SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1132-14T3

RED BANK ACQUISITION I, LLC, d/b/a CHAPIN HILL AT RED BANK, a New Jersey limited liability company,

Plaintiff-Appellant,

v.

R.B. REALTY ASSOCIATES, LP, a New Jersey limited partnership,

Defendant/Third-Party Plaintiff-Respondent,

v.

LIZER JOZEFOVIC, LORRAINE JOZEFOVIC, ZEV FARKAS, and ISAAC FARKAS,

Third-Party Defendants-Appellants.

Argued April 26, 2017 – Decided July 17, 2017

Before Judges Alvarez, Accurso, and Manahan.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-23-12.

Fred R. Gruen argued the cause for appellants (Gruen & Goldstein, and Michael Paneth (Paneth & O'Mahony, PLLC), attorneys; Mr. Gruen, on the briefs).

Andrew Bayer argued the cause for respondent (GluckWalrath LLP, attorneys; Mr. Bayer, of counsel and on the brief; Emily Hinchman, on the brief).

PER CURIAM

Red Bank Acquisition I, LLC, doing business as Chapin Hill at Red Bank (Chapin Hill), Lizer Jozefovic, Lorraine Jozefovic, Zev Farkas, and Isaac Farkas, appeal the entry of a judgment of possession of a nursing home, along with an award of attorney's fees and costs of $653,454.34. After nineteen days of trial, the court also held that the parties were bound by an August 21, 2006 lease, and that the agreement did not transfer ownership to the nursing home beds within the facility. We affirm the court's judgment, except for counsel fees. On that score, we vacate the award and remand for consideration in accord with this decision.

The final October 29, 2014 judgment included the following provisions: 1) the lease dated August 21, 2006, promoted by R.B. Realty Associates, LP (R.B. Realty), was the controlling lease between the parties; 2) Chapin Hill materially breached the lease; 3) the court awarded possession of the nursing home to R.B. Realty;

4) the judgment required Chapin Hill to vacate the premises and cooperate fully with R.B. Realty to ensure a smooth transition of nursing home operations; 5) the judgment obligated Chapin Hill to pay rent in accordance with the lease until it vacated the premises; 6) R.B. Realty was the sole owner of the nursing home's 180 licensed beds and thus retained ownership of the bed rights upon termination of the lease; 7) Chapin Hill and the guarantors on the lease had to pay legal fees and costs of $653,454.34; and 8) the court denied R.B. Realty's claim for liquidated damages.

Thereafter, on March 12, 2015, on R.B. Realty's motion to enforce litigants' rights, the court ordered Chapin Hill to provide R.B. Realty with the information and documentation necessary to transfer operation of the nursing home. In addition, the court directed that once the State authorities approved R.B. Realty's assumption of operation, Chapin Hill was to vacate the premises.

The judge's decision relied to a great extent on the trial testimony of Harvey Lichtman. Lichtman was the treasurer of Ganot Corporation, a real estate holding company, which owned twenty-six nursing homes throughout the United States. Sisel Klurman was Ganot's president and chief executive officer in 2005, when the lease negotiations began. Lichtman, in addition to his role as Ganot's treasurer, was Klurman's long-time family friend and confidante.

The building in question, located in Red Bank, was sold to R.B. Realty on July 1, 1979 for $1,914,000. On July 24, 1979, the Department of Health (DOH) approved the certificate of need (CN) and transfer of ownership of the building from the prior owner, enabling R.B. Realty to operate the nursing home. R.B. Realty leased the building to Red Bank Convalescent Center, Inc. (RBCC, Inc.), which initially operated the nursing home as a 150-bed long-term care facility, expanded in 1986 to house 180 beds. In 1993, RBCC, Inc.'s stock was purchased by AG Holdings, a Ganot company, whose treasurer was Lichtman, and whose president and director was Klurman. RBCC, Inc. then began doing business as Avante at Red Bank (Avante). The Avante officers in 2005-2006 were Richard Berson, vice-president and acting president, Bill Ioanno, secretary, and Lichtman, treasurer. Klurman was Avante's director and chairman of the board.

Avante's successful nursing home business began to decline after 2000. Its profit and loss statement for the fiscal year ending May 31, 2006, showed a loss of $1,791,160.

Lizer Jozefovic worked for Avante as the Red Bank facility administrator from 1993 to 1999, and initially held an ownership interest in Chapin Hill. Zev Farkas was Avante's administrator from 2004 until September 2006. Farkas owns the majority interest in Chapin Hill.

Lichtman testified that in 2005, he began negotiating the lease agreement between the parties with Jozefovic. It was Klurman's practice to rely upon Lichtman for advice, and she never made business calls or conducted meetings on her own. David Reimer, Esquire[1] represented R.B. Realty in the transaction. Mark Zafrin, Esquire represented Jozefovic and Chapin Hill. Reimer prepared a draft agreement after Lichtman relayed the terms of the proposed lease to him.

Lichtman sent Jozefovic the initial draft, which called for a ten-year lease term with four five-year options to renew. Section 9.3 of the draft stated that all licenses and CNs were vested exclusively in the landlord, and that the tenant had no rights unless expressly granted in the lease. Because Klurman and Lichtman had always enjoyed a good relationship with Jozefovic, the draft required him to remain as the tenant's managing partner.

On July 20, 2005, Zafrin sent Reimer an email with Jozefovic's comments. Rather than a ten-year term with options to renew, Jozefovic asked for a flat thirty-year term. He also sought a modification of section 9.3 whereby the landlord would retain rights only to the building, and would convey the CN. Jozefovic also wanted to reduce the bed size of the facility, and to that

[1] Reimer did not testify at deposition or trial despite the parties' efforts to subpoena him.

end, wanted the right to temporarily decertify beds for periods not to exceed two years at a time.

Lichtman said that he rejected most of Jozefovic's proposals. He identified a September 15, 2005 memorandum from Reimer to Zafrin, containing Jozefovic's requests accompanied by Lichtman's responses. Lichtman denied the request for a thirty-year lease, but agreed that the four, five-year options to renew would be automatic. He wrote "*?No" next to Jozefovic's § 9.3 proposal and wrote "No Lessee is not purchasing the CN" in the September 15 memo. Lichtman likewise wrote "No" next to the request to reduce the number of beds. At trial, he explained that bed rights are a valuable asset and he did not want the tenant to do anything to jeopardize the number of beds on the license.

After Zafrin informed Reimer that Jozefovic wanted to assign up to seventy-five percent membership interest in the company to people who were investors or to family members, Reimer agreed, but added that a condition of any transfer would be that Jozefovic remain in voting control. Zafrin accepted that condition, but asked Lichtman to reconsider the bed decertification issue. Lichtman reluctantly agreed to decertification under five specific conditions described in the document.

On January 3, 2006, Lichtman sent Jozefovic an email with a new lease draft attached that Reimer had just prepared. Section

9.3 remained unchanged from the June 23, 2005, draft. Reimer incorporated Lichtman's comments to section 12.4 concerning percentage of membership, but instead of writing Jozefovic's name as retaining voting control, he left the space for a name blank. Lichtman testified that it was understood that the limited liability company would be manager-controlled and that Jozefovic would be the manager. The draft had a new section, section 13.3, that enumerated the steps the tenants had to take before the number of beds could be reduced.

At this time the parties were also discussing a second agreement necessary to consummate the lease initially designated as an "asset transfer agreement," but later designated as the "operations transfer agreement (OTA)." According to Lichtman, the OTA's purpose was to set forth the protocols for addressing accounts receivable, inventory, supplies, accounts payable, prepaid credits, employees, fringe benefits, approved payroll and so on. Although Lichtman was involved in certain aspects of negotiating the OTA, the primary responsibility for negotiation fell on Berson.

On January 4, 2006, Zafrin sent a draft OTA to Reimer, Jozefovic, and Lichtman. Lichtman forwarded the draft to Berson and also to Farkas. At that time, Lichtman believed that Farkas was simply Avante's administrator; he did not know that Farkas was

also part of Chapin Hill's ownership group. He testified that he did not believe it was a coincidence that once the parties entered negotiations the nursing home began to experience large losses. He implied Farkas intentionally brought down the value of the facility and personally changed the terms of the lease and OTA to benefit Chapin Hill.

On February 8, 2006, Reimer sent Lichtman a red-lined version of the OTA reflecting the changes made by Berson. Paragraph 8(d) addressed Avante's right to assign licenses and permits, adding "except to the extent held by the landlord." Lichtman testified that the language was added to protect the landlord's CN and bed rights.

Starting on February 16, 2006, Reimer and Zafrin exchanged emails concerning changes to the lease agreement and OTA; by February 21, 2006, Zafrin stated that he was ready to execute the documents. On February 23, 2006, Reimer responded that his client was signing the OTA and he would send Zafrin the signature pages to be followed by the complete agreement. Zafrin replied that his client had already signed the lease and the OTA, and that he would fax the signature pages. At that point, Lichtman believed that both the lease and the OTA were "done deals."

On February 23, 2006, Berson signed the OTA on behalf of Avante, and Klurman signed as a witness. Lichtman was present

when the documents were signed. Lichtman sent Reimer a fax of the signature pages for the OTA and the lease, adding that "some signatures need to be added" to the lease. Zafrin then sent Reimer a fax of the signature pages of the lease and OTA, both signed by Jozefovic.

The lease draft exchanged on February 23, 2006, while executed by both parties, left the dates, the term of the lease, and the amounts of rent due blank. Sections 9.3 and 13.3 were complete, however, and consistent with the changes that had been negotiated in January 2006.

On May 16, 2006, Zafrin applied to DOH to transfer ownership of the nursing home from Avante to Chapin Hill. In the cover letter, he stated that the lease had an initial term of ten years with four additional five-year renewal options. Annexed to the application was a copy of the lease, consistent with the February 23, 2006 draft, except that the term of the lease was set at ten years with four, five-year renewal options, and the rent was set at $509,752. The OTA was also attached. The submission identified the ownership of Chapin Hill, and included Jozefovic and Farkas. R.B. Realty was not copied on the application and attachments, and Lichtman testified that as of May 2006, he was still unaware that Farkas was an owner of Chapin Hill.

Zafrin emailed Reimer on July 17, 2006, that DOH could not read the signature page from the OTA, and needed a fully executed copy of the lease. In response, Reimer sent Zafrin a fax of Klurman's signature for the lease. Lichtman stated that Klurman would have believed the February 23, 2006 lease was the only one she was signing in July 2006, because they did not know that Zafrin submitted a different version of the lease to DOH in May. DOH approved the transfer of ownership on July 20, 2006.

From the end of July through the end of August 2006, emails were exchanged in anticipation of closing. With regard to the lease, the emails addressed the closing statement, security deposits, amounts to be paid, capital improvements to the building, and the means of calculating annual rent increases. As to the OTA, the parties had to agree on the value of the inventory, approved salaries, union benefits, and disposition of the facility's automobiles.

R.B. Realty became concerned when it learned that Jozefovic was no longer going to be the "key man" in the transaction and wanted to ensure the monthly rent would be paid. Therefore, guarantee agreements were negotiated and signed at the end of

August with the principals of Chapin Hill.[2] There was no mention in any of the emails from July or August of bed decertification, license rights, or CNs.

Lichtman testified that the deal closed on either August 31, 2006, or on September 1, 2006. Chapin Hill sent R.B. Realty a check for the amount due at closing on September 1, 2006, and started operating the nursing home on that date.

Lichtman identified the hand-dated August 21, 2006 lease as the final lease between the parties. When Reimer forwarded the lease to Zafrin on August 22, 2006, Zafrin asked for one additional change: that a sentence be added to section 22.2 requiring the landlord, in the event of a default, to make commercially reasonable efforts to obtain a new tenant so as to mitigate damages. Lichtman did not agree to the requested change. R.B. Realty received no other emails from Zafrin between August 21 and September 1, except for those addressing capital improvements Chapin Hill was making to the facility and the guarantees.

The August 21, 2006 lease was consistent with prior lease drafts. Although section 1.2 was blank as to the lease term,

[2] Appendix VIII contains unsigned, undated guarantee and indemnification agreements attached to unsigned, undated copies of the lease. The guarantees purportedly sent to R.B. Realty on August 31, 2006 are attached to the August 21, 2006 version of the lease.

section 1.3 specified four periods of five years each for renewal. Rent was set at $509,752.51 annually with a two percent annual increase. Sections 9.3 and 13.3 were unchanged from the February 23, 2006 draft.

Although the signature page contained two signatures from Klurman, Lichtman testified on direct examination that Klurman did not sign the August 21, 2006 lease.[3] Rather, Klurman's signatures were copies of earlier signatures that she provided to Reimer, probably in response to Zafrin's request for signatures in July 2006. Lichtman speculated that Reimer had simply attached those signatures to the lease.

On January 25, 2008, Reimer gave Lichtman a final, executed original copy of the August 21, 2006 lease that had both Klurman's signature and Jozefovic's signature attached. When Lichtman received the lease from Reimer, he believed that all the signatures were proper.

Matan Ben-Aviv, Klurman's grandson, joined Ganot as chief executive officer, and began systematic review of relevant leases of all of the company's facilities. The search for the lease for

[3] On cross-examination, however, Lichtman stated that he did not remember whether or not he had Klurman sign the August 21, 2006 lease. On redirect, he said that he definitely had Klurman sign the lease and he gave that signature to Reimer. He did not explain these inconsistencies.

the Red Bank nursing home led to the discovery in November 2009 that the lease provided by Jozefovic was inconsistent with the August 21, 2006 lease in R.B. Realty's files. At that juncture, the discrepancies could not be discussed with Klurman, then struggling with problems with dementia and heart disease.

Lichtman testified that the August 31, 2006 lease provided by Chapin Hill was significantly different from the August 21, 2006 lease. Section 1.2 provided for a fixed thirty-year lease term instead of the ten-year term with four five-year options. The August 31, 2006 lease did not contain section 12.4, requiring Jozefovic to act as Chapin Hill's sole manager. It also deleted all of section 13, except for two minor provisions, thus allowing Chapin Hill to make temporary changes to the number of licensed beds. Furthermore, at the end of section 22.2, a sentence had been added requiring the landlord, after notice of default, to make commercially reasonable efforts to obtain a new tenant so as to mitigate damages. Section 8.3, which prohibited Chapin Hill from financing equipment or fixtures without the landlord's permission, was eliminated.

The August 21, 2006 lease had Klurman's signature on the signature page, below which Lichtman had written her name and title. The August 31, 2006 lease only had her signature. Lichtman testified that although he witnessed Klurman's signature on every

document she signed on behalf of R.B. Realty or Ganot; he did not see her sign the August 31, 2006 lease. She did not have a computer in her home or office, and did not know how to operate a fax machine. Klurman relied upon others, including Lichtman, to open her mail and organize her papers. She never mentioned any changes to the August 21, 2006 lease to Lichtman.

At Ben-Aviv's behest, R.B. Realty's attorneys became involved in September 2010 and sent Chapin Hill an executed copy of the August 21, 2006 lease. In October 2010, Chapin Hill responded that it needed the right to manage its own bed count. Chapin Hill stated that it had temporarily decertified beds and put them into a holding company pursuant to DOH regulations.

By that time, both Lichtman and Ben-Aviv were aware that Chapin Hill had transferred fifty beds off license. Ben-Aviv explained that he discovered that information on his own by looking on a government website that listed the facility as having only 130 beds. Chapin Hill had never notified R.B. Realty of the transfer, nor did it post a bond as required by section 13.3 of the August 21, 2006 lease.

In November or December 2010, R.B. Realty received documents from DOH pursuant to an OPRA request. The documents revealed that on September 1, 2006, Chapin Hill sold thirty-five beds to Red Bank Acquisition I Holding LLC ("the holding company") for ten

dollars each. On January 10, 2007, Chapin Hill wrote to DOH requesting to change the number of transferred beds from thirty-five to fifty. That request was approved by DOH on February 23, 2007.

The first page of the February 23, 2007 letter from DOH identified the ownership of Chapin Hill; Jozefovic's name was not on that list. An application for a license filed by Chapin Hill with DOH on April 11, 2007, which confirmed the fifty-bed transfer, was signed by Farkas as managing member.

As a result of the information contained in these documents, Ben-Aviv authorized his attorneys to send Chapin Hill a notice of default. On January 12, 2011, counsel sent Chapin Hill a letter entitled "Notice of Default and Termination of Right to Possession." Chapin Hill disputed the allegations of this letter, and R.B. Realty sent a second notice of default and termination of the lease on February 25, 2011. Unsuccessful settlement negotiations followed. R.B. Realty sent Chapin Hill additional notices of continuing default on August 19, 2011, and October 8, 2013.

During the litigation, Chapin Hill continued to pay, and R.B. Realty continued to collect, rent on the nursing home property. Nevertheless, Ben-Aviv stated that as a result of the breach R.B. Realty suffered liquidated damages of $100,000 per transferred

bed, litigation costs, and losses associated with its inability to refinance the building while litigation was underway. He also claimed that Klurman's reputation was besmirched by comments made by Jozefovic and Farkas.

Jozefovic's testimony entirely contradicted the negotiations as described by Lichtman. Jozefovic asserted, for example, that Klurman signed the August 31 lease after he explained the impossibility of successfully operating the nursing home without the ability to exercise greater control over the number of nursing home beds. He testified he did not sign the August 21, 2006 lease for that reason. He claimed that because he was dissatisfied with the August 21, 2006 lease, he had a heart-to-heart last-minute call with Klurman, during which she agreed to the terms found in the August 31 lease. He also claimed that after she signed the lease and faxed her signature back to Farkas, he then reviewed it and signed it. Jozefovic never received the original of Klurman's signature attached to the August 31, 2006 lease.

The judge did not find Jozefovic's testimony credible. Among other details, Jozefovic testified that he had Farkas make the changes to the August 21 lease directly, rather than referring it to the attorneys who had prepared and exchanged earlier documents, because time was of the essence. Additionally, when he spoke with

Lichtman in late August, he never mentioned the August 31, 2006 lease nor did he tell Berson.

Moreover, the closing statement indicated the purchase price for the lease was $300,000. R.B. Realty was credited for rent advances, security deposits, real estate taxes, inventory, automobiles and prepaid expenses, and Chapin Hill was credited for employee benefits. Bed rights or license rights were not referenced in the closing statement.

Chapin Hill began construction work almost immediately upon assuming the operation of the nursing home, replacing the wall coverings, flooring and ceiling on the first floor of the building; renovating every room in the subacute unit on the top floor; and remodeling all common areas. Jozefovic estimated that his expenditures on capital improvements exceeded $1.5 million.

Chapin Hill did not dispute that on January 10, 2007 it submitted an application to DOH to transfer thirty-five beds to the holding company, which had "substantially similar ownership" to Chapin Hill. On February 23, 2007, DOH approved Chapin Hill's request to increase the number of transferred beds to fifty. An official license DOH issued to Chapin Hill on April 26, 2007, indicated that the nursing home was now a 130-bed facility.

Jozefovic explained that decertifying beds, as contemplated in the earlier drafts of the lease, was risky because DOH might

view the beds to be "disappeared" and not allow them to be put back on the license in the future. The better practice, which was formally approved by DOH in 2005, was to transfer the beds to a separate holding company. If DOH approved the transaction, there would be no trouble transferring the beds later back to the operating company.

Jozefovic also denied having signed the August 21, 2006 lease which purportedly bore his signature. Although he attempted to reach out to Klurman to discuss the problem with the leases in September 2010, once he learned about her health issues, he did not attempt to contact her again.

In the January 18, 2011 response Jozefovic sent to R.B. Realty after receipt of the first letter of default and termination of possession, Zafrin stated that "the tenant has never asserted ownership over those beds, in derogation of the landlord's expressed rights to the beds upon the expiration of the lease nor does the tenant intend to make such as assertion." Jozefovic testified that this sentence was "mistakenly written" and that he reproached Zafrin for writing it. Nevertheless, he admitted that he never sent anything to R.B. Realty to correct the mistake.

Indeed, Jozefovic acknowledged that his new counsel, Fred Gruen, "reiterated the same mistake" in a December 7, 2011 letter to R.B. Realty: "[y]our client continues to own the reversionary

rights of all licensed beds and that the [fifty] beds as well as the 130 bed balance will be returned to your client at lease expiration termination in accordance with its terms." Jozefovic stated that he always believed that he owned the bed rights and that his attorneys' letters were written to placate R.B. Realty for settlement purposes.

After litigation started, Jozefovic transferred the fifty beds from his holding company back to Chapin Hill. He did this as a "peace offering" and because Medicaid had stopped enforcing the low occupancy penalty, not because he conceded there had been a breach of the lease. To the contrary, Jozefovic claimed that R.B. Realty was looking for a loophole in the lease to get him out of the building. He had finally made the nursing home profitable and now R.B. Realty wanted to take the business back.

Zafrin, Jozefovic's counsel in the Chapin Hill transaction, testified that since he and Reimer were not located in the same state, communication was by phone, email, or fax. All documents, including at closing, were exchanged by fax and email, and the principals exchanged their signature documents directly. Hence not everyone was copied on everything.

Zafrin corroborated Jozefovic's testimony that section 13.3 was under discussion until the time of closing, and that any limitation on the ability to adjust the bed count was unacceptable

to Chapin Hill. He prepared the OTA draft, and believed it granted Chapin Hill the right to take the beds and licenses with them after the lease expired. Zafrin understood the purpose of the OTA to be to convey all assets used in the operation of the nursing home, as opposed to the real estate. He claimed that the fully signed February 23, 2006 lease draft was simply a "placekeeper" necessary to get Chapin Hill's application initiated with DOH. The parties were under pressure to get the deal finalized on or before September 1, 2006, so that Avante could avoid filing a fiscal report for 2005 and incurring a Medicaid low occupancy penalty.

Zafrin submitted the unsigned June 2005 draft to DOH, not the February 23, 2006 document. On cross-examination, he acknowledged that he did not remember details regarding the DOH application because it was handled by others in his office. Lawyers were not involved in the transaction after September 1, 2006, and as a result he did not become aware of a finalized copy of the lease until the 2010 dispute regarding its terms. Zafrin acknowledged writing the January 18, 2011 letter in which he said Chapin Hill did not assert ownership over the beds, but added that by that time he had forgotten the terms of the OTA.

In 2007, Farkas held a fifty-five percent interest in Chapin Hill. He was not directly involved in the negotiations for the

lease and OTA. Farkas changed the August 21, 2006 lease on Jozefovic's directions. He filled in the blanks in section 1.2 to reflect a lease term of thirty years, and deleted all of sections 12.4 and 8.3, and parts of sections 13.1, 13.2, 13.3, and 18.1. Farkas did not recall when he made the changes.

The attorneys were not available and there was a deadline coming up so Farkas met with Jozefovic, who signed the modified lease. Farkas then faxed the lease to Klurman and received a signature page signed by Klurman by return fax. He attached her signature to the lease and put it in his filing cabinet. He did not remember ever sending a copy of the fully signed August 31, 2006, lease to R.B. Realty or to the attorneys involved in the transaction and noted that the original lease was destroyed by flooding caused by Hurricane Irene in August 2011.

With regard to the April 11, 2007 license application to DOH that he signed as "managing member," Farkas denied that the designation was his actual title. He said he did not "look at titles," and that the difference between a member and managing member was "splitting hairs."

The parties presented two handwriting experts. The court credited the testimony of R.B. Realty's expert, J. Wright Leonard, who testified that Klurman's signature on the August 31, 2006 lease exactly matched her signature on the February 23, 2006 OTA

that was submitted to DOH in May 2006. Leonard opined "that this questioned signature was lifted, or manipulated from the [OTA] signature . . . in order to create the signature page in question." She was not exactly sure how Klurman's signature was lifted, but noted that there are several ways to do it, the most current being to cut and paste on a computer using photo software.

The court did not credit Chapin Hill's expert, William J. Ries. The judge noted that Leonard compared signatures with the aid of a microscope, whereas Ries enlarged the previously reduced signature on a lease to do a side-by-side comparison. He had difficulty explaining why enlarging a poor quality reduction might not have distorted the original, thereby significantly contributing to his opinion that Klurman's signature on the August 31 lease was not a copy.

The court also heard testimony from experts in nursing home regulations and DOH process. James Fogg, Chapin Hill's expert, stated that based on his research, a CN was issued to RBCC, Inc., but never issued to R.B. Realty. A change of ownership application was made in 1993 when the operator changed from RBCC, Inc. to Avante through a stock exchange. As of 1993, DOH recognized Avante as the licensed operator of the nursing home and R.B. Realty as the owner of the physical plant. No transfer of ownership application is on file with DOH, which would have been necessary

in order for R.B. Realty to acquire license rights from Avante. Accordingly, it was his opinion that Avante was the only party recognized by DOH as holding license rights throughout the operation and history of the facility. Fogg also testified that the DOH files contained a fully executed copy of the August 31, 2006 lease, submitted in 2007 when Chapin Hill renewed its license. The file also contained a copy of the February 23, 2006 lease signed by Jozefovic, and an unsigned May 2006 lease draft.

Fogg noted that Avante could have leased its license rights and bed rights to Chapin Hill instead of selling them. Fogg believed, however, that Avante transferred its license rights to Chapin Hill by sale as evidenced by the OTA language. Because Chapin Hill purchased the beds, when the lease term expires it can choose to move the license to another physical location.

In Fogg's experience, if the landlord intends to resume control over the license, and nursing home beds revert to it at the end of the lease, then the landlord clearly states that understanding in the recitals portion of the contract. The lease normally includes a clause requiring the tenant to cooperate in any such transfer. None of those elements are present in the OTA executed by Avante and Chapin Hill, and for that reason Fogg concluded that the parties did not intend for the license rights

to revert back to the landlord. Fogg opined "that Chapin Hill purchased and now owns the license rights for that facility."

Chapin Hill transferred fifty beds from its license to a holding company on February 23, 2007. Those beds were transferred back to the Chapin Hill license in 2012. Fogg represented Chapin Hill in both transactions. He testified that he did not provide R.B. Realty with notice of the bed transfers because section 13.3 was not in the lease that he had been given.

Based on the evidence produced at trial, the court found that "the lease promoted by [R.B. Realty], D-19 in evidence marked 8/21/06 is the true lease. The testimony of [] Jozefovic, [] Farkas and [] Zafrin was not credible or persuasive." It rejected Jozefovic's testimony that he resolved all issues in his favor during a single phone call to Klurman, observing that his version of events was "totally unworthy [of] belief[,]" and further observed:

> [] Zafrin would have the Court believe after over one and a half years of negotiations with attorneys and principals, he ceded the finalization of the transaction to the parties themselves, and never followed up on it.
>
> Furthermore, the testimony that [] Jozefovic finalized the terms of the lease with [] Klurman is controverted by the testimony that [she] was 80 years old, in failing health, and never conducted any business without her right hand man, Mr. Lichtman. [] Lichtman testified that he knew

> nothing of the heart to heart between [] Jozefovic and [] Klurman.

The court noted that Chapin Hill violated the terms of the August 21, 2006 lease beginning the day after closing when it sold thirty-five beds to its holding company. Chapin Hill further violated the lease when it named Farkas rather than Jozefovic as a "principal." The court continued:

> It is obvious that Chapin Hill had no intention of complying with the lease. The request by R.B. Realty in 2009, for a copy of the executed lease was fortuitous. It gave Chapin Hill the opportunity to provide its own version of a lease on terms entirely favorable to it. The Court finds that [] Klurman's signature was lifted from one document onto the August 31, 2006 Chapin Hill version by someone acting on behalf of Chapin Hill.

As to bed rights, the judge found that both parties understood that the reference to licenses and permits in section 9.3 of the lease encompassed that term. The judge refused to consider any expert opinions with regard to whether Chapin Hill purchased the bed rights, finding that it constituted impermissible testimony concerning the interpretation of a contract. The judge also found that section 9.3 of the lease clearly reserved the bed rights to the landlord, and that while section 2 of the OTA stated that the buyer was purchasing all "licenses and permits" held by the seller, that reference did not include bed rights in light of sections

13.3 and 9.3 of the lease. Furthermore, Chapin Hill did not assert ownership of the bed rights until after the litigation commenced:

> The assertion by [Chapin Hill] that it owns the bed rights is disingenuous. Further, Chapin Hill retransferred the beds back [to] its license in February 2012. It would not have done that it if owned the bed rights. The Court finds that R.B. Realty did not sell the bed rights to Chapin Hill either through the lease or the [OTA]. The Court finds that R.B. Realty owns and has always owned the bed rights.

The judge further found that the notices of default were proper and that Chapin Hill defaulted under the terms of the lease by transferring beds to a holding company, failing to give timely notice of the transfer, failing to provide R.B. Realty with all communications with DOH, failing to pay the $100,000 transfer fee, and substituting the managing member of Chapin Hill.[4] These defaults were material, thus the court entered judgment for possession in favor of R.B. Realty.

The court denied R.B. Realty's request for $5 million in liquidated damages. The court concluded that since both the beds and the premises would be returned, a more appropriate remedy would be to award counsel fees to R.B. Realty.

[4] The judge said by "substituting [] Jozefovic as the managing member of Chapin Hill," but given the decision and context, no doubt the judge intended to say either "substituting [] Farkas" or "substituting for [] Jozefovic."

On appeal, Chapin Hill raises the following points for our consideration:

I. STANDARD OF REVIEW.

II. THE TRIAL COURT CONCLUSION THAT THE NOTICE OF DEFAULT/TERMINATION OF JANUARY 11, 2012 COMPLIES WITH THE LEASE §19 AND WAS SUFFICIENT TO TERMINATE THE LEASE AND PLAINTIFF'S RIGHT TO POSSESSION IS CONTRARY TO CONTROLLING CASE LAW; IT WAS A MISTAKE OF LAW.

III. THE TRIAL COURT'S TERMINATION OF PLAINTIFF'S LEASEHOLD RIGHTS IN THE CONTEXT OF EQUITY'S ABHORRENCE OF A FORFEITURE (CONFUSION OVER WHICH LEASE DRAFT IF ANY WAS THE "TRUE LEASE", THE RE-TRANSFER OF PAPER BEDS TO PLAINTIFF AND ABSENCE OF INJURY TO DEFENDANT, AND PLAINTIFF'S HAVING SPENT $1.5 MILLION TO IMPROVE THE DEMISED BUILDING AND HAVING CREATED A PROFITABLE BUSINESS) CONSTITUTED AN ABUSE OF DISCRETION.

IV. THE TRIAL COURT'S HOLDING THAT THE AUGUST 21, 2006 LEASE DRAFT IS THE "TRUE LEASE" IS UNSUPPORTED BY ADEQUATE, SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD, AND IS A MISTAKE OF LAW (STATUTE OF FRAUDS).

V. THE TRIAL COURT'S HOLDING THAT THE AUGUST 31, 2006 LEASE WHICH CONTAINED NO BED TRANSFER RESTRICTIONS DOES NOT REFLECT AGREEMENT OF THE PARTIES AND WAS NOT SIGNED BY SISEL KLURMAN FOR LANDLORD, IS UNSUPPORTED BY ADEQUATE, SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD. ALTERNATIVELY, THE HOLDINGS WERE BASED UPON AN EVALUATION OF THE FACTS AS TESTIFIED TO BY PLAINTIFF'S WITNESSES, AS UNPERSUASIVE AND INCREDIBLE, AND NOT UPON AN EVALUATION OF THE CREDIBILITY OF THE WITNESSES. AS SUCH, PLAINTIFF IS

ENTITLED TO A DE NOVO REVIEW OF THAT EVALUATION, AND SO REVIEWED, THE AUGUST 31, 2006 LEASE SHOULD BE ADJUDGED THE TRUE LEASE BETWEEN THE PARTIES.

VI. THE TRIAL COURT'S HOLDING THAT THE LANGUAGE OF THE LEASE §9.3 AFFIRMED DEFENDANT'S OWNERSHIP OF LICENSE RIGHTS/BED RIGHTS AND THAT THE OPERATIONS TRANSFER AGREEMENT DID NOT CONVEY THE SAME TO PLAINTIFF IS A QUESTION OF LAW ENTITLED TO DE NOVO REVIEW, AND AS SO REVIEWED MUST BE REVERSED.

VII. THE AWARD OF ATTORNEYS' FEES IS UNDERMINED BY THE VERY CERTIFICATION OF SERVICES OF DEFENDANT'S ATTORNEY UPON WHICH IT IS BASED.

I.

In an appeal from a bench trial, "[t]he scope of appellate review of a trial court's fact-finding function is limited." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)). The factual findings and legal conclusions of the trial judge are not disturbed unless the reviewing court is "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." In re Trust Created by Agreement Dated Dec. 20, 1961, ex rel Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate when the

evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Cesare, supra, 154 N.J. at 412 (internal quotation marks and citations omitted); accord Zaman v. Felton, 219 N.J. 199, 215-16 (2014); N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008).

An appellate court owes no deference, however, to a trial court's interpretation of the law and the legal consequences that flow from established facts. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 358 (2007); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). In particular, a trial court's interpretation of a lease or contract is a question of law entitled to de novo review. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div.), certif. denied, 196 N.J. 85 (2008). The appellate court "pay[s] no special deference to the trial court's interpretation and look[s] at the contract with fresh eyes." Kieffer, supra, 205 N.J. at 223.

In our view, the trial court's decision was grounded in factual determinations made significantly based on credibility determinations, in addition to the correct application of relevant

law. The numerous rulings were substantially supported by the record, and are entitled to deference on appellate review.

II.

Chapin Hill contends that the trial court erred by concluding the landlord's notice of default complied with the terms of the lease, was legally sufficient, or afforded it a cure period. We disagree.

Chapin Hill actually received three notices regarding its failure to comply with the terms of the August 21, 2006 lease. In both the August 21 and August 31 leases, section 19.1 required R.B. Realty to extend to Chapin Hill a seven-day cure period before it could declare an event of default. The January 12, 2011 notice of default sent on Ben-Aviv's authorization, was titled "notice of default and termination of right to possession[.]" Chapin Hill disputed the allegations of this letter on January 18, 2011, and R.B. Realty therefore sent a second notice of default and termination of lease on February 25, 2011. When unsuccessful settlement negotiations ensued, R.B. Realty sent Chapin Hill additional notices of continuing default on August 19, 2011, and October 8, 2013. In the interim, Chapin Hill continued to pay rent on the nursing home property.

With regard to notice, the court stated:

> Chapin Hill further contends that R.B. Realty did not send a proper notice of default and did not allow Chapin Hill to cure the alleged default within the seven[-] day period. This is a convoluted reading of Section 19.2. . . . The Court finds that the notices of default were proper and that Chapin Hill has defaulted under the terms of the lease . . . .

Where the terms of a contract are clear and unambiguous, they must be enforced as written. Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). The court may not make "a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other." Karl's Sales & Serv., Inc. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div.), certif. denied, 127 N.J. 548 (1991).

When faced with differing proposed interpretations of contractual terms, however, the court must determine whether the language of the agreement is indeed clear and unambiguous. Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002).

> An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their plain and ordinary meaning.

> [Ibid. (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993).]

The determination of whether ambiguity exists, just as other interpretations of the terms of a contract, is a question of law. Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009).

Here, although the parties interpret the requirements imposed by sections 19.1 and 19.2[5] differently, the wording is not ambiguous. Under section 19.1, an "event of default" occurs when the lessee fails to fulfill any of the covenants of the lease and the lessee has not cured, or commenced curing such default, within seven days after receiving written notice. Section 19.1 further provides that the "Lessor, at its option, may give to Lessee a notice of intention to Terminate this Lease, effective as of the date of the occurrence of an Event of Default." (emphasis added). Section 19.2, upon which Chapin Hill heavily relies, simply gives the lessor a right of re-entry, i.e., to take possession of the demised premises after the lease is terminated in accord with section 19.1.

The January 12, 2011 default letter specified that Chapin Hill's right to possession was being terminated because it

[5] The relevant portions of sections 19.1 and 19.2 are identical in the August 21, 2006 lease and the August 31, 2006 lease.

submitted an altered and unapproved version of the lease agreement to DOH; Chapin Hill transferred facility beds to a holding company without R.B. Realty's consent; and Chapin Hill failed to pay the December 2010 rent in a timely fashion. It concluded:

> R.B. Realty is hereby placing [Chapin Hill] on notice that it is terminating [Chapin Hill's] right to possession of the Premises. Please contact me so that we may discuss how you intend to vacate the Premises in an orderly fashion by no later than March 31, 2011 so that the residents of the nursing home are properly protected.

The January 12 letter conforms to the requirements of sections 19.1 and 19.2. It identifies the relevant violations of covenants in the lease, informs Chapin Hill that R.B. Realty intended to take possession, and specifies a termination date more than seven days after the date of the notice. Although it did not state that Chapin Hill had the right to cure within seven days, nothing in either the August 21 or August 31 sections 19.1 or 19.2 required such language.

Additionally, R.B. Realty did not take possession until after two additional notices of default, dated February 25, 2011, and August 19, 2011. Obviously, Chapin Hill had ample time in which to correct the alleged defaults.

Furthermore, N.J.S.A. 2A:18-53(c)(4), which governs commercial leases, authorizes the removal of a tenant where a

breach of the covenants in the lease is committed, reserving a right of reentry in the landlord so long as a written notice has been served, and a written demand made for removal. The notices complied with the statute. The notices are not required to include language to the effect that the tenant must cease the objectionable conduct. Ivy Hill Park Apartments v. G&B Parking Corp., 236 N.J. Super. 565, 570 (Law Div.), aff'd, 237 N.J. Super. 1 (App. Div. 1989). Thus, the notices of default complied with the law.

Chapin Hill's reliance on Ingannamorte v. Kings Super Markets, Inc., 55 N.J. 223 (1970), is inapposite. Ingannamorte does not support Chapin Hill's argument because the issue in dispute between these parties is not a technical deficiency regarding the right to cure. Id. at 226. That was the issue in Ingannamorte, while here the notices were clear that R.B. Realty was willing to allow the tenant to continue in the premises. Chapin Hill, however, does not even recognize the August 21, 2006 lease as valid, or acknowledge that a breach occurred.

Porter & Ripa Associates, Inc. v. 200 Madison Avenue Real Estate Group, 159 N.J. Super. 317, 320 (Ch. Div. 1978), aff'd, 167 N.J. Super. 48 (App. Div. 1979), upon which Chapin Hill also relies, is a case in which a landlord locked out a tenant. R.B. Realty did not engage in such conduct, and in fact served Chapin

Hill with three notices over eleven months. Accordingly, the holding in Porter & Ripa has no bearing on the issues at hand.

Chapin Hill's arguments regarding the notices of default stem from its disagreement that the August 21 lease controlled, not from any actual deficiencies in the notices. Since the August 21, 2006 lease controls, Chapin Hill's reduction in the number of beds through transfer, rather than by temporary decertification, was a breach. It kept those beds off license for more than ninety days, failing to give R.B. Realty written notice of the transfer, failing to give R.B. Realty copies of communications with DOH concerning the transfer, and failing to provide R.B. Realty with an irrevocable letter of credit to secure the liquidated damages. Chapin Hill's transfer of the beds back onto its license did not cure the breach. As Ben-Aviv testified, R.B. Realty was entitled to damages for the violation of the lease terms caused by the unauthorized transfer. Thus, the court did not err in finding that Chapin Hill's failure to pay R.B. Realty $100,000 per transferred bed constituted a default of the lease.

We conclude that the January 12, 2011 notice was sufficient. The court's findings of default based on Chapin Hill's transfer of the beds should be affirmed.

III.

We agree with the trial court's conclusion that the August 21, 2006 lease was the controlling agreement entered into by the parties. It ultimately rejected the testimony of Jozefovic and Farkas as not credible and for that reason found that the August 21, 2006, lease represented the true agreement between the parties. Its evaluation of witness credibility is entitled to substantial deference, Cesare, supra, 154 N.J. at 412, and its findings concerning the August 21, 2006 lease will be affirmed if supported by competent, relevant, and credible evidence in the record, Rova Farms Resort, supra, 65 N.J. at 484.

Lichtman, upon whose testimony the judge relied, testified that the negotiations were essentially complete when the February 23, 2006 draft of the lease was distributed. Significantly, it is undisputed that both parties signed the February 23, 2006, draft. The August 21, 2006, lease was identical to the February 23, 2006 draft, except that the blanks for the amount of rent and the annual rent increase, which are not in dispute, had been filled in. The lease term renewal periods had also been filled in, but the initial lease term had not. Given that Jozefovic signed the February 23, 2006 draft and that the court disbelieved his unsupported testimony that Klurman capitulated on several key provisions during a single, last-minute phone call, it follows

that the August 21, 2006 lease reflected the true agreement between the parties. The decision was reached based on credibility findings, and is further supported by other evidence in the record.

While it is accurate that the court did not address Chapin Hill's argument concerning Jozefovic's signature on the August 21, 2006 lease, this does not detract from the court's finding of the lease's authenticity. The signatures on every document produced after February 23, 2006, were problematic. Even Lichtman was unsure whether Klurman had actually signed the August 21, 2006 lease. The parties' practice of simply faxing signature pages to their out-of-state attorneys, who then attached the pages to documents as required, contributed to the uncertainty.

The signature pages attached to the August 21, 2006 lease may well have been duplicates of other signature pages produced at other times during the negotiations. When considered in the context of the course of dealings between the parties, utilization of that practice does not mean that the attorneys were not authorized to attach those papers. It is undisputed that at no time during these negotiations did the parties and their attorneys assemble at the same time in the same place to sign a fully completed document.

The court was called upon to determine which agreement controlled when Chapin Hill took possession of the premises on

September 1, 2006. Its conclusion that that agreement was the August 21, 2006 lease is strongly supported by the evidence and should be affirmed.

Chapin Hill's argument that the court's credibility calls and other factual findings are conclusions of law to which we should give plenary review lacks merit. The judge, given the circumstances of the transaction between these parties, carefully drew the sequence of events from those witnesses whom she found worthy of belief, and then only if corroborated by other circumstances. Therefore, contrary to Chapin Hill's argument, her conclusions were not conclusions of law which we review de novo, but rather, conclusions of fact based on credibility determinations which we review deferentially.

The court's decision to credit R.B. Realty's handwriting expert, and not Chapin Hill's, was a reasonable exercise of discretion. See Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001) (internal citations omitted) ("[E]xpert testimony need not be given greater weight than other evidence nor more weight than it would otherwise deserve in light of common sense and experience. The factfinder may accept some of the expert's testimony and reject the rest."). R.B. Realty's expert examined the signatures on the August 31, 2006 lease and the OTA with the aid of a microscope, as opposed to Chapin Hill's expert,

who enlarged a previously reduced signature for a side-by-side comparison. Of the two procedures, only one did not potentially distort the item viewed. Accordingly, we find the trial judge's decision that the August 21, 2006 lease controlled was reasonable, based on credibility determinations and other substantial support in the record.

IV.

Chapin Hill further contends that even if the August 21, 2006 lease is the true lease, the court should not have terminated the leasehold. In support of the argument, it points out that forfeitures are disfavored in law, and the equities of the case mitigate against forfeiture, including the company's timely payments throughout the tenancy.

"Foreclosure is a harsh remedy and equity abhors a forfeiture." Brinkley v. W. World, Inc., 275 N.J. Super. 605, 610 (Ch. Div. 1994), aff'd, 292 N.J. Super. 134 (App. Div. 1996). For that reason, "[a] court of equity may invoke its inherent equitable powers to . . . deny the remedy of foreclosure." Ibid. Nevertheless, termination of the leasehold can be an appropriate remedy when a tenant violates the express terms of its lease contract. N.J.S.A. 2A:18-53.

In Dunkin' Donuts of America v. Middletown Donut Corp., 100 N.J. 166, 186 (1985), the Court held that the Chancery Division

had erred by invoking its equitable powers to preserve the rights of a franchisee that had willfully breached its contract agreement with the franchisor. The Court wrote:

> We focus first on the contention that strict adherence to contractual remedies in the circumstances before us will impose a forfeiture on the franchisee. Although it is true that equity abhors a forfeiture, equity's jurisdiction in relieving against a forfeiture is to be exercised with caution lest it be extended to the point of ignoring legal rights. Thus if parties choose to contract for a forfeiture, a court of equity will not interfere with that contract term in the absence of fraud, accident, surprise, or improper practice. Although the Chancery Division did find fraud, to be sure, the fraudulent misconduct was committed by the franchisee, who benefitted from the court's invocation of equity. The only sound conclusion to draw is that equitable relief against forfeitures should not be granted to a party whose own knowing fraudulent conduct is itself the cause of the forfeiture. See Faustin v. Lewis, 85 N.J. 507, 511 (1981), repeating the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit.
>
> [Id. at 182-83 (emphasis in original) (citations omitted).]

This reasoning applies to the matter at hand. R.B. Realty did not engage in misconduct, Chapin Hill did by decertifying beds contrary to the lease agreement. It breached the clear terms of the lease the day after the transaction closed by transferring thirty beds off license. It failed to maintain Jozefovic as the

facility's manager despite covenanting to do so. There was also evidence that Chapin Hill may have used Farkas's position of trust with Avante to its own advantage during contract negotiations. Because Chapin Hill's own knowing conduct laid the groundwork for the forfeiture, the court did not err by refusing to use its equitable powers to grant it relief.

None of the cases cited by Chapin Hill suggest otherwise. For example, Mandia v. Applegate, 310 N.J. Super. 435 (App. Div. 1998), is distinguishable in several ways. In Mandia, the trial court refused to declare a forfeiture of a leasehold interest where the tenant, a Seaside Park merchant, had continued using the boardwalk outside its store to display merchandise despite warnings from the landlord that the use violated the lease. Id. at 447-49. We noted that the relevant lease provision followed the warning that the tenant's breach of "any of its obligations hereunder" would trigger a forfeiture, suggesting that the breach of that provision would not result in a default. Id. at 448. Even if the forfeiture clause applied to obstruction of the boardwalk, the tenant's display of merchandise, when viewed in light of the prior business and personal relationship between the parties, constituted only a minor breach. Id. at 449. Citing to 49 American Jurisprudence 2d Landlord and Tenant § 339 (1995), we observed that equity may be invoked to avoid a forfeiture of a

lease when clearly necessary to prevent an unduly oppressive result or to prevent an unconscionable advantage to the lessor. Mandia, supra, 310 N.J. Super. at 449.

Here, the language of section 13.3 is not ambiguous. Section 13.3(c) states that "a breach of this provision in any way will constitute a material breach of the Lease." Thus, the parties clearly contemplated that a violation of section 13.3 would constitute a default under the lease. The default was classified as material and not the minor, non-permissible use that was at issue in Mandia. Moreover, imposing a forfeiture here is not oppressive or unconscionable where it resulted from Chapin Hill's own knowing misconduct. For these reasons, the court did not abuse its discretion in failing to invoke an equitable remedy to preserve Chapin Hill's leasehold.

V.

We do not address Chapin Hill's statute of frauds argument. It was not raised below, and is therefore not properly before us. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Additionally, such a claim is an affirmative defense that must be timely raised in a responsive pleading. Lahue v. Pio Costa, 263 N.J. Super. 575, 597-98 (App. Div.), certif. denied, 134 N.J. 477 (1993). That was not done in this case.

VI.

Chapin Hill further contends that the court erred in finding that the OTA did not convey the bed rights. It argues the evidence overwhelmingly established that the certificate of need referenced in section 9.3 of the August 21, 2006 lease pertained to the building, not the operating licenses, the OTA unambiguously conveyed the bed rights to Chapin Hill, Chapin Hill paid over $2 million in consideration for those bed rights, R.B. Realty never owned the bed rights for the nursing home operation, and Jozefovic offered a reasonable explanation for the retransfer of fifty beds from the holding company to Chapin Hill. We do not agree.

First, it is clear from the drafts of leases presented during the trial that Chapin Hill's efforts to purchase the bed rights were unequivocally rejected in the early stages of negotiations. Lichtman wrote "no" next to such a request on a copy of a July 20, 2005 email from Zafrin.

Negotiations surrounding the OTA established that the name of the document was altered for the very reason that no assets were being conveyed. Additionally, language stating that the licenses being sold related to ownership of the operations was removed from section 2(iii).

Nowhere in any version of the lease exchanged between the parties were the improvements made to the physical plant, which

Chapin Hill alleges were worth $1.5 million, mentioned as an obligation on the purchaser, or a portion of the purchase price. There is simply no evidence that the renovations were other than a business decision Chapin Hill made unrelated to purchase of bed rights.

Chapin Hill's expert's testimony regarding the bed rights, and references in the OTA as being about the bed rights, interpreted the contract. The court was obligated to disregard those opinions concerning the meaning of the contract. Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 659 (App. Div. 2000) (citing Healy v. Fairleigh Dickinson Univ., 287 N.J. Super. 407, 413 (App. Div.), certif. denied, 145 N.J. 372, cert. denied, 519 U.S. 1007, 117 S. Ct. 510, 136 L. Ed. 2d 399 (1996)). The interpretation of that document is also subject to de novo review on appeal. See Kieffer, supra, 205 N.J. at 222.

As an aside, the expert also testified, based on his review of DOH historical documents, that ownership of the bed rights still appeared to be in Avante, and was never conveyed by that entity. Avante, the corporate entity, no longer exists. We were advised at oral argument that since judgment was entered, the bed rights were conveyed, with DOH approval, by R.B. Realty to an outside group which now operates the nursing home. Regardless of whether DOH was aware of the title problem, or the expert simply

overlooked records establishing a transfer, or that such records were simply missing, the nursing home is currently fully operational and the issue is essentially moot.

In addition to the lack of consideration supporting the transfer of ownership of the beds, there were other circumstances that supported R.B. Realty's ownership. Among them we number Chapin Hill's attorneys writing to R.B. Realty stating that their client was not asserting ownership over the beds. Although he was no doubt aware of the contents of those letters, Jozefovic never made any effort to correct those statements. The issue regarding ownership and licensing rights did not even arise until after the second amended complaint was filed in November 2012, almost a full year after R.B. Realty filed eviction proceedings against Chapin Hill.

Finally, the language of section 9.3 of the August 21, 2006 lease is dispositive. It provides that all licenses issued by any government entity that were related to the premises were vested exclusively in the lessor, and that the lessee would have no right or interest in any of the licenses, except as expressly provided in the lease. At the same time, section 2(iii) of the OTA states that the seller would convey to buyer "to the extent assignable, all licenses and permits held by Seller relating to the operations of the Assets." In section 8(D), the seller warrants that

"[e]xcept to the extent held by the Landlord, Seller holds and has the right to assign (to the extent the same are assignable) to Buyer . . . all licenses . . . required to be held by Seller . . . to conduct and operate the Nursing Home." Thus, the lease vests all licenses in the landlord and the OTA exempts licenses held by the landlord from those being sold.

VII.

Chapin Hill disputes the trial court's $653,454.34 counsel fee award for several reasons. First, it attacks R.B. Realty's certification regarding services in that it does not allocate entries to the dismissed liquidated damages claim, has duplicative entries, and entries related to other cases. R.B. Realty responds that section 15.2 of the August 21, 2006 lease requires the tenant to pay legal fees for recovery of the facility, the trial judge had the discretion to award an equitable remedy, and did so in this case by requiring Chapin Hill to pay legal fees in lieu of liquidated damages. R.B. Realty also asserts no vague or duplicative entries were submitted, and that Chapin Hill fails to specifically identify any such entries.

Section 15.2 of the lease requires the lessee to pay "all reasonable legal costs and charges, including counsel fees, incurred by Lessor in obtaining possession of the demised premises after Lessee's default." Initially, the court was not relying on

that clause, rather, was awarding counsel fees as an equitable remedy in lieu of liquidated damages. Subsequently, however, the court stated that it would award fees based not as an equitable remedy in lieu of liquidated damages, but on section 15.2 of the lease.

The judge did review the counsel fee certification, finding it complied with Rule 4:42-9(b) and RPC 1:5(a), deleting certain entries made for work she did not consider strictly relevant to the litigation. The court noted that this case involved substantial motion practice, pretrial discovery, travel, and a nineteen-day trial.

The difficulty we have with the counsel fee award is that the language in section 15.2 does not include the dispute regarding ownership of the nursing home beds. Section 15.2 includes the work necessary regarding possession of the premises, not reacquiring the bed rights. Those items should therefore be deleted, to the extent possible, from the certification as not encompassed by section 15.2.

Although the court found the certification complied with applicable rules, it did not specifically find that the attorneys' fees were reasonable. No lodestar was established. See Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004) (citing Rendine v. Pantzer, 141 N.J. 292, 335 (1995)). "[T]he court should evaluate

the rate of the prevailing attorney in comparison to rates 'for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Id. at 22 (quoting Rendine, supra, 141 N.J. at 337); see also Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 387 (2009) (applying the test for reasonable attorney's fees in a contract case). Additionally, the hourly rate should be calculated according to the prevailing market rates in the relevant community. Rendine, supra, 141 N.J. at 337 (citing Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)); see also R.M. v. Supreme Court of N.J., 190 N.J. 1, 10 (2007) (noting that market rate analysis incorporates equitable considerations). That process did not occur.

Accordingly, we vacate the award of attorneys' fees and remand the matter so that fees and charges related to the bed rights claim can be deleted, and the court can address the reasonableness of R.B. Realty's hourly rate and time expended to secure possession of the premises.

VIII.

Finally, Chapin Hill contends the court erred in entering the March 12, 2015 enforcement order requiring it to cooperate with R.B. Realty in turning over the business and related documents. Chapin Hill's objection includes Medicare and Medicaid

certifications, which it avers did not in any way relate to license transfers or the smooth transition of operations.

R.B. Realty responds in a footnote in its merits brief that the enforcement order is within the trial court's equitable discretion and that, in any event, the court was merely "fleshing out" the final judgment order. Further, it states that Chapin Hill failed to address its logistical arguments in a timely fashion with the court below.

The March 12, 2015 order directs Chapin Hill to "provide all information R.B. Realty requests in order to assume operations of the Chapin Hill nursing home" and to "execute all documents requested by R.B. Realty to assume operations of the nursing home including but not limited to all documents related to the transfer of Chapin Hill's Medicare and Medicaid Certifications."[6] No oral or written statement explaining the court's reasoning are included in the record.

Nonetheless, because Chapin Hill's arguments are vague and unsupported by facts in evidence, they warrant little consideration on appeal. See Weiss v. Cedar Park Cemetery, 240

[6] The order also requires Chapin Hill to vacate the nursing home upon notice that R.B. Realty has been approved by DOH to provide services to nursing home residents. It also required Chapin Hill to pay $4663.22 in counsel fees; Chapin Hill does not challenge that aspect of the order.

N.J. Super. 86, 102 (App. Div. 1990) (failure to adequately brief issue requires it to be dismissed as waived); D'Ercole v. Mayor & Council of Norwood, 198 N.J. Super. 531, 542 (App. Div. 1984). Other than Chapin Hill's bald assertion that the documents requested by R.B. Realty relate to business valuation and not the transfer of operations, there is nothing in the record to identify the materials or how Chapin Hill will be damaged if it provides them. The trial court, thoroughly familiar with the matter following weeks of trial, was in a better position than this court to evaluate the propriety of R.B. Realty's requests. Moreover, an overriding consideration in the court's calculus likely was the continuation of care for the nursing home residents. The court's order, which requires cooperation between the parties, furthers that end.

Concerning the Medicare and Medicaid certifications, there is no basis to consider Chapin Hill's arguments now. Although Chapin Hill provides a certification from Fogg, it is not clear whether that certification was timely submitted to the court or whether the court even considered it. Since the damages Chapin Hill claims will ensue from sharing the certifications are monetary, Chapin Hill can file an action at a later date requesting reimbursement for any receivables that were improperly collected by R.B. Realty.

A trial court retains the discretionary power to make equitable determinations to achieve a just result. McNair v. McNair, 332 N.J. Super. 195, 198 (App. Div. 2000). Nothing in the record suggests that the trial court abused that discretion by ordering Chapin Hill to cooperate with R.B. Realty in the transfer of the nursing home operations.

Affirmed in part; reversed and remanded as to the award of counsel fees. We do not retain jurisdiction.