicable when "'there is unexplainable and inexcusable delay in enforcing a known right whereby prejudice has resulted to the other party because of such delay.'" Cnty. of Morris, supra, 153 N.J. at 105 (quoting Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 171 (Law Div. 1994), aff'd o.b., 287 N.J. Super. 114 (App. Div. 1996)). Relevant factors thus include "[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay . . . ." Lavin, supra, 90 N.J. at 152 (citation omitted).

A defense that is based on laches is similar to one premised on the expiration of a limitations period, in that both concern delay on the part of the pursuing party. Mancini, supra, 179 N.J. at 434. "The time constraints of laches, unlike the periods prescribed by the statute of limitations, are not fixed but are characteristically flexible." Lavin, supra, 90 N.J. at 151. Moreover, case law suggests that a claim that is defeated by a limitations defense, would likewise not survive a laches defense. See id. at 153 n.10 ("Where a legal and an

equitable remedy exist for the same cause of action, equity will generally follow the limitations statute . . . . Where the equitable cause of action is analogous to the one at law, laches may depend solely on the comparable statute of limitations.").

Defendants argue that because plaintiff seeks both the legal remedy of monetary damages and the equitable relief of reformation of the leases, such claims are subject under Lavin to both limitations and laches defenses. Defendants claim prejudice by plaintiff's delay because RPMS and Foam remained as tenants and continued to pay rent while damages were mounting.

Here, Judge Francis determined that plaintiff was due damages based on the 2003 lease renewal dates and expense charges going back to 2003. Laches is inappropriate because defendants did not notify plaintiff of the lease renewals. Further, while plaintiff could have reviewed the invoices at an earlier date, there was no prejudice to defendants because there is no indication of lost evidence or witnesses who would have testified years earlier but were no longer available. Therefore, we find that there is no merit to defendants' argument that plaintiff's claims of below fair market rent are barred by the doctrines of estoppel, waiver and laches.

Defendants maintain that plaintiff should be denied retroactive relief on his claims of below market rent. They

argue that they would suffer significant prejudice if monetary damages are sustained, particularly since the damages are mechanically extrapolated back to January 1, 2004. Defendants rely on Lavin, supra, 90 N.J. at 148-55, without citing to any specific portion of the opinion, and state that the Court considered how a damage award should be impacted by an unreasonable delay in asserting the claim. This argument merely addresses laches, which we have already discussed in the previous issue.

Defendants claim that plaintiff's belated assertion resulted in an enormous retroactive rent increase, for which RPMS and Foam have not budgeted and not agreed to pay. Judge Francis considered the fiduciary duty that Steiger and Perla owed plaintiff and determined what fair market value should be for the rental periods at issue. While RPMS and Foam owed money to Heritage, the damages are not an unfair retroactive rent increase, but instead a calculation of money due Heritage for fair market rental of the space.

Similar to the equitable doctrines already discussed, the doctrine of unclean hands is an affirmative defense which may be applied at the judge's discretion. Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 156 (App. Div. 2002). Its purpose is to

effectuate the principle that relief should not be granted to a wrongdoer. Ibid.

While equity avoids rewarding a party with unclean hands, that doctrine is not invoked upon any particular finding, but rather when the totality of circumstances indicates that the claimant stands to reap a reward despite its unjust conduct. Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65 (App. Div. 1993). This means that the claimant "produced the situation and created the attendant hardship." Heritage Bank, N.A. v. Ruh, 191 N.J. Super. 53, 72 (Ch. Div. 1983).

Here, defendants assert that plaintiff abandoned Heritage in late 1993 by withdrawing from an active role in the partnership. Defendants contend that plaintiff did not initiate any conversation with Perla and Steiger, and he did not respond to their communications. However, Judge Francis found that Steiger and Perla never told plaintiff about the lease renewals, so his inaction does not show that he produced a situation that created a hardship. Instead, the totality of the circumstances show that Steiger's and Perla's actions favored the entities in which they, but not plaintiff, had an interest. That resulted in the unfairness to Heritage. The judge did not abuse his discretion by failing to invoke the doctrine of unclean hands, and we have no cause to do differently.

On his cross-appeal, plaintiff asserts that defendants were not entitled to partial summary judgment based on laches or the statute of limitations. This argument relates to the period before November 13, 2001, where Judge Francis dismissed the claims based on laches. Plaintiff has included the November 7, 2008, order of partial summary judgment, but has not referred to a transcript from that date, or other document in the record setting forth the reasoning for the judge's decision.

It is not possible to thoroughly consider this issue because the record on appeal does not include Judge Francis's reasoning for granting partial summary judgment. Rule 2:5-3(b) requires that an appellant, with certain exceptions, file transcripts with this court of "the entire proceedings in the court . . . from which the appeal is taken." Plaintiff has also not complied with Rule 2:5-3(a), which requires "if a verbatim record was made of the proceedings before the court . . . from which the appeal is taken, the appellant shall, no later than the time of the filing and service of the notice of appeal, serve a request for preparation of an original and copy of the transcript . . . ." We, therefore, decline to address this issue. See Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 55 (2004) (upholding the Appellate Division's refusal to address the plaintiff's claim because she failed to submit a final order

or a trial transcript). See also Pressler and Verniero, Current N.J. Court Rules, comment 2 on R. 2:5-3(b) (2012) ("Failure to provide the complete transcript may result in dismissal of the appeal . . . .").

Plaintiff asserts that he was entitled to bring claims occurring outside the statute of limitations under the discovery rule. Plaintiff is correct that equitable principles may be applied to extend statutory periods of limitations. See Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524-25 (2005) (flexible applications of procedural statutes of limitations may be based on equitable principles, such as the discovery rule or estoppel).

Plaintiff argues that he is entitled to equitable tolling because defendants failed to inform him about the below market leases and the RPMS expense fees. It was within Judge Francis's discretion whether to apply an exception to the statute of limitations in this case. "The doctrine of equitable tolling has traditionally been applied where . . . the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Price v. N.J. Mfrs. Ins. Co., 368 N.J. Super. 356, 362 (App. Div. 2004), aff'd, 182 N.J. 519 (2005). This is not the situation here.

Instead, Steiger, Perla and plaintiff initially decided to create Heritage without employees and to rely on RPMS and Foam to cover Heritage's expenses. This is not a situation where the statute of limitations should have been tolled.

On his cross-appeal, plaintiff also maintains that defendants' management fees should have been further reduced. We disagree.

Plaintiff explains that RPMS's fees consisted of three charges: (1) administration fees, (2) performance incentives and (3) hourly charges. Defendants respond that the judge was only concerned with the first two categories, and the third category consisted of fees for non-management services. Defendants explain that this third grouping included hourly invoices for professional services performed by Steiger, as well as typing, design work, preparation of tenant layout drawings, office cleaning, building repairs and snow removal performed by various individuals.

Plaintiff states that the total of these fees was well above a reasonable level of management fees, however, the judge's ruling only reduced the administration fees and the performance incentives and failed to reduce the hourly charges that RPMS invoiced to Heritage.

After Judge Francis rendered his oral decision, defense counsel questioned the judge and he stated that he was only concerned with the reasonableness of RPMS's management fees, which would include administration fees and performance incentives. The judge stated that he was concerned with these management fees if they exceeded six percent of gross rents.

Judge Francis stated that the "other fees," representing hourly professional services, were reasonable and plaintiff was aware of them prior to his retirement from RPMS in late 1993. Our review of the record shows that plaintiff never presented any evidence to establish the unreasonableness of this third category of fees. Plaintiff's experts, a certified public accountant and an appraiser, found nothing unusual, extraordinary, or excessive in Heritage's operating expenses as billed by RPMS. Had plaintiff sought to recover damages for claims of overbilling, he would have had to present proof that the invoices were either for services that were unnecessary or that the hourly rates were unjustified. Plaintiff was aware from the start that Heritage had no employees and that RPMS was billing Heritage for these services.

Further, defendants correctly state that it was plaintiff's counsel who submitted the proposed form of judgment that did not contain any finding of unreasonableness of RPMS's hourly

professional services fees, which confirms plaintiff's understanding of the judge's decision that these fees were not unreasonable. We defer to the trial judge's determination. Rova Farms, supra, 65 N.J. at 483-84.

Affirmed.