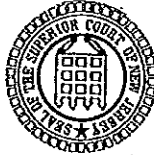


SUPERIOR COURT OF NEW JERSEY
HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY



Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE WRITTEN
APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

Gregory J. Castano, Jr. Esq.
Castano Quigley
155 Passaic Avenue, Suite 340
Fairfield, New Jersey 07004

Justin P. Walder, Esq.
Roger Plawker, Esq.
Pashman Stein Walder Hayden, P.C.
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07061

Re: Hartz Mountain Industries, Inc. and Hartz Kearny LLC. v.
Township of Kearny, New Jersey
Docket No. HUD-C-25-17
Date of Hearing: June 23, 2017
Date of Decision: June 27, 2017

Dear Counsel:

Introduction

Presently before the Court are cross-motions for summary judgment filed by Plaintiff Hartz Mountain Industries, Inc. (hereinafter "Hartz") and Defendant Township of Kearny (hereinafter "Kearny"), arising out of Plaintiff's complaint seeking to compel Kearny to provide an estoppel certificate in a form sufficient to satisfy the requirements of Plaintiff's lender in order to secure a financing agreement connected to the redevelopment of a 9.5-acre tract of land, which is part of a larger 26-acre property leased to the Plaintiff by the Defendant on Bergen Avenue in Kearny, New Jersey (hereinafter the "Bergen Avenue property" or "Bergen Avenue parcel").

This action arises out of a series of redevelopment leases entered into between Plaintiff and Defendant for tracts of land in Kearny, under which Plaintiff Hartz was awarded the redevelopment rights for certain properties in need of remediation. The relationship between the parties began over thirty-eight (38) years ago.

Initially, Kearny and Hartz executed a Master Leasing and Option Agreement on December 20, 1978 (the "Hartz Master Lease"), under which Hartz was designated as the redeveloper of certain parcels of land located in Kearny along the Belleville Turnpike. On August 8, 1979, Kearny and a separate entity, Mimi Development Associates, entered into a separate lease agreement (the "Mimi Master Lease"), concerning a separate 26-acre property located on Bergen Avenue in Kearny. Thereafter, as a result of a series of settlement agreements resolving federal and state litigation between Kearny, Hartz, and the Mimi company, in which it was determined that the Mimi lease had been produced by bribery, on August 9, 1988 the parties entered into a stipulation of settlement conveying the redevelopment rights for the Bergen Avenue property under the Mimi Master Lease to Hartz. Kearny subsequently approved the settlement by a resolution dated September 14, 1988.

Since that time, Hartz has entered into several seventy-five (75) year severance leases with Kearny for redevelopment of portions of the property governed by the Hartz Master Lease, dated December 20, 1984 and December 6, 2000, but did not enter into any severance leases concerning the Bergen Avenue property until 2016.¹ However, on June 14, 2016, Kearny passed a resolution re-affirming the settlement of the litigation, stating that all rights under the Mimi Master Lease were assigned to Hartz, and allowing the Mayor to execute a severance lease for the 9.5-acre portion of the Bergen Avenue parcel with Hartz. Thereafter, on June 28, 2016, Kearny and Hartz executed a Severance Lease for the 9.5-acre portion of the Bergen Avenue Mimi property.

Since the execution of that severance lease, Hartz has entered into a sublease with Cummins Power Systems, LLC for that 9.5-acre parcel, under which Hartz would construct a maintenance facility on the property and thereafter Cummins would use the property for a training, sales, and repair center. In connection with its obligation to construct the improvements on the property, Hartz sought financing from Teachers Insurance and Annuity Association of America (hereinafter "Teachers"). As a precondition to providing the financing, Teachers required that Hartz obtain an estoppel certificate from Kearny, as landlord, in a specific form. However, Kearny has refused to provide the required estoppel certificate, and instead offered an unsatisfactory version, despite provisions in the Mimi Master Lease and Hartz Master Lease requiring Kearny to take any "necessary or appropriate" steps to effectuate the purpose of the lease, and the fact that Kearny had previously submitted estoppel certificates for Hartz on at least six (6) other occasions for properties arising under the Hartz lease. Kearny has never before issued an estoppel certificate for a property governed by the Mimi lease.

Plaintiff subsequently filed this action to compel Kearny to provide an estoppel certificate, by complaint and order to show cause dated February 24, 2017. However, after the return date of the order to show cause, this Court entered an order on April 21, 2017 denying Plaintiff's request for summary relief, noting that the matter was not ripe for summary adjudication under R. 4:67-1, and setting the matter down for an expedited discovery schedule.

¹ As set forth in Plaintiff's papers, the parties were delayed in entering into severance leases for the property, under which Plaintiff Hartz would be able to sublease smaller portions of the overall Bergen Avenue tract to sublessors, due to the extensive efforts undertaken by Hartz to remediate the contaminated land, which had previously served as a landfill.

Now, both parties have filed motions for summary judgment. Defendant Kearny argues, in its motion for summary judgment, that: (1) it is not required, as a matter of law, to provide an estoppel certificate because the June 2016 Severance Lease does not include a requirement to issue an estoppel certificate and because Kearny had told Plaintiff, during negotiations for the Severance Lease, that it would not provide an estoppel certificate; and (2) the complaint must be dismissed because Plaintiff has unclean hands, caused by Plaintiff's installation of utility lines under the property, which Kearny alleges was done without obtaining the proper easement. In support of its motion, Defendant Kearny has produced the "expert" report of John J. Curley, Esq., who opines that New Jersey law does not compel a landlord to deliver an estoppel certificate absent a contractual obligation to do so.

In its cross-motion for summary judgment, Plaintiff Hartz argues that: (1) the Mimi Master Lease requires Kearny to issue the estoppel certificate because Kearny is required to take all "necessary or appropriate" steps to effectuate the lease and because Kearny has previously issued six (6) prior estoppel certificates; (2) the estoppel certificate should reflect the terms of the Mimi Master Lease, including the rent described in the Mimi Lease; (3) there is no defect in Hartz's rights that prevent Kearny from issuing the estoppel certificate because Hartz's rights to the Mimi Master Lease arise from a settlement between the parties and because Kearny has subsequently ratified the Mimi Master Lease and Hartz's rights under it and has acknowledged that it does not challenge Hartz's rights as developer under the lease; and (4) Hartz does not have unclean hands and has not breached the Mimi Master Lease.

Facts

Plaintiff Hartz Mountain Industries and Defendant Kearny are parties to a Master Leasing and Option Agreement dated December 15, 1978. (Plaintiff's Statement of Facts ¶ 6; Master Lease, Verified Compl. Ex. A) (hereinafter "Hartz Master Lease"). Under this Hartz Master Lease, Hartz is the designated and exclusive redeveloper of certain parcels of land located in Kearny along the Belleville Turnpike. (Master Lease, Compl. Ex. A, ¶ 3, 6, 8).

The Hartz Master Lease contains no specific requirement that Kearny provide an estoppel certificate to the Plaintiff. However, the Hartz Master Lease contains two (2) similar provisions requiring Kearny to take "all necessary steps" to effectuate the purpose of the lease. Specifically, section 2(d) provides:

The Town will take all necessary steps to assure that each Redevelopment Parcel may be leased to Redeveloper for the purposes herein set forth, and may be redeveloped by Redeveloper in accordance with the terms of this Agreement and of the applicable Lease.

Likewise, section 2(i) provides:

The Town will take any and all other or further action necessary or appropriate to implement this Agreement or to effectuate its purposes

A separate Master Leasing and Option Agreement dated August 8, 1979 between Mimi Development Associates, an apparently now-defunct entity, and Kearny (hereinafter "Mimi Master Lease") covers an approximate 26-acre portion of Block 286, Lot 4 near Bergen Avenue ("the Bergen Avenue property"). (Plaintiff's Statement of Facts ¶ 8; Mimi Lease, Compl. Ex. B). The Mimi Master Lease obligates the redeveloper to prepare the leased parcels for commercial development, including by building improvements on the parcels.

While the Mimi Master Lease contains no specific requirement that Kearny provide an estoppel certificate, the Mimi Master Lease contains identical provisions to the Hartz Master Lease requiring Kearny to take "all necessary steps" to effectuate the purposes of the lease. Specifically, section 2(d) provides:

The Town will take all necessary steps to assure that each Redevelopment Parcel may be leased to Redeveloper for the purposes herein set forth, and may be redeveloped by Redeveloper in accordance with the terms of this Agreement and of the applicable Lease.

Likewise, section 2(j) provides:

The Town will take any and all other or further action necessary or appropriate to implement this Agreement or to effectuate its purposes

Section 11(b) of the Mimi Master Lease prohibits Hartz from subleasing the redevelopment area prior to proper completion of the improvements, absent Kearny's approval.

Litigation Concerning the Mimi Master Lease and Assignment of the Mimi Master Lease to Plaintiff Hartz

Mimi, Hartz, and Kearny were involved in federal and state litigation in the 1980s concerning the rights to develop the Bergen Avenue property that Kearny had leased to Mimi under the Mimi Master Lease. Hartz had evidently brought a lawsuit in the Chancery Division, under Docket No. HUD-C-2950-79, in which Hartz claimed that it had a right of first refusal for the Bergen Avenue property. The Kearny mayor and a councilman filed affidavits stating that the Town never gave Kearny a right of first refusal. See Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1265 (3d Cir. 1987). As a result, Hartz entered into a stipulation of settlement waiving any rights it may have otherwise had in the Bergen Avenue property covered by the Mimi Master Lease. Ibid. Thereafter, in early 1983, the mayor and the councilman were convicted of federal offenses relating to the taking of bribes leading to the procurement of the Mimi Master Lease.

In 1984, Hartz and Kearny, as separate plaintiffs, initiated an action in the United States District Court, under Civil Action No. 84-4056, against all the entities implicated in the Mimi Master Lease, which had been produced by bribery. In a settlement agreement between Kearny and the Mimi defendants dated June 4, 1986, Kearny dismissed all claims against Mimi, and Mimi agreed to pay Kearny \$500,000 plus attorneys' fees. Kearny also expressly agreed to "recognize and support the validity" of the Mimi Master Lease, and that the lease "shall be

recognized as valid by the Town of Kearny." (Settlement Agreement dated June 4, 1986, ¶ 1-5, 8, attached as Ex. H to Cinotti Cert).

Hartz proceeded with its own claims against Mimi until 1988, when Hartz, Mimi, and Kearny agreed to another settlement, which was put on the record before Judge Politan of the U.S. District Court for the District of New Jersey. (Plaintiff's Statement of Facts ¶ 11; Transcript Cinotti Cert. Ex. I). Under this settlement, Mimi assigned Hartz the parcel of land described as Block 286, Lot 4 (the Bergen Avenue property), except for a 5-acre parcel that Mimi would retain. (Plaintiff's Statement of Facts ¶ 12; Transcript at 3:5-24). A stipulation of settlement, dated August 9, 1988, memorialized the agreement and stated that Hudson Meadows, as Mimi's successor, "hereby conveys and assigns to Hartz . . . all of its leasehold rights and interests to . . . Block 286, Lot 4 . . . as conveyed by the Town to [the Mimi entities]." (Plaintiff's Statement of Facts ¶ 13; Cinotti Cert. Ex. J, Town of Kearny v. Hudson Meadows Urban Renewal Corp., No. 84-4056 (D.N.J.), Stipulation of Settlement ¶ 2). Under this stipulation, all other interested parties disclaimed any interest in the property. (Stipulation ¶ 3-4). This settlement was approved by a resolution passed by Kearny, dated September 14, 1988, which provides that the Town was authorized to "execute any further documents required to effectuate said settlement, including formal Stipulation of Settlement; any required pleadings, consents to assignment of all or part of certain lease rights now held by Hudson Meadows and/or Hartz Mountain Industries." (Plaintiff's Statement of Facts ¶ 14; Ex. J).

Facts Pertaining to Kearny's Recognition of Hartz's Right to Redevelop the Land under the Mimi Lease

On November 2, 1999, Kearny ratified the Mimi Master Lease in an amendment to the Mimi Master Lease. (Plaintiff's Statement of Facts ¶ 15; Compl. Ex. D).

On June 28, 2000, Hartz and Kearny entered into a Financial Agreement concerning the redevelopment of the Mimi Master Lease property through the implementation of an environmental remediation program by Hartz. (Plaintiff's Statement of Facts ¶ 17; Compl. Ex. K). In connection with this agreement, the mayor of Kearny, Alberto Santos, submitted a letter, dated July 14, 2000, to the New Jersey Redevelopment Authority, applying for a grant under the Brownfields Remediation Program, in which he acknowledged that "[t]he Town has designated Hartz Mountain Industries, Inc. ("Hartz") as the designated redeveloper of the [Bergen Avenue property]." (Plaintiff's Statement of Facts ¶ 17; Compl. Ex. J). The letter notes that "[t]he grant monies will be used by the Town to reimburse Hartz for actual remediation costs incurred in the remediation of this Property."

Kearny, in its responses to Plaintiff's requests for admissions, stated that it "has recognized Hartz as the designated redeveloper of the 26-acre portion of the Bergen Avenue parcel under the Hartz Master Lease and the Mimi Master Lease." (Plaintiff's Statement of Facts ¶ 16; Cinotti Cert. Ex. G, ¶ 13).

June 2016 Severance Lease

From approximately June 2015 through June 2016, the parties negotiated the terms of a severance lease for the subject 9.5-acre portion of the Bergen Avenue parcel. The parties exchanged numerous communications and draft lease agreements, which under a proposed "Substitute Lease" or "Ground Lease" did include provisions calling for the adjustment of the amount of rent due and contained negotiations concerning the form of an estoppel certificate. Kearny took the position, during these negotiations, that it could not certify as to the validity of the title to the land subject to the Mimi Master Lease. Kearny, in support of this proposition, at the time and also in support of its motion, cited to the fact that Hartz's own title company created an exception for the property due to the background of the Mimi Master Lease.

These negotiations came to a head when Plaintiff, by letter dated June 8, 2016, requested that Kearny either sign a severance lease document, in the form provided for in the Mimi Master Lease, or a "Final Severance Lease" that had been the subject of negotiations between the parties. Separately in that letter, Hartz requested that the Town "authoriz[e] the execution and delivery of an estoppel certificate in the form" requested by Hartz. Ultimately, the parties agreed to sign the form of the severance lease called for in the Mimi Master Lease, and thereafter engaged in a period of negotiations as to the form of an estoppel certificate that might be acceptable to both parties. They never reached an agreement on the form of an estoppel certificate.

On June 14, 2016, Kearny authorized by resolution the issuance of a severance lease for the 9.5-acre portion of the 26-acre Bergen Avenue property subject to the Mimi Master Lease, and in so doing affirmed that the federal litigation "was settled in 1988 and in the Stipulation of Settlement all rights under the [Mimi Master Lease], including the lease rights to Block 286, Lot 4, were assigned to Hartz with the exception of five acres reserved to Mimi." (Plaintiff's Statement of Facts ¶ 18; Resolution attached as Ex. G to Compl.). Thereafter, Kearny issued a Severance Lease to Hartz dated June 28, 2016, which permits Hartz to redevelop the 9.5-acre portion at issue in this case. (Plaintiff's Statement of Facts ¶ 20; Severance Lease, Comp. Ex. H). The term of the Severance Lease is 75 years from June 28, 2016. (Plaintiff's Statement of Facts ¶ 21). As to the issue of rent, the Severance Lease provides:

The rent hereunder shall be the rent payable under the First Lease. The date for payment of such rent, the conditions relating to default in payment, and all other applicable provisions of the First Lease shall remain with respect to the First Severance Lease.

The rent due under the Mimi Master Lease is \$1,500 per acre per annum. The Severance Lease further provides that "[t]he improvements to be constructed on the First Severance Lease Parcel are as approved by the Kearny Planning Board) and that "[i]n all other respects, the terms and conditions of this First Severance Lease shall be the same as those of the First Lease, made applicable to the First Severance Lease Parcel."

Hartz's Redevelopment Efforts and Sublease to Cummins

Since 1988, Hartz has spent more than \$8 million to remediate a former landfill that occupied the 26-acre Bergen Avenue property assigned to Hartz under the Mimi Master Lease. (Plaintiff's Statement of Facts ¶ 25).

Following the execution of the June 28, 2016 Severance Lease, Hartz entered into a sublease with Cummins Power Systems, LLC for the 9.5-acre parcel of the Bergen Avenue property covered by the Severance Lease. Cummins is a Fortune 500 truck and marine-engine manufacturing and servicing company, and will use the facility for technical training, parts sales, and truck maintenance and repair. (Plaintiff's Statement of Facts ¶ 26). Pursuant to this sublease, Hartz is constructing a state-of-the-art truck maintenance facility and related improvements. (Plaintiff's Statement of Facts ¶ 27). Under the Cummins Sublease, the commencement date of the lease is defined as "the date on which Landlord's Work . . . is Substantially Complete" or the date that is the earlier of 90 days after the anticipated commencement date or the date the tenant first occupies the premises.

On July 6, 2016, the Kearny Planning Board approved Hartz's application for a site plan to construct improvements on the parcel at issue in this case. (Plaintiff's Statement of Facts ¶ 28; Planning Board Resolution, Cinotti Cert. Ex. N; Def's Req. for Admissions ¶ 38, Cinotti Cert. Ex. G). Importantly, the resolution was affirmed by Mayor Alberto Santos, Kearny Business Administrator and Zoning Officer Michael Martello, and Commissioner James J. Capobianco.

Through May 2017, Hartz has incurred more than \$14 million in costs related to the construction of improvements on the parcel, not including cost of capital, for the Cummins' facility. (Plaintiff's Statement of Facts ¶ 29).

Estoppel Certificates

In order to finance the construction project pursuant to the Cummins Sublease, Hartz sought approximately \$19 million in financing from Teachers Insurance and Annuity Association of America. (Plaintiff's Statement of Facts ¶ 36). As a precondition to providing the financing, Teachers requested an estoppel certificate from Kearny as landlord in the form attached to the Complaint at Exhibit I. (Plaintiff's Statement of Facts ¶ 37). However, Kearny refused to provide the required estoppel certificate and has instead proposed a different version of the certificate. (Plaintiff's Statement of Facts ¶ 40).

Teachers rejected the estoppel certificate proposed by the Township of Kearny and will not close on the financing agreement without the estoppel certificate in the form that it has requested. (Plaintiff's Statement of Facts ¶ 44).

Kearny has provided Hartz with estoppel certificates at least six (6) times in the past for properties covered by the Hartz Lease, but has never issued an estoppel certificate for properties falling under the Mimi Master Lease. (Plaintiff's Statement of Facts ¶ 31; Defendant's Brief, p. 4). In relation to those previously issued estoppel certificates, Kearny did not seek to

adjust the rent that Hartz owed Kearny under the Hartz Master lease. (Plaintiff's Statement of Facts ¶¶ 32-33; Def's Response to Pltfs' Req. for Admissions ¶¶ 55-56, Cinotti Cert. Ex. G). The previously issued estoppel certificates state the lease term, rental rate, absence of default, and the other terms now requested by Hartz.

Installation of Underground Pipes

Defendant asserts that Plaintiff has installed underground utility pipes beneath the property. Defendant argues that this was done "without an easement underneath Town owned public land that is not part of their leasehold interest pursuant to the 'Mimi Lease.'" (Defendant's Statement of Material Facts ¶ 4). Defendant, therefore, argues that the lease has been breached which justifies its refusal to execute the estoppel certificate.

However, as indicated by Plaintiff, the Planning Board and Town of Kearny both authorized the right of way for installation of the utilities in the relevant site plan by resolution and through the Mimi Master Lease. (Plaintiff's Statement of Facts ¶ 4). Specifically, the Town of Kearny passed a resolution, at the request of PSE&G, on April 11, 2017, permitting PSE&G to install a new gas service at the Bergen Avenue parcel. (Cinotti Cert. Ex. L). Furthermore, the Preliminary and Final Sight Plan Application, dated February 10, 2016, submitted by Hartz to the Kearny Planning Board, indicates that "[g]as service will be brought to the site." (Application, Cinotti Cert. Ex. M, at 2). Finally, the application was approved by a resolution by the Kearny Planning Board, dated July 6, 2016, after public hearings were held. (July 6, 2016 Resolution, Cinotti Cert. Ex. N).

Expert Reports

Both parties submitted expert opinions in support of their motions for summary judgment. The Court offers the following as a summary of the reports. However, for purposes of its consideration of the motions on the merits, the Court will only consider the reports of Defendant's expert John J. Curley, Esq. and Plaintiff's expert Edward J. Butler, Esq.²

Defendant's Expert John J. Curley, Esq., of John J. Curley LLC, dated May 2, 2017 (Ex. 31 to Defendant's Certification)

Mr. Curley advises that an estoppel certificate "would reassure plaintiffs' lender that the Mimi Master Lease remains in full force and effect, that the Hartz entity is not in default, and that the rent is paid to a current date." However, Mr. Curley states that the Plaintiff's proposed estoppel certificate goes beyond those representations. Further, an estoppel certificate, as stated by Mr. Curley, "is enforceable against the party who has signed it without inquiry into the party's actual knowledge."

² The Court notes that Defendant Township of Kearny, in its letter to the Court dated May 17, 2017, argued that it should be permitted to retain an additional expert report to respond to a report furnished by a second expert retained by Plaintiff, Mr. Robert S. Goldsmith, Esq., of Greenbaum Rowe Smith & Davis LLP. However, since the Court feels that the issue presented is ripe for summary judgment, the Court will not consider Plaintiff's second expert, Mr. Goldsmith.

On the issue of the purpose of an estoppel certificate, Mr. Curley provides the following observation:

An estoppel certificate is often sought by a ground lease tenant from his landlord in order to obtain financing by pledging leasehold mortgage. Whether a tenant is entitled to compel his landlord to issue an estoppel certificate depends upon the terms of the lease. In New Jersey, no statutory or decisional law requires a landlord to deliver an estoppel certificate to his tenant or tenant's lender. See, Dowd, Gordon and Schachter, Commercial Real Estate Transactions in N.J., Section 2.26 (ICLE):

The obligation of a party to sign and deliver an estoppel should be set forth in the lease and the basic components of the estoppel should be described in the lease (see Article 38 of the Office Lease form, *supra*). Absent such contractual obligation, the authors know of no common or statutory law in New Jersey that would impose any such requirement upon either the tenant or the landlord.

Attorneys practicing in this area are well aware of the lack of legal compulsion where the lease fails to contain a covenant requiring the landlord to issue an estoppel certificate. In fact, the parties to a long-term lease will frequently negotiate the terms of the estoppel certificate and attach the pre-negotiated form as a lease exhibit so that there is no doubt as to the contract obligations of the parties.

Mr. Curley therefore concludes, without any discussion of the specific terms of the underlying documents and actions by the Defendants over the last several years, that since the Mimi Master Lease does not have a provision dealing with estoppel certificates, "[n]one of these agreements contain a covenant requiring the Town to assume the risk and burden of issuing an estoppel certificate."

Plaintiff's Certification of Edward J. Butler, Jr., Esq., of McCarter & English, dated February 23, 2017 (Ex. D to Plaintiff's Certification)

Mr. Butler states that he was asked to provide "an opinion with respect to usage of . . . an estoppel certificate in connection with real estate development and financing transactions involving lessors and lessees." Mr. Butler describes the common use of an estoppel certificate as a way of "giv[ing] the lender comfort that as of the date of the making of the loan, the ground lease remains in full force and effect, the primary business terms of the ground lease, such as the rent being paid and the expiration date of the lease, are accurately set forth in the lease, and the borrower is not in default of its obligations under the ground lease."

Further, Mr. Butler concludes that, after reviewing the Proposed Teachers Estoppel and the proposed Kearny Estoppel, "[t]he Proposed Teachers Estoppel is consistent with the type of estoppel I typically see in financing transactions secured by a leasehold mortgage. It is also similar to the 2002 Estoppel previously executed by Kearny for Teachers." In comparison, Mr. Butler concludes that the proposed Kearny certificate is "woefully inadequate . . . [as] it simply

states the Ground Lease has not been terminated, there are no amendments and Kearny has not declared a default." Mr. Butler advises that he is "unaware of any lender that would accept such an incomplete estoppel in connection with a financing transaction similar to the proposed Teachers Loan."

Discussion

Contract Interpretation

The rules of contract interpretation are well-established, as is the concept that the role of the court is to give "juristic effect" to the intention of the parties, as expressed in the contract. George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 170 N.J. 20, 27-28 (1954); see also Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001) ("Courts are generally obligated to enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.").

While courts ordinarily give the terms of a contract "their plain and ordinary meaning" in order to determine the meaning of the agreement as intended by the parties, Nestor v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997), "[c]ourts use a number of interpretive devices to discover the intention of parties to a contract." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 548 (1994) (quoting Jacobs v. Great Pacific Century Corp., 104 N.J. 580, 582 (1986)). This is true even where the contract is free on its face of ambiguity. Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). In interpreting the intention of the parties, "[t]he polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." Ibid. At the same time, however, "[s]emantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties. Consequently, the words of the contract alone will not always control." Conway v. 287 Corporate Ctr. Associates, 187 N.J. 250, 269-70 (2006) (quoting Schwimmer, supra, 12 N.J. at 307) (alteration in original). Accordingly, when interpreting contracts, courts "look to the words used by the drafters . . . , not in isolation but as a whole." Town of Kearny v. Discount City of Old Bridge, Inc., 205 N.J. 386, 411 (2011).

Courts are obliged to "consider all of the relevant evidence that will assist in determining the intent and meaning of [a] contract." Conway, supra, 187 N.J. at 269. The parol evidence rule allows for "[t]he admission of evidence of extrinsic facts . . . to secure light by which to measure its actual significance . . . for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms." Schwimmer, supra, 12 N.J. at 301-02. It is the role of the court to consider this parol evidence in aiding its review of the intent of the parties, by considering "what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose." Id. at 302. Therefore, courts "permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." Conway, supra, 187 N.J. at 270. In considering the intent of the parties and the meaning of the contractual terms, courts may use a number of sources of extrinsic evidence to determine the intent of the parties and to give the language of the contract

a rational meaning, including "consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 221 (1979).

"While it is a general rule that the construction of a contract is a question of law for the court, that rule is predicated upon the absence of an issue of fact. Where the effect of a written instrument depends not merely on its construction and meaning but upon disputed collateral facts in pais and extrinsic circumstances, the inferences of fact to be drawn therefrom are for the jury's determination." Jennings v. Pinto, 5 N.J. 562, 569-70 (1950).

In order to interpret the intentions of the parties, the Court must first look to the plain language of the underlying lease contracts between Hartz and Kearny. First, the June 28, 2016 "Severance Lease" between Kearny and Hartz, which governs the specific parcel of land at issue here, provides no specific guidance on the issuance of an estoppel certificate. However, the Severance Lease does specifically adopt the language of the First Lease between the parties for this tract of land, meaning the Mimi Master Lease dated August 8, 1979. Specifically, the Severance Lease provides, under section five (5):

In all other respects, the terms and conditions of this First Severance Lease shall be the same as those of the First Lease, made applicable to the First Severance Lease Parcel.

Accordingly, the Court must look to the language of the Mimi Master Lease to determine if the parties intended to compel Kearny to issue an estoppel certificate.

The Mimi Master Lease provides, under section 2(j), that the "Town will take any and all other or further action necessary or appropriate to implement or this Agreement or effectuate its purposes." Section 2(d) of the Mimi Master Lease also provides that:

The Town will take all necessary steps to assure that each Redevelopment Parcel may be leased to Redeveloper for the purposes herein set forth, and may be redeveloped by Redeveloper in accordance with the terms of this Agreement and of the applicable Lease³

The purpose of the Mimi Master Lease, as set forth in the lease itself, is to "facilitate redevelopment of [the] area" and "to permit the construction [on the parcel] by the Redeveloper" of commercial buildings. (Mimi Master Lease, Recitals, at 2-3). In fact, the Mimi Master Lease, under section 6(a)(2), requires Hartz to "use its best efforts . . . to redevelop the Redevelopment Area in order to generate employment and tax ratables for the Town by the Construction of such buildings and other facilities as are permitted by law." Thus, it is clear that the Mimi Master Lease, by its plain language, compels the Defendant Kearny to take any and all "necessary" or "appropriate" actions to implement the agreement so that Hartz may redevelop the property and construct commercial buildings on that property.

³ As an additional note, the Hartz Master Lease, dated December 15, 1978, contains identical provisions under sections 2(d) and 2(i).

As an initial note, the use of the expansive phrases "any and all" clearly indicates that the parties intended for Kearny's duties under the lease to be expansive. See generally In re J.S., 223 N.J. 54, 73 (2015). However, the leases do not provide any specific direction as to what may constitute "necessary" or "appropriate" actions to implement the agreement. Accordingly, the Court may, under the principles of contract construction and interpretation previously discussed, analyze the extrinsic evidence presented to the Court to determine the intentions of the parties in entering into these lease agreements. Specifically, the Court must analyze whether the issuance of an estoppel certificate will facilitate the redevelopment of the parcel of land at issue here and effectuate the purposes of the lease.

Plaintiff's financier, Teachers, seeks the estoppel certificate in order to provide Plaintiff Hartz a loan to finance its development project relating to the Cummins sublease. Estoppel certificates are sought in order to reassure lenders that the primary source of repayment for a potential loan, the borrower's leasehold interest in a ground lease, is secure. As set forth in a real estate law treatise, cited by the Defendant in support of its motion:

An estoppel certificate or letter is customarily delivered by a tenant in the context of either a refinance of the property in which the demised premises are located, or at the same of the property to a third party. The estoppel confirms certain facts regarding the lease, such as the parties, the rental amounts, the lease term, whether any default exists, the amount of the security deposit, renewal and first refusal rights, etc., with a recognition by the tenant that the prospective purchaser and/or lender will rely on the estoppel in completing the transaction. Further, the estoppel is intended to have the effect of barring, or estopping, the tenant from asserting in the future a state of facts different from that set forth in the estoppel.

Commercial Real Estate Transactions in NJ § 2.26, at 1 (Castano Cert. Ex. 32). As set forth by Plaintiff's expert, Mr. Butler, an estoppel certificate is a "critical component of the financing transaction [and] gives the lender comfort that as of the date of the making of the loan, the ground lease remains in full force and effect, the primary business terms of the ground lease, such as the rent being paid and the expiration date of the lease, are accurately set forth in the lease, and the borrower is not in default of its obligations under the ground lease."

As acknowledged by the experts of both Plaintiff and Defendant, Mr. Butler and Mr. Curley respectively, estoppel certificates are commonly sought by ground lease tenants from their landlords in order to obtain financing from lenders, and accordingly regularly are issued in this type of transaction. Specifically, Mr. Curley states that "[a]n estoppel certificate is often sought by a ground lease tenant from his landlord in order to obtain financing by pledging a leasehold mortgage." Likewise, Mr. Butler addressed the regularity with which estoppel certificates are required, observing that:

Over the years I have been involved in numerous lending transactions, both on the borrower side and the lender side, involving, among other things, ground leases (in which both private and public entities were the ground lessor), redevelopment agreements and financial agreements, and all types of real estate development such as office buildings, industrial buildings, shopping centers and apartments. Regardless of whether I was representing the borrower or lender, the lender in these financing transactions required an

estoppel certificate from the ground lessor or the municipal body that is a signatory to the ground lease, redevelopment agreement or financial agreement. The requirement to obtain from the ground lessor an estoppel certificate for the benefit of the lender is unequivocally standard industry practice, regardless of whether the ground lessor is a private entity or public body.

Accordingly, it is undisputed by both parties' experts that estoppel certificates are regularly required by lenders and given by ground lessors in similar types of situations.

Therefore, despite the Severance Lease and the Mimi Master Lease not directly referencing an estoppel certificate, a reasonable interpretation of the broad provisions of the leases directing Kearny to take "any and all" "necessary or appropriate" actions to ensure that the Plaintiff Hartz can implement the agreement and redevelop the property can only lead to the conclusion that the parties intended that Kearny be compelled to issue an estoppel certificate. The undisputed facts indicate here, as confirmed by the expert witnesses for both parties, that estoppel certificates are a regular and necessary corollary to redevelopment projects, such as the one here, where a tenant on a ground lease must obtain financing in order to develop the property. Accordingly, the issuance of an estoppel certificate is clearly a "necessary" and "appropriate" action that must be taken by Kearny to ensure that the property is developed. To hold otherwise would effectively render the Plaintiff unable to redevelop the property subject to the Mimi Master Lease, which would clearly be contrary to the purpose of the lease agreements between the parties.

Furthermore, the lengthy history between the parties also provides relevant extrinsic evidence, which further demonstrates that the requirement that Kearny issue an estoppel certificate is a reasonable interpretation of the leases. It is undisputed that Defendant Kearny has provided estoppel certificates to the Plaintiff Hartz on at least six (6) prior occasions without asserting any of the arguments herein asserted by Kearny and without seeking to adjust the rent due to Kearny under the leases. It is true that those six (6) previously issued estoppel certificates did not relate to land encumbered by the Mimi Master Lease, which Defendant argues is "tainted," and instead relate to land encumbered by the Hartz Master Lease. Likewise, it is also undisputed that Hartz has never previously sought an estoppel certificate for the any land covered by the Mimi Master Lease, prior to seeking the estoppel certificate at issue in this case. However, the Mimi Master Lease and Hartz Master Lease are virtually identical, and, accordingly, neither contains any specific requirement that Kearny must issue an estoppel certificate. To the contrary, both leases contain identically worded provisions directing Kearny to take "any and all" "necessary" and "appropriate" action to effectuate the lease, as described above. Therefore, the fact that Kearny has issued six (6) prior estoppel certificates, without any apparent significant objection, under the Hartz Master Lease, without a specific requirement to do so, inferentially provides evidence that the parties intended for those broad provisions to require Kearny to produce estoppel certificate.⁴

⁴ Defendant Kearny attempts to distinguish the estoppel certificates issued under the Hartz Master Lease from the estoppel certificate at issue here, arising under the Mimi Master Lease, by arguing that the "origin" of the Mimi Master Lease "taints" the Mimi Master Lease to such a degree that Kearny cannot possibly issue an estoppel certificate for land arising out of the Mimi Master Lease. However, for the reasons to be discussed *infra* on page 15 of this Opinion, the Court rejects that argument.

Finally, the Court notes that the fact that parties negotiated different versions of the Severance Lease, some of which apparently may have contained provisions regarding the production of an estoppel certificate, does not bar Court from reaching this conclusion as to the intent of the parties. Even assuming the parties did discuss draft severance leases or "substitute leases" with a direction for the production of the estoppel certificate, the fact remains that the June 2016 Severance Lease, actually executed by the parties, cites to the Mimi Master Lease, which contains the above-described provisions requiring Kearny's cooperation. These negotiations do not trump the plain terms of the Mimi Master Lease, the course of conduct of the parties' history, and the customary practice of similarly situated parties.

Accordingly, the Court holds that the lease provisions, as reasonably interpreted using the relevant undisputed evidence, clearly require the Defendant Kearny to issue an estoppel certificate in this case. Therefore, it is not necessary to address the legal conclusions offered in Mr. Curley's "expert" opinion that "[i]n New Jersey, no statutory or decisional law requires a landlord to deliver an estoppel certificate to his tenant or tenant's lender."⁵ Thus it is clear that, absent the validity of the Defendant Kearny's specific objections to the issuance of an estoppel certificate, the Defendant Kearny is compelled by the Mimi Master Lease and June 2016 Severance Lease to issue an estoppel certificate to the Plaintiff.

Defendant Kearny's Specific Objections to the Issuance of an Estoppel Certificate

Throughout this case, Defendant Kearny has provided the Court with a variety of reasons why it cannot issue an estoppel certificate for this specific parcel of land at issue in this case. First, in a supplemental brief from counsel, dated April 10, 2017, submitted at the Court's request in opposition to Plaintiff's order to show cause, Kearny stated that it could not certify to the "continuing validity" of the Mimi Master Lease due to the origins of the Mimi Master Lease, which, as already discussed, was given to the Mimi company by Kearny as a result of bribery and was subsequently transferred to the Plaintiff Hartz pursuant to a settlement of complex litigation between the three parties. Defendant Kearny has also asserted, in the second count of its counterclaim and in other submissions to the Court, that Kearny is entitled to a recalculation of the rent payable from Plaintiff to Defendant under the Mimi Master Lease and the Severance Lease, arguing that Plaintiff violated section 11 of the Mimi Master Lease by entering into the sublease with Cummins. Similarly, Kearny seeks under the first count of its counterclaim, essentially, a reformation of the Mimi Master Lease to increase the rent due under that lease due to Plaintiff's alleged delay in initiating development of the properties encumbered by the Mimi Master Lease. Finally, in support of its own motion for summary judgment, Kearny argues that it cannot issue an estoppel certificate, and therefore Plaintiff's case must be dismissed, because Plaintiff breached the lease by installing certain utility lines under the property.

⁵ The legal conclusions in Mr. Curley's report may be considered as "net opinions" as he has not considered the significant fact background leading to the execution of the June 2016 severance lease, including the underlying purpose of the parties in entering into these different agreements, dating back to 1979, and because his report does not discuss the specific language contained in the relevant leases or estoppel agreements. See *Kirkpatrick v. Hidden View Farm*, 448 N.J. Super. 165, 179 (App. Div. 2017); *Polzo v. Cnty. Of Essex*, 196 N.J. 569, 584 (2008).

The Court will now address the merits of each of these arguments.

Validity of the Mimi Master Lease and Title Issues

Defendant Kearny argues that it cannot issue an estoppel certificate because of the "tainted" origins of the Mimi Master Lease. As already noted, an estoppel certificate "confirms certain facts regarding the lease, such as the parties, the rental amounts, the lease term, whether any default exists, the amount of the security deposit, renewal and first refusal rights, etc., with a recognition by the tenant that the prospective purchaser and/or lender will rely on the estoppel in completing the transaction." Commercial Real Estate Transactions in NJ § 2.26, at 1 (Castano Cert. Ex. 32). Defendant essentially argues that it cannot confirm the continuing validity of the Mimi Master Lease and thus cannot issue an estoppel certificate. However, Kearny's argument is without merit.

First, as an initial note, counsel for Kearny, Mr. Castano, in an April 10, 2017 letter to the Court, wrote that Kearny "is not contesting the redevelopment rights plaintiffs have in the approximately 26-acre portion of [the Bergen Avenue property] that is the subject of this litigation." Plaintiff's development rights in the 9.5-acre parcel of the Bergen Avenue property stem directly from the Mimi Master Lease. Kearny's position, therefore, that it does not challenge Hartz's redevelopment rights to the land covered by the Mimi Master Lease, but cannot certify to the continuing validity of the Mimi Master Lease, is inconsistent and without merit.

Further, the lengthy history between the parties concerning the land covered by the Mimi Master Lease confirms that the Mimi Master Lease is valid and binding on Kearny, and is not a basis for refusing to issue an estoppel certificate. Specifically, the Court finds that Kearny, through its actions, has consented to and ratified the validity of the Mimi Master Lease, barring the town from here arguing that it cannot now state that the lease is valid.

It is undisputed that the Mimi Master Lease, dated August 8, 1979, was found, as a result of the litigation surrounding the lease in the 1980s, to have been given to the Mimi company, apparently to the detriment of Hartz, as the result of bribery of certain Kearny town officials. See Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1265 (3d Cir. 1987). This led to a series of lawsuits between Mimi, Kearny, and Hartz, and also a criminal action against the mayor and councilman of Kearny. Kearny, in a settlement agreement with the Mimi parties, dated June 4, 1986, dismissed all claims against Mimi and also agreed to "recognize and support the validity" of the Mimi Master Lease and that the lease "shall be recognized as valid by the Town of Kearny." Thereafter, Hartz, Mimi, and Kearny entered into another settlement agreement in 1988, which was reduced to a stipulation of settlement, dated August 9, 1988, proving that Mimi, and its successor, would assign its leasehold rights in the Bergen Avenue property under the Mimi Master Lease to Hartz, and all other interested parties disclaimed any interest in the property. This settlement was approved by a resolution passed by Kearny, dated September 14, 1988, which provides that Kearny was authorized to execute any documents necessary to effectuate the settlement to assign the lease rights formerly held by the Mimi parties to Hartz.

Thereafter, on November 2, 1999, Kearny ratified the Mimi Master Lease by an amendment to the lease and recognized that Hartz was the designated redeveloper of the parcel covered by the Mimi Master Lease, as admitted by Kearny in its requests for admissions. Specifically, the lease amendment states that the "Town hereby waives any rights or remedies that the Town may have under the Master Agreement and First Lease by reason of any breach or default of any such terms, covenants or conditions of the Master Agreement and/or First Lease prior to and including the date hereof."

Kearny further affirmed or recognized Hartz's redeveloper rights under the Mimi Master Lease by entering into the June 2000 financial agreement with Hartz and applying for a grant from the state of New Jersey under the Brownfield Remediation Program in July 2000. In making that application, the Town represented to the State that Hartz was the designated redeveloper of the parcel at issue here.

Further, in the Kearny resolution authorizing the severance lease for the property in question, dated June 14, 2016, Kearny stated that the federal litigation "was settled in 1988 and in the Stipulation of Settlement all rights under the [Mimi Master Lease], including the lease rights to Block 286, Lot 4, were assigned to Hartz with the exception of five acres reserved to Mimi."

Accordingly, this history, since the settlement of the litigation in 1988, shows that Kearny has continuously reaffirmed, ratified, or otherwise recognized Hartz's position as the redeveloper of the Bergen Avenue property covered by the Mimi Master Lease. Kearny has, time and again, acted in such a way as to recognize the validity of the lease over the last thirty years, only to, in the past two years, change its position as to the validity of the Mimi Master Lease. During this time, Hartz has reasonably relied on the belief that the Mimi Master Lease would be treated as valid by Kearny, given Kearny's decades of consistent treatment of Hartz as the redeveloper of the Mimi parcel, and has apparently spent over \$8 million to remediate the property, found a tenant, and expended over \$14 million on construction of necessary improvements to the property for that tenant. As a matter of equity, Kearny cannot now deny the validity of the lease and refuse to issue an estoppel certificate on that basis.

Moreover, the Court rejects any arguments by the Defendant Kearny that the fact that it warned Hartz, during negotiations for the Severance Lease and prior to the execution of that Severance Lease, that it would not issue an estoppel certificate due to the title issues, somehow absolves Kearny of the obligation to issue an estoppel certificate. The primary argument apparently made by Kearny, as reflected in Kearny's brief and supporting exhibits, during these negotiations was that it could not issue an estoppel certificate due to the alleged title issue, and therefore the town warned Hartz that it would not issue the certificate even if it executed the Severance Lease. However, as already noted, the Court finds that Kearny has an obligation under the Mimi Master Lease to issue the estoppel certificate and that its objections to the issuance based on this alleged title issue are meritless, based on Kearny's own actions and the history of this case. Accordingly, the "warning" does not prevent the Court from herein ordering the issuance of an estoppel certificate.

Finally, the Court finds no merit to the position that the exception issued by Plaintiff's title company creates a basis for Kearny to refuse to issue an estoppel certificate. As already set forth, the long history to the parties in this case shows that the 1988 settlement is valid. The longstanding validity of the settlement is confirmed by the fact that no interested party, including any of the Mimi entities, has challenged Hartz's rights to redevelop the land at issue in the nearly thirty years since that settlement.

Accordingly, the Court rejects Defendant Kearny's arguments that it cannot issue an estoppel certificate based on its refusal to confirm that title to the property is valid. The Court finds that Hartz's rights under the Mimi Master Lease are valid and enforceable, as assigned to Hartz under the 1988 settlement, and that Kearny cannot now decline to recognize the validity of Hartz's interest after acknowledging that interest for years in dealings with Hartz and the State of New Jersey.

Defendant's Additional Objection to the Issuance of the Estoppel Certificate

Plaintiff Hartz moves for summary judgment, arguing that the estoppel certificate should reflect the terms of the Mimi Master Lease, including the provisions regarding the payment of rent. Essentially, therefore, Plaintiff seeks summary judgment as to the second count of Kearny's counterclaim, which calls for an increase in the rent owed to the town by Plaintiff. Defendant Kearny's second count of its counterclaim alleges that the Mimi Master Lease, and, by-extension, the Severance Lease, "requires plaintiffs to provide the Town with the economic terms of any proposed sub-lease so that the Town can determine whether plaintiffs are sub-leasing any portion of the property in contravention of paragraph 11(1)(D)." In a chart submitted to the Court as an aid, showing the specific issues Kearny has with each provision of the proposed estoppel certificate submitted by Plaintiff for Teachers, attached as exhibit 35 to Mr. Castano's certification, Kearny argues that the statement of rent in the estoppel certificate would need to be adjusted from the base rent of the Mimi Master Lease based on the terms of the Cummins Sublease. Although not argued specifically in Kearny's motion for summary judgment, Kearny has previously asserted this as a basis to deny the issuance of an estoppel certificate, and Plaintiff moves to dismiss this argument in its own cross-motion for summary judgment.

Section 11 of the Mimi Master Lease, entitled "Prohibitions Against Assignment and Transfer; Permitted Assignments and Transfers; Permitted Assignees and Transferees," contains certain provisions barring transfer of the land for the purpose of speculation. Specifically, section 11(a) sets out the general purpose of the prohibitions against transfer, and provides that:

Because of the important of the redevelopment of the Redevelopment Area to the general welfare of the community . . . the Redeveloper represents and agrees that each Lease . . . and each other undertaking of Redeveloper pursuant to this Agreement, are, and will be used, for the purpose of redevelopment of the Redevelopment Area and not for speculation in landholding.

Accordingly, the lease, under that section, establishes certain provisions barring the transfer of the subject land for speculation, and requires that the improvements constructed on the property are to be built by a party "having a substantial identify of interest" with the redeveloper. See Mimi Master Lease § 11(b)(1)(C). The lease, therefore, generally prohibits subleasing by Hartz without the consent of Kearny until the issuance of a certificate of completion of construction of the improvements by Kearny. See Mimi Master Lease §11(b)(1)(E).

The subsection at issue, Section 11(b)(2)(D), provides, in relevant part:

The consideration payable for the transfer by the transferee or on its behalf shall not exceed an amount representing the actual cost (including carrying charges) to the Redeveloper . . . of the Redevelopment Area (or allocable to the part thereof or interest therein transferred) and of any Improvements (including, for this purpose, any Land Improvements made pursuant to Paragraph 6b) thereon or allocable thereto; it being the intent of this provision to preclude assignment of this Agreement or of the applicable Lease or any transfer of any part of the Redevelopment Area for profit prior to the completion of the Improvements thereon and to provide that if any such assignment or transfer is made (and is not cancelled), the Town shall be entitled to increase the rental therefor to the Redeveloper . . . by the amount that the consideration payable for the assignment or transfer is in excess of the amount that may be authorized pursuant to this Paragraph 11b. (2) (D), and such consideration shall, to the extent it is in excess of the amount so authorized, belong to and forthwith be paid to the Town.

Mimi Master Lease § 11(b)(2)(D) (emphasis added).

Kearny asserts, generally, that the sublease to Cummins may violate this provision, and thus Kearny may be entitled to an increase in rent from the \$1,500 per acre per year value in the Mimi Master Lease, as confirmed by the Severance Lease.⁶ Accordingly, Kearny has asserted that it cannot issue an estoppel certificate, which would generally require Kearny to confirm the amount rent that is due under its ground lease, as the amount of rent due is at issue.

However, the Court finds that Kearny's arguments concerning the application of section 11(b)(2)(D) of the Mimi Master Lease are not meritorious, and dismisses the arguments as a basis upon which to deny issuance of an estoppel certificate. The sublease of the property to Cummins is simply not the type of speculative assignment meant to be covered by this section of the Mimi Master Lease. Given the section's instructive language that the Plaintiff's leasehold interests are not to be transferred "for speculation in landholding," the rent increase provisions are clearly only meant to apply if Hartz were to transfer the property to another development as part of a speculation transaction. In fact, the pertinent portion of the Mimi Master Lease, Section 11(b)(2)(D), cited above, states clearly that the "intent" of this rent-increase provision is "to preclude assignment of this Agreement or of the applicable Lease or any transfer of any part of the Redevelopment Area for profit prior to the completion of the Improvements." Effectively,

⁶ The June 2016 Severance Lease provides, in relevant part, that "[t]he rent hereunder shall be the rent payable under the First Lease," meaning the Mimi Master Lease.

therefore, the rent increase serves as a penalty for Hartz engaging in speculation concerning the property's ownership.

To the contrary, the Cummins sublease cannot be considered a "speculative" transfer of the property "for profit prior to the completion of the Improvements." As correctly noted by the Plaintiff, under the Cummins sublease, the Cummins's right to occupy the premises and the obligation to pay rent does not begin until Hartz's work is "Substantially Complete," meaning when Kearny issues a Certificate of Completion for the Improvements. See Excerpt of Cummins Sublease §§ 1, 3A, 4E(a)(v), 5. Accordingly, the Cummins sublease would not violate Section 11(b)(2)(D) of the Mimi Master Lease, as it does not assign Cummins an interest in the property for profit prior to the completion of the improvement.

The simple fact of the matter is that the Cummins sublease allows Cummins to enter the property as a commercial tenant after Hartz has completed remediating, redeveloping, and improving property pursuant to its duties under the Mimi Master Lease. The Cummins sublease cannot reasonably be considered a "speculative" deal, but rather is exactly the type of sublease that the parties hoped would result from the redevelopment of the properties when the original leases were entered into in the late 1970s. Moreover, there is no basis to argue that the rent should be increased now, because the parties entered into the June 2016 Severance Lease and specifically directed that the rent due under that Severance Lease would be the rent due under the Mimi Master Lease. Accordingly, the Court finds that the Cummins sublease is not in violation of Section 11(b)(2)(D) of the Mimi Master Lease, and rejects any arguments by the Defendant that this provision constitutes a basis to deny issuance of an estoppel certificate to Hartz. Plaintiff is only liable to pay rent to Kearny in the amount established by the Mimi Master Lease, \$1,500 per acre, per year. Accordingly, the Court finds that Plaintiff is entitled to be issued an estoppel certificate reflecting the terms of the Mimi Master Lease and 2016 Severance Lease, including the provisions regarding rent, in the form requested by the Plaintiff.

Unclean Hands

Finally, in support of its motion for summary judgment, the Township of Kearny argues that the Plaintiff's complaint must be dismissed because Plaintiff has "unclean hands" based on its installation of utility lines underneath Town-owned property without an access easement. In support of this argument, Kearny cites a notice of default issued by the Township of Kearny, dated May 16, 2017, which provides that Kearny has deemed Hartz to be in default of the Mimi Master Lease by installing underground utilities on land not within its leasehold without the town's approval.

It is well established that "a suitor in equity must come to the court with clean hands and must keep them clean after his entry and throughout the proceedings." A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949). The clean hands doctrine is "an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy." Glaser Motors v. Osterlund, Inc., 180 N.J. Super. 6, 13 (App. Div. 1981).

The Court denies Defendant's motion to dismiss the complaint for "unclean hands." Here, Kearny has provided no valid argument that the installation of the utility lines constitutes a material breach of the Mimi Master Lease or any other governing law. In fact, Kearny does not cite any specific provision of the Mimi Master Lease alleged to have been breached by Hartz, and rather only argues, generally, that action constitutes a "trespass," without any additional citation to any principal of law.

To the contrary, Hartz, which does not deny that utility lines were installed, states that the Kearny Town Council authorized PSE&G to open the road where the utility lines were installed, by resolution dated April 11, 2017, and approved Hartz's site-plan application, which showed where the utility lines would be placed. Furthermore, Hartz argues that the 1988 stipulation of settlement, signed and approved by Kearny, gives an easement on the right of way in Hartz's favor between Hartz's parcel and the five-acre parcel retained by Hudson Meadows, a Mimi-related entity.

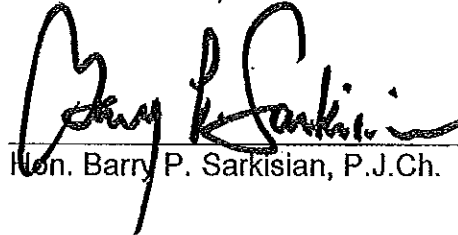
After analyzing Defendant's argument in light of all the relevant facts, the Court does not find that the actions of Hartz constitute "unclean hands" sufficient to warrant dismissal of Plaintiff's complaint. Defendant Kearny has failed to show that Plaintiff's actions were clearly unlawful, in material breach of the lease, or performed in bad faith to such a degree to constitute "unclean hands," and the Court rejects this argument as a basis to dismiss this complaint or to fail to issue the estoppel certificate. Moreover, as correctly argued by the Plaintiff in opposition to this discrete issue, the doctrine of unclean hands only prevents relief if it is based on misconduct "directly related to the subject-matter upon which relief is being sought. If it is not, the issue of misconduct is irrelevant." Garlinger v. Garlinger, 137 N.J. Super. 56, 62 (App. Div. 1975); see also Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65 (App. Div. 1993). Here, the action concerns the parties' obligations under the Mimi Master Lease and June 2016 Severance Lease. This issue, concerning the installation of utility lines, does not directly arise out of the underlying issues in this case, and therefore the doctrine of unclean hands does not apply. Accordingly, the Court rejects this argument and finds that the issues surrounding Plaintiff's apparent installation of utility lines do not provide a basis to deny the issuance of an estoppel certificate in the form requested by Plaintiff in this case. Moreover, Plaintiff's conduct, in the utility line installation, under the facts now presented to the Court, is blameless.

Conclusion

For the aforementioned reasons, the Court grants Plaintiff Hartz Mountain Industries' cross-motion for summary judgment and denies Defendant Kearny's motion for summary judgment. The Court finds that Kearny is obligated under the 1979 Mimi Master Lease to issue an estoppel certificate to Plaintiff Hartz in the form submitted by Hartz, as annexed to Plaintiff's complaint as Exhibit I, and rejects all arguments raised by Kearny, discussed supra, that dispute that obligation to issue the estoppel certificate. In making this finding, the Court confirms the validity of Hartz Mountain Industries' redevelopment rights under the Mimi Master Lease, as assigned to Hartz pursuant to the August 9, 1988 settlement.

Furthermore, the Court finds that Kearny is not entitled, under Section 11(b)(2)(D) of the Mimi Master Lease, to an increase in the amount of rent due to Kearny by Hartz under that lease and accordingly dismisses the second count of Defendant's counterclaim. Finally, the Court, having ruled in favor of the Plaintiff, dismisses the third count of Kearny's counterclaim.⁷ As set forth in footnote 7 to this opinion, Defendant shall advise the Court within thirty (30) days of this order whether it will pursue the first count of its counterclaim, and, if so, the Court will schedule a status conference to determine the scope of additional discovery required and to enter into a case management order.

SO ORDERED,


Hon. Barry P. Sarkisian, P.J.Ch.

⁷ The parties, pursuant to the Court's May 24, 2017 Case Management Order, which limited the motions for summary judgment to Plaintiff's claim for relief relating to the issuance of the estoppel certificate, did not move for summary judgment as to Count One of Defendant's counterclaim, which seeks, essentially, a reformation of the Mimi Master Lease to increase the rent due under that lease due to Plaintiff's alleged delay in initiating development of the properties encumbered by the Mimi Master Lease. Therefore, the Court will not address the counterclaim on its merits. However, the Court does note that the pendency of this counterclaim or any arguments reserved by the Defendant in support of this counterclaim do not create a basis to justify any refusal to issue Plaintiff an estoppel certificate, as required by this opinion. The Court does note that approximately ten years of the delay was caused by the underlying litigation in the 1980s, during which Plaintiff did not have the right to develop the property, and that the Plaintiff's delay in failing to execute a severance lease for the development of the parcel until 2016 may have been caused by its ongoing attempts to perform extensive environmental remediation on the property, as noted in a letter submitted to the New Jersey Redevelopment Authority by the Kearny Mayor Alberto G. Santos on July 14, 2000. Given these issues surrounding the ability of Defendant to meet the requirements to reform the Mimi Master Lease, the Court holds that this lone remaining counterclaim does not provide any basis for Defendant to refuse to issue an estoppel certificate. Defendant shall advise the Court within thirty (30) days of this order whether it will pursue this counterclaim, and, if so, the Court will schedule a status conference to determine the scope of additional discovery required and to enter into a case management order.