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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4632-19**

**CENTRAL JERSEY COLLEGE
PREP CHARTER SCHOOL, a
New Jersey non-profit corporation,**

**Plaintiff-Respondent/
Cross-Appellant,**

v.

**NEW JERSEY CHINESE
COMMUNITY CENTER, INC.,**

**Defendant-Appellant/
Cross-Respondent.**

Argued October 18, 2022 – Decided December 28, 2022

Before Judges Messano, Gilson, and Rose.

On appeal from the Superior Court of New Jersey,
Law Division, Somerset County, Docket Nos.
L-1305-16, L-1399-16, and L-1414-17.

Joel C. Seltzer argued the cause for appellant/cross-respondent (Joel Seltzer Law Office and Law Office of Cynthia M. Hwang, LLC, attorneys; Joel C. Seltzer and Cynthia M. Hwang, on the briefs).

Arthur L. Skaar, Jr., argued the cause for respondent/cross-appellant.

PER CURIAM

This appeal involves contentious disputes between a former tenant that operated a charter school in a building owned by a not-for-profit community center. The ensuing litigation gave rise to a convoluted procedural history.

Following a bench trial, the court found that the tenant had not been constructively evicted by the landlord and had breached leases by moving its school to a new building three years before the leases expired. The trial court, therefore, entered a judgment awarding the landlord just over \$921,000 for lost rent.

The landlord moved for reconsideration, seeking additional damages for rent under a second lease not expressly addressed by the trial court. Instead of addressing the damages issue, the trial court sua sponte considered statutes and a regulation concerning the obligation of public schools to provide students with physical education. That authority had not been addressed at trial. Based on its reading of the statutes and regulation, the trial court vacated the original judgment, held that the landlord had constructively evicted the tenant by not allowing it to build a new gym, and entered a new judgment awarding neither

party damages. The trial court, thereafter, entered an order awarding the tenant legal fees based on an offer of judgment made before trial.

The landlord now appeals and the tenant cross-appeals. Because of procedural and substantive errors, we are constrained to vacate the second judgment entered on reconsideration, reinstate the liability portion of the original judgment, and remand for a new hearing on lost rent owed to the landlord.

I.

Plaintiff Central Jersey College Prep Charter School (plaintiff, Tenant, or Charter School) began operating a charter school in 2006. Initially, the Charter School enrolled students in grades six through twelve. Later, it expanded its enrollment to include students in kindergarten through fifth grade.

Defendant New Jersey Chinese Community Center (defendant, Landlord, or Community Center), operates a community center, including a small private school with approximately fifty students. The Community Center owns a building that has approximately 90,000 square feet.

Beginning in 2007, and for the next ten years, the Charter School operated its school in the Community Center's building. In June 2007, the Charter School rented space from the Community Center under a one-year lease that expired in

July 2008. Thereafter, the Charter School rented space from the Community Center under two leases.

The first lease was signed in May 2008, and was amended and extended twice thereafter on June 19, 2011, and October 31, 2013 (the First Lease). The June 19, 2011 amendment extended the term of the First Lease to July 14, 2012, and provided the Charter School with an option to extend the term for an additional year. The October 31, 2013 amendment extended the term for another two years and provided that the term would be automatically extended for an additional five years unless the Charter School notified the Landlord otherwise. Because the Charter School did not exercise its right to cancel the First Lease, the term was extended to July 14, 2020.

Under the First Lease, the Charter School rented approximately 45,000 square feet of the Community Center's building and, for the period from July 2015 to July 2020, it agreed to pay rent of \$2,225,000 in monthly installments of just over \$37,000. The Charter School also agreed to pay a \$60,000 security deposit in three installments. The First Lease allowed the Charter School "to construct a gymnasium and classrooms in the leased premises" at its own expense. Consequently, the Charter School converted a storage space that was roughly the size of two or three classrooms, with an approximately twenty-six-

foot ceiling, into a gymnasium. The gymnasium had room for a small indoor basketball court. The Charter School also had access to an outdoor basketball court.

The October 31, 2013 amendment also gave the Charter School permission to construct a new and larger "air bubble gym" (the bubble gym) in the rear parking area of the building. The amendment provided that the Charter School would be responsible for paying for and constructing the bubble gym, as well as for any maintenance and repairs to the new gym.

The second lease was signed in April 2015 and ran from July 14, 2015, to July 14, 2020 (the Second Lease). Under the Second Lease, the Charter School rented additional sections of the Community Center's building and agreed to pay a total rent of \$1,356,468 in monthly installments, as well as a \$40,000 security deposit. The Charter School had expanded its enrollment in 2015 to include kindergarten through fifth grade students and it intended to use the additional space to accommodate those new students. Both the First and Second Leases contained covenants of quiet enjoyment.

Around the time the parties signed the Second Lease, disputes arose concerning the construction of the bubble gym. In 2014, the Charter School had submitted to the local board of adjustments a site plan and application for zoning

variances to construct the bubble gym. The director of the Community Center had reviewed and signed an affidavit in support of that application. The following year, in February 2015, the board of adjustments held a public hearing during which no members of the public spoke on the application. Shortly after the hearing concluded, the director of the Community Center informed the existing head of the Charter School that he did not agree with the current design of the bubble gym and asked that the Charter School revise the design. The Charter School declined to do so, and, in July 2015, the board of adjustments granted the Charter School's variances to build the bubble gym.

Around that same time, the Charter School expressed an interest in buying the building from the Community Center and indicated that it might not build the bubble gym unless the Community Center sold it the building. In response, the Community Center proposed constructing a larger shared indoor gymnasium, but the Charter School did not find that proposed gymnasium suitable for its students and reiterated that the cost of the bubble gym was what it could afford if the Community Center was willing to sell the building. Thereafter, the parties began to dispute the scope of the leased space available to the Charter School, including the existing indoor gymnasium.

In October 2015, the Community Center filed a summary dispossession action seeking to prevent the Charter School from using the existing gymnasium. Ultimately, the Charter School prevailed in that action.

Through 2015, and against the backdrop of these disputes, the parties negotiated the potential sale of the building to the Charter School. After exchanging various proposals, the parties agreed on a purchase price of \$15 million, but they could not agree on a closing date. The Community Center wanted to sell the building in 2020, so it could continue collecting rent under the existing leases. The Charter School, however, did not want to wait that long.

Around December 2015, the Charter School began negotiating a new lease in a new building owned by a different landlord. Seven months later, in July 2016, the Charter School signed a five-year lease to rent 90,000 square feet in a building located on Mettlers Road (the Mettlers Lease). The Mettlers Lease term began in September 2017, and the new landlord agreed to renovate the space and have it available by August 2017. The Mettlers Lease also included an indemnification provision, under which the new landlord agreed to indemnify the Charter School from any losses it incurred in breaking the leases with the Community Center.

Two weeks before the Charter School signed the Mettlers Lease, the Community Center notified the Charter School that it would be terminating the leases unless the Charter School repaired the parking lot and driveway as required by the leases. The Charter School made those repairs, but the Community Center did not find them acceptable. Nevertheless, the Community Center extended the time for the Charter School to make additional repairs. The Charter School then signed the Mettlers Lease but did not notify the Community Center of that new lease. Thereafter, in September 2016, the Community Center filed a second summary dispossession action.

In October 2016, the Charter School filed a complaint for a declaratory judgment and other relief. The Charter School alleged that beginning in October 2015, the Community Center had "pursued a pattern of abusive, retaliatory and unlawful action against" the Charter School and had thereby violated the Charter School's covenant of quiet enjoyment of the premises. The Charter School sought a declaration that it was absolved from further obligations under the leases and was entitled to damages from the Community Center. The Charter School also sought to consolidate the second summary dispossession action the Community Center had filed.

The Charter School then vacated the Community Center's building in September 2017 and moved to the Mettlers Road building. At the time of that move, the gymnasium at the Mettlers Road building was not yet complete and the Charter School had to use "alternative space" for its "gymnasium purposes."

Shortly after the Charter School moved, the Community Center sent the Charter School multiple notifications of defaults for abandoning the premises and failing to pay rent and utilities, repair and maintain the premises, and secure the Landlord's consent before making structural alterations to the premises. The Community Center asserted that because of the Charter School's default, it would seek to terminate the leases. The Community Center then filed a third summary dispossession action in October 2017.

Thereafter, in 2018, the Charter School filed an amended complaint asserting causes of action for constructive eviction, breach of contract, return of a security deposit, conversion of materials and equipment left at the Community Center's building, and tortious interference. The Charter School further amended its complaint to add a count alleging abuse of process.

The Community Center responded with affirmative defenses and counterclaims, including claims for breach of contract, fraud, constructive fraud, negligent misrepresentation, civil conspiracy, unjust enrichment, breach of the

implied covenant of good faith and fair dealing, and abuse of process. It sought to terminate the leases and damages, including damages for unpaid rent. The second and third dispossession actions were later transferred to the Law Division and consolidated with the declaratory judgment action.

In 2019, both parties moved for summary judgment, and on July 12, 2019, the court granted the Charter School's motion in part and denied the Community Center's motion in its entirety. Three days later, the Charter School served the Community Center with an offer of judgment under Rule 4:58. The Charter School offered to pay \$300,000 to resolve "all claims by and against" the Charter School. The Community Center did not accept that offer.

A fourteen-day bench trial was conducted on non-consecutive days between October 2019 and January 2020. During trial, the court heard testimony from numerous witnesses, including the former and current heads of the Charter School, the director of the Community Center, and expert witnesses called by both parties. A central issue was whether the Community Center had interfered with the Charter School's construction of the bubble gym. Both the former and current heads of the Charter School testified that the Charter School never had to delay, suspend, or cease its operations, and that the existing indoor gymnasium was continuously available to the Charter School during the time

that it occupied the premises at the Community Center's building. The experts offered opinions concerning the parties' landlord-tenant relationship and issues related to the Charter School's ability to move forward with and construct the bubble gym.

On April 29, 2020, after hearing the evidence, and after receiving post-trial submissions from the parties, the trial court entered final judgment awarding the Community Center \$921,695 (the April 2020 Judgment). The court supported that judgment with a fifty-three-page written opinion, in which it made findings of facts and conclusions of law.

The court started by addressing the claims asserted by the Charter School. First, the trial court found that none of the actions of the Community Center had constructively evicted the Charter School. Specifically, the court found that both the past and current heads of the Charter School testified that the Community Center's actions had no substantial effect on the Charter School's operations, the ability of its students to attend school, its teachers' and staff's ability to go to work, and the Charter School's ability to use the leased premises. While the court found that the Community Center had prevented the Charter School from constructing the bubble gym, the court also found that the absence

of a bubble gym did not affect the Charter School's use of the entire leased premises:

Plaintiff's allegations that the addition of the K-5 students could not be accommodated by the existing interior gym, and must have the bubble gym, is not supported by the evidence. Plaintiff opened and operated [k]indergarten, 1st and 2nd grades as planned in 2015-16 and 3rd grade as planned in 2016-17, all without a bubble gym.

Second, the court found that the Community Center had partially breached the First Lease by interfering with the Charter School's construction of the bubble gym. The court also found, however, that the Charter School was only entitled to an offset of \$52,477, to reimburse it for the costs it had incurred in planning and applying for approvals to build the bubble gym.

Third, the court found no credible evidence that the Charter School paid \$30,000 of the \$60,000 security deposit for the First Lease and noted that the First and Second Leases called for the return of any security deposit only after the Tenant performed according to the leases. Therefore, the court denied the Charter School's request for the return of the security deposits.

Fourth, the court rejected the Charter School's conversion claim, finding that the Charter School had abandoned any property it left in the building when it moved out in September 2017. In that regard, the court noted that the First

Lease stated that any fixtures or furniture left in the building after the tenancy would be deemed abandoned by the Tenant and would become the property of the Landlord.

Fifth, the court rejected the Charter School's claims of tortious interference, retaliation, and abuse of process. The court found that the Community Center had a right to pursue its legal claims, including the actions for summary dispossession. The court also found that the Community Center had a right to re-enter the leased premises after the Charter School moved out. In addition, the court found the Charter School had not established a claim of retaliation because the Community Center did not owe the Charter School a duty independent from the leases.

In summary, the trial court found that the Charter School had operated in the Community Center's building for over ten years without a bubble gym and that the absence of a bubble gym did not deprive the Charter School of its beneficial enjoyment of the leased premises. Indeed, the court found that the Charter School had been able to expand its enrollment and that, while the Community Center did not always act appropriately, none of its actions substantially frustrated the Charter School's ability to use the entire leased premises.

Turning to the Community Center's claims, the trial court found that the Charter School had breached the leases by vacating the premises before the terms expired. The Community Center had alleged several types of damages, including damages for the cost to repair and replace items damaged by the Charter School and for lost rent. Ultimately, the trial court concluded the Community Center was only entitled to lost rent.

In making that finding, the court noted that the Landlord had not been a "paragon of admirable business practice," but nonetheless was entitled to its contractual remedies. The court then found that the Community Center had lost rent from September 14, 2017, to July 14, 2020, in the amount of \$969,218. The court then decreased that amount to account for \$100,000 in security deposits and added \$52,477 in costs incurred by the Charter School in connection with the bubble gym. The trial court apparently intended to subtract the costs the Charter School incurred in preparing to build the bubble gym from the lost rent award, but the court mistakenly added those costs. Consequently, the court awarded the Community Center \$921,695 (that is, \$969,218, less \$100,000, plus \$52,477). Finally, the court rejected each party's claims for attorneys' fees and costs.

The day after the court issued its April 2020 Judgment, the Community Center moved for reconsideration. The Community Center contended that the court had awarded lost rent under the Second Lease only, and it had mistakenly failed to award lost rent under the First Lease. The Charter School opposed the motion, argued that the judgment should not be reconsidered, and it did not file its own motion for reconsideration or to open the judgment.

In opposing the Community Center's motion for reconsideration, however, the Charter School attached a copy of a reply brief it had submitted on July 8, 2019, in connection with an earlier motion for summary judgment. The July 8, 2019 reply brief cited statutes and a regulation concerning physical education requirements and learning standards for students. Specifically, the reply brief cited N.J.S.A. 18A:35-5, -7, and -8, and N.J.A.C. 6A:8-1.3. Based on those statutes and that regulation, the Charter School contended that it had to have a gymnasium and the Community Center had constructively evicted it by interfering with the construction of the bubble gym.

On May 21, 2020, the trial court held a telephone conference with counsel, but that conference was not recorded. The following day, the court entered an order stating that it would reconsider its April 2020 Judgment, reopen the record, and allow the parties to submit supplemental briefs.

In June 2020, the Charter School submitted supplemental briefs, in which it contended the court should amend the damages amount, but it did not file a cross-motion for reconsideration or motion to open the judgment. In one of its briefs, the Charter School stated that it "respect[ed] this [c]ourt[']s legal analysis of plaintiff's main defense of constructive eviction[.]" but maintained the court erred in concluding that the absence of a bubble gym did not affect the Charter School's use of the entire leased premises. In support of that contention, the Charter School reiterated its arguments that it was required to have a gymnasium and the Community Center had constructively evicted it by interfering with the construction of the bubble gym.

On August 5, 2020, the trial court issued an amended order for judgment, together with a "revised" opinion (the Revised August 2020 Judgment). In the Revised August 2020 Judgment, the court stated that it had granted the Community Center's motion for reconsideration because it had made an error and had confused the two leases in calculating damages. The court went on to rule, however, that the damages award to the Community Center was "moot" because the court had been made aware of "the Physical Education requirements under New Jersey law[.]" The court acknowledged that it had previously found that the absence of a bubble gym did not affect the Charter School's use of the

entire leased premises. The court concluded, however, that its prior factual finding was an error. Without analyzing the statutes and regulation cited by the Charter School, the court found that the Charter School had been forced to leave the Community Center's building because of the Community Center's interference with its construction of the bubble gym. In making that new finding, the trial court reasoned that "[u]nder New Jersey State law, to which the court is now privy, if Tenant could not construct a gym, it could not meet its educational objective to operate a school, which was clearly the purpose for which the premises were leased."

The court then went on to find that although the Charter School had continued to use the leased premises through August 2017, "the use contemplated under the lease[s] was thwarted by [L]andlord by preventing Tenant's compliance with the law, and use of the premises for which it was intended. [Tenant] was thus, deprived of the purpose for which the premises were leased." Thereafter, the trial court analyzed the claims made by each of the parties, but ultimately found that neither party had established any monetary damages. Consequently, in the Revised August 2020 Judgment, the court did not award damages to either party.

Shortly thereafter, the Charter School moved for an award of attorney's fees based on the offer of judgment rule. The Community Center cross-moved for reconsideration of the Revised August 2020 Judgment.

Before either of those applications was addressed, the Community Center filed an appeal from the Revised August 2020 Judgment and the Charter School cross-appealed. We temporarily remanded the matter for the trial court to decide the pending motions. On November 20, 2020, the trial court denied the Community Center's motion for reconsideration as untimely and granted the Charter School just over \$47,000 in attorney's fees. The court stayed execution of that award pending the appeals to this court.

The Community Center now appeals from the Revised August 2020 Judgment and the Charter School cross-appeals.

II.

On its appeal, the Community Center contends that we should (1) vacate the Revised August 2020 Judgment; (2) reinstate the April 2020 Judgment; (3) increase its damages award to include lost rent under both leases; and (4) vacate the order awarding attorney's fees to the Charter School. In support of its positions, the Community Center makes numerous arguments, which principally contend that the trial court's original findings were supported by substantial

credible evidence and the Revised August 2020 Judgment was procedurally and substantively defective.

In response, the Charter School argues that the trial court's procedures for reconsideration were appropriate, and the Revised August 2020 Judgment and the order awarding attorney's fees should be affirmed. The Charter School also argues that the April 2020 Judgment was not supported by the evidence presented at trial. On its cross-appeal, the Charter School contends that it is entitled to damages consisting of \$100,000 in security deposits, the costs that it incurred in applying for zoning variances for the bubble gym, and its moving costs.

The arguments presented by both parties depend on the validity of the Revised August 2020 Judgment and whether the trial court's original findings should be reinstated. Accordingly, we will analyze those issues and then address the contentions concerning damages.

A. The Revised August 2020 Judgment.

We hold that the Revised August 2020 Judgment was procedurally and substantively flawed. Therefore, we vacate that judgment.

1. The Procedural Flaws.

In August 2020, the trial court sua sponte reconsidered its determination on the Charter School's constructive eviction claim. Specifically, the court reversed its determination that the absence of a bubble gym did not affect the Charter School's use of the entire leased premises and, instead, reasoned that its prior conclusion was wrong. The trial court explained:

Here, had the court been made aware at trial of the Physical Education requirements under New Jersey law, (rather than being relegated to mine over 600 pages of the . . . record developed before trial) the initial judgment entered by the court would have been different, and correct. That counsel did not bring that critical fact to this court's attention before post-trial proceedings, is true. The fact that this court did not become privy to that legal requirement on its own is also true. No matter. Justice does not require assignment of fault in every instance. It does, however, require correction of error, and hopefully, this court has now done so.

In reconsidering its decision, the trial court referenced statutes and a regulation concerning physical education requirements and learning standards for students, which the Charter School had cited in its July 8, 2019 reply brief. The trial court, however, did not cite specific provisions of the statutes or regulation in the Revised August 2020 Judgment. Instead, the court stated that

it was taking judicial notice of "New Jersey [Department of Education] standards" regarding the need for a gymnasium. The court then reasoned:

Under New Jersey State law, to which the court is now privy, if Tenant could not construct a gym, it could not meet its educational objective to operate a school, which was clearly the purpose for which the premises were leased.

There are several procedural flaws with the Revised August 2020 Judgment. First, the Charter School never formally moved to vacate the April 2020 Judgment under Rule 4:50-1 or to alter or amend the judgment under Rule 4:49-2. Instead, only the Community Center moved for reconsideration and that motion was limited to the damages awarded for unpaid rent. Without an appropriate motion, the trial court should not have revised the April 2020 Judgment by granting different relief on its own initiative. Cf. Lombardi v. Masso, 207 N.J. 517, 537 (2011) (explaining that a trial court's "entitlement to change a prior ruling in the interests of justice is what distinguishes an interlocutory order from a final judgment").

Rule 4:50-1 "is 'designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Mancini v. EDS, 132 N.J.

330, 334 (1993)). While that rule allows a trial court to grant relief from a final judgment for a "mistake," it is not to be used to correct legal errors that should be addressed on appeal. See DEG, LLC v. Township of Fairfield, 198 N.J. 242, 263 (2009) (explaining that Rule 4:50-1(a) is intended to provide relief from mistakes the parties could not have protected themselves from during the litigation); Wausau Ins. Co. v. Prudential Prop. & Cas. Ins. Co. of N.J., 312 N.J. Super. 516, 519 (App. Div. 1998) (noting that "[i]t is well established that an R. 4:50 motion may not be used as a substitute for a timely appeal" and that "[u]ntimely motions for reconsideration are governed by the same principle").

Second, the trial court did not cite or quote a specific statute or regulation in revising its decision. Accordingly, the court violated Rule 1:7-4(a), which mandates that a court "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury" The trial court's passing references to the Charter School's July 8, 2019 reply brief is insufficient and impedes appellate review. See United Consumer Fin. Servs. Co. v. Carbo, 410 N.J. Super. 280, 313 (App. Div. 2009) (reversing the trial court's decision and remanding because the basis for the trial court's decision was "not sufficiently explained to permit [appellate] review").

Third, in proceeding as it did, the trial court failed to give the Community Center the opportunity to present testimony concerning the statutes and regulation cited by the Charter School. It is undisputed that the statutes and regulation were not addressed at trial, and whether the Charter School could operate without the bubble gym was a material issue of fact in dispute.

2. The Substantive Flaw.

The more fundamental problem with the trial court's Revised August 2020 Judgment is that it was based on an incorrect reading of the statutes and regulation concerning physical education requirements and learning standards for students. The Charter School's July 8, 2019 reply brief, referenced by the trial court in its Revised August 2020 Judgment, cited N.J.S.A. 18A:35-5, -7, and -8, and N.J.A.C. 6A:8-1.3. Neither the statutes nor the regulation requires charter schools to have a gymnasium, let alone a gymnasium of a certain size.

Instead, the statutes require public schools to offer physical education classes and require most students to participate in those classes. See N.J.S.A. 18A:35-5 (requiring public schools to offer age-appropriate physical education classes); N.J.S.A. 18A:35-7 (requiring public school students, except kindergarten students, who are physically able to participate in physical education classes to be promoted and to graduate); N.J.S.A. 18A:35-8 (requiring

public schools to devote at least two-and-a-half hours weekly to health, safety, and physical education classes during non-holiday weeks). Charter schools also must include physical education as part of their curriculum. N.J.S.A. 18A:36A-11(a) (generally requiring charter schools to operate under the same statutes and regulations as public schools).

N.J.A.C. 6A:8-1.3 pertains to the New Jersey Student Learning Standards (the Learning Standards). A charter school must demonstrate annually that its curriculum complies with the Learning Standards. N.J.A.C. 6A:11-2.2(a)(1)(iii). Compliance with the Learning Standards ensures that a charter school is providing its students with a "thorough and efficient education." N.J.A.C. 6A:8-1.3. Both the current and then-existing Learning Standards for comprehensive health and physical education do not require public schools or charter schools to hold physical education classes in gymnasiums of a certain size. See Dep't of Educ., 2020 New Jersey Student Learning Standards – Comprehensive Health and Physical Education (2020); Dep't of Educ., New Jersey Student Learning Standards for Comprehensive Health and Physical Education (2014). In short, the statutes and regulation cited by the Charter School do not require it to have a gymnasium or a space of a specified size for physical education classes.

Nonetheless, the evidence at trial established that the Charter School had a gymnasium. Indeed, pursuant to the First Lease, the Charter School exercised its right to build a gymnasium and converted a storage room the size of two or three classrooms into gym. The evidence at trial also established that the Charter School never had to cease its operations or classes while at the Community Center's building and that during its entire tenancy the Charter School provided its students with physical education classes using the existing indoor gymnasium or outdoor spaces.

Just as significantly, there was no evidence presented at trial that the New Jersey Department of Education ever notified the Charter School that it needed to build a new gymnasium. Moreover, the Charter School's application to amend its charter to relocate to the Mettlers Road building, was granted in early 2017 even though the Mettlers Road building did not yet include a gymnasium. In that regard, the Mettlers Road building did not have a gymnasium when the Charter School moved in, and the Charter School had to use "alternative space" for their "gymnasium purposes" for the entire 2017-2018 school year.

B. The April 2020 Judgment.

Having vacated the Revised August 2020 Judgment, we must determine whether to reinstate the April 2020 Judgment and the factual findings supporting

it or remand for a new trial. Appellate courts "should 'not disturb the factual findings and legal conclusions of the trial judge' unless . . . those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Gripenburg v. Township of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). In contrast, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Because the factual findings supporting the April 2020 Judgment are based on substantial credible evidence, we reinstate those findings and the liability portion of the April 2020 Judgment.

The central issue at trial was whether the Community Center had constructively evicted the Charter School. The terms of both leases ran to July 14, 2020. It is undisputed that the Charter School stopped paying rent and left the leased premises in September 2017. Consequently, unless the Community Center constructively evicted the Charter School in 2015 or 2016, the Charter School breached the leases and its claim for a declaratory judgment fails.

Moreover, as a corollary, the Community Center would be entitled to lost rent because of the Charter School's breach.

"A claim for constructive eviction in this State must be based upon a substantial breach of the tenant's right to the quiet enjoyment of the leased premises." JS Props., LLC v. Brown & Filson, Inc., 389 N.J. Super. 542, 548 (App. Div. 2006). A tenant must establish that the landlord's acts or omissions "renders the premises substantially unsuitable for the purpose for which they are leased, or . . . seriously interferes with the beneficial enjoyment of the premises" Reste Realty Corp. v. Cooper, 53 N.J. 444, 457 (1969).

A landlord's "mere abridgment or interference . . . with the enjoyment of the premises [does] not necessarily constitute constructive eviction." Duncan Dev. Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293, 298 (App. Div. 1995). Rather, the landlord's "act of eviction must be of a permanent character performed . . . in order to deprive, and which in effect does deprive, the tenant of the beneficial enjoyment of the demised premises, or a part of it." Id. at 297. Moreover, the deprivation must be "of a character and degree sufficient to prevent the tenant's beneficial enjoyment of the entire property." Id. at 298. "A tenant who continues to occupy the premises for an unreasonable length of time after an act which constitutes constructive eviction waives the eviction, and may

not thereafter abandon the premises and assert the eviction." Id. at 297; accord Reste Realty Corp., 53 N.J. at 461.

In finding that there was no constrictive eviction in its decision supporting the April 2020 Judgment, the trial court made four key findings of fact. First, the court found that the Community Center prevented the Charter School from constructing the bubble gym. Second, the court found that the Community Center's actions, however, had no effect on the Charter School's ability to operate and did not deprive the Charter School of "the purpose for which the premises were leased." Third, the court found that the Charter School decided to relocate and not make several capital improvements because the Community Center would not agree to sell the building to the Charter School. Finally, the court found that the Community Center's actions in 2015 and 2016 did not amount to a constructive eviction and that the Charter School waived any claim for constructive eviction by failing to vacate the premises within a reasonable time.

All those factual findings were supported by substantial credible evidence presented at trial and are consistent with the law of constructive eviction. The former and current heads of the Charter School testified that the Charter School had continuous access to and used the existing gymnasium at the leased

premises. Those witnesses also confirmed that the Charter School could always operate its classes, including providing physical education classes while at the Community Center's building. Although those witnesses testified that there were difficulties accommodating all the Charter School's needs, they confirmed that the Charter School never had to suspend or cease its operations, and that the existing gymnasium, which the Charter School had built, was available and was used during the entire time that the school was in the Community Center's building.

In short, the evidence at trial supports the trial court's initial rejection of the constructive eviction defense and claim. The parties have also raised no arguments that would cause us to reverse the trial court's April 2020 rulings on their other claims for relief. Consequently, we reinstate the April 2020 Judgment as it relates to liability.

C. Damages.

In entering the April 2020 Judgment, the trial court awarded the Community Center \$921,695 in damages. The court calculated that the Community Center was entitled to lost rent of \$969,218, less \$100,000 in security deposits paid by the Charter School, plus \$52,477 in costs the Charter School had incurred in planning to build the bubble gym. While the trial court

found the Community Center had to reimburse the Charter School for the costs it incurred in planning to build the bubble gym, it mistakenly added, rather than subtracted, those costs. The court also rejected the Charter School's claims for moving costs and the conversion of the property left in the building.

On reconsideration, the trial court acknowledged that its damages calculation of lost rent owed to the Community Center was wrong. The court explained that it calculated damages under the wrong lease. Specifically, the trial court stated that the Community Center was entitled to lost rent under the First Lease because when the Charter School moved out, the Community Center had mitigated its damages by occupying and using the space that had been leased under the Second Lease.

At oral argument before us, the Community Center requested us to reinstate the \$921,695 judgment to avoid further proceedings on remand. The record, however, does not allow us to accept that request. Although the record is clear that the trial court made a mistake in awarding damages, the record does not allow us to determine the appropriate amount of lost rent due to the Community Center.

Specifically, the trial court did not explain in the April 2020 Judgment whether the Community Center was entitled to lost rent under the First Lease,

Second Lease, or both. The court noted as much in the Revised August 2020 Judgment, when it explained that it had denied the Community Center's "claim for lost rent under the [Second Lease] although without adequate explanation therefor in the [April 2020 Judgment]." Further, the court calculated lost rent under the Second Lease despite intending to do so under the First Lease. In addition, while the court explained in the Revised August 2020 Judgment that it intended to calculate lost rent under the First Lease only, the court did not adequately explain why it denied the Community Center's claim for lost rent under the Second Lease. In denying that claim, the court stated the Community Center had mitigated its damages by taking over and occupying the space leased by the Charter School under the Second Lease. The court did not, however, explain the extent to which the Community Center occupied that space, including whether the Community Center occupied all the space leased by the Charter School or leased any portion of it to another entity.

Moreover, at trial, the parties disputed the Community Center's effort to mitigate damages by re-renting portions of the building that had been used by the Charter School. "[A] commercial landlord must make 'reasonable' efforts to mitigate its damages after a tenant breaches the lease." Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470, 473 (App. Div. 1998) (citing

McGuire v. City of Jersey City, 125 N.J. 310, 320-21 (1991)). A landlord's failure to make reasonable efforts to mitigate, however, does not preclude all recovery. Id. at 473-74. Instead, a landlord may still recover for unavoidable losses or losses that it would have incurred even with reasonable mitigation efforts. See Ingraham v. Townbridge Builders, 297 N.J. Super. 72, 82-83 (App. Div. 1997). "Whether [a] landlord's efforts to mitigate its damages were reasonable is a question of fact." Harrison Riverside Ltd. P'ship, 309 N.J. Super. at 475. "Thus, the proper standard in a non-jury case regarding the judge's decision on mitigation of damages 'is whether the judge's findings are supported by sufficient, credible evidence in the record.'" Ingraham, 297 N.J. Super. at 84 (quoting Fanarjian v. Moskowitz, 237 N.J. Super. 395, 406 (App. Div. 1989)). Here, the trial judge recognized the Community Center's duty to mitigate damages but did not make findings of facts as to whether the Community Center made reasonable efforts to fulfill that duty.

Because of these unresolved factual issues, we are constrained to remand this matter for an evidentiary hearing on damages. See Price v. Himeji, LLC, 214 N.J. 263, 294 (2013) (explaining that an appellate court's exercise of original jurisdiction is discouraged if factfinding is involved); Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 539 (1988) (affirming the judgment in

part, reversing in part, and "remanding to the trial court for retrial on damages only").

That hearing, however, will be limited. The only issue is the amount of lost rent due to the Community Center because of the Charter School's breaches of the leases. We discern no basis to reverse or disturb the trial court's original rulings that the Community Center was not entitled to other types of damages. Nor do we discern any basis to reverse or disturb the trial court's rejection of the Charter School's claims for the return of security deposits, moving or relocation expenses, or its claim of conversion of property left at the building. We do, however, conclude that the trial court intended to offset the amount of lost rent by the costs incurred by the Charter School in planning to build the bubble gym but mistakenly added, rather than subtracted, those costs. We further conclude that the court mistakenly reduced the amount of lost rent by \$100,000, the combined total security deposit amount under both leases, despite having found there was no credible evidence that the Charter School had paid \$30,000 of the \$60,000 required under the First Lease. Accordingly, the amount of lost rent should be reduced by \$70,000 for the security deposits and by \$52,477 for the costs related to planning to build the bubble gym. Finally, we direct that the evidentiary hearing on damages be conducted by a new judge.

D. The Order Awarding Attorney's Fees to the Charter School.

Given the vacation of the Revised August 2020 Judgment, the Charter School is not entitled to an award of attorney's fees. Accordingly, we vacate the November 20, 2020 order awarding attorney's fees to the Charter School.

E. In Summary.

We vacate the Revised August 2020 Judgment, reinstate the liability portion of the April 2020 Judgment, which is supported by substantial credible evidence, and remand for an evidentiary hearing on damages consistent with this opinion. To the extent that we have not expressly addressed other arguments raised by the parties, it is because those arguments lack sufficient merit to warrant discussing in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION