Superior Court of New Jersey

Appellate Division

Docket No. A-003655-22T2

VITO COLLUCCI and LUCILLE COLLUCCI, as Husband and Wife and Individually, *Plaintiffs-Appellants-Cross-Respondents,* vs. COSIMA CASSESE and CASSESE'S ENTERPRISE, INC., *Defendants-Respondents,* REALTY EXECUTIVES and NIROAL, LLC, *Defendants-Respondents-Cross-Appellants,* *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY Docket No.: PAS-L-2221-18 Sat Below: HON. DARREN J. DEL SARDO, J.S.C. HON. VICKI. J. CITRINO, J.S.C.

BRIEF FOR PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS

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TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG and JEONG HE PAK,

Defendants-Respondents,

KYONG HUI NAM KOONG,

Defendant-Respondent-Cross-Appellant,

- and -

JOHN DOES 1-10 AND/OR ABC CORPORATIONS 1-10, in Their Corporate Capacity and as to the Principles and Owners Individually (Names Being Fictitious and Unknown but Described as Corporate or Individual Owner(s), Manager(s), Lessor(s), Supervisor(s), Who Had Control of the Premises Located at 140 Rifle Camp Road, WOODLAND PARK, NEW JERSEY, Who Contributed to the March 16, 2017 Loss),

Defendants-Respondents.

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

TABLE OF TRANSCRIPTS

Page

PRELIMINARY STATEMENT

Plaintiffs/Appellants Vito Collucci ("Vito Collucci") and Lucille Collucci ("Lucille Collucci") (collectively "Plaintiffs/Appellants") submit this brief in support of their appeal from a June 25, 2021 Order of the Law Division (the "Order"). By way of the Order, the Law Division denied Appellant's motion for partial summary judgment and, instead, granted the motions for summary judgment of the defendants/respondents My Sister's Deli, LLC (the "Deli"); Realty Executives ("Realty"); Niroal LLC; Tuyen Kim Nguyen, and Golden Styles Barber Studio (collectively the "Tenant Defendants" or "Respondents").

Vito Collucci suffered significant personal injuries after he slipped and fell on ice that had formed on a walkway adjacent to retail premises, a retail strip mall, in which each of the Respondents leased space. The accident happened on a walkway alongside the building. This sidewalk was a partially covered asphalt surface that was set off from the parking lot by cement curbs placed at the top of designated parking spots. Anyone parking their cars in one of the spots would have reasonably and foreseeably walked forward to this path, and then used it to walk toward the entry of the premises. Plaintiffs' expert concluded that the area would be deemed a walkway, citing applicable safety and construction codes. No contrary expert opinion was served.

For these reasons, Plaintiffs requested that the Law Division hold that Respondents each had a contractual duty to maintain the area, as per Article 3 of their leases, and sought partial summary judgment. Plaintiffs argued that the Law Division should enforce the unambiguous terms of the leases and hold that each of the Tenant Defendants were contractually obligated to maintain that walkway, remove snow and ice, Plaintiffs asked for the matter to be set down for a trial as to whether the Tenant Defendants breached their duty to maintain the walkway and whether that breach was a proximate cause of Vito Collucci's fall and injuries.

Respondents all moved for summary judgment on the same issue, arguing a number of improper contentions, each of which the Law Division accepted. Those errors will be outlined in greater detail in this brief. However, the most notable analytical error -- the one from which all other mistakes flowed -- was that the Law Division read the word "adjacent" out of Article 3 of the Lease; mistakenly believing that the words "adjacent" and "adjoining" were synonyms, when they are not. The Law Division thus stated: "In this case, the plain and unambiguous language requires the tenants to maintain the areas in front of their stores and nothing more." That is not what "adjacent" means.

The Law Division also found that the fall happened in a so-called "common area," not a walkway or sidewalk. In support, the Law Division cited

a single photograph and observed that this walkway area was asphalt, like the parking lot next to it. To the contrary, the photograph shows that it would be foreseeable that a pedestrian would use it as a sidewalk and, in fact, were invited to use it for such a purpose. Ignoring expert opinion to the contrary, the Law Division appointed itself the decisive juror and resolved what was, at best, a disputed fact, based on its review of a single photograph: "Also, it is noted by the photographs, certification of Joseph Cerra, Exhibit B, the area where Mr. Collucci allegedly fell is neither a sidewalk nor a walkway. It is a part of the parking lot blacktop on the side of the building, which falls under the definition of common areas." The term "common area" was not a defined term in any of the leases. Certain aspects of the premises were identified as "common areas" that the Landlord promised to maintain – but sidewalks were not included. The photograph cited by the Court demonstrated that the spot at issue was partially covered and set off from the parking lot area by the cement curb blocks -- creating an obvious means to access the building on foot and inviting such use.

For these reasons, and those explained in greater detail in this brief, this Court should vacate the Order; and remand to the Law Division to enter partial summary judgment in favor of Plaintiffs; to deny the Tenant Defendants' motion for summary judgment; and to set the matter down for trial on liability and damages.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on July 3, 2018 seeking damages from the defendant landlord/owners of the retail mall premises located at 140 Rifle Camp Road, Woodland Park (the "Premises"), for personal injuries resulting from Vito Collucci's slip and fall on an ice patch on the property on March 16. 2017. [Pa118-136]. The complaint named as defendants Casima Cassese, Cassese Enterprises (collectively the "Cassese Defendants"), and an entity identified as Garret Mountain Shopping Center, Inc., all of whom showed in public records as an owner of the Premises, along with John Does I-1X, identified as persons or entities who may have had control over the Premises. Pa118-136].

The Cassese Defendants filed an Answer and a Third-Party Complaint against a landscaper, PL Landscape on September 24, 2018. [Pa137-144].

On October 15, 2018, Plaintiffs filed a motion to amend their complaint which sought (i) to add PL Landscape to the action as a direct defendant and (ii) to remove the entity Garret Mountain Shopping Center, Inc., as Plaintiffs had not been able to serve the entity and discovered that no such entity existed in the records of the Secretary of State of the State of New Jersey. [Pa148-169].

That motion was granted on November 26, 2018 [Pa170-171]; and the First Amended Complaint was filed on November 27, 2018. [Pa214-226].

On February 14, 2019, Plaintiffs served a subpoena on the law office that had performed the transactional work relating to the Premises, and the Tenant Defendants' leases, for the insurers of the parties of the Tenant Defendants. [Pa177-181]. The subpoena was returnable on March 13, 2019, allowing nearly a month for production. [Pa177-181].

This assured that all leases would be produced prior to the second anniversary of the accident – except for one thing, the law office for the insurers, the true parties in interest, flouted the subpoena [Pa177-181]. After efforts to enforce the subpoena without court intervention failed, Plaintiffs were forced to file a motion in an effort to secure the Tenant Defendants' leases that were supposed to be produced on March 13, 2019. [Pa174-196]. As Plaintiffs' counsel explained in this Certification, this law office had "completed transactional work and tenant leases for the property where the subject accident took place, and is therefore in possession of tenant leases and liability policies regarding said property."

An order compelling compliance with the subpoena was issued on April 12, 2019. [187-188].

Plaintiffs served the order compelling production on the parties' law firm but, yet again, there was no production -- so on April 29, 2019, Plaintiffs were forced to move, yet again, to compel production of the leases, so that they could

confirm the actual identity of the tenants in possession on the date of the accident and ascertain what contractual duty they may have had to remove the snow and ice. [Pa189-196].

That motion was withdrawn when the leases and related transactional work, including the insurance policies issued by the true parties in interest, were finally produced shortly before the return date. [Pa197].

After reviewing the leases in place on the date of the accident, and believing that this information confirmed the identity of the tenants in actual possession of parts of the Premises, and reviewing the lease terms, Plaintiffs had done the work needed to comply with Rule 1:4-8, and filed a motion to amend the complaint to identity and add some of Respondents as some of the "John Doe" defendants identified in the complaint. [Pa198-316]. That motion was granted on June 7, 2019 [Pa317-318]. Plaintiffs' Second Amended Complaint, adding some of the Respondents as some of the John Doe defendants, was filed on June 12, 2019 [Pa319-330].

PL Landscape filed an Answer on July 3, 2019 [348-355] and an Answer to the Second Amended Complaint on August 21, 2019. [Pa400-405].

Respondent Real Estate Consultants filed an Answer to the Second Amended Complaint on August 15, 2019. [Pa358-362].

Respondent Robert Arcucci a/k/a Niroal LLC filed an Answer to the Second Amended Complaint on September 10, 2019. [Pa425-431].

In the meantime, Plaintiffs discovered that they had been provided with inaccurate or incomplete information concerning the parties specified in the Second Amended Complaint [*see* Pa339-345]. Therefore, on August 19, 2019, Plaintiffs were forced to file a Third Amended Complaint so that they could finally have all the correct Respondents joined as the "John Doe" defendants. [Pa368-388]. That motion was granted on September 13, 2019. [Pa432-433].

Plaintiffs' Third Amended Complaint was filed on September 23, 2019. [Pa436-447].

Respondent Robert Arcucci a/k/a Niroal LLC filed an Answer to the Third Amended Complaint on September 24, 2019. [Pa448-454].

Respondent Sister's Gourmet Deli, LLC filed an Answer to the Third Amended Complaint on September 25, 2019. [Pa455-468].

Defendant PL Landscaping (not a Respondent) filed Answer to the Third Amended Complaint on September 27, 2019 [Pa471-474].

Respondent Real Estate Consultants filed Answer to the Third Amended Complaint on October 25, 2019 [Pa475-482].

Defendant (not a Respondent) Cassese Enterprises Corp. filed an Answer on October 28, 2019. [Pa483-495].

On December 19, 2019, Respondent Real Estate Associates filed a motion for summary judgment, asserting that they should not have been joined as one of the "John Doe" defendants and that the two-year Statute of Limitations had lapsed before the transactional counsel had provided a copy of the subject lease to Plaintiffs. [Pa496-510]. Their argument was that Plaintiffs' counsel should have immediately sued Real Estate Associates because they had a sign up at the premises in 2018; when counsel had retained. [Pa496-510]. They contended that Plaintiffs' counsel should have assumed, from this fact, that Real Estate Associates were also present over a year earlier *and* there was also a written lease that obligated Real Estate Associates to remove snow and ice from the sidewalk. [Pa496-510].

Other Tenant Defendants followed with the same motion, making the same claim that counsel should have "shot first," and find the factual information to support a cause of action against the Respondents later. [Pa522-23].

Plaintiffs opposed all motions by highlighting that they had responsibly substituted the Tenant Defendants as promptly as they had confirmed that each of them (i) was actually a tenant on March 17, 2017; and (ii) had agreed to a lease that included Article 3, the provision of the leases at issue on this appeal. [Pa511-518]. Plaintiffs contended that parties in interest, the insurance

companies, should not be rewarded because their law firm decided not to produce the leases until after the second anniversary of the accident, despite a proper subpoena having been served, seeking production before the passage of the two-year anniversary. [Pa511-518].

One Respondent, Kyong Namkoong, i/p/a Kyong Hui Nam Koong, had not answered yet and instead filed a motion to dismiss the Third Amended Complaint, based on the same argument. [Pa534-535].

Given the history of the failure to produce the leases, the motion judge, of course, denied all motions, and held that all of the Tenant Defendants/Respondents had been properly substituted as "John Doe" defendants and suffered no demonstrable prejudice. [Pa5-13]. These orders are the basis for the cross appeals. [Pa5-13].

Kyong Namkoong, i/p/a Kyong Hui Nam Koong filed a motion for summary judgment on April 21, 2021, arguing that they had no lease or common law duty to maintain the area where Vito Collucci fell. [Pa594-736].

Motions arguing the same were filed by My Sister's Deli on April 30, 2021. [Pa737-823]; by Real Estate Consultants on May 27, 2021 [Pa824-887]; by Robert Arcucci Niroal LLC d/b/a Amore Ristorante on May 28, 2021 [Pa888-928].

Plaintiffs filed a motion for partial summary judgment on May 28, 2021 on the same issues against all Respondents. [Pa929-1040].

On June 25, 2021, the Hon. Vicki Citrino, J.S.C. entered an order granting Respondents' motions for summary judgment; and denying Plaintiffs' motions for summary judgment. [Pa1-2].

Thereafter, the matter proceeded to trial in March 2023 against the landlord defendant and PL Landscape; however, the case was settled against the landlord defendant before a final jury verdict and a final order dismissing the case against the landlord defendant and PL Landscape was entered on June 27, 2023 [Pa3-4].

This appeal from the June 25, 2021 Order was thereafter timely filed.

STATEMENT OF FACTS

On March 16, 2017, Vito Collucci slipped on a negligently maintained walkway adjacent to the retail strip located at 140 Rifle Camp Road, Woodland Park, New Jersey. The mall which was owned by COSIMA CASSESE, CASSESE'S ENTERPRISES, INC. ("Landlord Defendant"). The location of the fall is in an area on the side of the building. [Pa947 (Collucci Deposition) at 55:25 – 56:4; 75:7 – 13; Pa950 (accident location photos)]. As photographs of the area reflect, a strip mall patron would have reasonably perceived the area to be a walkway and foreseeably used it as such. [Pa950 (accident location

photos)]. Plaintiffs' expert offered the unrebutted opinion that this area was a walkway or sidewalk pursuant to applicable safety and construction codes:

> The subject location is considered to be a walkway and an area where pedestrian traffic is reasonably foreseeable. The following consensus standards address these types of exterior surfaces.
>
> walkway, n—walking surfaces constructed for pedestrian usage including floors, ramps, walks, sidewalks, stair treads, parking lots and similar paved areas that may be reasonably foreseeable as pedestrian paths. Natural surfaces such as fields, playing fields, paths, walks, or footpaths, or a combination thereof, are not included. F1637
>
> walkway surface, n—a structure intended to be used by a person attempting to walk.
>
> (ASTM International - ASTM F13.50 F1637; F1646).

[Pa797]. Frankly, it is baffling how the motion judge could have determined that this area was not a walkway, based on the single review of a photograph that clearly reflects, to the contrary, that customers, notably those who parked in the spots adjoining that walkway, would have reasonably and foreseeably used this area to access the building. [Pa950].

As noted, even though Plaintiffs offered unrebutted expert proof that the area was legally defined as a walkway, the Law Division ignored this evidence; pointed to a single photograph; and determined, factually, based on a single photograph, that this was actually a "common area." [Transcript of June 25, 2021, 56:8-13].

Within every lease agreement between the Tenant Defendants and Landlord Defendant, the following provision, Article 3, can be found:

> Care and Maintenance of Premises.
> Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received; normal wear and tear excepted. **Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and which shall be maintained by Lessor. Lessee shall also maintain in good condition such, portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.**

[Pa751-754; Pa 951-996

On March 16, 2017, the strip mall where Plaintiff fell had the following Tenant Defendants: 4U Nails; My Sister's Deli; Real Estate Executives; and Amore Restaurant. [Pa1001 at 36:22 – 37:1]..

The Landlord's principal testified at deposition that the Landlord's duty was to remove snow from the parking lot:

> Q. Since 1980, has it been your responsibility as the owner of the strip mall to make sure there is no dangerous snow and ice conditions in your parking lot at this strip mall; yes or no?
>
> A. Yes.

> Q. You also have leases with the tenants that if there was a problem, and you didn't fix it, they would have to step up and take care of snow and ice removal issues?
>
> [Objections made by all tenant defendants and the question is read back].
>
> A. In the contract, it says that I am the one, I take care of the parking lot. If there is any problem, they will call me. And they never did it. Nobody did it.

[Pa1002 at 184:3 – 185: 3]. However, the tenants plainly had a duty to remove snow and ice:

> Q. Can you go to P-25, while you are pulling it up. Did the tenants that were there have their own salt and shovels to clear the outside part of their businesses, to your knowledge?
>
> A. Yes.

[Pa1005 at 241:4 – 9].

During Landlord Defendant's deposition, the Landlord's representative testified further that tenants were expected to remove snow from the sidewalks adjacent to the premises:

> Q. Did you expect your tenants to remove snow from the sidewalks?
>
> A. Always I told them take care of the sidewalk if they see. And if they need extra salt, to put it on. And they do. That's what they told me.
>
> Q. Mina, you testified yesterday that you would expect your tenants to tell you or call you if the parking lot or some area in the common areas required additional

> snow removal services. Correct?
>
> A. Yes.

[Pa1006 at 285:16 – 21].

Defendants' Liability Expert, Michael Cronin, issued a report wherein he opined:

> ...Based on testimony, all tenants of the property agreed that the property was in a satisfactory condition after the winter storm of March 14, 2017...
>
> The writer reviewed no evidence that Cassese was ever notified by any of their tenants that the side… of the building was required to be cleared of snow and ice prior to the time of Mr. Collucci's accident...

[Pa1033 (Cronin Report, first and second bullet points)].

Furthermore, Mr. Cronin testified that no Tenant Defendants contacted Landlord Defendant about clearing the area where Plaintiff fell, and that he considered the whole of the strip mall as the "premises." [Pa1038-1039 at 48:24 – 50:12]. Mr. Cronin testified that X marking the area where Mr. Collucci slipped and fell was adjacent to the building premises. [Pa1038-1039.at 49:2 – 50:12].

ARGUMENT

Introduction

Each of the Tenant Defendants leased space in a retail strip mall from the defendant COSIMA CASSESE, CASSESE'S ENTERPRISES, INC., the

Landlord, and were tenants at the premises on March 16, 2017 – the date on which Mr. Collucci slipped on ice at the premises, causing the injuries for which he sues.

By way of the appeal, Appellants seek a determination that each of the Tenant Defendants had a duty, pursuant to the terms of the lease, to remove snow and ice from the area where Mr. Collucci fell and was injured. The leases executed by the Landlord and each of the Tenant Defendants were similar -- and identical with respect to the issues presented by the Motion. At Article 3 of the leases, each of the Tenant Defendants assumed an unambiguous and broad duty "at [their] own expense and at all times, [to] maintain the premises in and safe condition." [*See, e.g.,* Pa991].

Article 3 also imposed on the Tenant Defendants the responsibility "for all repairs required, excepting the roof, exterior walls and structural foundations." Therefore, according to the terms of the leases, the Landlord Defendant had exclusive responsibility to maintain and repair "the roof, exterior walls and structural foundations." [*See, e.g.*, Pa991].

But these were the only matters of maintenance or repair over which the Landlord Defendant maintained exclusive duty.

Finally, Article 3 explicitly placed each of the Tenant Defendants under an explicit duty to "maintain in good repair such portions adjacent to the

premises such as sidewalks, driveways, lawns, shrubbery, which would otherwise be required to be maintained by [Landlord]." [*See, e.g.,* Pa991].

Based on the foregoing, Plaintiffs contend that there is no genuine legal dispute over whether the Tenant Defendants had a duty to maintain, and remove snow and ice, from the location where Mr. Collucci slipped on ice and fell.

POINT I

THE LEASE AGREEMENTS PLACED THE TENANT DEFENDANTS UNDER A DUTY TO CLEAR SNOW AND ICE FROM THE LOCATION WHERE MR. COLLUCCI WAS INJURED
[Raised at Pa594-1040; Decided at Pa1-2]

The Tenant Defendants asked the Law Division to rewrite their leases in a way that would excuse them from the duty they assumed under Article 3 of the Leases. Regrettably, the Law Division did so.

Article 3 of the leases state:

> Care and Maintenance of Premises.
>
> Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received; normal wear and tear excepted. **Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and which shall be maintained by Lessor. Lessee shall also maintain in good condition such, portions**

> **adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.**

[*See, e.g.,* Pa991 (emphasis added)].

The Tenant Defendants all agreed to maintain the walkways and parking lot "adjacent" to the premises. From this language, however, the Law Division held incorrectly that they had no duty to maintain walkways which do not touch "their premises."

New Jersey law makes clear that an agreement is interpreted in accordance with the intention of the parties -- but that intention must be established within and by the actual language of the agreement. "The polestar of construction is the intention of the parties to the contract ***as revealed by the language used, taken as an entirety***..." Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 301 (1953) (emphasis added); see Conway v. 287 Corporate Center Associates, 187 N.J. 259, 269 (2006). It is true enough that extrinsic evidence of the contract's formation can be considered in interpreting the agreement. However:

> The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. ***Such evidence is adducible only for the purpose of interpreting the writing — not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said.*** So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord

> to the language a rational meaning in keeping with the expressed general purpose.

Conway v. 287 Corporate Center Associates, 187 N.J. at 269 (quoting Schwimmer, 12 N.J. at 302) (emphasis added).

Therefore, New Jersey law holds that, when interpreting a contract, a court must conduct "an examination solely into that intent which is expressed or apparent in the writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. 134, 148 (App. Div. 1960), certif. den. 34 N.J. 134 (1961). "An actual intent which is not made known in the instrument will not be given effect." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 148 (citing, Corn Exchange, etc., Phil. v. Taubel, 113 N.J.L. 605, 609 (E. & A. 1934); Casriel v. King, 2 N.J. 45, 50 (1949); New York Sash & Door Co., Inc. v. National House & Farms Association, Inc., 131 N.J.L. 466, 469 (E. & A. 1944); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953); 3 Williston, Contracts, s 610, p. 1750)).

From these bedrock principles of New Jersey law, flow two other principles of particular importance to this case.

First, "the law will not enforce a different contract than the parties have seen fit to express in their writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 148. "It has been decided many times and in many cases that the court will not make a different or a better contract than the parties themselves

have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951) (citing, Herbert L. Farkas Co. v. N.Y. Fire Ins. Co., 5 N.J. 604, (1950); James v. Federal Ins. Co., 5 N.J. 21 (1950); First National Bank, Fort Lee, v. Burdett, 121 N.J.Eq. 277 (E. & A. 1936); Krieg v. Phoenix Ins. Co., 116 N.J.L. 467 (E. & A. 1936); Marone v. Hartford Fire Ins. Co., 114 N.J.L. 295 (E. &. A. 1934); Frisbie Throwing Co. v. London Guarantee, &c., Co., 105 N.J.L. 613, (E. & A. 1929); Kupfersmith v. Delaware Ins. Co., 84 N.J.L. 271, 86 A. 399 (E. & A. 1912)).

Second, in furtherance of the principle that the law will not enforce a better agreement than the one actually executed by the parties, the law additionally holds that the parties' statements as to an agreement's meaning are excluded from evidence. Deerhurst Estates, 64 N.J.Super. at 149. To the extent that this "intent" is not expressed in the writing, it is irrelevant:

> The cardinal rule, in the interpretation of contracts, is to ascertain and give effect to the common intention of the parties, so far as it may be effectuated without infringing legal principles. Basic Iron Ore Co. v. Dahlke, 103 N.J.Law 635, 137 A. 423; Dixon v. Smyth Sales Corp., 110 N.J.Law 459, 166 A. 103; Westville Land Co. v. Handle, 112 N.J. Law 447, 171 A. 520. But where, as here, the parties have made a memorial of their bargain, or a writing is required by law, their actual intent unless expressed in some way in the writing is ineffective, except when it may, in accordance with established principles, afford the basis for a reformation of the writing. While the intention of the parties is sought, it can be found only in their expression in the writing. In effect, it is not the real intent but the intent expressed or apparent in the writing that controls. The obligation of a contractor depends upon his expressed,

> not his actual, intention. Williston on Contracts, §§ 608, 610, 629. The parties are bound by the language used regardless of their intent. The terms of the writing are exclusive, and, therefore a contract may have a meaning different from that which either party supposed it to have. American Law Institute Restatement, Contracts, vol. 1, § 230.

Corn Exchange, etc., Phil. v. Taubel, 113 N.J.L. 605, 608-609 (E. & A. 1934).

A. Article 3 of the Leases

Against this backdrop, this Court should hold the Tenant Defendants to the obligations which they assumed under the terms of their leases. The leases executed by the Landlord and each of the Tenant Defendants were similar -- and identical with respect to the issues presented by the Motion. At Article 3 of the leases, each of the Tenant Defendants assumed an unambiguous and broad duty "at [their] own expense and at all times, [to] maintain the premises in and safe condition," including an explicit duty to "maintain in good repair such portions adjacent to the premises such as sidewalks, driveways, lawns, shrubbery, which would otherwise be required to be maintained by [Landlord]." [*See, e.g.,* Pa991].

Based on the foregoing, Plaintiffs contend that there is no genuine legal dispute over whether the Tenant Defendants had a duty to maintain, and remove snow and ice, from the location where Mr. Collucci slipped on ice and fell.

B. "Adjacent" to the "Premises"

As an initial matter, the Law Division defined the term "premises" narrowly to mean only the storefront location in which each of the tenants

conducted business – and not retail mall premises. Unlike most commercial leases, however, the parties never actually defined "premises" within the lease. Notably, the Landlord's expert opined, however, that "premises" meant the whole of the strip mall – not just each storefront separately.

Accordingly, since the area where Mr. Collucci fell was "adjacent" to the "premises," the area would be governed by Article 3 of the Lease.

Even if this Court were to accept the Law Division's narrow definition, the Tenant Defendants all agreed to maintain the walkways and parking lot "adjacent" to the premises. From this language, they all maintain that they had no duty to maintain walkways and parking areas which do not touch "their storefronts." The Law Division held that the walkway area was not "adjacent" to the "premises" because it did not touch any of the tenant's storefronts. However, Merriam-Webster, the most popular dictionary for general English usage, defines "adjacent," as its first and most frequent use, to mean "not distant, nearby." *https://www.merriam-webster.com/dictionary/adjacent.*

There really cannot be any doubt that the spot where Mr. Collucci fell was "not distant" and "nearby" each of the storefront of the Tenant Defendants.

For general legal usage, Black's Law Dictionary distinguishes the terms "adjacent" and "adjoining" in its definition of "adjacent":

> Lying near or close to; contiguous. The difference between adjacent and adjoining seems to be that the former implies that the two

> objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes. People v. Keechler, 194 111. 235. 62 N. E. 525; Ilanifen v. Armitage (C. C.) 117 Fed. &45; McDonald v. Wilson. 59 Ind. 54; Wormley v. Wright County, 108 Iowa, 232, 78 N. W. 824; Hennessy v. Douglas County, 90 Wis. 129, 74 N. W. 9S3; Yard v. Ocean Beach Ass'n, 49 N. J.Eq. 300, 24 Atl. 729; Henderson v. Long, 11 Fed. Cas. 10S4; Yuba County v. Kate Hayes Min. Co., 141 Cal. 3G0, 74 Pac. 1049; United States v. St. Anthony It. Co.. 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 54S. But see Miller v. Cabell, 81 Ky. 184; In re Sadler, 142 Pa. 511, 21 Atl. 978.

https://thelawdictionary.org/adjacent/.

Binding New Jersey precedent from the Court of Error and Appeals, the predecessor to the present New Jersey Supreme Court created by the 1947 Constitution, provides as follows:

> The word "adjoining" implies a closer relation than "adjacent." The latter word, uncontrolled by the context or subject-matter, is not inconsistent with the idea of something intervening. But the primary meaning of the word "adjoining" is to lie next to, to be in contact with, excluding the idea of any intervening space.

Yard v. Ocean Beach Association, 49 N.J.Eq. 306, 312 (1892)[1]. The plain and clear meaning of "adjacent" is "not distant" and "nearby" – an understanding

[1] "[The Appellate Division"] has no authority to overrule a decision of the Court of Errors and Appeals." Hutchinson v. Atlantic City Med. Center–Mainland, 314 N.J.Super. 468, 478 (App.Div.1998); Jackson v. Hankinson, 94 N.J.Super. 505, 515 (App.Div.1967), aff'd, 51 N.J. 230 (1968) ("Here, however, we are saved such analyses since we are bound by decisions of the Court of Errors and Appeals").

that plainly places each of the Tenant Defendants under an independent duty to safeguard the walkways near their storefronts.

"The settled primary standard of interpretation of an integrated agreement is the meaning that would be ascribed to it by a reasonably intelligent person who was acquainted with all of the operative usages and circumstances surrounding the making of the writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 149. Under this standard, this Court must hold the parties to the most natural and legally settled definition of "adjacent." Therefore, as a matter of law, Mr. Collucci's fall occurred "adjacent" to each of the Tenant Defendants' locations, as that spot was plainly "nearby" and "not distant" to each of their locations.

C. Article 17 and the So-Called "Common Area Charges"

After rewriting Article 3 of the leases, the Law Division then move on to Article 17 and expanded that provision to narrow even further the duties imposed by Article 3 of the leases, Ultimately, the Law Division concluded that Article 17 provides that the tenants mu pay "common area" charges for the maintenance of "common areas," including for the removal of snow and ice from the parking lots and driveways, this covered the sidewalks referenced in Article 3 too. Accordingly, the Law Division utilized Article 17 to discharge a duty plainly imposed by Article 3.

The Law Division misread Article 17. This provision, in fact, states that "[i]n the event the demised premises are located in a shopping center or in a commercial building in which there are common area, Lessee agrees to pay his *pro rata* share of maintenance, taxes and insurance for the common area."

Thus, right off the bat, it is clear that Article 17 merely provides for right for the Landlord to impose "common area" charges but does not define or identify what the "common areas" are; what charges are being imposed for what services; or what any of the tenants' shares of those expenses are.

For these reasons, on its face, Article 17 provides absolutely no textual support for the Law Division's determination that the Tenant Defendants paid a "common area" fee for the removal of snow and ice from the walkways and parking lot. In order to so hold, the Law Division improperly accepted as evidence the Tenant Defendants' self-serving testimony about what the parties intended in Article 17. See Deerhurst Estates, 64 N.J.Super. at 149 ("The only excluded circumstances are statements by the parties themselves as to what they intended the language to mean").

Based on "irrelevant" and inadmissible statements of the Tenant Defendants' subjective intent, the Law Division re-wrote Article 17 to include the following provisions: (i) to define the walkway as a "common area"; (ii) to provide that any payments which may have been pursuant to Article 17 were for

the removal of snow and ice from the walkways and parking lot; and (iii) to impose upon the Landlord an *exclusive* obligation to maintain the walkways. Once again, however, "[i]t has been decided many times and in many cases that the court will not make a different or a better contract than the parties themselves have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951). This Court simply cannot rewrite the leases for the Tenant Defendants' benefit to Plaintiffs' detriment. If the Tenant Defendants wanted to impose an *exclusive* duty on the Landlord to remove snow and ice -- and to have that service imposed as a "common area" charge – they needed to express that so-called intention within their writing. That intention is simply not there.

To claim that the "walkways" were indisputably a "common area" is not accurate. These leases did not include a definition of what constituted the "common areas" and certainly did not identify the walkways as a "common area." That the walkways may have been "commonly used" by invitees of all of the establishments does not make them a "common area" within the meaning of leasing law in general, or the meaning of these specific leases.

More correctly, when viewed under the ***actual language*** of these leases, the walkway where Mr. Collucci fell was "adjacent" to the locations of each of the Tenant Defendants, and thus in an area that falls explicitly with the Tenant

Defendants' duty to remove snow and ice, according to the clear and unambiguous text of Article 3 of the leases.

POINT II

THE LAW DIVISION ERRED BY HOLDING THERE WAS NO COMMON LAW DUTY TO MAINTAIN [Raised At Pa549-1040; Decided at Pa1-2]

The Law Division also dismissed all of Plaintiffs' common law claims by holding that, generally speaking, a commercial tenant in a retail mall does not have a duty to maintain parking areas. (See Transcript, citing Kandrac v. Marrazzo's Market at Robinsville, 429 N.J. 79 (App. Div. 2012)). Nonetheless, a more careful inspection of Kandrac demonstrates that this principle was announced in a case in which the lease agreement – in contrast to the leases in this case – "squarely assigns the duty to maintain the area where plaintiff was injured to the landlord." Kandrac, 429 N.J.Super. at 89.

Tellingly, the Kandrac court critically observed "the assignment of responsibilities in the lease, within the context of a multi-tenant shopping center, also impacts the scope of tenant's ability to address conditions in the parking lot." Id. Thus, in Kandrac, the fact that the lease did, in fact, place an exclusive duty on the landlord to maintain the parking lot, where the plaintiff fell, was essential to the outcome. In Kandrac, the lease at issue provided:

> The LESSOR covenants and agrees that it shall maintain the common areas of the shopping center in good operating condition

> and repair ... [and t]he LESSOR shall resurface the sidewalk, parking and driveway areas when the same shall be reasonably necessary together with the restriping of the parking areas.

Kandrac, 429 N.J.Super. at 482. Critically, this language or any form of similar language, does not appear in the leases of the Tenant Defendants. In fact, as the earlier review of Article 3 demonstrates, the language of these leases did not include language placing the Landlord under such an "exclusive" duty at all; and, in fact, included language which ***three times*** placed the Tenant Defendants under a duty to maintain the property.

Truth be told, Kandrac serves as instruction as to all the things which place the Tenant Defendants under a duty in this case.

- In Kandrac, the lease specifically defined and identified the "common areas" over which the landlord was obligated. "The lease defined 'common areas' as 'employees' parking areas, service roads, loading facilities, sidewalks, and customers' parking areas[.]'" Kandrac, 429 N.J.Super. at 82. As noted, the so-called "common areas" are neither defined nor identified in the Tenant Defendants' leases.
- In Kandrac, the lease "squarely assign[ed] the duty to maintain the area where plaintiff was injured to the landlord." Kandrac, 429 N.J.Super. at 89. Notably, the tenant defendant in Kandrac did not have to "supplement" the lease with improper statements of subjective

> intent, see Deerhurst Estates, 64 N.J.Super. at 149; or, obscure provisions of the lease under which the tenant had assumed some duty of maintaining that area. Here, the subject leases plainly place a duty on the Tenant Defendants to maintain the walkways adjacent to the premises.

In the end, the significant distinctions between this case and Kandrac, as highlighted within the Kandrac decision, itself, only underscore both how inapplicable the ultimate holding of Kandrac is to this case and why a different holding is required here.

In Kandrac, the defendant tenant was one of thirty-six tenants in a large commercial mall. This case, however, involves a small, strip-mall property with five tenant locations, surrounded by a parking area and walkways in which every location is "not distant" to any tenant location.

The far-smaller footprint of this property means that each of the tenants could readily observe, with far more ease, conditions of the walkways surrounding the building. Every spot of the parking lot was conceivably usable by a "business invitee" of any one of the tenants. No spot was so far away as to render it remote that an invitee of any one of the tenants would not park or use any area of the parking lot or the walkways adjacent to the building.

This Court has observed: "The common law's progression should not stop because of the labels adopted by the parties in defining their relationship when an innocent individual, not a party to that relationship, is injured by the condition of—or the failure to warn of the condition of—abutting property or nearby areas that an invitee might foreseeably encounter." Nielsen v. Walmart Store #2, 2171, 429 N.J.Super. 251, 260 (App. Div. 2013). Each of these tenants were aware of the conditions of the premises; were situated to at least warn any visitor of those conditions and, at the very least, give notice to the Landlord; and were even contractually obligated to maintain the walkways nearby the premises.

A deeper read of Kandrac compels the grant of partial summary judgment in favor of Plaintiffs. In Kandrac, the court's analysis started with a recognition:

> The line of cases expanding the duty of the commercial landowner began with the Supreme Court's formulation of a new rule in Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 432 A.2d 881 (1981), that imposed a duty upon commercial landowners to "maintain[ ] in reasonably good condition the sidewalks abutting their property and [made the landowners] liable to pedestrians injured as a result of their negligent failure to do so." Id. at 157, 432 A.2d 881. The holding was based upon an assessment of various factors relating to public policy that remain relevant to a consideration of whether a duty should be imposed here.

Kandrac, 429 N.J.Super. at 85. The court then considered that "[t]he ruling in Stewart was extended to commercial tenants in Antenucci v. Mr. Nick's Mens Sportswear, 212 N.J.Super. 124, 514 A.2d 75 (App.Div.1986)." Id. at 86. The court observed the extension to tenants was justified: "In addition to the public's

right to use the sidewalk and the "harshness of the non-liability rule," we noted that the "resulting incentive to keep the abutting sidewalk in good repair applies to either the property owner or the lessee in exclusive possession[.]" Id.

The limitation which the Kandrac observed, concerning the extension of duty to tenants, was that "[t]hose considerations do not apply, however, to tenants in a multi-tenant mall that do not have control or maintenance responsibilities for a common area and have no contractual obligation to maintain such areas." Id. as previously discussed, however, these tenants did assume a duty to maintain the walkways. Given the small size of the strip-mall, even apart from the contractual duty they assumed, each of the Tenant Defendants had an opportunity to observe the conditions on the property and the nature of the attendant risk. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). Each of them had the "opportunity and ability" – along with a contractual duty – "to exercise care." Id. Instead, all the tenants disregarded the dangerous conditions on the property; did not abide by their contractual duty to clear the nearby walkways; and did not even notify the Landlord of the dangerous conditions. Id.

Finally, as the "public interest in the proposed solution," id., this Court has observed that the solution can be one which permits a tenant to "blithely turn a blind eye to any defects or hazards in common areas not owned by the

unit owner or tenant but foreseeably used by their invitees and passersby." Id. And that is precisely what happened here. The tenants closed their businesses at the end of the day of March 16, 2017, aware of the condition of the property, and "blithely turn[ed] a blind eye" to the fate of a "passerby" like Mr. Collucci.

Accordingly, for the above reasons, Plaintiffs contend that the common law establishes, as a matter of law, the duty of the Tenant Defendants in this case. The case should have been set down for trial on whether the Tenant Defendants negligently discharged that duty, and whether that negligence caused injury to Plaintiffs.

POINT III

THE LAW DIVISION SHOULD HAVE GRANTED PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS [Raised at Pa548-1040; Decided at Pa1-2]

A party is entitled to summary judgment upon a showing that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c). An issue of fact is genuine if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. A nonmoving party must oppose a summary judgment motion with more than a mere "scintilla of evidence." *Brill v. Guardian Life*

Ins. Co. of America, 142 *N.J.* 520, 532 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 252 (1986)).

Plaintiffs contend that there are no material disputes of facts over the following dispositive circumstances:

- The leases executed by the Landlord and each of the Tenant Defendants were similar -- and identical with respect to the issues presented by the Motion. At Article 3 of the leases, each of the Tenant Defendants assumed an unambiguous and broad duty "at [their] own expense and at all times, [to] maintain the premises in and safe condition."
- Article 3 also imposed on the Tenant Defendants the responsibility "for all repairs required, excepting the roof, exterior walls and structural foundations." Therefore, according to the terms of the leases, the Landlord Defendant had exclusive responsibility to maintain and repair "the roof, exterior walls and structural foundations." But these were the only matters of maintenance or repair over which the Landlord Defendant maintained exclusive duty.
- Article 3 explicitly placed each of the Tenant Defendants under an explicit duty to "maintain in good repair such portions adjacent to the premises such as sidewalks, driveways, lawns, shrubbery, which would otherwise be required to be maintained by [Landlord]."

- Article 17 does not establish that the walkway where Mr. Collucci was injured was a "common area" or that "common area" fees were paid for the purposes of maintaining that area.
- The term "common area" was not defined in the lease.
- That the Tenant Defendants, by virtue of their leases, owed a duty to Mr. Collucci.

CONCLUSION

For the foregoing reasons, this should vacate the Order; and remand to the Law Division to enter partial summary judgment in favor of Plaintiffs; to deny the Tenant Defendants' motion for summary judgment; and to set the matter down for trial on liability and damages.

Respectfully submitted,

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By:/s/ *Joseph M. Cerra*
Joseph M. Cerra

Dated: November 27, 2023

In the Superior Court of New Jersey
Appellate Division

Filed: March 8, 2024

DOCKET No: A-003655-22

VITO COLLUCCI and LUCILLE COLLUCCI, as husband and wife and Individually, Plaintiff, v. COSIMA CASSESE, CASSESE'S ENTERPRISES, INC., REALTY EXECUTIVES, NIROAL LLC, TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG, JEONG HE PAK, KYONG HUI NAM KOONG, JOHN DOES 1-10 and/or ABC CORPORATIONS 1-10, in their corporate capacity and as to the principles and owners individually (Names being fictitious and unknown but described as the corporate or individual owner(s), manager(s), lessor(s), supervisor(s), who had control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed to the March 16, 2017 loss), Defendants	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION PASSAIC COUNTY Docket No. PAS-L-2221-18 Sat Below: Hon. Frank Covello, J.S.C. Hon. Vicki J. Citrino, J.S.C.

BRIEF OF RESPONDENT/CROSS-APPELLANT ROBERTO ARCUCCI NIROAL LLC D/B/A AMORE RISTORANTE (IMPROPERLY PLED AS NIROAL, LLC)

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Table of Contents

Table of Authorities

Cases

Statutes

Court Rules

Table of Judgments, Orders, and Rulings Being Cross-Appealed

A. Preliminary Statement

The Plaintiff's appeal presents two questions, with Defendant's protective cross-appeal related to both issues. Plaintiff claims to have been injured when he slipped and fell on some black ice in the parking lot of a strip mall located in Woodland Park, New Jersey. He was on the property visiting the restaurant of Defendant, Roberto Arcucci Niroal LLC d/b/a Amore Ristorante (improperly pled as Niroal, LLC) (hereinafter "Amore"), who leased space at that location.

The first question asks whether the lease imposed upon Amore any contractual duty to maintain the common area where the accident allegedly occurred. The trial judge properly found that under the lease, the landlord had complete responsibility for maintenance of the area of the property where Plaintiff claims the accident occurred.

The second question asks whether Amore owed any common-law duty to maintain the area where the incident occurred. The trial judge, again, properly found that Amore owed no such duty and recognized that this Court had previously rejected the notion that a tenant in a multi-tenant commercial shopping center owes a common law duty to maintain common areas of which the landlord has retained control.

As for the cross-appeal, it asserts that the trial judges erroneously denied Amore's motions for summary judgment on the grounds that Plaintiff filed the first complaint which named Amore after the statute of limitations expired. Thus, if this Court should find any error in the grant of summary judgment in Amore's favor, it should nevertheless affirm the dismissal of Plaintiff's complaint, as the statute of limitations barred Plaintiff's claims, but the trial judge erroneously denied the initial motion to dismiss on state of limitations grounds.

Accordingly, Amore asks this Court to affirm the decision below dismissing the complaint.

B. Procedural History

On July 3, 2018, Plaintiff[1] filed his initial complaint against Amore's landlord, Cassese's Enterprises, Inc. ("Cassese," "landlord" or "lessor"); its owner, Cosima Cassese; Garrett Mountain Shopping Center; and several fictitiously named parties. (Pa118-130)

On October 15, 2018, Plaintiff filed a motion to amend the complaint. (Pa148-169) The amendment added PL Landscaping as a Defendant and removed Garrett Mountain Shopping Center, Inc., as a Defendant. (Id.)

[1] Although technically there are two Plaintiffs, Lucille Collucci's claim is a derivative, per quod claim, so the singular will be used to avoid confusion.

On May 21, 2019, Plaintiff filed a second motion to amend the complaint to include, *inter alia*, Amore as a Defendant. (Pa198-316) That motion was granted by order dated June 7, 2019. (Pa317-318) Plaintiff filed the second amended complaint on June 12, 2019. (Pa319-330) This was the first time Plaintiff named Amore as a defendant. (Cf. Pa118-130, Pa156-167 and Pa319-330)

On September 10, 2019, Amore filed an Answer to the second amended complaint. (Pa425-431) Plaintiffs filed a third amended complaint on September 23, 2019 to which Amore responded on September 24, 2019. (Pa436-454)

After several other defendants filed motions for summary judgment, Amore filed its own cross-motion for summary judgment on January 14, 2020. (Pa522-529) Amore argued that the Plaintiff failed to file its complaint within the two-year statute of limitations and that, therefore, dismissal was warranted. (Id.) On January 24, 2020, the Hon. Frank Covello, J.S.C., denied the motions to dismiss. (Pa7-8; 1T47:15-48:22[2])

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[2] 1T=January 24, 2020 hearing on motion for summary judgment
2T=February 14, 2020 transcript of motion
3T=June 25, 2021 hearing on second motion for summary judgment
4T=August 9, 2021 hearing on motion for reconsideration

At the conclusion of discovery, on May 28, 2021, Amore filed its motion for summary judgment, arguing Plaintiff produced evidence in discovery demonstrating that Amore had a duty to maintain the area where Plaintiff fell, and reraising the statute of limitations claim. (Pa888-928) On June 25, 2021, the Hon. Vicki Citrino, J.S.C., granted Amore's motion for summary judgment finding that there was no basis to impose a duty on Amore based either on the lease or on the common law, but rejecting the statute of limitations argument. (Pa1-2; 3T4:2-68:9) Plaintiff filed a motion for reconsideration which Amore opposed and which Judge Citrino denied. (4T4:1-28:24)

After the dismissal of the tenant defendants, including Amore, the case was tried to a verdict against PL Landscaping and Cassese. (See, Pa3-4) The jury found no liability against PL Landscaping, and Plaintiff and Cassese reached a settlement after the jury's verdict found each of them partially liable. (Id.) The order to enter judgment was entered on June 27, 2023. (Id.) Plaintiff's appeal and Amore's cross-appeal follow. (Pa14-24; 38-60)

C. Statement of the Facts

Amore and Cassese entered into a commercial lease agreement on or about May 5, 2014. (Pa973-989) Amore leased a unit in the shopping center located at 140 Rifle Camp Road, Woodland Park, New Jersey. (Id.) The

location is a strip mall which contains several businesses side-by-side in a single building. (Id.; Pa732; Pa1151)

The lease contained several provisions concerning the responsibility which each party to the lease would have concerning the maintenance and upkeep of the property. (Pa973-989) As for the responsibility for the external portion of the property, the lease made the tenant responsible for the sidewalk adjacent to the tenant's unit, but made the landlord responsible for the common areas, with the tenants each contributing a fee for that maintenance. (Id.)

Paragraph 3 of the lease states as follows:

> **3. Care and Maintenance of Premises.** Leasee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Leasee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and all other system or equipment upon the premises and shall surrender the same at termination hereof, in as good condition as received, normal wear and tear excepted, lease shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and SEE RIDER
>
> which shall be maintained by leasor. Leasee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by leasor.
>
> [Pa973]

The portions of the lease setting out the process for handling expenses for the common areas reads:

> **17. Common Area Expenses.** In the event the demised premises are situated in a shopping center or in a commercial building in which there are common areas, leasee agrees to share his pro rata share of maintenance, taxes and insurance for the common area.
>
> [Pa975]

The rider reads, in part:

> Leasee herein agrees that he shall be responsible to reimburse leasor for the leasee's proportionate share of the cost of lighting the parking lot, cleaning the parking lot, and all common areas and snow removal for the parking lot and all common areas, including maintenance, repair or replacement of septic system and/or well and garbage removal from the disposal containers. The leasor hereby estimates that the leasee's proportionate share shall be in the amount of $600 per month. As such, lease hereby agrees to pay said amount of $600 per month to leasor, as and for the aforesaid common area charges (CAM charges) on the first day of each and every month, along with the monthly rental payments. Leasee shall receive a complete accounting of all the CAM charges collected and expended each year by April 30 of the following year. In the event there is a surplus of fees, same shall be credited towards the following year's payments. In the event there is a shortage, leasee shall be responsible to pay same within thirty (30) days of presentation by leasor to leasee.
>
> [Pa976]

The lease further clearly set out landlord's responsibility over the common areas in the rider to the Amore lease, and which contains the following terms assigning the responsibility for the common areas to Cassese:

> **41st Maintenance, Upkeep, Repairs and Redecoration.** Lessee herein acknowledges that lessor shall in no way be liable for maintenance, upkeep, repairs, and/or redecorating of the premises in question. Lessee understands, agrees and acknowledges that he is responsible of [*sic*] any and all repairs to the demised premises and for cleaning the windows. Lessee specifically agrees that he shall be responsible for all repairs and/or replacements necessary to the plumbing and air conditions systems. Lessor shall be responsible for any major structural repairs to the roof or exterior of the structure, to the parking area and other common areas,[3] provided however that any such repairs are not necessitated as a result of negligence, damage or abuse by lessee, its agents, servants and/or assigns.
>
> ***
>
> **45th Control of Common Areas.** The common areas shall be subject to the exclusive control and management of the lessor and the lessor shall have the right to establish, modify, change, enforce reasonable rules and regulations with respect to the common areas and lessee agrees to abide by and conform with such rules and regulations. The right of customers to use the parking facilities shall apply only while they are shopping in the shopping center. Lessee agrees that lessee and lessee's employees will park their trucks, delivery vehicles and automobiles only in such parking areas as lessor shall from time to time

[3] It should be noted that the statement "to the parking area" and "other common areas" are separated by commas with none in between.

> designate for that purpose. Lessor shall have the right to close any part of the common areas for such time as may, in the opinion of the lessor's counsel, be necessary to prevent a dedication thereof, or the accrual of any rights in any person, or to clean and repair the same, and to close any part of the parking area for such time as lessor deems necessary in order to discourage non-customer parking. Lessor is hereby prohibited from leasing any portion of the parking lot to any business or other third party not within the leasehold premises.
>
> [Pa981-982]

In fulfillment of its responsibilities, Cassese hired a snow removal contractor, PL Landscaping, to remove all the snow from the parking spaces. (Pa922 [271:16-19]). Ms. Cassese[4] testified that she expected PL Landscaping to apply salt to all the parking spaces and the parking lot, to remove the snow from the sidewalk in front of the building and apply salt to that area, (Id. [271:20-22; 271:23-272:5])

As it was the landlord's obligation to remove snow and ice from the sidewalk and apply salt to the sidewalk, Ms. Cassese testified that she did not expect the tenants to shovel snow from the sidewalk nor to hire another contractor to remove snow from the sidewalk in front of their property. (Pa925 [285:7-15; 286:3-8]).

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[4] When referring to her, specifically, Cosima Cassese will be referred to as "Ms. Cassese" to eliminate confusion between her and her company, which will be referred to as "Cassese."

Ms. Cassese further recognized that she maintained exclusive control and management of the common areas of the shopping center, which included the parking lots, parking spaces, sidewalks and all other common areas. (Pa927 [292:12-19]).

On March 16, 2017, Plaintiff and members of his family were customers at Amore Ristorante. (Pa621). Geraldo Luciano and his son-in-law, Roberto Arcucci own Amore. (Pa745-746) Plaintiffs have known Geraldo Luciano and his wife for many years, and consider them to be family through marriage, as Plaintiff's niece is married to the Luciano's nephew. (Pa746) Plaintiffs were frequent customers of Amore Restaurant. (Pa921)

After eating dinner, Plaintiff exited the restaurant to walk to his car, which was parked in the front parking lot, in front of the building, to get a cake for his adult son's birthday. (Pa621) Plaintiff retrieved the cake and walked back to the restaurant. (Id.) However, instead of entering through the public entrance at the front door, he proceeded past the front of the restaurant to the end of the building. (Id.; Pa673) He turned around the corner and proceeded alongside the north end of the property, toward the back, as he intended to enter Amore's kitchen through a rear door. (Id.) As he progressed along the side of the building, he allegedly slipped on black ice and fell. (Pa118-130;

673, 859. See, also, Pa848, with "x" marking the spot where Plaintiff allegedly fell.)

Ms. Cassese identified the location of Plaintiff's accident as part of the parking lot and therefore a common area. (Pa927 [294:1-7]). She did not expect Amore to remove snow and ice from that location. (Id. [294:8-12]). Rather, she expected that the snow removal contractor would do so. (Id. [294:13-16]).

Plaintiff filed his original complaint on July 3, 2018, approximately 15 months after the alleged accident. (Pa118-130). Plaintiff did not name Amore in that original complaint, but did name several fictitious defendants, identified as "John Does 1-10 and/or ABC Corporations 1-10." (Id.)

Plaintiff's first amended complaint, filed on November 27, 2018, also did not name Amore as a defendant. (Pa89-98).

On May 21, 2019—more than two years after the accident and after the statute of limitations expired—Plaintiff moved to amend the complaint again, to name Amore and the other tenants as defendants. (Pa198-316). Plaintiff argued that he had no basis to sue Amore up to that point in time because he had to first review Amore's lease and he had just received it. (Pa200-205).

Plaintiff's motion was granted and the second amended complaint was filed on June 12, 2019, naming Amore as a defendant. (Pa319-330).

In January 14, 2020, Amore filed its cross-motion for summary judgment on the grounds that the statute of limitations barred the complaint. (Pa522-529) On January 24, 2020, the Hon. Frank Covello, J.S.C., denied the motions to dismiss. (Pa7-8; 1T47:15-48:22) He reasoned that because the landlord was not forthcoming in producing the leases and because Plaintiff may have been misled by Cassese's answers to interrogatories indicating that there were "no other parties who might be responsible," he would permit the late filing. (Id.)

After Amore's initial motion for summary judgment to dismiss the complaint for failure to abide by the statute of limitations was denied, the matter proceeded to discovery. (Pa7-8) At the conclusion of discovery, Amore again sought summary judgment, this time on the grounds that it bore no duty under either the lease nor the common law to clear the location where the accident allegedly occurred, as well as on the statute of limitations grounds. (Pa888-928; 3T4:2-68:9) Judge Citrino granted that motion, finding no duty. (Pa1-2; Id.)

D. Appeal Legal Argument

ISSUE I: STANDARDS OF REVIEW OF AN ORDER DECIDING A MOTION FOR SUMMARY JUDGMENT.

The review of an order granting summary judgment is plenary and a reviewing court applies the same standard as the motion judge. Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135-36 (2017).

New Jersey Court Rule 4:46-2(c) provides that summary judgment:

> ...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

Summary Judgment is warranted when the evidence presents no genuine issue of fact or when it is so one sided that one party must prevail as a matter of law. Brill v. Guardian Life Insurance of America, 142 N.J. 520, 536 (1995). To avoid summary judgment, the opposing party must come forward with evidence that creates a genuine issue as to a challenged material fact. Brill, 142 N.J. at 529.

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (citations omitted). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)). A court cannot deny a motion for summary judgment merely because the opposing party points to an insubstantial or controverted fact. Id.

The determination that a genuine issue of material fact exists cannot be made based on a mere argument of counsel or the bare assertion of a conclusion opposite to the factual position of the adversary. Amabile v. Lerner, 74 N.J. Super. 43 (App. Div. 1963); U.S. Pipe & Foundry Co. v. Am. Arbitration Assoc., 67 N.J. Super. 384, 400 (App. Div. 1961); Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369 (App. Div. 1960). When evidence fails to present sufficient disagreement to require submission to a jury, or when evidence is so one sided that a party must prevail as a matter of law, summary judgment should be granted. Brill, 142 N.J. at 536.

In this case, Judge Covello wrongly denied the initial motion summary, because Plaintiff failed to file suit against Amore within the two-year statute of limitations period. However, Judge Citrino properly granted Amore summary judgment, as there was no basis for imposing a duty on Amore to maintain the area of the property where the plaintiff allegedly fell. Under the lease with its landlord, Amore is free of any obligation to maintain the common area, as that is the responsibility of the lessor. Moreover, tenants of a multi-tenant shopping center have no common law duty to maintain the common areas when the lease delegates responsibility for maintenance of the common area to the landlord.

ISSUE II: SUMMARY JUDGMENT WAS PROPER BECAUSE AMORE'S LEASE DOES NOT PROVIDE A BASIS TO FIND THAT IT WAS RESPONSIBLE FOR ICE AND SNOW REMOVAL WHERE THE PLAINTIFF FELL.

Plaintiff first asserts that Judge Citrino improperly dismissed his cause of action asserting that Amore had a contractual duty to maintain the area of the parking lot where he allegedly fell. Because both the text of the lease and the testimony of the lessor confirm that the lessor had exclusive responsibility for the maintenance of the common areas, including the parking lot, and that the unit tenants only had responsibility, at most, to maintain the sidewalks immediately outside their businesses, summary judgment was proper.

When determining whether a rental contract assigned a duty to maintain the parking lot to a tenant, it must be first understood that a landlord has the duty, albeit a delegable one, to "exercise reasonable care to guard against foreseeable dangers arising from use of those portions of the rental property over which the landlord retains control," a duty which includes snow and ice removal. Shields v. Ramslee Motors, 240 N.J. 479, 491 (2020).

In this case, Amore did not have exclusive control and possession of the entire property. The landlord, Cassese, retained control of the common areas and each tenant exercised control over its unit. Therefore, the question then becomes whether the lease delegated the duty to clear ice and snow in the spot where Plaintiff fell.

Leases in New Jersey are contracts and, as such, courts must interpret them as they do all contracts. Courts are to apply basic principles of contract interpretation to leases. See Town of Kearny v. Disc. City of Old Bridge, Inc., 205 N.J. 386, 411 (2011). Contract terms are generally "given their plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). "Courts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)

(quoting Caruso v. Ravenswood Devs., Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)).

The courts are permitted "a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 270 (2006); see also Renee Cleaners, Inc. v. Good Deal Super Mkts., Inc., 89 N.J. Super. 186, 190 (App. Div. 1965) ("In general, the polestar of construction is the intention of the parties as disclosed by the language used, taken in its entirety, and evidence of the attendant circumstances may be considered, not to change the agreement made but to secure light by which to measure its actual significance."). "The plain language of the contract is the cornerstone of the interpretive inquiry." Barila v. Bd. of Educ., 241 N.J. 595, 616 (2020).

In this case, there are several provisions which are key. First, the contract specifically delegates some responsibility to the tenant, but that ***does not*** include responsibility for the common areas:

> 3. **Care and Maintenance of Premises.** Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations, and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be

> responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and: SEE RIDER
>
> which shall be maintained by Lessor. Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.
>
> * * *
>
> 17. **Common area expenses.** In the event the demised premises are situated in a shopping center .. .in which there are common areas, Lessee agrees to pay his pro-rata share of maintenance, taxes and insurance for the common area.
>
> [Pa973; 975].

Furthermore, the rider to Amore's contract clearly assigns that responsibility to Cassese:

> **41st Maintenance, Upkeep, Repairs and Redecoration.** Lessee herein acknowledges that lessor shall in no way be liable for maintenance, upkeep, repairs, and/or redecorating of the premises in question. Lessee understands, agrees and acknowledges that he is responsible of [*sic*] any and all repairs to the demised premises and for cleaning the windows. Lessee specifically agrees that he shall be responsible for all repairs and/or replacements necessary to the plumbing and air conditions systems. Lessor shall be responsible for any major structural repairs to the roof or exterior of the structure, to the parking area and other common areas,[5] provided

[5] It should be noted that the statement "to the parking area" and "other common areas" are separated by commas with none in between.

> however that any such repairs are not necessitated as a result of negligence, damage or abuse by lessee, its agents, servants and/or assigns.
>
> ***
>
> **45. Control of Common Areas.** The common areas shall be subject to the exclusive control and management of the lessor and the lessor shall have the right to establish, modify, change, enforce reasonable rules and regulations with respect to the common areas and lessee agrees to abide by and conform with such rules and regulations. The right of customers to use the parking facilities shall apply only while they are shopping in the shopping center. Lessee agrees that lessee and lessee's employees will park their trucks, delivery vehicles and automobiles only in such parking areas as lessor shall from time to time designate for that purpose. Lessor shall have the right to close any part of the common areas for such time as may, in the opinion of the lessor's counsel, be necessary to prevent a dedication thereof, or the accrual of any rights in any person, or to clean and repair the same, and to close any part of the parking area for such time as lessor deems necessary in order to discourage non-customer parking. Lessor is hereby prohibited from leasing any portion of the parking lot to any business or other third party not within the leasehold premises.
>
> [Pa981-982]

Thus, nowhere in the lease is the tenant assigned any duty to maintain the parking lot, nor does it state within any of the articles quoted that the tenants are responsible to maintain the parking lot for snow and ice removal. The language cited above, as well as the language in both the lease and the

riders to the lease which specifies Cassese's responsibility for common areas, evidences the conclusion that the lease does not assign to tenants any responsibility to clear ice and snow.

Under the lease's plain language, the parking lot falls under the definition of "common areas" and Cassese was responsible for the maintenance of those common areas.

Although the plain language of the lease clearly demonstrates Cassese's retention of responsibility over the common area and parking lot, Ms. Cassese agreed, in her deposition testimony, that the lessor retained responsibility for the property common areas. She testified:

> Q; Since 1980, has it been your responsibility as the owner of the strip mall to make sure there is no dangerous snow and ice conditions in your parking lot at this strip mall; yes or no?
>
> A: Yes.
>
> [Pa1002 (184:3-8)]

Ms. Cassese also testified that the lease provided that Cassese was responsible for removal of snow and ice from the parking lot, including the snow and ice removal services that PL Landscaping provided on March 16, 2017. [Pa911]

> Q: Under Section 3, is there a provision that this tenant had an obligation to be responsible for the care and maintenance of the premises?

A: I take care of the common area complete.

[Pa911 (74:17-22)]

She further testified that the tenants paid the expenses for that maintenance with each paying its share:

Q: And as part of these common area expenses, they give you the money, and then you use that money to cover these common area expenses as the landlord. Is that correct?

A: Yes.

Q: And part of those common area expenses go to snow and ice removal services that you hire a contractor to do?

A: Yes.

Q: And then you took all active tenants' money, and you used some of that money to cover the snow and ice removal services you paid for stuff that was done at your strip mall?

A: Yes.

Q: That included the services P&L [*sic*] provided from March 14th to March 16th, 2017. Correct?

A: Yes.

[Pa911-912 (77:13-78:50)]

She further testified :

Q; Now, as the landlord, under the lease, it was the landlord's obligation to also take care of the sidewalk. Is that correct?

A; Yes.

Q; And to remove snow and ice from the sidewalk?

A: Yes.

Q: And to apply salt to the sidewalk?

A: Yes.

[Pa295 (285:7-15)]

She finally stated that she only expected the tenants to take care of the sidewalk and lay down additional salt, if they see it is necessary. (Pa920 [285:16-21])

She further affirmed that Cassese maintained exclusive control and management of all the common areas of the shopping center, which included the parking lots, the parking spaces, the sidewalks and all other areas:

> Q: Okay. Would you agree, based on this portion of the lease, this paragraph, it makes it clear that you, as the lessor, Cassese, you maintained exclusive control and management of the common areas of the shopping center, which included the parking lots, the parking spaces, the sidewalks, and all other common areas?
>
> A: Yes.
>
> [Pa927 (292:12-19)].

As such, Cassese was exclusively responsible for any snow or ice removal in the parking lot, including the spot where Plaintiff fell.

Plaintiff, in his brief, argues that the area where he slipped was not part of the parking lot, but a walkway.[6] He makes this claim so that he can then argue that Amore somehow had the obligation to maintain it as a "sidewalk" "adjacent to the premises" under Section 3 of the lease.

However, Judge Citrino properly determined that the photographs of the area where Plaintiff identified the spot where he fell show that it is "neither a sidewalk nor a walkway. It is a part of the parking lot blacktop on the side of the building, which falls under the definition of common areas." (3T56:20-25)

Furthermore, Plaintiff's argument that a question of fact exists whether this spot constitutes a walkway or a sidewalk (and that therefore the opinion of his expert, Scott Moore, was relevant) is misguided.

First, that question is irrelevant, because regardless of how it is described or whether it might be walked upon by a patron, the area is undeniably part of the blacktop parking lot and therefore a part of the common area which, under the lease, the landlord is responsible for maintaining.

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[6] In fact, Plaintiff's description of this area was quite fluid, as he changed his description of the area multiple times in this litigation. (Pa529, describing in the answers to interrogatories that he fell "in the parking lot."; Pa200, in the motion to file a second amended complaint, asserting that the "location of the fall is in an area that is in the parking lot...")

Moreover, the underlying premise of that argument is that this area of blacktop can be considered "adjacent" to the premises leased by Amore. There is simply no factual support for that assertion. The spot where Plaintiff fell is on the side of the building, separated by Amore's unit by the property leased to Realty Executives.

It further makes no sense because, under the lease agreements, the tenants must pay a *pro rata* share of common area maintenance fees, and the common areas and their maintenance were under the exclusive control of the landlord, Cassese. It would make those provisions of the lease superfluous if Amore would be nevertheless somehow responsible to maintain a remote portion of the parking lot, which is nowhere near its unit, when it already has paid its share of the maintenance fee for the common areas to the landlord.

In this case, the plain and unambiguous language requires the tenants to maintain the areas in front of their stores and nothing more. The landlord intended to exercise control over common areas, such as parking lots, by reserving the right to charge for common area maintenance.

By contrast, Plaintiff's argument that the term "adjacent" should be read to mean common areas abutting, adjoining or contiguous with the tenant's leased premises, located anywhere in the entirety of the shopping center, would have the effect of imposing a duty on every tenant, over large portions

of the shopping center property which are remote from that tenant's unit and which are contractually the duty of Cassese as part of the common areas. Even if the plain language of the lease could be read in such a manner, such an outcome would be an absurdity and so that reading should be rejected. It is well established law that "when the intent of the parties [to a contract] is plain and the language is clear and unambiguous, a court must enforce the agreement as written, ***unless doing so would lead to an absurd result***." Quinn v. Quinn, 225 N.J. 34, 45 (2016) (emphasis supplied.)

In this case, given the provisions of the lease which place the duty for the maintenance of the common areas on the lessor, the provisions which provide for the collection of fees for common area expenses, and the fact that the area in question was part of the blacktop parking lot, any reading of the term "adjacent" which would make Amore responsible for ice and snow clearance along the side of the shopping center, when it had a unit toward the center of the complex, would be an absurd result and thus unsupportable under the law.

For all the foregoing reasons, Judge Citrino properly granted Amore summary judgment and Amore asks this Court to affirm that determination.

ISSUE III: SUMMARY JUDGMENT WAS PROPERLY GRANTED TO AMORE, AS IT HAD NO COMMON LAW DUTY TO MAINTAIN THE PARKING LOT WHERE THE PLAINTIFF FELL.

Next, Plaintiff argues that Amore had a common-law duty to maintain the area of the parking lot where the Plaintiff fell. Under the common law, a property ***owner*** has a duty to provide a "reasonably safe place to do that which is within the scope of the invitation," including the duty to "use reasonable care to make the premises safe, including the duty to conduct a reasonable inspection to discover defective conditions." D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011).

However, when a property owner leases part, but not all, of the property to tenants and retains control of common areas of the property, the factor under Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993) must be examined to see whether the tenant owes a duty to maintain common areas. Those factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution—all demonstrate that no duty exists here.

First, the relationship of the parties favors a finding of no duty. The landlord and tenant have agreed between themselves how to apportion the responsibility for property maintenance with Cassese being responsible for the

common areas and Amore paying its *pro rata* share of the maintenance costs for those common area, along with the other tenants.

Second, the nature of the attendant risk—the potential to slip and fall on unseen ice—is significant, but it is an intermittent matter which primarily effects the common areas of the property and is separate and apart from the business engaged in by each of the tenants. However, it is well suited to be handled by property management, which would naturally fall within the competence of Cassese as the lessor.

Third, the opportunity and ability to exercise care factor favors a finding of no duty because consolidating the responsibility for maintenance of the common areas and assigning it to the landlord, permits the landlord to address the problem efficiently by hiring a dedicated snow and ice contractor like PL Landscaping to both monitor for snow activity and to treat the entire shopping center when needed. Any individual unit lessee would be unlikely to easily or be regularly able to monitor the entirety of the property, including areas at a distance from the location of their individual units. Assigning the duty to multiple tenants would also encourage confusion and inefficiencies, as multiple parties would have overlapping and potentially conflicting resolutions to the problem every time it snowed.

Finally, the public interest in the proposed solution is advanced by the same efficiencies discussed above. The public's interest would be in ensuring the proper maintenance in the public areas of the property, more specifically, the prompt and complete clearance and treatment of ice and snow conditions. That can best, most efficiently, and most effectively be done by consolidating the responsibility for snow and ice maintenance and hiring a professional company like PL Landscaping to provide that service. The alternative is for any number of individual unit lessees attempting to arrange for such maintenance on an ad hoc basis, with potentially confused and conflicting responses potentially leading to difficulties and delays in clearing the snow and ice conditions.

Thus, Judge Citrino was correct to find that no common law duty existed here.

Furthermore, she properly considered Kandrac v. Marrazzo's Market at Robbinsville, 429 N.J. Super. 79 (2012), for the question of whether a lessee of a single unit in a shopping center owes a common law duty to a patron to maintain the common parking lot. As this Court defined it, the case "concern[ed] whether a commercial tenant in a multi-tenant shopping center owes a duty to its patrons to maintain an area of the parking lot that the landlord is contractually obligated to maintain." Kandrac, 429 N.J. Super. at

81. The Court ultimately determined that "as a general rule, the commercial tenant does not have such a duty..." Id.

In Kandrac, the Plaintiff was a patron of the defendant, Marrazzo's Market, which was one of thirty-six stores in The Shoppes at Foxmoor shopping center. Id. After crossing the fire lane and access roadway to the parking area, her foot caught on a "hump" in the asphalt and she fell forward, injuring herself. Id.

The lease between Marrazzo and Foxmoor contained a provision which assigned to the lessor the responsibility to maintain the common areas of the center. Id., at 82. It read:

> The LESSOR covenants and agrees that it shall maintain the common areas of the shopping center in good operating condition and repair ... [and t]he LESSOR shall resurface the sidewalk, parking and driveway areas when the same shall be reasonably necessary together with the restriping of the parking areas.
>
> [Id.]

The testimony from managers and employees of both the lessor and tenant indicated that the lessor had responsibility for repairs and maintenance and that the tenant would notify the lessor if any danger or safety issues arose. Id., at 82-83.

In determining whether Marrazzo owed a duty, the Court first reviewed the law which applied to commercial enterprises to maintain the sidewalks adjacent to their properties and any walkway along the expected route between the parking provided and the entry to the store. Id., at 85. The Court then recognized that the imposition of a duty does not extend to "tenants in a multi-tenant mall that do not have control or maintenance responsibilities for a common area and have no contractual obligation to maintain such areas." Id., at 86.

The Court then examined the policy reasons for extending liability, as set forth in Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981), including:

> (1) a recognition of the "considerable interest in and rights" the commercial landowner had regarding the property in question,
>
> (2) whether imposing a duty associated with those rights would be arbitrary,
>
> (3) whether a failure to impose the duty would leave innocent victims without recourse,
>
> (4) a recognition that the imposition of liability would give an incentive to landowners to care for the property,
>
> (5) whether the proximity of the place where the injury occurred to the business establishment would render a failure to impose a duty arbitrary, and
>
> (6) a recognition that the commercial landowner would treat the costs associated with additional insurance

> premiums and maintenance as one of the necessary costs of doing business.

Kandrac, 429 N.J. Super. at 87-88.

The Kandrac Court then rejected the plaintiff's argument that this was a question of ingress and egress, noting that the location where the plaintiff fell was not a sidewalk abutting the premises or a marked walkway, but was the parking lot, part of the common areas of the shopping center, with "no defined route" to her vehicle. Id., at 88.

Finally, the Court emphasized that the lessor was clearly assigned responsibility to maintain the lot, so the plaintiff was not without recourse, and assigning the duty to the individual tenants would be potentially counter-productive, due to duplication of effort and interference with the landlord's maintenance program. Id., at 90.

Consequently, the Court concluded that, "as a general rule, when a commercial tenant in a multi-tenant shopping center has no control or contractual obligation to maintain a parking lot shared with other tenants, the common law does not impose a duty upon the tenant to do so." Id., at 90-91.

Applied to the facts of this case, Kandrac clearly controls. Factors which Kandrac Court cited applies here as well. Amore had no responsibility or control common areas, the area where Plaintiff fell was not a sidewalk or marked walkway, towards the designated public entrance to the restaurant, and

both Cassese and PL Landscaping had responsibility for maintenance of the lot. Therefore, Plaintiff cannot be said to be without recourse.

Moreover, Plaintiff's reliance on Stewart, supra, Antenucci v. Mr. Nick's Mens Sportswear, 212 N.J. Super. 124 (App. Div. 1986) and Nielsen v. Wal-Mart Store No. 2171, 429 N.J. Super. 251 (App. Div. 2013), for the proposition that the law imposes a duty on a party such as Amore, is misguided.

First, Stewart stands for the proposition that a commercial landowner is liable for pedestrian injuries caused by a deteriorated sidewalk abutting that landowner's business. Stewart, 87 N.J. at 149. In this case, however, the accident did not occur on a sidewalk abutting the Amore Risterante, but in a section of the parking lot along the side of the shopping center, between the building and the vehicle parking blocks.[7] Furthermore, Amore is not the owner of the property but merely a tenant. Thus, the decision in Stewart is irrelevant because the accident did not implicate commercial landowners' duty to clear the public sidewalk abutting their property.

Next, the decision in Antenucci extended the principal of Stewart to tenants who are in exclusive possession and sole occupants of the property at

[7] The end tenant, closest to the site of the accident, is not Amore, but is Realty Executives. (See, Pa735)

issue. Antenucci, 212 N.J. Super. at 130. Because Amore was not in exclusive possession nor the sole occupant of the property, being only one of five tenants located in the shopping center at 140 Rifle Camp Road, the decision in Antenucci had no bearing on this case and does not provide a basis to reverse the trial judge's decision.

Finally, Plaintiff cites to Nielsen. In Nielsen, the plaintiff was a pest control contractor of the defendant, Walmart, who was directed by the defendant to service the bait stations set up around the premises by travelling around the exterior of the building, where he encountered the sand and gravel condition which caused his fall. Nielsen, 429 N.J. Super. at 262.

The Nielsen Court, then, applied the factors set out in the Supreme Court's decision of Hopkins and found that, under the facts of the case, the Hopkins analysis favored the imposition of a common law duty. Key among the factors were the "nature of the attendant risk" and "opportunity and ability to exercise care" factors because Walmart specifically directed the contractor to access the bait traps from the exterior of the unit and not the interior of the store. Nielsen, at 262. It was thus "utilizing the common area for Walmart's benefit precisely as directed by Walmart." Id.

The Court also found that the business could be chargeable with a duty to be "familiar with the perimeter outside its unit and other common areas that its invitees and passersby might foreseeably use." Id., at 263.

In this case, however, there are no similar facts which are analogous to the key factors that the Nielsen Court relied upon. First, there is simply no evidence that anyone at Amore directed to travel around the side of the parking lot towards the back of the building, as was the case with the contractor in Nielsen. Plaintiff claimed that he told the people in Amore's kitchen that he was going to bring the birthday cake to the back door,[8] but there is no evidence—even from Plaintiff, himself—that anyone from Amore directed Plaintiff to bring the cake to the back of the restaurant.

Furthermore, the area where the accident allegedly occurred is not the "perimeter outside [Amore's] unit" nor in an area where Amore's invitees "might foreseeably use." Id., at 263. The spot where the accident occurred was along the perimeter of the shopping center, itself, but well away from Amore's unit.

Moreover, it was not an area which its patrons might foreseeably use. There is no public access to the restaurant from the rear of the building, and the entrance for the public is at the front of the building. When Plaintiff went

[8] This is a point which Amore disputes.

to retrieve the cake, he proceeded from his car ***past the public entrance*** and proceeded along the side of the building. He clearly left the area which might be considered a place that patrons "might foreseeably use."

Thus, the key factors in Nielsen are not present here, and Judge Citrino was correct in finding that the conclusion in that case had no bearing on the present matter.

E. Cross-Appeal Legal Argument

ISSUE IV: PLAINTIFF'S COMPLAINT AGAINST AMORE SHOULD HAVE BEEN DISMISSED ON THE GROUNDS THAT PLAINTIFF FAILED TO FILE THE COMPLAINT WITHIN THE TWO-YEAR STATUTE OF LIMITATIONS PERIOD. (PRESENTED AT PA522-529; 1T5:1-48:22; PA888-928; 3T4:2-66:6)

In the alternative, if this Court were to somehow find error with the Law Division's finding that Amore owed Plaintiff no duty to maintain the property on the side of the strip mall building, on either the theory that the lease imposed a duty or that there was a common law duty, this Court should nevertheless find that the Plaintiff's complaint was properly dismissed because he failed to file suit against Amore within the two-year statute of limitations. Judge Covello erred by denying the motion to dismiss the complaint on statute of limitations grounds, and Judge Citrino erred by not crediting that theory when it was re-raised in the second motion for summary judgment.

The statute of limitations in this case was two-years. N.J.S.A. 2A:14-2. A statute of limitations commences to run upon the happening of the accident or event upon which the claim is based. Beauchamp v. Amedio, 164 N.J. 111, 116 (2000). In this case, that would be the moment when Plaintiff allegedly slipped on March 16, 2017. Thus, the Plaintiff had until March 16, 2019 to file suit. However, he failed to file suit until June 12, 2019.

New Jersey law recognizes the so-called "discovery rule" to toll the running of the statute of limitations. In such cases, a cause of action will not accrue and the statute of limitations will not begin to run until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim. Lopez v. Swyer, 62 N.J. 267, 272 (1973). That point exists when the plaintiff is aware of being injured and that the injury is the fault of another. Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 275 (App. Div. 1997) (citing Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986).)

However, the discovery rule does not apply here because Plaintiff knew immediately that he had fallen on ice and injured himself and that it was the fault of another, so the statute commenced running immediately and the discovery rule has no bearing on this case.

Plaintiff included in his complaint several "John Doe" defendants, to comply with the fictitious-party practice in Rule 4:26-4. However, that rule is only appropriate when "the defendant's true name is unknown to the plaintiff..." R. 4:26-4. It applies only when "the nature of the claim is known and the tortfeasor's identity is not." Freeman v. State, 347 N.J. Super. 11, 29 (App. Div. 2002).

In this case, Plaintiff unquestionably knew of Amore's identity at the time of the accident, as Plaintiff conceding that he was on friendly terms with the restaurant's owners, as they related by marriage. (Pa746) On that ground, alone, the fictitious-party pleading rule could not save Plaintiff's claim from dismissal under the statute of limitations bar.

Plaintiff argued, however, that he needed to examine the lease in this case to determine the nature of the claim. However, what that argument essentially states is that Plaintiff knew the identity of potential defendants, but did not know the specific theory of recovery that Plaintiff might assert against those party.

However, the fictitious-party pleading rules are simply not applicable when the defendant's true name is known, but the nature of the claim is unknown. Thus, the fact that Plaintiff added "John Doe" defendants in his

pleading was irrelevant and was not a basis to find that he complied with the statute of limitations.

In any event, Plaintiff's argument that he could not file suit against Amore without first examining the lease is simply false. Plaintiff ultimately argued that Amore had a duty to maintain the area where he fell based on the lease, but also on the common law, relying a case—Nielsen—which was published in 2013.[9]

Thus, at the moment of the injury, Plaintiff knew of his injury, knew Amore's identity, and reasonably could have known the nature of the claim, i.e., that he could assert a common-law duty based on the reasoning in Nielsen. Thus, neither the discovery rule nor the fictitious-party pleading practice applied, and Plaintiff's failure to file suit with two years of the incident doomed his case.

Furthermore, the argument that Plaintiff needed to examine the lease in order to file suit appears to be nothing but a post-hoc rationalization. Not only did Plaintiff ultimately assert a common-law claim—for which the lease was not relevant—but also because the complaint's Count III, which asserts the claim against the fictitious-party defendants, without mentioning the lease at

[9] The fact that Nielsen did not apply, as asserted in the previous section of the brief, is of no moment, because the question is whether the claim could be asserted, and not whether it was ultimately meritorious.

all. Thus, Plaintiff was fully capable of timely asserting the cause of action against Amore without resorting to the fictitious-party pleading rules, but simply failed to do so.

Additionally, while a lease might provide an alternate potential basis for the imposition of a duty of care, as opposed to the common law, the fact that Plaintiff may have not received the lease until after the statue ran is immaterial. Had Plaintiff timely filed a common-law theory negligence claim against Amore and then later, after the statute ran, obtained the lease in discovery and desired to assert a cause of action based on the lease, he could have simply moved to amend the complaint at that time, to add the theory that the duty emanated from the lease.

Because that hypothetical amended complaint would have asserted a claim arising out of the same "conduct, transaction or occurrence" as would have been set forth in the initial, timely complaint—namely that Plaintiff slipped and fell in the parking lot—the filing date of the amendment would relate back under R. 4:9-3 to the filing date of the initial pleading and would have been deemed timely.

However, because Plaintiff failed to name Amore in his initial complaint, and instead improperly named "John Doe" defendants, the statute of limitations expired prior to Amore being named and, as such, Amore

acquired "a vested right to be forever free" of the claim asserted by Plaintiff. Molnar v. Hedden, 138 N.J. 96, 104 (1994) (quoting McGlone v. Corbi, 59 N.J. 86, 94 (1971).)

Finally, Judge Covello denied the motion to dismiss on the grounds that the landlord was not forthcoming in producing the leases and because Plaintiff may have been misled by Cassese's answers to interrogatories indicating that there were "no other parties who might be responsible." (See Exhibit I, Transcript of Oral Argument, pp. 47:20 – 48:22).

However, neither of those reasons are well-founded. First, the issue regarding the lease was, as the foregoing section of this argument demonstrates, nothing but a red herring. Plaintiff did not need to review the lease to know that he had been injured by the fault of another, to know Amore's identity, nor that he had a potential cause of action on a common-law duty theory. Consequently, the lack of a lease did not preclude Plaintiff from filing the complaint under the common law theory he later espoused.

In addition, there is no merit to the claim that Cassese's answer to interrogatories was misleading. The courts have invoked several equitable doctrines, including equitable estoppel, detrimental reliance, and equitable tolling, to toll the statute of limitations when a statement induces a plaintiff to withhold filing his or her complaint until after a statute of limitations period

expires. However, in each case, the party seeking the protection of the statute of limitations must be the party who induced the reliance by the plaintiff. Trinity Church v. Lawson–Bell, 394 N.J. Super. 159, 171 (App. Div. 2007) ("[A] defendant may be denied the benefit of a statute of limitations where, by ***its inequitable conduct***, ***it has caused*** a plaintiff to withhold filing a complaint until after the statute has run." Emphasis added); Konopka v. Foster, 356 N.J. Super. 223, 232 (App. Div. 2002) (party seeking to apply equitable estoppel must prove "***conduct on the part of the defendant*** occurring intentionally or under such circumstances that it is both natural and probable that the conduct would induce inaction, together with reasonable detrimental reliance on plaintiff's part." Emphasis added.); Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div. 2001) ("Typically the doctrine [of equitable tolling] is applied 'where the complainant has been induced or tricked ***by his adversary's*** misconduct into allowing the filing deadline to pass." Emphasis added.)

In this case, because Plaintiff did not allege nor demonstrate that Amore indicated that no other party may be responsible, it cannot be said that Amore committed any inequitable conduct sufficient to bar the application of the statute of limitations under any of these equitable theories. Consequently, Judge Covello erred in not dismissing the complaint for failure to file within the statute limitations.

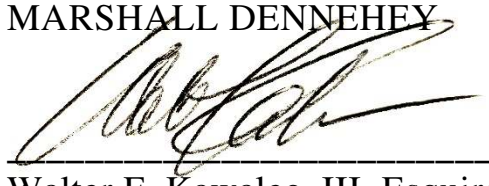
Therefore, in the event this Court somehow finds that Judge Citrino erred in dismissing the complaint against Amore for lack of a duty, Amore is nevertheless entitled to summary judgment as a matter of law, based upon Plaintiff's failure to commence suit within the two-year statute of limitations.

Plaintiff had knowledge of sufficient facts from the day of the accident to know that he may have an actionable claim against Amore. Plaintiffs failed to act with diligence to identify and name Amore in the original Complaint, and failed to act with diligence to add Amore as a defendant prior to the expiration of the statute of limitations. As such, Amore asks this Court to affirm the grant of summary judgment.

F. Conclusion

For all the foregoing reasons, Defendant Roberto Arcucci Niroal LLC d/b/a Amore Ristorante, respectfully requests that this Court affirm the judgement in Defendant's favor.

Respectfully Submitted,
MARSHALL DENNEHEY



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VITO COLLUCCI AND LUCILLE COLLUCCI, as husband and wife and Individually, *Plaintiffs-Appellants-Cross-Respondents,* vs. COSIMA CASSESE, CASSESE'S ENTERPRISE, INC., *Defendants-Respondents,* REALTY EXECUTIVES and NIROAL, LLC, *Defendants-Respondents-Cross-Appellants,* *(For Continuation of Caption See Inside Cover)*	APPELLATE DIVISION DOCKET NO.:A-003655-22 ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-2221-18 Sat Below: Hon. DARREN J. DEL SARDO, J.S.C. HON. VICKI A. CITRINO, J.S.C. HON. FRANK COVELLO, J.S.C.

BRIEF FOR DEFENDANT-RESPONDENT-CROSS APPLANT-KYONG NAMKOONG I/P/A KYONG HUI NAM KOONG

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Date Submitted: January 19, 2024

TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG, JEONG HE PAK,

Defendants-Respondents,

KYONG HUI NAM KOONG,

Defendant-Respondent-Cross Appellant,

-and-

JOHN DOES 1-10 and/or ABC CORPORATIONS 1-10, in their corporate capacity and as to the principles and owners individually (Names being fictitious and unknown but described as corporate or individual owner(s), manager(s), lessor(s), supervisor(s), who had control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed to the March 16, 2017 loss),

Defendants-Respondents.

TABLE OF CONTENTS

PAGE

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING CROSS-APPEALED

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes

TABLE OF TRANSCRIPTS

TRANSCRIPTS **Page**

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant-respondent-cross appellant, Kyong Namkoong i/p/a Kyong Hui Nam Koong ("Namkoong"), in response to plaintiffs' appeal and in support of Namkoong's cross appeal seeking to reverse the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds and in the interests of justice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations, and, upon reversal, granting Namkoong summary judgment and dismissing the third amended complaint with prejudice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations.

This matter arises from plaintiff, Vito Collucci's, a then 55 year old, Caucasian, male, claim that on March 16, 2017 at approximately 6:00 p.m., he allegedly slipped and fell on black ice on the surface of the parking lot located in a shopping mall at 140 Rifle Camp Road, Woodland Park, New Jersey (the "Premises") and allegedly sustained bodily injuries.

Namkoong was a commercial tenant in the premises and operating a nail salon.

There are no witnesses to the alleged slip and fall.

Namkoong contends that it had no duty to plaintiffs with respect to the area of the premises' parking lot where Mr. Collucci allegedly slipped and fell. Namkoong paid Common Area Expenses, also known as Common Area Maintenance charges (hereinafter collectively referred to as "CAM charges"), to defendants/commercial property owner/lessor, Cassese Enterprises Corp. i/p/a Cassese's Enterprises, Inc. and Cosima Cassese (hereinafter collectively referred to as "Cassese"), in addition to rent. Cassese utilized Namkoong's CAM charges to pay for the maintenance of the parking lot.

Namkoong contends that the area of the premises' parking lot where Mr. Collucci allegedly slipped and fell is not adjacent to Namkoong's leased premises.

Namkoong contends that Cassese had no expectation that Namkoong would be responsible for maintaining the area of the premises' parking lot where Mr. Collucci allegedly slipped and fell.

Lastly, Namkoong contends that the plaintiffs' third amended complaint should be dismissed, with prejudice, in the interests of justice, based upon discovery gathered which establishes that plaintiffs knew or should have known of Namkoong's identity and alleged potential liability prior to the expiration of the applicable statute of limitations and plaintiffs deliberately omitted disclosing this exculpatory information to the Court at oral argument of Namkoong's motion in

lieu of an answer based on the argument that the action was brought against Namkoong after the applicable statute of limitations expired.

As a result of plaintiffs' deliberate omission of exculpatory information which favored and favors Namkoong's statute of limitations argument it is respectfully submitted that, in the interests of justice, the Court should reverse the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds, and in the interests of justice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations, and, upon reversal, granting Namkoong summary judgment and dismissing the third amended complaint with prejudice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations.

PROCEDURAL HISTORY

Plaintiffs filed a third amended complaint on September 23, 2019. [Pa436]. Namkoong filed a motion to dismiss the third amended complaint in lieu of answer pursuant to **R**. 4:6-2. [Pa590].

Namkoong's motion was denied, without prejudice. [Pa11-Pa12].

Namkoong filed an answer to the third amended complaint. [Pa558].

Plaintiffs served answers to interrogatories. [Pa616]. Namkoong served answers to interrogatories. [Pa638].

Namkoong filed a motion for summary judgment. [Pa594]. That motion was granted in part and denied in part. [Pa1-Pa2].

Plaintiffs then filed a motion for summary judgment [Pa929]. That motion was denied. [Pa1-Pa2].

While plaintiffs' cross motion for partial summary judgment was pending, plaintiffs filed a second cross motion for partial summary judgment for an Order, compelling all co-defendants' insurers to provide, Cassese, with insurance coverage. Plaintiffs' Notice of Appeal, Case Information Statement, Brief and Appendix make no reference to this cross motion or that plaintiffs seek to address the denial of this cross motion for partial summary judgment as part of their relief sought herein. Consequently, it is respectfully submitted that the denial of plaintiffs' cross motion for second cross motion for partial summary judgment for an Order compelling all co-defendants' insurers to provide, Cassese, with insurance coverage should not be made a part of this appeal.

STATEMENT OF FACTS

Plaintiff, Vito Collucci, ("Mr. Collucci"), alleges that on March 16, 2017 he fell **due to snow or ice on the parking lot at premises located at 140 Rifle Camp Road, Woodland Park, New Jersey** (hereinafter referred to as the "Premises"). [Pa437 at Para. 1] (emphasis added).

Mr. Collucci claims "…, at all times and specifically on March 16, 2017, Plaintiff, Vito Collucci, was a pedestrian lawfully **walking <u>on the parking lot</u>… at 140 Rifle Camp Road, Woodland Park, New Jersey."** [Pa437, Para. 1] (emphasis added).

In answers to interrogatories Mr. Collucci certifies that "…, the subject accident took place on or about March 16, 2017 at the shopping center at 140 Rifle Camp Road in Woodland Park, NJ. Plaintiff was walking from his vehicle to a restaurant in the shopping center **when he slipped and fell on black ice in the parking lot**". [Pa621 at Para. 2] (emphasis added).

The applicable statute of limitations expired on March 16, 2019. *NJ Rev Stat § 2A:14-22 (2021).*

The third amended complaint, which included claims against Namkoong, was filed on September 23, 2019, one hundred and ninety one (191) days after the tolling of the applicable statute of limitations.

On April 7, 2017 plaintiffs counsel's private investigator, Enrique Calderin, went to the premises and (i) interviewed an owner of defendant, Robert Arcucci Niroal LLC d/b/a Amore Ristorante (improperly pled as Niroal, LLC) (hereinafter referred to as "Amore"). [Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

Mr. Calderin obtained Google Earth imagery of the premises. [Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

Mr. Calderin obtained copies of police reports generated by the Woodland Park, NJ Police Department, regarding accidents at the premises prior to March 16, 2017. [Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

Mr. Calderin issued a report, dated July 1, 2017, concerning his investigation of the alleged accident and discovery he had obtained as part of that investigation. [Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

As of March 16, 2017, plaintiffs knew or should have known (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages [Pa436-Pa447].

As of April 7, 2017, plaintiffs knew or should have known (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages. [Pa687 (Calderin Deposition) at

37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

As of July 1, 2017, plaintiffs knew or should have known (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages. [Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719].

On January 29, 2019 Mr. Calderin continued his investigation, on plaintiffs' behalf, to identify the party or parties allegedly responsible for causing Mr. Collucci's alleged injuries and Mr. Calderin interviewed defendant, PL Landscaping's owner, Pablo Lopez, and obtained a written statement from him. [Pa686 (Calderin Deposition) at 18:21-23, and Pa689 at 57:18-25 and Pa690 at 58:1-4; and Pa730].

Plaintiffs failed to disclose to the Court at oral argument on January 24, 2020 and February 14, 2020 that as of March 16, 2017, April 7, 2017 and July 1, 2017 and January 29, 2019, plaintiffs knew or should have known (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages [Pa436-Pa447; Pa687 (Calderin

Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719 and Pa686 (Calderin Deposition) at 18:21-23, and Pa689 at 57:18-25 and Pa690 at 58:1-4; and Pa730; Pa691-Pa703 and Pa704-Pa719 and Pa729-Pa732].

Plaintiffs' failure to disclose to the Court at oral argument, on January 24, 2020 and February 14, 2020, that they had retained Mr. Calderin in or about April 2017 and again in January 2019 to investigate Mr. Collucci's alleged accident and as a result of Mr. Calderin's investigation plaintiffs knew or should have known, as of March 16, 2017, April 7, 2017 and July 1, 2017 and January 29, 2019, (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages. [Pa436-Pa447; Pa687 (Calderin Deposition) at 37:12-25 and Pa688 at 38:1-11 and at 40:23-25 and at 41:1-11; and Pa691-Pa703; and Pa704-Pa719 and Pa686 (Calderin Deposition) at 18:21-23, and Pa689 at 57:18-25 and Pa690 at 58:1-4; and Pa730; and Pa691-Pa703 and Pa704-Pa719 and Pa729-Pa732], directly resulted in the Court erroneously denying Namkoong's motion to dismiss in lieu of filing an answer on the ground that plaintiffs failed to file an action against Namkoong within the applicable statute of limitations. [2T and Pa7-Pa9].

Namkoong cannot be located and the Court authorized plaintiffs to serve Namkoong's insurer, Sentinel Insurance Company, Ltd, with a complaint. [Pa721-Pa722].

Namkoong's insurer answered the third amended complaint on behalf of Namkoong. [Pa558-Pa569].

Namkoong's insurer served answers to interrogatories on behalf of Namkoong. [Pa639-Pa649].

On March 16, 2017 Namkoong and Cassese were parties to a lease (hereinafter referred to as the "Lease") whereby Cassese was the lessor and Namkoong was the lessee. [Pa650-Pa656].

On March 16, 2017 Namkoong was actively paying rent and in compliance with the terms of the lease. [Pa650-Pa656] and [Pa680 (Cosima Cassese Deposition) at 170: 2-9].

The lease provided that, "Care and Maintenance of Premises. Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and:

[this area is left blank]

which shall be maintained by Lessor (Landlord). Lessee shall also maintain in good condition such portions **adjacent to the premises,** such as sidewalks,

driveways….which would otherwise be required to be maintained by Lessor (Landlord)" (emphasis added). [Pa653 at Para 3).

The lease provided that "Common Area Expenses. In the event the demised premises are situated in a shopping center or in a commercial building in which there are common areas, Lessee agrees to pay his pro-rata share of maintenance, taxes, and insurance for the common area". [Pa655 at Para. 17).

The lease provided that Cassese was responsible for removal of snow and ice from the parking lot, including the snow and ice removal services that PL Landscaping provided on March 16, 2017. [Pa 677 (Cassese Deposition)at 74:21-22 and at 74:13-25 and Pa678 at 78:1-5 and Pa679 at 148:2-25].

Cassese did not expect Namkoong to maintain the area where Mr. Collucci allegedly fell and did not expect Namkoong to keep the area where plaintiff allegedly fell free from snow and ice. [Pa682 (Cassese Deposition) at 301: 5-23].

Cassese defined the term "premises" as set forth in the lease between Cassese and Namkoong, to wit, Namkoong's (i) leased premises is designated with its own street address within the shopping center, that is, 146 Rifle Camp Road, Woodland Park, NJ; (ii) leased premises is a portion of the building within which exists Namkoong's leased premises; (iii) leased premises is part of the building within which Namkoong's leased premises exist; (iv) leased premises is a unit of the building within which Namkoong's leased premises exist; and (v)

leased premises is a particular space in the interior of the building within which Namkoong's leased premises exist. [Da11(Cassese Deposition) at 280:7-13 and 23-25 and Da12 at 281:10].

Cassese defined the term "Common Area Maintenance charges" as set forth in the lease between Cassese and Namkoong, to wit, Cassese "…took care of the common area, complete". [Da4 (Cassese Deposition) at 74:21-22]. Part of the common area expenses go to snow and ice removal services that [Cassese] hires a contractor to do. [Da4 at 77:13-21 and 78:1]. Cassese maintained exclusive control and management of the common areas of the shopping center, which included the parking lots, the parking spaces, the sidewalks and all other areas. [Da13 at 292:12-19].

At his deposition, Mr. Collucci examined photographs and identified the path he traversed from his vehicle to the area where he allegedly slipped and fell, while carrying the birthday cake. [Pa673 and Pa662 (Vito Collucci Deposition)at 111:14-22, and Pa663 at 112:6-12].

At his deposition, Mr. Collucci examined photographs and identified the location where he allegedly slipped and fell while carrying the birthday cake. [Pa671 and Pa660 (Vito Collucci Deposition) at 74:22-25 and Pa661 at 75:12-13 and 23-25, and Pa666 at 222:24-25 and Pa667 at 223:1-3 and Pa735).

At no time prior to the alleged slip and fall on March 16, 2017 did Mr. Collucci walk on the sidewalk in front of Namkoong's leased premises. [Pa668 (Vito Collucci Deposition)at 234:24-25 and Pa. 669:1].

The only reason Mr. Collucci went to the premises on March 16, 2017 was to have dinner at Amore. [Pa664 (Vito Collucci Deposition)at 143:14-16 and Pa665 at 148:21-25).

Plaintiffs concede that only the Court can interpret the meaning of the language of the lease between Cassese and Namkoong. [Pa681 (Cassese Deposition) at 286:13-24].

A. PLAINTIFFS' ALLEGED LIABILITY EXPERT'S OPINION WAS DIRECTLY REBUTTED

Contrary to plaintiffs' assertion, Mr. Moore's alleged expert opinion was directly rebutted. Namkoong argued below that Mr. Moore, as an engineering expert, was not qualified to interpret and render legal opinions regarding documents, such as leases and ordinances. Namkoong also argued that Mr. Moore's opinion was not admissible to prove the existence of a legal duty of care, which is a legal issue to be decided by the Court.

At his deposition, Mr. Moore admitted that he had no competent basis to offer his opinions. Mr. Moore admitted that he was not a lawyer, not an expert in the law, and not an expert in interpreting leases, and plaintiffs' counsel stipulated to these facts. [Da23 (Scott Moore

Deposition) 215:6 – 24, Da25 (Moore Deposition) at 225:16 – 25, Da-Add From Appendix at 227:13-15, Da26 (Moore Deposition) at 234:17 – 235:20]. Mr. Moore also admitted that he was not qualified to offer opinions with respect to the Woodland Park Ordinances with respect to whether Namkoong qualified as an owner, occupier, operator or tenant under the Woodland Park Ordinances, because it was ambiguous and not clear, and required a legal opinion that he was not qualified to provide. [Da23 (Moore Deposition) at 215:6 – 228:6).

Mr. Moore also admitted that all of the publications and general standards that he referenced in his report were voluntary standards that were not adopted by and not required by the Borough of Woodland Park. [Da22 (Moore Deposition) at 119:6 - 120:19).

Clearly, Mr. Moore's opinions were directly rebutted and plaintiffs' claim that these opinions were not rebutted is an inaccurate representation of the record in this case.

B. THE LEASE BETWEEN CASSESE AND NAMKOONG

The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong is obligated to notify Cassese that the parking lot and/or common areas of the multi-tenant shopping center need to be maintained. [Pa650-Pa656].

The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong could maintain the parking lot and/or common areas of the multi-tenant shopping center and charge Cassese for the expenses associated with undertaking such maintenance. [[Pa650-Pa656].

C. PLAINTIFFS' GLOBAL STATEMENT OF MATERIAL FACTS

Plaintiffs submit their Responses to Namkoong's Statement of Material Facts, which Namkoong submitted in support of its motion for summary judgment. [Pa1094-Pa1100]. In plaintiffs' responses they reference "Plaintiffs' Global Statement of Material Facts". [Pa1094]. However, plaintiffs do not submit their Global Statement of Material Facts as part of their record on appeal. Nor do plaintiffs submit the certification of Jack J. Bingham, Esq., dated June 15, 2021, [Da14-19], to which plaintiffs' Global Statement of Material Facts was appended, and which certification and Global Statement of Material Facts, with exhibits annexed, were offered in opposition to Namkoong's motion for summary judgment.

It is respectfully submitted therefore that this Court should reject Plaintiffs' Responses to Namkoong's Statement of Material Facts, which Namkoong submitted in support of its motion for summary judgment and reject plaintiffs' Global Statement of Material Facts, with exhibits annexed, which were offered in opposition to Namkoong's motion for summary judgment.

Upon so rejecting Plaintiffs' Responses to Namkoong's Statement of Material Facts, which Namkoong submitted in support of its motion for summary judgment and plaintiffs' Global Statement of Material Facts, with exhibits annexed, which were offered in opposition to Namkoong's motion for summary judgment, the Court should find that there has been no discovery in this case regarding the Foxmoor Shopping Center and plaintiffs' references to Foxmoor Shopping Center should be rejected by the Court and there has been no discovery of alleged Strip Mall Proximity Estimates and references to alleged Strip Mall Proximity Estimates should be rejected by the Court.

It is further respectfully noted the certification of Jack J. Bingham, Esq., dated June 15, 2021, erroneously states that Namkoong has been barred from testifying in this matter. [Da19]. No Order was issued below barring Namkoong from testifying in this matter.

ARGUMENT

POINT I

THE LEASE AGREEMENT DID NOT PLACE NAMKOONG UNDER A CONTRACTUAL DUTY TO CLEAR SNOW AND ICE FROM THE LOCATION WHERE MR. COLLUCCI WAS ALLEGEDLY INJURED [Raised at Pa590-1172; Decided at Pa1-2]

The facts set out in STATEMENT OF FACTS above, [Db at 4-15] support the Law Division's proper finding that Namkoong was not contractually

responsible to clear snow and ice from the area where Mr. Collucci was allegedly injured. Thus, for the sake of brevity, the facts set out in STATEMENT OF FACTS above, will not be re-set out here in POINT I and are hereby adopted and incorporated herein by reference as if fully set forth herein.

The lease provided that Cassese was responsible for removal of snow and ice from the parking lot, including the snow and ice removal services that PL Landscaping provided on March 16, 2017.

Cassese did not expect Namkoong to maintain the area where Mr. Collucci allegedly fell and did not expect Namkoong to keep the area where plaintiff allegedly fell free from snow and ice.

At no time prior to the alleged slip and fall on March 16, 2017 did Mr. Collucci walk on the sidewalk in front of Namkoong's leased premises.

The only reason Mr. Collucci went to the premises on March 16, 2017 was to have dinner at Amore.

The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong is obligated to notify Cassese that the parking lot and/or common areas of the multi-tenant shopping center need to be maintained.

The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong could maintain the parking lot and/or common areas of the

multi-tenant shopping center and charge Cassese for the expenses associated with undertaking such maintenance.

POINT II

NAMKOONG HAD NO COMMON LAW DUTY TO MAINTAIN THE LOCATION WHERE MR. COLLUCCI WAS ALLEGEDLY INJURED
[Raised at Pa590-1172; Decided at Pa1-2]

The facts set out in STATEMENT OF FACTS above, [Db at 4-15] support the Law Division's proper finding that Namkoong had no common law duty to maintain the location where Mr. Collucci allegedly was injured. Thus, for the sake of brevity, the facts set out in STATEMENT OF FACTS above, will not be re-set out here in POINT II and are hereby adopted and incorporated herein by reference as if fully set forth herein.

It is also true that the principles which underlie the Law Division's proper finding that Namkoong had no contractual duty to clear snow and ice from the location where Mr. Collucci was allegedly injured apply equally to support the Law Division's proper finding that Namkoong had no common law duty to maintain the location where Mr. Collucci was allegedly injured.

The principles set out in *Kandrac v. Marrazzo's Market at Robbinsville,* 65 A.3d 263 (App. Div. 2013) are on all fours with the instant action and it is respectfully submitted that the decision in *Kandrac* is dispositive and affirms Namkoong's entitlement to summary judgment in this case.

Kandrac addressed the issue of whether a commercial tenant in a multi-tenant shopping center owes a duty to its patrons to maintain an area of the parking lot that the landlord is contractually obligated to maintain. The Court held that a commercial tenant does not have such a duty.

At bar, Namkoong was a commercial tenant in a shopping mall. The shopping mall is owned by Cassese. Namkoong was actively paying rent and Common Area Expense charges and was compliant with the terms of the lease on the day of the alleged incident. Mr. Collucci admits that he was not entering or exiting leaving Namkoong's leased premises and the only reason he was at the shopping mall was to have dinner at Amore.

Mr. Collucci identified the location of his allegedly slip and fall as an area of the parking lot which is not adjacent to Namkoong's leased premises.

At bar, there is no evidence presented, in admissible form, that Namkoong had a duty to maintain the area of the parking lot where plaintiff allegedly slipped and fell. To the contrary, all evidence presented, in admissible form, establishes that Namkoong had no duty to maintain the area of the parking lot where plaintiff allegedly slipped and fell.

In the instant action, plaintiff was not an invitee of Namkoong and he confirmed that he had no intention of entering or exiting Namkoong's leased

premises. Therefore plaintiff could have no expectation that safe passage would be afforded from the parking lot to Namkoong's leased premises.

Namkoong had no duty to maintain the route plaintiff traveled when returning from his vehicle to Amore since plaintiff was not using the route he chose to enter or exit Namkoong's leased premises.

Here, the location of Mr. Collucci's expected route was not a route Mr. Collucci would have taken to enter or exit Namkoong's leased premises and. moreover, Mr. Collucci admits he had no intention to patronize Namkoong's business at the time of the accident.

In addition, the condition of the parking lot area where plaintiff allegedly fell was not a condition which Namkoong might reasonably remedy since Namkoong paid Cassese Common Area Expenses for Cassese to maintain the parking lot area where plaintiff allegedly fell and Cassese admitted that it had no expectation that Namkoong would maintain the area of the parking lot where plaintiff allegedly slipped and fell.

In the instant action, Namkoong was a tenant in a multi-tenant mall that did not have control or maintenance responsibilities for the common area where plaintiff allegedly slipped and fell and had no contractual obligation to maintain that area.

Guided by the principles in *Kandrac* it is respectfully submitted that the Law Division properly found that that it is undisputed that plaintiff was not a patron of Namkoong on the day of the accident, and therefore he was not Namkoong's business invitee. There is no evidence in admissible form that an alleged risk of injury posed by the alleged condition of the parking area where plaintiff allegedly slipped and fell would have been observable by Namkoong, in the exercise of a reasonable inspection, since there is no evidence that Namkoong was responsible for inspecting the area where plaintiff allegedly slipped and fell.

At bar, the record fails to show that plaintiff's alleged injury occurred in a location necessary to enter or exit Namkoong's leased premises and plaintiff admits he was neither entering or exiting Namkoong at the time of the accident and he had no intention to of visiting Namkoong's leased premises. Plaintiff was not injured in an area adjacent to Namkoong's leased premises. It is respectfully submitted that the record shows that the alleged injury did not occur in an area within Namkoong's control.

In this case, Namkoong was not in an ideal position to inspect the area of the parking lot in issue and to take prompt action to cure an alleged defect and the area of the parking lot where plaintiff allegedly slipped and fell does not constitute an ingress or egress to Namkoong's leased premises, a premises which plaintiff admits he had no intention of visiting at the time of his alleged accident.

The evidence presented regarding the lease covenants squarely assigns the duty to maintain the area where plaintiff was allegedly injured to the landlord. Consistent with that allocation, there is no evidence that Namkoong was obligated to make inspections of the parking lot area where plaintiff allegedly slipped and fell. The landlord retained the obligation to make such inspections, did so, and performed all necessary repairs and maintenance. The record does not establish any "rights" that Namkoong had over the area where the alleged injury occurred.

The *Kandrac, supra*, Court addressed the indicia which a Court should examine to determine that a commercial tenant, such as Namkoong, owed no duty to plaintiffs to remove snow and ice from the location of Mr. Collucci's alleged slip and fall.

The *Kandrac, supra* indicia applicable to the case at bar are:

-Namkoong was a commercial tenant in a multi-commercial tenant shopping mall. The shopping mall is owned by Cassese. Namkoong was actively paying rent and Common Area Expense charges and was compliant with the terms of the lease on the day of the alleged incident. Mr. Collucci admits that he was not entering or exiting leaving Namkoong's leased premises and the only reason he was at the shopping mall was to have dinner at Amore.

-Mr. Collucci identified the location of his allegedly slip and fall as an area of the parking lot which is not adjacent to Namkoong's leased premises.

-The lease provided that Cassese was responsible for removal of snow and ice from the parking lot, including the snow and ice removal services that PL Landscaping provided on March 16, 2017.

-Cassese did not expect Namkoong to maintain the area where Mr. Collucci allegedly fell and did not expect Namkoong to keep the area where plaintiff allegedly fell free from snow and ice.

-At bar, there is no evidence presented, in admissible form that Namkoong had a duty to maintain the area of the parking lot where plaintiff allegedly slipped and fell. To the contrary, all evidence presented, in admissible form, establishes that Namkoong had no duty to maintain the area of the parking lot where plaintiff allegedly slipped and fell.

-In the instant action, plaintiff was not an invitee of Namkoong and he confirmed that he had no intention of entering or exiting Namkoong's leased premises. Therefore plaintiff could have no expectation that safe passage would be afforded from the parking lot to Namkoong's leased premises.

-Namkoong had no duty to maintain the route plaintiff traveled when returning from his vehicle to Amore since plaintiff was not using the route he chose to enter or exit Namkoong's leased premises.

-Here, the location of Mr. Collucci's expected route was not a route Mr. Collucci would have taken to enter or exit Namkoong's leased premises and,

moreover, Mr. Collucci admits he had no intention to patronize Namkoong's business at the time of the accident.

-In addition, the condition of the parking lot area where plaintiff allegedly fell was not a condition which Namkoong might reasonably remedy since Namkoong paid Cassese Common Area Expenses for Cassese to maintain the parking lot area where plaintiff allegedly fell and Cassese admitted that it had no expectation that Namkoong would maintain the area of the parking lot where plaintiff allegedly slipped and fell.

-In the instant action, Namkoong was a tenant in a multi-commercial tenant shopping mall that did not have control or maintenance responsibilities for the common area where plaintiff allegedly slipped and fell and had no contractual obligation to maintain that area.

Moreover, applying the *Kandrac supra,* principles the Court should find that it is undisputed that plaintiff was not a patron of Namkoong on the day of the accident, and therefore he was not Namkoong's business invitee. There is no evidence in admissible form that an alleged risk of injury posed by the alleged condition of the parking area where plaintiff allegedly slipped and fell would have been observable by Namkoong, in the exercise of a reasonable inspection since there is no evidence that Namkoong was responsible for inspecting the area where plaintiff allegedly slipped and fell.

POINT III

THE LAW DIVISION DID NOT ERR IN DENYING PLAINTIFFS PARTIAL SUMMARY JUDGMENT
[Raised at Pa929-1172; Decided at Pa1-2]

The facts set out in STATEMENT OF FACTS above, [Db at 4-15] support that the Law Division properly denied plaintiffs partial summary judgment. Thus, for the sake of brevity, the facts set out in STATEMENT OF FACTS above, will not be re-set out here in POINT III and are hereby adopted and incorporated herein by reference as if fully set forth herein.

Plaintiffs' motion for partial summary judgment failed because plaintiffs either omitted and/or conceded the following undisputed material facts:

-The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong is obligated to notify Cassese that the parking lot and/or common areas of the multi-tenant shopping center need to be maintained.

-The lease as between Cassese and Namkoong does not contain a provision whereby Namkoong could maintain the parking lot and/or common areas of the multi-tenant shopping center and charge Cassese for the expenses associated with undertaking such maintenance. [Pa650-Pa656].

-Namkoong paid Common Area Expenses, also known as Common Area Maintenance charges (hereinafter collectively referred to as "CAM charges"), to

Cassese in addition to rent. Cassese utilized Namkoong's CAM charges to pay for the maintenance of the parking lot.

-The area of the multi-tenant shopping mall's parking lot where Mr. Collucci allegedly slipped and fell is not adjacent to Namkoong's leased premises.

Moreover, in support of their motion for partial summary judgment plaintiffs offered no pleading, deposition, answers to interrogatories, admissions on file, affidavits, statute or case law to support their contention that Namkoong owed a duty to plaintiffs to remove snow and ice from the location of Mr. Collucci's alleged fall.

Instead, plaintiffs cited to *Kandrac supra,* and the principles set out therein, which, instead of supporting plaintiffs' position, actually supports Namkoong's position that it did not owe a duty to plaintiffs' to remove snow and ice from the location where Mr. Collucci was allegedly injured.

As noted, *Kandrac, supra,* established that a commercial tenant in a multi-tenant commercial shopping center, such as Namkoong, owes neither a contractual or common law duty to its patrons to maintain an area of the parking lot that the landlord is contractually obligated to maintain. Consequently the Law Division properly denied plaintiffs' motion for partial summary judgment.

POINT IV

THE LAW DIVISION SHOULD HAVE GRANTED NAMKOONG MOTION TO DISMISS IN LIEU OF ANSWER AND MOTION FOR SUMMARY JUDGMENT, BOTH, ON STATUTE OF LIMITATIONS GROUNDS

[Raised at Pa530-542; Decided at Pa11-12 and Raised at Pa590-1172; Decided at Pa1-2]

The facts set out in statement of facts above, [Db at 4-15] support reversal of the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds, and, upon reversal, the Court should grant Namkoong summary judgment on statute of limitations grounds. Thus, for the sake of brevity, the facts set out in STATEMENT OF FACTS above, will not be re-set out here in POINT IV and are hereby adopted and incorporated herein by reference as if fully set forth herein.

It is noted that plaintiffs' chose not to disclose to this Court, the admissible evidence of Calderin's private investigation activities, which activities took place prior to the expiration of the statute of limitations and which activities establish that plaintiffs knew or should have known of Namkoong's existence as a commercial tenant at the premises in issue. It is respectfully submitted that the disclosure of Calderin's private investigation activities to this Court would have significantly challenged plaintiffs' ability to establish that they engaged in the

necessary due diligence to merit their alleged good faith reliance on "John Doe" pleading principles to commence a timely action against Namkoong.

This is the same behavior plaintiffs exhibited when they chose not to disclose Calderin's private investigation activities to Judge Covello at oral argument of Namkoong's motion to dismiss in lieu of answer.

Namkoong filed a motion to dismiss in lieu of filing an answer and the Law Division was aware that the other defendants/tenants filed motions to dismiss, all arguing that the statute of limitations expired prior to their respectively being brought into this action. The Court denied these motions.

Plaintiffs' argument in opposition to Namkoong's motion to dismiss in lieu of filing and answer was that they had not received a copy of the lease as between Cassese and Namkoong and thus could not perform the necessary due diligence to identify Namkoong and to identify Namkoong's alleged potential liability for plaintiffs alleged damages. Plaintiffs made no mention of their private investigator, Mr. Calderin's, comprehensive investigation of the premises, prior to the expiration of the applicable statute of limitations and confirmation that Namkoong was then occupying leased premises therein.

As a result of plaintiffs' failing to disclose Mr. Calderin's activities in 2017 and 2019 to the Court, the Court was precluded from assessing whether plaintiffs had undertaken the necessary due diligence to sustain their effort to utilize "John

Doe" pleading principles to commence an action against Namkoong after the statute of limitations expired.

Plaintiffs' failure to disclose Mr. Calderin's activities in 2017 and 2019 to the Court resulted in the Court erroneously denying Namkoong's motion to dismiss in lieu of filing an answer on the ground that plaintiffs failed to file an action against Namkoong within the applicable statute of limitations.

In its motion for summary judgment Namkoong advised the Court that it could not have filed a motion to reargue or a motion for leave to appeal the Court's February 14, 2020, because plaintiffs withheld information concerning Mr. Calderin's activities in 2017 and 2019 from the Court and the parties.

Secondly, Namkoong, at oral argument on January 24, 2020 and February 14, 2020, did not have available plaintiffs' liability expert, Mr. Moore's opinion that Namkoong's alleged potential liability for plaintiffs' alleged damages could be determined without reference to the very same lease that plaintiffs' counsel claimed at oral argument was needed to determine Namkoong's identity and Namkoong's alleged potential liability in this case.

Plaintiffs' claim that they could not bring a timely action against Namkoong because they needed to review a copy of Namkoong's lease with Cassese is not supported by their alleged liability expert's claim that the identity of any tenant on the premises and the assessment of any alleged tenant's duty to plaintiffs could be

determined without any reference to the lease between Namkoong and Cassese. Thus, plaintiffs' either needed to review a copy of the lease between Namkoong and Cassese in order to bring a timely action against Namkoong or they did not. Plaintiffs cannot have it both ways and therefore plaintiffs did not engage in the necessary due diligence to support their use of "John Doe" pleading in order to bring an action against Namkoong after the statute of limitations expired.

Plaintiffs' counsel's actions in withholding dispositive information from the Court and the parties during motion practice in January and February 2020 prohibited Namkoong from providing the Court with available evidence, that only plaintiffs then possessed, which would have supported Namkoong's claim that plaintiffs did not undertake the necessary due diligence to sustain "John Doe" pleading principals to commence this action against Namkoong after the statute of limitations expired.

Plaintiffs' behavior regarding their deliberate nondisclosure of Calderin's private investigation activities should prompt this Court, in the interests of justice, to reverse the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds, and, upon reversal, the Court should grant Namkoong summary judgment on statute of limitations grounds.

CONCLUSION

For the foregoing reasons, Namkoong respectfully submits that the Court should deny plaintiffs' appeal and affirm the finding of the Law Division granting summary judgment in favor of Namkoong pursuant to R. 4:46-2 dismissing plaintiffs' third amended complaint, with prejudice against Namkoong and reverse the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds and in the interests of justice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations, and, upon reversal, grant Namkoong summary judgment pursuant to R. 4:46-2 dismissing plaintiffs' third amended complaint with prejudice against Namkoong , for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations.

Dated: January 19, 2024

Respectfully submitted,
Law Offices of Linda S. Baumann
Attorneys for Defendant-Respondent-Cross Appellant, Kyong Namkoong i/p/a Kyong Hui Nam Koong
By: ***Michael F. Lynch***
Michael F. Lynch, Esq.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket no. A-003655-22T2

VITO COLLUCCI and LUCILLE COLLUCCI, as Husband and Wife And Individually,	:	CIVIL ACTION
Plaintiffs-Appellants-Cross Respondents	:	ON APPEAL FROM THE LAW DIVISION PASSAIC COUNTY
vs.	:	DOCKET NO. PAS-L-2221-18
COSIMA CASSESE and CASSEE ENTERPRISES, INC.,	:	Sat Below: HON. FRANK COVELLO, J.S.C. HON. VICKI J. CITRINO, J.S.C.
Defendants-Respondents,	:	
(For continuation of Caption see next page)	:	

BRIEF AND APPENDIX FOR DEFENDANT-RESPONDENT-CROSS-APPELLANT REAL ESTATE CONSULTANTS, LLC d/b/a REALTY EXECUTIVES

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Date submitted: January 26, 2024

REALTY EXECUTIVES and NIROAL, LLC,

Defendants-Respondents-Cross-Appellants

TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG and JEONG HE PAK,

Defendants-Respondents,

KWONG HUI NAM KOONG,

Defendant-Respondent-Cross-Appellant

and

JOHN DOES 1-10 AND/OR ABC CORPORATIONS 1-10, in their Corporate Capacity and as to the Principals and Owners Individually (Names being fictitious and Unknown but described as Corporate or Individual Owner(s), Manager(s), Lessor(s), Supervisor(s), who had Control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed To the March 16, 2017 loss)

Defendants-Respondents

TABLE OF CONTENTS page

INDEX TO APPENDIX page

TABLE OF ORDERS, JUDGMENTS AND RULINGS ON THE CROSS APPEAL

TABLE OF CASES AND AUTHORITIES page

PRELIMINARY STATEMENT

On the evening of March 16, 2017, plaintiff Vito Collucci visited a strip mall located at 140 Rifle Camp Road, Woodland Park, New Jersey. The strip mall contained multiple tenants who occupied portions thereof pursuant to written leases. Defendant Real Estate Consultants, LLC, d/b/a Realty Executives (hereinafter "Real Estate Consultants") was one such tenant. Its offices had been closed due to inclement weather for approximately two days prior to March 16, 2017, and remained closed at the time of the subject accident.

Mr. Collucci went to the strip mall for the purpose of celebrating his son's birthday at Amore Restaurant, another tenant's business. He parked his car and attempted to enter the restaurant through a back door into the kitchen. As he walked from the parking lot towards the restaurant, he slipped on black ice and fell, allegedly sustaining serious injuries. Mr. Collucci was still in the parking lot at the time of his fall. Mr. Collucci then got up from the asphalt lot and took photographs of the location of his fall.

Plaintiff retained counsel sometime between March 16, 2017 and April 7, 2017. On July 3, 2018, counsel filed an initial complaint naming the landlord and various "John Doe" defendants who "had control of the

premises." Plaintiff's counsel filed a first amended complaint on November 27, 2018. Real Estate Consultants was not named as a defendant in the case until the filing of plaintiff's second amended complaint on June 12, 2019, approximately three months after the statute of limitations had run. Real Estate Consultants' counsel moved to dismiss the complaint for failure to comply with the statute of limitations in December 2019. This motion was denied.

Following the completion of discovery, Real Estate Consultants moved for summary judgment on several grounds. It argued that 1) the lease between Real Estate Consultants and Cassese Enterprises did not impose a contractual obligation upon Real Estate Consultants to have cleared (or otherwise remediated) the parking area where plaintiff had fallen and 2) Real Estate Consultants had no common law obligation to have cleared or remediated the parking lot as a matter of law. It also renewed its motion for summary judgment on the statute of limitations, claiming that plaintiff was not entitled to the benefit of the "discovery rule" or the "relation back" doctrine and that the second amended complaint should be dismissed with prejudice.

On June 25, 2023, Hon. Vicki A. Citrino, J.S.C., Passaic County granted defendant's motion. She held that the lease between Real Estate

Consultants and Cassese Enterprises did not impose a contractual obligation upon the former to have remediated the parking lot prior to plaintiff's accident or to have notified the landlord that the parking lot required attention. She further held that Real Estate Consultants had no common law obligation to have remediated the parking lot prior to plaintiff's accident. She characterized Real Estate Consultants' arguments based upon the statute of limitations as seeking reconsideration of the trial court's prior ruling under R. 4:49-2, and ruled that defendant had not met the standard for relief under that rule.

Following the disposition of the case as to the remaining defendants, plaintiffs filed the instant appeal from the summary judgment in favor of Real Estate Consultants. They argue, inter alia, that the trial court misconstrued applicable provisions of defendant's lease with Cassese Associates when it absolved Real Estate Consultants of any contractual obligation to have remediated the parking lot and that the trial court incorrectly held that the tenant defendants did not have a common law duty to have remediated the parking lot. For the reasons stated infra., these arguments must fail. However, in the event that this Court disagrees with defendant, the summary judgment in its favor should still be affirmed based upon plaintiff's noncompliance with N.J.S.A. 2A:14-2.

PROCEDURAL HISTORY

Plaintiff was injured in a slip and fall accident on March 16, 2017. Plaintiffs filed their initial complaint against Cosima Cassese, Cassese's Enterprises, Inc., Garrett Mountain Shopping Center and various "John Doe" defendants who "had control of the premises" on July 3, 2018. (Pa118-130) An answer was filed on behalf of Cosima Cassese and Cassese's Enterprises on September 24, 2018. This answer contained a third party complaint against PL Landscape. (Pa138-144) Plaintiffs then moved for leave to amend their complaint to add PL Landscape as a direct defendant and remove Garret Mountain Enterprises as a defendant. (Pa148-169. This motion was granted on November 26, 2018 (Pa170-171), and plaintiff's first amended complaint was filed on November 27, 2018. (Pa156-167)

Plaintiff moved for leave to file a second amended complaint on May 21, 2019. (Pa198-316) This motion was granted on June 7, 2019. (Pa317-318) One of the parties added to the case in the second amended complaint was Real Estate Consultants, LLC, d/b/a Realty Executives. (hereinafter "Real Estate Consultants") (Pa317-318) This defendant was not placed on

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1T=transcript of January 24, 2020
2T=transcript of February 14, 2020
3T=transcript of June 25, 2021

notice of the motion for leave to amend the complaint and had no opportunity to respond thereto. (Pa498-499) The second amended complaint was filed on June 12, 2019. (Pa319-330) Real Estate Consultants filed an answer to the second amended complaint on August 15, 2019. (Pa358-362) This answer contained a statute of limitations defense. (Pa359)

On August 18, 2019, plaintiff moved for leave to file a third amended complaint adding Sang Huang, Jeong He Pak and Kyong Hui Nam Koong as defendants. (Pa367-405) This motion was granted on September 13, 2019, and the third amended complaint was filed on September 23, 2019. (Pa436-447) Real Estate Consultants filed an answer to the third amended complaint on October 25, 2019. (Pa475-479) This answer contained a statute of limitations defense. (Pa476)

On December 11, 2019, Real Estate Consultants filed a motion for summary judgment based upon the statute of limitations. (Pa496-509, Pa358-362) Plaintiff opposed the motion on January 14, 2020. (Pa511-521, Pa118-130, Pa206-316, Pa177-181, Pa187-196) Real Estate Consultants responded to plaintiff's opposition on January 21, 2020. The motion was argued on January 24, 2020. (1T5-1 to 47-14) Hon. Frank

Covello, J.S.C., Passaic County, denied the motion (1T1T47-15 to 48-22) and entered an order to that effect. (Pa5-6)

On May 27, 2021, defendant Real Estate Consultants again moved for summary judgment, this time on the statute of limitations and liability for plaintiff's accident. (Pa824-887, Pa118-130, Pa319-330, 1T1-3 to 59-18) On May 28, 2023, plaintiffs filed a cross motion for partial summary judgment on liability. (Pa929-1040, Pa752-754) Plaintiffs opposed Real Estate Consultants' motion for summary judgment on June 15, 2021. (Pa1068-1075) Real Estate Consultants opposed plaintiffs' cross motion for partial summary judgment on June 15, 2021. (Pa1134-1179) Real Estate Consultants replied to plaintiffs' opposition to their summary judgment motion on June 21, 2023.

The motions were argued on June 25, 2023. (3T7-11-to 47-6) Hon. Vicki A. Citrino, J.S.C., Passaic County, granted Real Estate Consultants' motion for summary judgment on liability. (3T58-25 to 59-6, 3T59-14 to 61-18, Pa1-2) She denied plaintiffs' cross motion for partial summary judgment on liability. (Id.) Finally, she denied that portion of the motion based upon the statute of limitations. (3T65-4 to 66-18, Pa1-2) Summary judgment was also entered in favor of My Sisters Gourmet Deli, LLC, i/p/a My Sister's Gourmet Deli, Kyong Nam Koong i/p/a Kyong Hui Nam

Koong, and Robert Arcucci Niroal LLC d/b/a Amore Ristorante i/p/a Niroal, LLC (Id.)

The complaint had been dismissed with prejudice as to Cosima Cassese personally on October 4, 2021. (Da1-2) The matter was tried from February 6, 2023 through March 30, 2023 as to Cassese Enterprises and PL Landscaping. (Pa3) The case settled as to Cassese Enterprises prior to the jury verdict. A stipulation of dismissal with prejudice was filed as to Cassese Enterprises on May 16, 2023. (Da3-4) The jury returned a verdict of no cause of action as to defendant PL Landscaping and an order for judgment in its favor was entered on June 27, 2023. (Pa1-2) This order for judgment also noted that the matter had been fully resolved and ordered that the court's file be marked closed. (Id.)

Plaintiffs filed a notice of appeal from the June 27, 2023 order and from portions of the June 25, 2021 order. Specifically, they appeal the portions of the order granting summary judgment in favor of Real Estate Consultants, My Sisters Gourmet Deli, LLC, i/p/a My Sister's Gourmet Deli, Kyong Nam Koong i/p/a Kyong Hui Nam Koong, and Robert Arcucci Niroal LLC d/b/a Amore Ristorante i/p/a Niroal, LLC and the provision denying their motion for partial summary judgment on liability. (Pa14-20)

Real Estate Consultants filed a notice of cross appeal from the June

27, 2023 order on August 16, 2023. It also protectively cross appealed the January 24, 2020 order denying its motion for summary judgment on the statute of limitations and that portion of the trial court's June 25, 2021 order denying its motion for summary judgment on the statute of limitations. (Pa61-68)

STATEMENT OF FACTS

On March 16, 2016, plaintiff Vito Collucci visited a strip mall located at 140 Rifle Camp Road, Woodland Park, New Jersey. This strip mall was owned by defendant Cassese Associates. (Pa118-122, Pa513, Pa1165) Plaintiff had come to the property to attend a birthday dinner for his son at the Amore Restaurant. (Pa842, Pa947) Plaintiff parked his car in the parking lot and began walking towards the rear entrance of Amore Restaurant to drop off a birthday cake. (Pa948) While doing so, he slipped on black ice located in the parking lot. (Pa842, Pa845-849, Pa1144; Pa1147-1151) Following the fall, he got up and delivered the cake. (Pa948) He then took photographs of the area where he fell. (Pa846-849, Pa1149-1151) He confirmed at his deposition that the area in which he had fallen was not a walkway or a sidewalk; it was "actually part of the parking lot." (Pa845, Pa1148; see also Pa513) Although he later characterized the area where he had fallen as a "walkway," (Pa948), it is uncontroverted that the area where plaintiff fell was constructed of black asphalt and not delineated in any way as intended for pedestrian passage. It was clearly part of the parking lot. It was not a cement sidewalk. (Pa847-849, Pa1149-1151)

Defendant Real Estate Consultants was one of several tenants who had leased space from Cassese Enterprises prior to the date of loss. (Pa504-507, Pa509, Pa859, Pa869-872) Real Estate Consultants had leased 680 square feet of the 7,000 square foot building to operate a real estate office. (Pa504-507, Pa509, Pa859, Pa869-873) The real estate office had been in that location since January 1, 2014. (Pa504-507, Pa869-872) There was clear signage with the name "Realty Executives" above the leased space and in its window. (Pa509, Pa859) The office was customarily open by appointment and closed for storms for the safety of its employees. (Pa886-887, Pa1169-1170) The office had been closed for two days prior to plaintiff's accident due to the weather conditions. (Pa1175-1179) Although the real estate office had a back door to the parking lot, (Pa1166), the back door was not for customers' use. In fact, it could not be used at all at the time of plaintiff's accident because Amore Restaurant's belongings were piled up against it. (Pa1171)

Real Estate Consultants' lease with Cassese Enterprises appears twice in appellant's appendix; at Pa504-507 and Pa869-872. The lease provided, in pertinent part, as follows:

> 1. **Term and Rent**. Lessor demises the above premises for a term of three years commencing on January 1, 2014 and terminating on December 31, 2016...[subject to extensions set forth on Pa507 and Pa872]

2. **Use.** Lessee shall use and occupy the premises for a real estate office. The premises shall be used for no other purpose.
3. **Care and Maintenance of Premises.** Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations, and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and: [blank] which shall be maintained by Lessor. Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.
4. **Alterations.** Lessee shall not, without first obtaining the written consent of Lessor, make any alterations, additions, or improvements in, to or about the premises.
5. **Ordinances and Statutes.** Lessee shall comply with all statutes ordinances and requirements of all municipal, state and federal authorities now in force, or which may hereafter be in force, pertaining to the premises, occasioned by of affecting the use thereof by Lessee.
6. **Assignment and subletting.** Lessee shall not assign this lease or sublet any portion of the premises without prior written consent of the Lessor, which shall not be unreasonably withheld…
7. **Utilities.** All applications and connections for necessary utility services on the demised premises shall be made in the name of lessee only…
8. **Entry and Inspection.** Lessee shall permit Lessor or Lessor's agents to enter the premises at reasonable times and upon reasonable notice for the purpose of inspecting same…and will permit Lessor…within sixty (60) days prior to the expiration of this lease, to place upon the premises any usual "To Let" or "For Lease" signs and permit persons desiring to lease the same to inspect the premises thereafter.
9. **Possession.** If Lessor is unable to deliver possession of the premises at commencement hereof…Lessee shall not be liable for any rent until possession is delivered. (Pa504, Pa869)

The lease also contained an indemnification provision as follows:

> 10. **Indemnification of lessor.** Lessor shall not be liable for any damage or injury to lessee, or any other person, or to any property occurring on the demised premises or any part thereof, and Lessee agrees to hold Lessor harmless from any claims for damages, no matter how caused. (Pa505, Pa870)

Finally, the lease provided that Real Estate Consultants was obligated to pay its pro-rata share of expenses incurred by the landlord for the maintenance, taxes and insurance on common areas.

> 17. **Common area expenses**. In the event the demised premises are situated in a shopping center…in which there are common areas, Lessee agrees to pay his pro-rata share of maintenance, taxes and insurance for the common area. (Pa506, Pa871)

Defendant Real Estate Consultants did, in fact, pay its pro rata share of those expenses. (Pa873-874, Pa1154-1157) Douglas Radford, who signed the lease on behalf of Real Estate Consultants consulted with Cosima Cassese, the principal of Cassese Enterprises, prior to signing the lease. Based upon her representations as well as the language of the lease, he believed that he had no contractual obligation regarding maintenance of common areas such as the parking lot other than payment of those charges. (Pa1154-1155) Ms. Cassese also considered the parking lot, including the area where plaintiff had fallen, to be "common area" and did not expect any of her tenants to do anything to remove or remediate snow and/or ice from

it. (Pa851-858, Pa1159-1166) In fact, she hired P & L Landscaping to perform snow and ice removal in common areas of the property. (Pa862) She went to the property on March 16, 2017 to inspect their work. (Pa861-867)

Plaintiff retained counsel sometime between March 16, 2017 and April 7, 2017. (Pa694-697) Counsel then retained EJC Investigative Services. E.J. Calderin visited the strip mall on April 7, 2017, and submitted his report on July 1, 2017. (Id.) The initial complaint naming the landlord and "John Doe" defendants was filed on July 3, 2018. (Pa118-130) Defendants Cosima Cassese/Cassese Enterprises filed an answer to the complaint with a third party complaint on September 24, 2018. (Pa138-144) Although the record does not reflect the date they were answered, Cosima Cassese/Cassese Enterprises answered form C interrogatories during the course of discovery. (Pa210-213) These interrogatories identified P&L Landscaping as a third party defendant (Pa211, #3) and stated that P&L Landscaping was another potentially culpable entity. (Pa213, #7) Plaintiff filed his first amended complaint against P&L Landscaping on November 27, 2018. (Pa215-226)

Although the landlord's answers to interrogatories did not name any of the tenant defendants as potentially culpable parties, plaintiff's counsel

attempted to obtain the leases of the various tenant defendants. (Pa513-518, Pa228-232, Pa178-181, Pa187-188, Pa189-196) On or about April 29, 2019, plaintiff's counsel received a response to his notice to produce served upon the Cassese defendants. (Pa280-301) On or about April 30, 2019, counsel received some additional tenants' leases. He did not receive the lease between Cassese Associates and Real Estate Consultants. (Pa234-Pa278)

Although he had not yet received this defendant's lease, plaintiff moved for leave to amend his complaint to name, inter alia, Real Estate Consultants as a defendant on May 21, 2019. (Pa198-316, Pa513-518, Pa228-232, Pa178-181, Pa187-188, Pa189-196) Real Estate Consultants was not notified of the motion and had no opportunity to respond thereto. (Pa498-499) The motion was granted, and plaintiff's second amended complaint was filed on June 12, 2019. (Pa319-330)

On December 11, 2019, Real Estate Consultants moved for summary judgment based upon plaintiff's noncompliance with the statute of limitations. (Pa496-509, Pa358-362) Plaintiff opposed the motion, citing the same circumstances as he had in his motion for leave to file his second amended complaint, specifically the difficulties counsel had had in obtaining the tenant defendants' leases. (Pa511-518, Pa228-232, Pa178-

181, Pa187-188, Pa189-196) He did not disclose to the court that he had sent Mr. Calderin to the property in April 2017. (Pa511-518)

The motion, as well as similar motions filed by other tenant defendants, was argued on January 24, 2020 before Hon. Frank Covello, J.S.C., Passaic County. (1T5-1 to 47-14) Essentially, plaintiff's counsel argued that they were entitled to know whether the claim against Real Estate Consultants was potentially meritorious before the obligation to file it accrued. (Pa517, Pa520, 1T8-14 to 11-24) They also argued that they had been misled by the Cassese defendants' response to interrogatories set forth above. (1T13-9 to 14-19) The defense countered that all plaintiff (and/or counsel) needed to know only the identities of the tenants in order to have amended his complaint in a timely fashion; knowledge of the merits of the potential claim was not necessary to trigger the obligation to have filed the amended complaint. (1T18-24 to 24-4, 1T26-14 to 30-2, 1T31-10 to 32-25)

On several occasions throughout the argument, Judge Covello expressed his dissatisfaction with the manner in which counsel had managed the proceedings up until that point. He noted that "the defendants who had moved for summary judgment...were readily identifiable by the sign over the store" and asked "So, if you know who they all are, you know,

where they are, don't you do anything to try to bring them in aside from motion practice against the landlord to try to get the leases?" (1T12-9 to 12-16) He also surmised that plaintiff himself may have known the identities of the tenant defendants, (1T20-14 to 20-18) and noted that "Here's a guy who fell and injured himself and has filed a claim for personal injuries. So clearly within his knowledge to figure out who the tenants are. And, and, you know, the due diligence...isn't only by the attorney. It's by the plaintiff himself to do something...the plaintiff himself ha[d] some obligation here" (1T32-10 to 32-18)

The court reiterated its misgivings when it denied the tenant defendants' motions. The trial court's holding was as follows:

> And, the reason I'm denying the motions and we're starting to run late, is because while I'm really—I wrestled with this for a long time and spent a lot of time with you guys because I have some real problems with how the plaintiff handled this. But at the end of the day, I think that the plaintiff was misled by the landlord. I don't know whether it was intentional or not.
>
> But you have a situation where there's discovery that has taken place. And the landlord tells the plaintiff that there are no other parties who might be responsible. Yes, the plaintiff knew the identities of these tenants. But I cannot fault the plaintiff for not including these tenants if he didn't really have a theory of liability against them. And at that point in time not only—so he knew the identities of the—all of the stores in the strip mall, but when asked, the landlord said there's nobody else that's responsible. And then the plaintiff began the process of trying to get those leases. It required motion practice and repeated efforts to get the leases. Ultimately he got some leases that seemed to demonstrate

> that there might be some responsibility on the part of the tenants. And I think that that—the efforts that were made were sufficient efforts, not great, not perfect, they were sufficient efforts to identify whether there was a cause of action. And for that reason, I'm denying the motions. (1T47-19 to 48-22)

On May 27, 2021, Real Estate Consultants again moved for summary judgment. Its basis for the motion was twofold; 1) it had neither contractual nor common law liability to plaintiff for his parking lot accident as a matter of law; 2) plaintiff's complaint should be dismissed with prejudice for his failure to comply with N.J.S.A. 2A:14-2. (Pa829-835, Pa882-883; 3T8-8 to 8-20, 3T31-17 to 32-16, 3T44-1 to 44-24) Since the original motion based upon the statute of limitations was decided, defense counsel had learned that plaintiff had retained counsel within three weeks of the subject accident, and that E.J. Calderin, an investigator, had visited the strip mall at the behest of plaintiff's counsel. (Pa694-697) Plaintiff had also admitted at his deposition that he had taken pictures of the accident scene immediately following the fall. (Pa846-849, Pa1149-1151) In contrast to counsel's assertions in opposition to Real Estate Consultants' first motion for summary judgment, plaintiff also believed from the outset that he had a viable cause of action against all of the tenant defendants in the strip mall. (Pa832-834, Pa882-883)

Real Estate Consultants' motion, as well as other tenant defendants' motions for summary judgment and plaintiff's cross motion for partial summary judgment on liability, were argued on June 25, 2021. (3T7-11 to 47-6) Hon. Vicki A. Citrino, J.S.C., Passaic County, granted Real Estate Consultants' motion for summary judgment on liability, denied the motion based upon the statute of limitations, and denied plaintiffs' cross motion for partial summary judgment on liability. (Pa1-2, 3T58-25 to 59-6, 3T59-14 to 61-18) She found as a fact that plaintiff had fallen in the parking lot, not a driveway or walkway, relying upon photographs attached by plaintiff's counsel as Exhibit B to his certification. (3T56-20 to 56-25, 3T60-19 to 60-24, Pa941-943, Pa949-950) Therefore, plaintiff had fallen in common area for which the landlord was solely responsible. She further found that the tenants were obligated to pay their pro rata share of common area maintenance fees, but that they had no contractual responsibility other than that for the area in which plaintiff fell. (3T57-1 to 57-5, 3T58-8 to 58-17, 3T58-25 to 59-6) Finally, she found that the tenants had no common law duty to have done anything to remediate the parking lot prior to plaintiff's accident. (3T59-7-to 61-18) She granted all of the tenants' motions for summary judgment on liability and denied plaintiffs' cross motion for partial summary judgment on liability. (3T61-13 to 61-18, Pa1-2)

Judge Citrino treated Real Estate Consultants' motion for summary judgment on the statute of limitations as though it were an untimely motion for reconsideration of Judge Covello's order of January 24, 2020, rather than a summary judgment motion based upon the additional information pertaining to plaintiff's and counsel's conduct that counsel had received through discovery. (3T65-21 to 66-16, Pa5-6) She stated:

> This issue has already been decided by the Court. Judge Covello was assigned the prior motions to dismiss on this ground and denied the motions on January 24, 2020 and February 14, 2020. This is essentially a request for reconsideration of Judge Covello's two prior orders.
>
> The tenants claim that the plaintiff engaged an investigator in 2017 who had information regarding the tenancy of the strip mall, but failed to reveal this information to Judge Covello. They waited until now to file this motion without detailing when they received this information, thus they have not demonstrated that the Court expressed its decision based upon a palpably incorrect or irrational basis or that it was obvious that the Court either did not consider or failed to appreciate the significance of probative competent evidence. Moreover, any motion for reconsideration should have been timely filed before Judge Covello upon notice that the plaintiff had the names of the tenants prior to date explained in oral argument. (3T65-21 to 66-16)

Plaintiffs now appeal the portions of the June 25, 2021 order granting summary judgment in favor of the tenant defendants on liability and denying their cross motion for partial summary judgment on liability. (Pa14-20) Defendant Real Estate Consultants opposes plaintiffs' misguided attempt to persuade this Court to reverse those portions of Judge Citrino's

order. Real Estate Consultants protectively cross appeals Judge Covello's January 24, 2020 order denying its motion to dismiss based upon the statute of limitations and that portion of Judge Citrino's June 25, 2021 order denying its motion on that basis. For the reasons stated infra., the summary judgment in favor of Real Estate Consultants on liability should be affirmed. Alternatively, plaintiffs' second amended complaint should be dismissed with prejudice for his failure to have complied with the statute of limitations.

POINT I

THE TRIAL COURT CORRECTLY HELD THAT THE LEASE AGREEMENT BETWEEN CASSESE ENTERPRISES, INC. AND REAL ESTATE CONSULTANTS, LLC DID NOT IMPOSE AN OBLIGATION UPON THE LATTER TO HAVE REMOVED OR REMEDIATED THE SNOWAND ICE IN THE AREA WHERE PLAINTIFF FELL. NOR DID THE LEASE IMPOSE A DUTY UPON THIS DEFENDANT TO HAVE NOTIFIED CASSESE ENTERPRISES, INC. OF THE CONDITION OF THE PARKING LOT

At Pb14-25, plaintiffs argue that the leases between Cassese Enterprises and the various tenant defendants imposed a duty upon any or all of them to have remediated the parking lot where plaintiff fell. Defendant Real Estate Consultants respectfully submits that this argument contains numerous flaws that mandate its failure. Therefore, the summary judgment in its favor should be affirmed.

Essentially, plaintiffs argue that this defendant had a contractual obligation to have remedied the condition of the parking lot prior to Vito Collucci's accident. Plaintiffs overlook the fact that the lease agreement was and is a contract between Cassese Enterprises and Real Estate Consultants. Any obligations imposed upon Real Estate Consultants by the contract run from Real Estate Associates to Cassese Enterprises, not to plaintiffs. There is no privity of contract between plaintiffs and Cassese Associates. Put another way, plaintiffs have no standing to assert breach of

contract claims against this defendant. The only ways that plaintiffs could properly assert claims arising out of Real Estate Consultants' alleged breach of contract are by an assignment of rights from Cassese Enterprises, the party to the contract who holds those rights, or as intended third party beneficiaries of the contract. See e.g., Biasi vs. Allstate Insurance, 104 N.J. Super. 155, 159 (App. Div. 1969); Murray v. Allstate Insurance Company, 209 N.J. Super. 163, 170 (App. Div. 1986); Ross v. Lowitz, 222 N.J. 494, 513-515 (2015) See also Atlantic Employers' Insurance Company v. Tots & Toddlers, Inc., 239 N.J. Super. 276 (App. Div. 1990) certif. den. 122 N.J. 147 (1990) (holding that, absent an assignment of rights, an injured plaintiff has only the right to intervene in an action between insured and insurer to adjudicate the existence of coverage.) There is no evidence in this record that plaintiffs ever obtained such an assignment of rights from Cassese Enterprises.

Nor are plaintiffs intended third party beneficiaries of the contract between Cassese Enterprises and Real Estate Consultants. Divining the intent of a contract is ordinarily a question of law. Bosshard v. Hackensack University Medical Center, 345 N.J. Super. 78, 92 (App. Div. 2001) When a court determines the existence of third party beneficiary status, the inquiry focuses on whether the parties to the contract intended others to benefit from the existence of the contract or whether the benefit so derived

arises merely as an unintended consequence of the agreement. Ross, supra., at 513, citing Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982); Rieder Cmtys. v. Twp. of New Brunswick, 227 N.J. Super. 214, 222 (App. Div.), certif. denied, 113 N.J. 638 (1988) If there is no intent to recognize the third party's right to contract performance, then the third person is merely an incidental beneficiary, having no contractual standing. Broadway Maint., supra., at 259, citing Standard Gas Power Corp. v. New England Cas. Co., 90 N.J.L. 570, 573 (E&A 1917) ; Labega v. Joshi, 470 N.J. Super. 472, 485 (App. Div. 2022) The intent of the parties to make the specific person or class of persons third party beneficiaries of their agreement is to be determined by the language of the contract. Id., at 486. The question is whether the parties intended that the third party receive a benefit which might be enforced in the courts. Id., at 485, citing Bor. of Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 77 (E&A 1940) If there is no expressed intent on the part of the parties to enter into contractual relations with a third party or permit a third party such as plaintiff herein to have the right to sue to enforce the obligations of the contract, that person is merely an incidental beneficiary to the contract and has no standing to assert a claim based upon an alleged breach of the agreement. Labega, supra., at 485-486. It is plaintiffs' burden to prove

their third party beneficiary status. Id., at 486. The contract between Cassese Enterprises and Real Estate Consultants is set forth at Pa504-507 and Pa869-872. There is absolutely nothing in it that could possibly be read to confer intended third party beneficiary status upon plaintiffs.

While New Jersey courts have not specifically addressed whether an injured member of the public can be a third party beneficiary of a lease agreement between a landlord and tenant containing provisions pertaining to the maintenance of the property, other jurisdictions have done so. At least two of them have rejected this proposition. See e.g., Gazo v. City of Stamford, 765 A.2d. 505, 515 (Conn. 2001) (member of the public injured on sidewalk adjoining bank was not third party beneficiary of agreement between bank and third party maintenance contractor.) and Brunsell v. City of Zeeland, 651 N.W. 2d. 388 (Mich. 2002) (Pedestrian injured on city sidewalk was not a third party beneficiary of the lease between the city and the property owner.) Since plaintiffs essentially attempted to assert rights that that they did not and do not have, the summary judgment in favor of Real Estate Consultants was properly entered and should be affirmed.

Assuming arguendo that plaintiffs can circumvent the procedural infirmities outlined above, their substantive arguments pertaining to the trial court's allegedly defective construction of Real Estate Consultants'

lease agreement with Cassese Associates must fall of their own weight. Plaintiffs rely on their liability experts' reports in support of their construction of the lease agreement and their argument that the lease agreement imposed a duty on Real Estate Consultants to have removed the snow and ice from the area where plaintiff fell. (Pa11, Pb14) Their reliance on their experts' reports is misplaced. Expert testimony is admissible only where it will assist the trier of fact. N.J.R.E. 702. An expert cannot render an opinion on matters which involve a question of law. Healy v. Fairleigh Dickinson University, 287 N.J. Super. 407, 413 (App. Div. 1996), citing Marx & Co. v. Diners' Club, Inc., 550 F. 2d. 505 (2d. Cir.), cert. denied 434 U.S. 861 (1977); State v. Grimes, 235 N.J. Super. 75, 79 (App. Div.) certif. denied, 118 N.J. 222 (1989) An expert's opinion as to the interpretation of terms in a contract is of no legal effect. Healy, supra., at 413; Boddy v. Cigna Property and Cas. Companies, 334 N.J. Super. 649, 659 (App. Div. 2000) A fortiori, an expert cannot create (or opine as to the existence/breach of) a legal duty to do anything or to refrain from doing anything. Id. Therefore, plaintiffs' experts' distortion of the terms of the lease between Cassese Enterprises and Real Estate Consultants was properly ignored by the trial court. This court should do the same.

Plaintiffs rely extensively on paragraph 3 of defendant's lease in support of their argument that defendant had a contractual obligation to have maintained the area where plaintiff fell. It is set forth in full in the statement of facts, supra. It clearly states that the tenant had an obligation to maintain "portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery..." (Pa504, Pa869) Plaintiffs mischaracterize the area as plaintiff fell as a "walkway." (Pb11) They take their quantum leap in logic one step further by equating "walkway" with "sidewalk." (Pb11) Relying on their experts' reports, they then argue that plaintiff fell in a "walkway," rather than the parking lot. (Pb11) They then misconstrue the word "premises" as used in the leases to mean the entire strip mall, rather than the portion of the mall demised to each tenant. (Pb16-20) Finally, they torture the meaning of the word "adjacent" in order to reach their desired result. (Pb20-23) A review of the contract provisions and the law under which this court should construe them clearly indicates that the trial court's interpretation of the lease was correct.

When construing a contract, "the court's goal is to ascertain 'the intention of the parties to the contract as revealed by the language used, taken as an entirety...the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain.' "

Phoenix Pinelands Corporation v. Davidoff, 467 N.J. Super. 532 (App. Div. 2021), citing Borough of Princeton v. Bd. of Chosen Freeholders of County of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000); Cruz-Mendez v. ISU/Insurance Servs., 156 N.J. 556, 570-571 (1999) aff'd. 169 N.J. 135 (2001) The document is to "be read as a whole, without artificial emphasis on one section, with a consequent disregard for others." (Id.) Finally, and perhaps most important, the interpretation "should 'accord with justice and common sense.' " Phoenix Pinelands, supra., citing Borough of Princeton, supra., at 325, quoting Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956) See also Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 101-102 (2009); Porreca v. City of Millville, 419 N.J. Super. 212, 233-234 (App. Div. 2011)

The trial court held that the word "premises", as used in the tenant defendants' leases referred to the demised premises; that portion of the strip mall rented to each tenant. (3T58-15 to 58-24) A review of this tenant's lease in accordance with the foregoing principles of law supports the trial court's interpretation of the word "premises." Paragraphs 1-8 of Real Estate Consultants' lease are set forth in the statement of facts, supra. They set forth the rent to be paid, purpose for which the tenant is permitted to use the rented portion of the property, limitations on the tenant's use of the

demised portion of the property, the tenant's responsibility for utilities for the demised portion of the property, and the landlord's right to enter the rented portion of the property for inspections. Finally paragraph 9 provides that the tenant is not liable for rent until "possession of the premises" is delivered. (Pa504, Pa869) To construe these provisions as referring to anything other than the portion of the strip mall rented to each tenant is to effectively render them nonsensical. It makes no sense, and violates the principles enunciated above, to interpret the word "premises" as used in paragraph 3 differently than in paragraphs 1, 2 and 4-9 of the lease, as urged by plaintiffs. It is clear that the word "premises" as used in paragraph 3 of the lease obligated a tenant to maintain only that area "adjacent" to the portion of the property rented by that tenant.

As previously noted, Real Estate Consultants' lease obligates it to maintain only a "sidewalk" or "driveway" adjacent to its rental premises. Plaintiffs do not argue that Mr. Collucci fell in a "driveway." Instead, they create some kind of "walkway" (as defined by their experts) in the parking lot, and mistakenly equate this "walkway" with a "sidewalk." This argument must fail for several reasons, including Mr. Collucci's prior sworn statements. Plaintiff's certified answers to interrogatories stated that he fell in the "parking lot." (Pa842; Pa1144) He also confirmed at

his deposition that the area in which he had fallen was not a "walkway" or a "sidewalk;" it was "actually part of the parking lot." (Pa845; Pa513, Pa1148) The photographs he had taken following his fall supported his statements that he had fallen in the parking lot. (Pa846-849; Pa1149-1151) The trial court properly declined to consider plaintiffs' belated attempt to repudiate Mr. Collucci's prior sworn statements to enhance their position. This court should follow its lead. See e.g. Doe v. Roe, 2023 WL 2542566 (App. Div.), (Da5-10) citing Metro Mktg., LLC v. Nationwide Vehicle Assurance, Inc., 472 N.J. Super. 132 (App. Div. 2022) ; Shelcusky v. Garjuilo, 172 N.J. 185 (2002)

Moreover, the term "sidewalk" should be construed in accordance with its commonly accepted meaning. A "sidewalk" is defined as "[t]hat part of a public street or highway designed for the use of pedestrians, being exclusively reserved for them." Gaskill v. Active Environmental Technologies, 360 N.J. Super. 530, 534 (App. Div. 2003), citing Chimiente v. Adam Corp., 221 N. J. Super. 580, 583 (App. Div. 1987) (quoting Black's Law Dictionary 1238 (5th ed. 1979) Although the instant matter involves private property, that should not and does not change the requirement of the exclusive reservation of the area for pedestrians in order for the area to be considered a "sidewalk." Moreover, a pathway taken by a

pedestrian that does not fit that definition is not a "sidewalk," See e.g. Moore v. Croatian American Bocci Club, 2008 WL 2548541 (App. Div.), (Da11-15) at pages 2-3 (Da12-13) It is clear that plaintiff did not fall on a "sidewalk" as that term has been defined by case law.

It is equally clear that the parties to the lease agreement at issue herein did not consider the area where plaintiff fell to be a "sidewalk" under the terms of the lease. The front entrance to Real Estate Consultants' demised premises did, in fact, have a "sidewalk" immediately outside its front door. (Pa509) The clear intent of both Cassese Enterprises and Real Estate Consultants was that Real Estate Consultants would maintain the pedestrian walkway immediately contiguous to the entrance to its place of business. (Pa873-874; Pa1154-1157; Pa851-858; Pa1159-1166)

Finally, plaintiffs misconstrue the meaning of the word "adjacent" as used in the contract. They argue it means "nearby" the tenants' premises, rather than "immediately adjoining" them. (Pa20-22) This is a transparent attempt to impermissibly rewrite the lease to support the result they seek. "Adjacent" means "lying near, close, or contiguous; neighboring; bordering on; as, a field adjacent to the highway." Webster's 1913 Dictionary. It is defined in WordNet Dictionary as :

1) nearest in space or position, immediately adjoining without intervening space; "had adjacent rooms," in the next room"; "the

person sitting next to me;" "our room were side by side."
Synonyms: next, side by side

2) having a common boundary or edge; touching; "abutting lots"; "adjoining rooms"; "Rhode Island has two bordering states; Massachusetts and Connecticut.;" "the side of Germany contiguous with France"; "Utah and the contiguous state of Idaho"; "neighboring cities"
Synonyms: abutting, adjoining, conterminous, neighboring, contiguous
3) near or close to, but not necessarily touching; "lands adjacent to the mountains"; "New York and adjacent cities"

Plaintiffs focus on the third definition in support of their argument, and ignore the first two. The third definition is listed third because it is the least common and least accepted. It is the normal practice of those who define words to set forth the most common definition of the word first, followed by the next most commonly used, and finally the last. English Language and Usage Stack Exchange, October 8, 2012. https://english.stackexchange.com. Moreover, as expressed in the examples of construction set forth above, the third definition of "adjacent" would not apply to portions of real property. It clearly applies to certain types of geographic areas and the nearest similar areas. It is well settled that the term" adjacent" in the context of real property means "nearest in space or position" or "having a common boundary or edge." See e.g., Great Northern Ins. Co. v. Leontarakis, 387 N.J. Super. 583, 587-588 (App. Div. 2006); Jock v. Zoning Bd. of Adjustment of Twp. of Wall, 182 N.J. 260

(2005) The application of the third definition set forth herein to the terms of the lease agreement is clearly contrary to the intent of the parties as expressed above. It also violates the foregoing principles of construction of a contract.

At paragraph 17, the lease between Cassese Enterprises and Real Estate Consultants contains a provision entitled "common area expenses." It is set forth in its entirety in the statement of facts, supra. Essentially, it provides that Real Estate Consultants would pay its pro rata share of maintenance, taxes and insurance for the common areas of the strip mall. (Pa506-871) The construction of the contract urged by plaintiffs essentially ignores the intent of the parties and renders this provision meaningless. Such a construction was properly rejected by the trial court. Mrs. Cassese indicated that she considered the parking lot to be "common area." (Pa851-858; Pa1159-1166) Conversely, Real Estate Consultants did not have any expectation of any responsibility for the parking lot other than payment of its pro rata share of the aforementioned expenses. (Pa1154-1155)

If this Court were to adopt the construction of the lease agreement urged by plaintiffs, it would essentially render the "common area" provision of the contract meaningless, and Real Estate Consultants would be paying for nothing. The subject accident occurred at a multi-tenant strip

mall. Pursuant to its lease, Real Estate Consultants was obligated to maintain the portions of the strip mall demised to it, as well as the sidewalk abutting the entrance into its business. Any other portion of the property not leased to it or to the other tenants was, by implication, "common area." In the context of a strip mall, once the contract has excluded the demised premises and the abutting sidewalk(s) from that definition, there could not be much else other than the parking lot that would remain under control of the landlord. If this court were to hold that Real Estate Consultants, inter alia, had the contractual obligation to have maintained the parking lot, the "common area" provision of the lease would become meaningless as there would be little or none of the property to which it could apply. A contract should not be interpreted to render one of its terms meaningless. Porreca., supra., at 233, citing Cumberland County Improvement Auth., 358 N.J. Super. 484, 497 (App. Div.), certif. denied 177 N.J. 222 (2003)

Finally, plaintiffs rely on the indemnification provisions in the leases in support of their argument that any or all of the tenant defendants had some sort of contractual obligation to them. The indemnification provision in Real Estate Consultants' lease is set forth in the statement of facts, supra., at paragraph 10. (Pa505, Pa870) It is entitled "Indemnification of Lessor." It clearly imposes an obligation upon Real Estate Consultants to

indemnify Cassese Enterprises for "any damage or injury…to any person…occurring on the demised premises or any part thereof, and Lessee agrees to hold Lessor harmless for any claims for damages, no matter how caused." It does not create a contractual obligation to plaintiffs. Plaintiffs' settlement with Cassese Enterprises rendered this contractual obligation moot. (Da3-4) This language does not provide plaintiffs with a remedy against Real Estate Consultants.

Moreover, paragraph 10 of the lease clearly states that Real Estate Consultants was obligated to indemnify Cassese Enterprises for injuries "occurring on the demised premises, or any part thereof…no matter how caused." This provision, as stated, makes sense and is consistent with New Jersey law. The landlord should not be responsible for accidents occurring on the rented portions of the premises, as it has relinquished control of those areas to the tenants. See e.g., Michaels v. Brookchester, Inc., 26 N.J. 379, 382 (1958) Conversely, this provision does not obligate Real Estate Consultants to indemnify Cassese Enterprises for accidents or injuries that occur on or in the common areas of the property that remain under the control of the landlord. See e.g., McBride v. Port Auth. of N.Y. and N.J., 295 N.J. Super. 521, 525 (App. Div. 1966) Real Estate Consultants bought its peace for accidents and injuries occurring in the common areas of the

property by paying its pro rata share of the maintenance and insurance charges for those areas. As set forth above, the subject accident occurred in the strip mall parking lot, clearly a "common area" under the terms of the lease. The indemnification provision should be construed as written, Longobardi v. Chubb Insurance Company, 121 N.J. 530, 537 (1990), and the summary judgment in favor of Real Estate Consultants should be affirmed.

POINT II

THE TRIAL COURT CORRECTLY HELD THAT REAL ESTATE CONSULTANTS DID NOT HAVE A COMMON LAW DUTY TO HAVE MAINTAINED THE PARKING LOT WHERE PLAINTIFF FELL. ITS CROSS MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED AND PLAINTIFFS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT WAS PROPERLY DENIED.

At point II of their brief, plaintiffs repeatedly rely upon Real Estate Consultants' and other tenant defendants' alleged breach of their lease agreements in support of their argument that the tenants in the strip mall had a common law duty to plaintiffs to have cleared the parking lot of snow and ice. (Pb26-28) They further argue that these tenants could have and should have notified the landlord of the condition of the parking lot. (Pb29) For the reasons stated supra., at point I, Real Estate Consultants neither had nor breached any contractual obligation to plaintiffs. Assuming arguendo that it had and breached a contractual obligation to plaintiffs, that breach would not create a tort remedy for them in the absence of an independent duty owed from this defendant to plaintiffs. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 314, 316 (2002) For the reasons that follow, Real Estate Consultants neither had nor breached a common law obligation to plaintiffs to have cleared the parking lot where the subject accident occurred. Nor did it have a common law duty to have notified Cassese

Enterprises of the condition of the parking lot. Plaintiffs' arguments to the contrary are wishful thinking; they are not indicative of the law in this state.

In Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993), the Supreme Court indicated that the inquiry pertaining to the existence of a duty to maintain real property "should be not what common law classifications most closely characterize the relationship of the parties, but whether in light of the actual relationship between the parties under all of the surrounding circumstances, the imposition on the landowner of a general duty to exercise reasonable care in preventing foreseeable harm to visitors is fair and just." Id., at 438. "Whether the landowner owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Id. at 439. This inquiry involves identifying, weighing, and balancing several factors, i.e., the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. Id. This analysis is very fact specific; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct. Id. The determination of whether a party owes a duty of reasonable care to another is to be made by

the court. Jiminez vs. Maisch, 329 N.J.Super. 398, 403 (App.Div.2000); Hopkins , supra., at 439.

In the instant matter, there was no relationship whatsoever between Real Estate Consultants and Vito Collucci. He did not come to the strip mall to transact any business with it. (Pa842, Pa947) In fact, Real Estate Consultants' office had been closed for two days prior to the date of loss. (Pa1175-1179) Mr. Collucci was also attempting to enter Amore Restaurant through a back door, not a customer entrance, at the time of his fall. (Pa948) This area was clearly "not necessary to the ingress or egress" of this defendant's business. Kandrac v. Marrazzo's Market at Robbinsville, 429 N.J. Super. 79, 88 (App. Div. 2012) The conditions in the area where plaintiff fell presented significantly less risk to the general public than the same conditions would have presented if they existed at or near the customer entrances to the strip mall's businesses. Plaintiff also had (and exercised) a legal remedy for his accident against the landlord. (Da3-4) Therefore, there is little or no public interest in imposing a duty of care upon Real Estate Consultants to have maintained the area where plaintiff fell. It would be manifestly unjust to Real Estate Consultants to impose a duty of care upon it under the circumstances presented by this loss.

The fourth factor that a court should consider in deciding whether or not a duty of care should be imposed upon a landowner is the "opportunity and ability to exercise care." Hopkins, supra., at 439. Plaintiffs rely extensively on their misinterpretation of the lease agreement between Real Estate Consultants and Cassese Enterprises in support of their arguments that the former had control of the area where plaintiff fell. (Pb26-31) They then erroneously conclude that Real Estate Consultants had the "opportunity and ability" to have removed the snow and ice. Id. Finally, they argue that the trial court erred in refusing to impose a duty to have done so upon Real Estate Consultants. (Id.)

New Jersey law uniformly holds that tenants in a multi-tenant shopping center who do not have control of or a contractual obligation to maintain a common parking lot do not have a common law obligation to do so. See Kandrac, supra., at 90-91; Barrows v. Trs. of Princeton Univ., 244 N.J. Super. 144, 148 (Law Div. 1990); Holmes v. Kimco Realty Corp., 598 F. 3d. 115, 123 (3d. Cir. 2010); Ricco v. Walmart, 2013 WL 5232496 (D.N.J.) (Da16-25); Spano v. Supervalu, Inc., 2016 WL 3943360 (Law Div.) (Da26-29); Tchikindas v. Basser-Kaufman Management Corp., 2021 WL 1749961 (App. Div.) (Da30-39) See also Kantonides v. KLM Royal Dutch Airlines, 802 F. Supp. 1203 (D.N.J. 1992) (Airline's duty to provide

safe ingress and egress "did not and does not encompass the common areas of the airport terminal." Id., at 1215); Mc Cann v. Borough of Washington, 2006 WL 2726818 (App. Div.) (Da37-39); Siegel v. County of Monmouth, 2007 WL 1628141 (App. Div.) certif. denied 192 N.J. 477 (2007) (Da40-45)

The trial court correctly relied upon Kandrac, supra., as it is directly on point. In Kandrac, plaintiff fell in the parking lot of a shopping center with thirty six tenants. Id., at 81. The landlord retained control of the parking lot pursuant to its lease agreement. Id., at 82. The plaintiff was not in an area necessary to the ingress or egress of the tenant defendant's business, or on a sidewalk abutting the business. Id., at 88. Nor was she in a crosswalk that identified a route from the shopping center across a roadway to the parking area. Id. Like plaintiff herein, she was injured as she was walking around a car in the parking lot. Id. The Kandrac Court held that "...the assignment of responsibilities in the lease, within the context of a multi-tenant shopping center...impact the scope of [the tenant's] ability to address conditions in the parking lot. The lease squarely assigns the duty to maintain the area where plaintiff fell to the landlord." Id., at 89. The court further noted that "the ability of the proprietor to "reasonably remedy" an unsafe condition is a significant factor in

determining what duty, if any, should be imposed." Id., citing Monaco v. Hartz Mountain Corp., 178 N.J. 401, 419 (2004) As set forth supra., at point I, this defendant had no control over the parking lot. The parking lot remained in the exclusive control of the landlord. The "common area" charges and the conduct of Cassese Enterprises in hiring a snow removal contractor support this interpretation of the contract. As this defendant had no control over the parking lot, the imposition of such a duty upon it would have been legally unsupportable.

The Kandrac Court also found that "the imposition of a duty on the tenants would result in duplicative effort and interference with the landlord's maintenance program. It is not hard to imagine the confusion, and perhaps danger, that could ensue if snow plows and salt trucks hired b the landlord, Lowe's, Bally's Total Fitness, and Mattress Giant all attempted to maintain the parking lot at the same time..." Id., at 90. While it noted that the context of the argument in that case, a strip mall with twenty or more tenants, "highlighted the absurdity of such a shared duty," it clearly did not limit its holding to those facts. In fact, it noted the "confusion, and perhaps danger" of such a situation even if there were only the landlord and the four tenants named above. Id.

Finally, the Kandrac Court rejected plaintiffs' public policy based arguments. Id. In doing so, it noted that Ms. Kandrac, like plaintiff herein, was not left without a remedy for her injuries. Id. The extension of a common law duty to maintain a shared parking lot in a multi-tenant commercial property would also "lead to uncertainty with regard to the areas of the parking lot for which each tenant is responsible and encourage 'shotgun' litigation...where the customer sued every store at which he had browsed or purchased an item prior to his fall. Id., citing Holmes, supra., at 524. Such uncertainty would also make it difficult to reasonably predict appropriate additional insurance premiums and maintenance costs the tenant would assume, making it less feasible for the tenant to spread the burden of liability as part of the costs of doing business." Id., citing Stewart v. 104 Wallace Street, 87 N.J. 146, 160 (1981) Those same considerations mandate the affirmance of the summary judgment in favor of Real Estate Consultants.

Plaintiffs rely on Nielsen v. Wal-Mart Store #2171, 429 N.J. Super. 251 (App. Div. 2013) and Antenucci v. Mr. Nick's Men's Sportswear, 212 N.J. Super. 124 (App. Div. 1986) in support of their argument that the trial court improperly declined to impose a duty to have maintained the parking lot upon Real Estate Consultants and the other tenant defendants in this

matter. (Pb29) Both cases are distinguishable from the instant matter, and neither supports the reversal of the summary judgment in favor of Real Estate Consultants. In Antenucci, the Appellate Division imposed a duty to maintain an adjoining sidewalk upon a tenant in exclusive possession of the leased premises. Id., at 130. It was careful to limit its holding to only that set of circumstances, saying "[w]e emphasize that our extension of the Stewart rule applies only to a commercial tenant who is in exclusive possession of the premises abutting the sidewalk." Id. The Antenucci Court expressly declined to address the situation of "a multiple tenanted" facility. Id. See also Holmes, supra., at 119; Barrows, supra., at 146. Moreover, as discussed at length at point I, this matter does not involve an "adjoining sidewalk."

In Nielsen, supra., plaintiff fell at the Nassau Park Shopping Center, a multi-unit commercial condominium. Wal-Mart had hired his employer, Ecolab, to exterminate pests. Wal-Mart directed plaintiff to access the various store entrances from the exterior of its unit. Plaintiff slipped and fell in the exterior area around the perimeter of the unit, which was owned and maintained by the developer pursuant to the master deed. Id., at 254-255. The Nielsen Court found that under the particular circumstances presented, Wal-Mart had a duty to have addressed the hazard that had

caused plaintiff to fall. It based its holding on several factors; 1) the area where plaintiff fell adjoined Wal-Mart's unit; 2) Customers could foreseeably use that particular area to access its store; 3) Wal-Mart had directed plaintiff to use that particular area in performance of his duties; and 4) Wal-Mart had a remedy if found liable for an injury that occurred on the developer's property-its right to seek indemnification from the developer. Id., at 263-264. None of the foregoing factors are present in the instant matter.

Since Nielsen, the Appellate Division and the U.S. District Court for New Jersey have decided three cases that address a tenant's liability for injuries that occur in the common area in a multi-tenant facility. All have declined to apply Nielsen to facts similar to those at issue herein. All three courts have recognized that Nielsen represents a departure from the general principle of tenants' non liability for injuries that occur in common areas, and that its holding was limited to its facts. In Spano v. Supervalu, supra., (Da26-29), plaintiff fell in a shopping center parking lot shared by Acme and other tenants. The Appellate Division rejected plaintiff's arguments based upon Nielsen because, like plaintiff herein, she did not fall in an area immediately adjoining the Acme store, but was "a distance away" from it. Nor did Acme direct Ms. Spano to walk in the area where she had fallen.

Id., at 3. Under virtually identical circumstances to those at issue herein, the court found that "there were no comparable facts that would justify imposing a duty of care upon Acme to maintain the parking lot of the shopping center." Id. See also Ricco, supra., at 7 (Da22); Similarly, there is no duty to notify the landlord of hazardous conditions under the circumstances of this case. Tchikindas, supra., at 5-6 (Da34-35)

POINT III

IN THE EVENT THAT THIS COURT DISAGREES WITH THE TRIAL COURT'S DECISION ON ITS SUMMARY JUDGMENT MOTION ON LIABILITY, IT SHOULD AFFIRM THE SUMMARY JUDGMENT ORDER OF JUNE 25, 2021 BASED UPON PLAINTIFFS' FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS. PLAINTIFF WAS NOT ENTITLED TO THE BENEFIT OF THE "DISCOVERY RULE" OR THE "RELATION BACK" DOCTRINE UNDER THE CIRCUMSTANCES OF THIS CASE. (1T47-19 TO 48-22; Pa5-6; 3T65-4 to 66-18; Pa1-2)

As set forth in the procedural history and statement of facts, supra., Real Estate Consultants was not named as a defendant in this case until the filing of the second amended complaint on June 12, 2019, approximately three months after the statute of limitations ran. (Pa317-318; Pa319-330) It was not notified of the motion for leave to file the second amended complaint, and had no opportunity to respond thereto. (Pa488-489) Real Estate Consultants initially moved for summary judgment in December 2019. (Pa496-509; Pa358-362)

The trial court decided defendant's initial motion for summary judgment on January 24, 2020, approximately seven months after its answer was filed. (1T47-19 to 48-22) The trial court's holding is set forth verbatim in the statement of facts. Judge Covello acknowledged that plaintiff and/or his counsel had an obligation to have acted diligently to have ascertained the identities of the tenants of the strip mall. (1T20-14 to

20-18; 1T32-10 to 32-18) However, he gave undue deference to both plaintiff and counsel for having failed to do so. He misinterpreted applicable law, holding that plaintiff and/or counsel had to know or have reason to know of a potential theory of liability before the obligation to amend the complaint accrued. He further noted, without any support in the record, that counsel had been misled by Cosima Cassese's answers to interrogatories, which listed only P & L Landscaping as the only other potentially culpable entity. (1T47-19 to 48-22)

A claim for personal injuries must be filed within two years of the date of accrual of the cause of action. N.J.S.A. 2A:14-2.2(a). A cause of action accrues on the first date that a right to institute and maintain an action arises. Burd v. N.J. Telephone Co., 76 N.J. 284, 292 (1978) The "right to institute and maintain an action" arises when the claimant becomes aware of " the existence of that state of facts which may equate in law with a cause of action. Id. The "state of facts" referred to in these cases is the accident/injury; not the theory of liability that may underlie it. "There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until plaintiff learns or should learn the state of the law positing a right to recovery upon the facts already known to or reasonably knowable by the plaintiff." Id. See also Lopez v. Swyer, 62

N.J. 267, 273 (1973); Fernandi v. Strully, 35 N.J. 434 (1961) A fortiori, neither plaintiff nor his counsel were entitled to wait until receipt of any or all of the tenants' leases before filing suit against them. Plaintiffs' cause of action in the instant matter accrued on the date of loss, March 16, 2017. The law does not and did not postpone the accrual of his cause of action until he had an opportunity to have learned of the potential legal underpinnings of his claim.

Rule 4:26-4 provides that where the identity of the defendant is unknown, plaintiff may institute process against such individual by designating him as a "John Doe" defendant, and may thereafter amend the complaint to the proper designation when the defendant's identity is ascertained. The purpose of this rule is to render timely, through "relation back," a complaint filed in an otherwise timely manner by a plaintiff who knows he has a cause of action but does not know the plaintiff's name. Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005) Description of the defendant must be sufficient to identify his involvement in the action. Farrell v. Votator Division of Chemetron Corp., 62 N.J. 111, 120 (1973); DiMura v. Knapik, 277 N.J. Super. 156, 161 (App. Div. 1994) (allegation against John Doe of negligent vehicle operation insufficient to preserve claim of negligent maintenance of roadway); Rutkowski v. Liberty Mutual

Ins. Co., 209 N.J. Super. 140, 147 (App. Div. 1986) (general description of 'John Doe' as one "otherwise responsible" for plaintiff's injuries insufficient to describe carrier who was negligent in inspecting industrial equipment)

The first element of fictitious party practice is that the identity of the defendant be "unknown" to the plaintiff. Marion v. Borough of Manasquan, 231 N.J. Super. 320, 334 (App. Div. 1985) The word "unknown" as used in R. 4:26-4 has been defined by case law. Its meaning is not only that the plaintiff has no actual knowledge of the putative defendant's identity. Rather, "unknown" means that the plaintiff had no knowledge of or reason to know of the identity of the defendant. "If a plaintiff does not know of the identity of a defendant he or she will still be precluded from using R. 4:26-4 if, through the use of due diligence, he or she could have known of the defendant's identity prior to the running of the statute of limitations." See Cardona v. Data Sys. Computer Centre, 261 N.J. Super. 232, 235 (App. Div. 1992); Younger v. Kracke, 236 N.J. Super. 595, 600 (Law Div. 1989) "When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as

well as the broader considerations of repose coincide to bar his claim." Farrell, supra., at 115; Marion,supra., at 334-335; DiMura, supra., at 161-162.

The "relation back" provided by this rule will not render timely a complaint where the plaintiff has already had ample time to ascertain the identity of the defendant before the running of the statute of limitations. Matynska v. Fried, 175 N.J. 51, 53 (2002) (belated attempt to name doctor in medical malpractice action untimely where, despite the naming of a John Doe, doctor's identity could have readily been found in plaintiff's hospital records); Cardona v. Data Systems Computer Centre, 261 N.J. Super. 232, 235 (App. Div. 1992) (in auto negligence matter, plaintiff failed to make "easy and routine inquiry" to obtain police report identifying defendant) Put another way, the identification of a defendant as fictitious under R. 4:26-4 may only be utilized if the plaintiff would not have been, or in fact, was not able to ascertain the defendant's name through the exercise of due diligence. Claypotch v. Heller, Inc., 360 N.J. Super. 472, 479-480 (App. Div. 2003) The requirement of "due diligence" exists both before and after the filing of the initial complaint. Mears v. Sandoz Pharmaceuticals, Inc., 300 N.J. Super. 622 (App. Div. 1997)

There is absolutely nothing in any of the foregoing case law that supports Judge Covello's ruling. In fact, Cardona, supra., mandated that the motion for summary judgment be granted. In Cardona, plaintiff failed to name the owner and driver of a vehicle involved in a motor vehicle accident in which he was injured. He named "John Doe" defendants in his complaint, but did not move to substitute the owner and/or the driver of the vehicle for the "John Doe" defendants until after the statute of limitations had run. The complaint was dismissed against those defendants for failure to comply with the statute of limitations. The Appellate Division affirmed the dismissal of the complaint, saying that plaintiff was not entitled to "relation back" because [he] knew or by the exercise of due diligence could have ascertained the identity of [the owner and driver] before filing his complaint..." Id. at 235. (Emphasis supplied.) Nowhere in this case (or in any of the others cited herein) does the court say that plaintiff was either obligated or entitled to investigate the putative defendants' potential liability for the accident before amending his complaint. Put another way, once a plaintiff has knowledge or reason to know of a potential defendant's identity, he has an obligation to act at that time. If he does not, his inertia should inure to his detriment, not that of the defendant. See also Matynska v. Fried, 175 N.J. 51 (2002). (Plaintiff "had a duty to investigate all potentially responsible parties.") Id. at 53. ; DiMura v. Knapik, 277 N.J. Super.

Super. 156 (App. Div. 1994) ("Fictitious name practice may be used only when the plaintiff does not know or have reason to know of the identity of an alleged culpable party...") Id. at 162.

After the denial of defendant's original motion, the defense learned that plaintiff had taken photographs of the area where he had fallen immediately after the accident. (Pa846-849; Pa1149-1151) He retained counsel sometime between March 16, 2017 and April 7, 2017. Counsel then retained EJC Investigative Services. E.J. Calderin visited the strip mall on April 7, 2017, and submitted his report to counsel on July 1, 2017. (Pa694-697) Moreover, plaintiff Vito Collucci admitted at his deposition that he believed that he had a cause of action against all of the tenants in the strip mall as of the date of loss. (Pa832-834; Pa882-883)

Counsel for Real Estate Consultants again moved for summary judgment on the statute of limitations in June 2021. The court's holding is set forth in the statement of facts, and is found at 3T65-21 to 66-16. Judge Citrino treated the second motion as though it were a motion for reconsideration of Judge Covello's prior order, and declined to consider the additional proofs produced by defendants. "The trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." See Cineas

v.Mammone, 270 N.J. Super. 200, 207 (App. Div. 1994), citing Johnson v. Cyclop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987) The submission of new factual material and/or fundamental legal error justifies the court's later conduct. Id., at 208. The court should have decided the second summary judgment motion under the standard enunciated in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), not the higher, "palpable unreasonable" standard for motions for reconsideration. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)

In the instant matter, the additional information provided to the court on the second motion clearly indicates that plaintiffs (and/or counsel) certainly knew or should have known of the identity of Real Estate Consultants prior to the expiration of the statute of limitations. Plaintiff himself was clearly capable of ascertaining the identities of the strip mall's tenants, as he took photographs immediately following the accident. Assuming arguendo that he should not be held to that standard due to his injuries, his counsel, through the investigator that went to the scene within weeks of the accident, certainly could have ascertained the identity of this defendant. The signage above its leased space and in its window was there for the world to see. (Pa509, Pa809) Plaintiff had ample opportunity to have ascertained the identity of this defendant and amended the complaint prior to the expiration of the statute of limitations. The

trial court effectively rewarded plaintiff for counsel's failure to previously disclose the existence of Mr. Calderin's report.

The fact that plaintiff's counsel did not receive the leases of any of the tenant defendants prior to the expiration of the statute of limitations does not absolve plaintiff of his obligation to have complied therewith, or entitle him to any relief under the "discovery rule" or the "relation back" doctrine. Plaintiff admitted that he believed from day one that he had a cause of action against any and all of the tenant defendants. (Pa832-834; Pa882-883) Assuming arguendo that plaintiff was entitled to know both the identity of this defendant and a potential theory of liability before the obligation to file suit accrued, he clearly had both at the time of the loss. Counsel's protestations that he could not ascertain whether any of the tenant defendants had any liability without first obtaining their leases must fail in view of plaintiff's representations. Moreover, the representations of counsel are merely an attempt to belatedly justify his inertia. The second amended complaint filed against this and other tenant defendants sounds in negligence, not breach of contract. (Pa319-330) He did not need the contracts to ascertain whether or not he had a common law cause of action.

Plaintiff 's admitted belief that he had a cause of action against all tenant defendants also renders the assertion contained in Cassese Enterprises' answers

to interrogatories that P&L Landscaping was the only other potentially culpable party (Pa211, Pa213) a "red herring." Plaintiff clearly thought otherwise and was not "misled" (1T47-25) by the information contained in those interrogatories. The protestations of counsel must yield to the sworn testimony of plaintiff himself.

This defendant was not afforded an opportunity to oppose the motion for leave to file the second amended complaint. Although that motion was granted, the granting of such a motion does not foreclose the newly added defendant from asserting any and all applicable defenses to a plaintiff's claims. This defendant filed its initial motion for summary judgment in the hopes of saving the costs of defense of a claim that should have been time- barred. It should not have been subject to a higher standard for the second motion than applied to the initial one. Moreover, based upon the additional information set forth herein, it is abundantly clear that plaintiffs were not entitled to the benefit of either the "discovery rule" or the "relation back' doctrine. Plaintiff knew or should have known of the identities of this and other tenant defendants well within the applicable statute of limitations. He also believed he had viable claims against all defendants since the date of loss. Under these circumstances, the second amended complaint should have been dismissed with prejudice for plaintiff's failure to comply with the statute of limitations. See e.g., The Palisades at Fort

Lee Condominium Association v. 100 Old Palisade, LLC, 230 N.J. 427 (2017)

In the event that this Court decides the questions presented in plaintiffs' appeal in their favor, it should still affirm the summary judgment in favor of this defendant for the reasons stated herein.

CONCLUSION

For all of the reasons stated herein, Judge Citrino properly granted Real Estate Consultants' motion for summary judgment. The clear, unambiguous language of its lease with Cassese Enterprises did not give it control of the area where plaintiff fell. It did not impose an obligation upon this defendant to have done anything to maintain the parking lot other than pay its pro rata share of common area charges. Nor did this defendant have any duty to have monitored the condition of the parking lot or to have notified the landlord of its condition. Since this defendant had no control over the parking lot, the trial court properly declined to find a common law duty upon this defendant to have taken any action regarding its condition. Therefore, the summary judgment in favor of Real Estate Consultants should be affirmed.

Alternatively, plaintiffs' complaint should be dismissed for the failure to comply with the statute of limitations. Plaintiff Vito Collucci certainly knew or should have known the identities of this and the other tenant defendants well within the two year period following the March 16, 2017 accident. He also believed that he had a cause of action against them as of the date of the accident. Therefore, he had a legal obligation to have filed his complaint within that time period. He was and is not entitled to the benefit of either the "discovery rule" or the "relation back" doctrine under the circumstances set

forth herein. In the event that this Court disagrees with this defendant's position on liability for Vito Collucci's accident and injuries, it should still affirm the summary judgment in its favor based upon plaintiffs' failure to have filed suit against this defendant within the appropriate time frame.

Respectfully submitted,

s/Murray A. Klayman

Murray A. Klayman, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-003655-22T2

VITO COLLUCCI and LUCILLE COLLUCCI, as Husband and Wife and Individually, *Plaintiffs-Appellants-Cross-Respondents,* vs. COSIMA CASSESE and CASSESE'S ENTERPRISE, INC., *Defendants-Respondents,* REALTY EXECUTIVES and NIROAL, LLC, *Defendants-Respondents-Cross-Appellants,* *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY Docket No.: PAS-L-2221-18 Sat Below: HON. DARREN J. DEL SARDO, J.S.C. HON. VICKI. J. CITRINO, J.S.C.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS

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TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG and JEONG HE PAK,

Defendants-Respondents,

KYONG HUI NAM KOONG,

Defendant-Respondent-Cross-Appellant,

- and -

JOHN DOES 1-10 AND/OR ABC CORPORATIONS 1-10, in Their Corporate Capacity and as to the Principles and Owners Individually (Names Being Fictitious and Unknown but Described as Corporate or Individual Owner(s), Manager(s), Lessor(s), Supervisor(s), Who Had Control of the Premises Located at 140 Rifle Camp Road, WOODLAND PARK, NEW JERSEY, Who Contributed to the March 16, 2017 Loss),

Defendants-Respondents.

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Plaintiffs/Appellants Vito Collucci ("Vito Collucci") and Lucille Collucci ("Lucille Collucci") (collectively "Plaintiffs" or "Appellants") submit this brief in further support of their appeal from a June 25, 2021 Order of the Law Division (the "Order"); and in reply to the opposition briefs filed by Respondents/Cross Appellants (i) Kyong-Namkoong i/p/a Kyong Hui Nam Koong (the "Nail Salon"); (ii) Real Estate Consultants LLC d/b/a Realty Executives ("Realty Executives"); (iii) My Sister's Gourmet Deli ("the "Deli"); and (iv) Roberto Arcucci Niroal LLC d/b/a Amore Ristorante (the "Restaurant") (collectively the "Respondents" or the "Cross Appellants").

This submission also addresses the truly unfortunate cross appeals filed by the Respondents.

A mere 26 months after the accident, the Law Division granted Plaintiffs' motion to amend the existing complaint to substitute the Respondents in place of John Doe parties that had been timely named in Plaintiffs' first complaint. Plaintiff had specified these John Defendants in the initial complaint as those tenants on the day of the accident who may have a contractual or common law obligation to remove snow from the sidewalk.

After filing the initial complaint, Plaintiffs set off on what proved to be a frustrating 10-month journey, thwarted by non-response and a misleading

response, in an effort to secure that which they had immediately sought through discovery: a list of tenants as of the date of the accident; and copies of their leases.

The accident occurred at a small strip mall with just a few storefronts. There is no valid reason why, in order to secure this small amount of information, it had to take Plaintiffs repeated on-going efforts over a ten-month period. This Court cannot ignore (i) the several months of non-response to interrogatories and document demands; (ii) the failure to comply with a third-party subpoena to a law firm that had represented the tenants in lease negotiations for production of a list of tenants, and copies of their leases; (iii) the necessity for Plaintiffs to have filed a motion to enforce the subpoena; and then finally (iv) the need even for a motion to hold the Respondents' law firm in contempt for failing to comply with the order enforcing the subpoena.

Even then, the information received from Respondents' law firm was not entirely accurate. Although *finally* providing a list of tenants on the date of the accident, the law firm provided just one lease for a tenant who had been in occupancy on the date of the restaurant – that being the Restaurant. Moreover, the list of tenants did not include the Nail Salon.

There is no doubt that, from the outset of the case, Plaintiffs set out on what should have been the simple task of obtaining a list of the tenants as of the

date of the accident; and their leases in order to assess if such claims could be responsibly asserted against the Respondents. Respondents have the temerity to argue that Plaintiffs could have "done more" to join them before the second anniversary of the accident. Respondents effectively contend that Plaintiffs' counsel should have driven to the mall after being retained after the accident and compiled a list of tenants ***then*** in possession. Then, Respondents argue that Plaintiffs -- without knowing if these tenants had actually been in possession on the date of the accident, or whether they had any contractual obligation to maintain the sidewalks on the premises – should have just opened fire on the tenants who just happened to be in possession several months later.

In effect, Respondents effectively contend that Plaintiffs should have ignored Rule 1:4-8. Did Plaintiffs have any actual basis to allege that these tenants were in possession on the date of the accident? Not really. Did Plaintiffs have any basis to allege that their leases imposed a maintenance duty on them? No.

Once the leases were *finally* produced -- revealing that Respondents had a contractual obligation to remove the snow from the spot where Mr. Collucci fell – Plaintiffs promptly moved to substitute the Respondents in lieu of John Doe defendants. That was merely 26 months after the accident.

PROCEDURAL HISTORY

Appellants rely on their Procedural History in their opening brief.

STATEMENT OF FACTS

Appellants rely on their Statement of Fact in their opening brief.

ARGUMENT

Introduction

SECTION A – THE APPEAL

POINT I

THE LEASE AGREEMENTS PLACED THE TENANT DEFENDANTS UNDER A DUTY TO CLEAR SNOW AND ICE FROM THE LOCATION WHERE MR. COLLUCCI WAS INJURED
[Raised at Pa594-1040; Decided at Pa1-2]

Nothing any of the Respondents have stated in their opposition briefs change this immutable fact: Article 3 of every subject lease placed the Respondents under an ambiguous duty to maintain sidewalks adjacent to the premises.

Article 3 of the lease is plain and unambiguous, places all of the Respondents under this contractual duty, and requires reversal.

Article 3 of the leases state:

> Care and Maintenance of Premises.
>
> Lessee acknowledges that the premises are in good

> order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received; normal wear and tear excepted. **Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations, and which shall be maintained by Lessor. Lessee shall also maintain in good condition such, portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.**

[*See, e.g.,* Pa991 (emphasis added)].

Plaintiffs respectfully contend that the location where Mr. Collucci was:

- Set off from the parking lot by concrete parking blocks;
- Marked off and separated from the parking lot area by large bright white lines, ***clearly delineating it as a sidewalk***;
- Foreseeably used by pedestrians parking on that side of the building as the safest and fastest way to access the premises;
- Partially covered, thus inviting customers to walk on it to access the premises; and
- Adjacent to Respondents' premises.

Ignoring all of the above, the Law Division examined a photograph of the spot where Mr. Collucci fell [Pa949] and determined, essentially, because it was

a black-top surface, it was part of the parking lot – thus, a common area under the lease.

In addition to ignoring all of the above, perhaps even more significantly, the Law Division likewise ignored *unrefuted* expert testimony explaining why this area, as depicted, would constitute a walkway under various safety codes. The Law Division rendered its decision without even acknowledging that relevant expert opinion was before it, let alone expert opinion which contradicted the conclusion to which the Law Division hastily jumped. Below, for the Court's convenience, is the photograph referenced in the Law Division's oral decision. [Pa949]. The Law Division concluded, based on its viewing of these photographs at Pa949: "the area where Mr. Collucci [] fell is neither a sidewalk nor a walkway. It is part of the parking lot blacktop on the side of the building, which falls under the definition of common areas." [3T 56:21-25].

The Law Division called this walkway area a "parking lot" simply because it was a black-top surface. Neither the Law Division nor the Respondents cited any provision of law, or any established safety code, holding that asphalt surfaces must always be considered parking areas. In fact, such a rule makes no sense and would not rationally exist. In its initial brief, Appellants cited relevant portions of the *unrefuted* opinion of its expert, setting forth why the subject area would be deemed a walkway inviting pedestrian use as per various safety codes.

The Law Division ignored this unrebutted opinion entirely, even though it contradicted its conclusory holding. [Appellants' Brief, pp.10-11][1].

The Law Division needed to examine more than one photograph, though, because other pictures in the record show that the handicap access walkway, next to the handicap parking spot near the spot where Mr. Collucci fell, is also abutting the parking lot and is likewise asphalt. [Pa787, photograph 28; Pa788, photograph 29]. As this Court can see, this walkway is similarly inviting the customer to park and walk directly toward the front of the premises, just as the parking spots on the side are laid out.

Plainly the Law Division's holding that any blacktop surface that abuts the parking lot is not a walkway, but part of the parking lot, is contradicted by other photographs of record. Would the Law Division have called the handicap walkway part of the parking lot? Of course not. It is no sensible to claim that any asphalt surface is, by definition, a "parking lot" area.

[1] It is not true that Plaintiffs' claim of the location of the accident has been "fluid," as charged by the Restaurant. Plaintiffs have never wavered from the spot where the accident happened. There have been rare occasions when Plaintiffs, in the haste of the moment, may have said that Mr. Collucci fell in the "parking lot." In contrast, Plaintiffs have properly indicated that Mr. Collucci fell on a walkway adjacent to the premises hundreds of times. Plaintiffs' very infrequent mistaken use of words is no more binding on this Court than what Plaintiffs submit is their hundreds of accurate descriptions. The Court can see the location and determine for itself.

A. The Opposition Brief of the Deli

Tellingly, in its opposition brief, the Deli never once responds or addresses Article 3 of its lease.

B. The Opposition Brief of the Restaurant

For its part, the Restaurant asks this Court to affirm the Law Division's holdings that it had neither a contractual nor common law duty to maintain this walkway adjacent to the premises, despite the lease agreement saying exactly the opposite. However, the Restaurant blurs the two issues into one in its briefing. At this point of the brief, Appellants will address the contractual issue only.

First, without any citation, the Restaurant asks this Court to affirm the Law Division's holding that "since it's a black top, it's a parking lot." [Restaurant Brief, pp.22-23]. As previously discussed, if the surface is set up to invite pedestrian use; if it is reasonably foreseeable that pedestrians will use that area; or if the area is a "sidewalk" within standard safety codes, then it is a walkway or sidewalk. [See Pa797].

Second, the Restaurant argues the red-herring that Plaintiffs seek to define adjacent "to mean common areas abutting, adjoining, or contiguous with the tenant's leased premises, located anywhere in the entirety of the shopping center." [Restaurant Brief, p.23]. In addition to demonstrating a continued

inability to grasp the meaning of "adjacent," the Restaurant is just putting words in Appellants' mouth.

What Article 3 of the leases plainly states is that the tenants have a duty to maintain the sidewalks adjacent to the *premises*. That is the simple contractual duty that Appellants ask this Court to enforce. Appellants do not ask this Court to hold that the tenants had any duty to maintain what may have been defined as "common areas." Appellants certainly do not ask this Court to hold that Respondents had a duty to maintain "anywhere in the entirety of the shopping center."

Of note, the leases did, in fact, define the parking lot as a "common area" that the landlord would maintain; however, the sidewalks and walkways adjacent to the premises *were not*. This is a small strip-mall property with five storefronts and a L-shaped walkway area adjacent to these premises. All Appellant ask this Court to is enforce the contractual obligation plainly specified in Article 3 of the leases: "**Lessee shall also maintain in good condition such, portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor."** [Pa991].

More to the point, the Restaurant implicitly concedes that Appellants are arguing the plain meaning of Article 3. At page 24 of its brief, the Restaurant

concedes the rule of law cited by Appellants, that a "court must enforce an agreement as written," [Restaurant's Brief, p.24]; however, it then argues that this rule is excepted when "doing so would lead to an absurd result." Id. (citing, Quinn v. Quinn, 225 N.J. 34, 45 (2016)). But the so-called "absurd result" here is the tack-on that the Restaurant makes to Appellants' position: that being the claim that Appellants are arguing for this duty of maintenance to extend to "common areas" that are "anywhere in the entirety of the shopping center." [Restaurant Brief, p.23].

Rather than be bound by these unambiguous terms, the Restaurant asks this Court to give credit to the way the landlord's deposition testimony sought to re-write these terms at her deposition.[2] As briefed in Appellants' initial brief, the landlord's testimony "interpreting" the lease language – in truth, directly contradicting the plain meaning of the leases – is not probative on the actual meaning of the lease.

New Jersey law holds that, when interpreting a contract, a court must conduct "an examination solely into that intent which is expressed or apparent in the writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. 134, 148 (App. Div. 1960), certif. den. 34 N.J. 134 (1961). "An actual intent which is not

[2] The Restaurant cites the irrelevant deposition testimony at pages 19 through 22 of its brief.

made known in the instrument will not be given effect." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 148.

Finally on this point, the Restaurant argues that Article 17 of the lease, concerning common area charges, essentially negates the obligation imposed on by Article 3. [Restaurant Brief, p.24]. But this is a plain misuse of Article 17.

As set forth in Appellants' initial brief, this provision, in fact, states that "[i]n the event the demised premises are located in a shopping center or in a commercial building in which there are common area, Lessee agrees to pay his *pro rata* share of maintenance, taxes and insurance for the common area." Thus, Article 17 merely provides for the right for the Landlord to impose "common area" charges but does not define or identify what the "common areas" are; what charges are being imposed for what services; or what any of the tenants' shares of those expenses are.

For these reasons, on its face, Article 17 provides absolutely no textual support for the Law Division's determination, or the Respondents' arguments, that the Respondents paid a "common area" fee for the removal of snow and ice from the walkways and parking lot. In order to so hold, the Law Division improperly accepted as evidence self-serving testimony about what the parties intended in Article 17. See Deerhurst Estates, 64 N.J.Super. at 149 ("The only excluded circumstances are statements by the parties themselves as to what they

intended the language to mean"). In addition, the term "premises" was not defined in the leases, but the Law Division determined that the term premises should be re-defined to mean not the premises itself, but merely the tenants' leasehold space.

In the end, the Law Division transformed a plain and unambiguous obligation to maintain sidewalks "*adjacent* to the *premises*" into an obligation merely to maintain the limited area of sidewalk *abutting* the *tenant's leasehold*.

That is just not what the lease says.

C. The Opposition Brief of Realty Executives

For its part, while joining in these same flawed positions advanced by the Restaurant, Realty Executives also asks this Court to hold that Plaintiffs lack standing to sue for its violation of Article 3 of the lease.

None of the Respondents argued this flawed position below. Only Realty Executives raises this issue on appeal – for the first time. All parties effectively conceded below that Plaintiffs and other customers of the mall were entitled to seek relief from any violation of Article 3 as intended beneficiaries of the obligation to remove snow and ice. The arguments they raised was that Article 3 did not impose any such duty on them. But no one claimed that Plaintiffs could not seek relief for violation of such an obligation.

The cases cited by Realty Executives concerning "privity" and lack of intended third-party beneficiary pertain to cases in which an injured person has sought the tortfeasor's insurance company. These cases have nothing to do with a case in which an injured party sues a defendant directly for the defendant's failure to abide by a safety requirement in a lease. Plainly New Jersey case law allows a direct claim based on such a contract provision, based on both contractual and common law. See, e.g, Kandrac v. Marrazzo's Market at Robinsville, 429 N.J. 79 (App. Div. 2012) (resolving a plaintiff's claim against a tenant by reference to the terms of the lease, and specifically whether the tenant had assumed any duty for snow and ice maintenance).

Indeed, as Kandrac and Nielsen v. Walmart Store #2, 2171, 429 N.J.Super. 251, 260 (App. Div. 2013) make clear, the existence of a contractual duty is a significant factor in weighing the scope of the overall duty owned by the tenant to a customer.

D. The Opposition Brief of The Nail Salon

Leading with its chin, the Nail Salon argues, incredibly enough, that the opinion of Plaintiffs' expert was rebutted. This claim does not merit a response. That Plaintiffs' expert acknowledged that he was not offering a legal opinion, or that the standard of care which he advocated applied even if the township did not have an ordinance defining "sidewalk," are absolutely insignificant.

Notably, the Nail Salon never cites any of the relevant lease provisions, including Article 3, and includes no discussion of them anywhere in its submission.

E. Summary of the Law

In the end, based on "irrelevant" and inadmissible statements of the Tenant Defendants' subjective intent, the Law Division re-wrote Article 17 to include the following provisions: (i) to define the walkway as a "common area"; (ii) to provide that any payments which may have been pursuant to Article 17 were for the removal of snow and ice from the walkways and parking lot; and (iii) to impose upon the Landlord an *exclusive* obligation to maintain the walkways. Once again, however, "[i]t has been decided many times and in many cases that the court will not make a different or a better contract than the parties themselves have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951). The court simply cannot rewrite the leases for the Respondents' benefit.

New Jersey law makes clear that an agreement is interpreted in accordance with the intention of the parties -- but that intention must be established within and by the actual language of the agreement. "The polestar of construction is the intention of the parties to the contract ***as revealed by the language used, taken***

as an entirety..." Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 301 (1953) (emphasis added). Moreover,

> The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. ***Such evidence is adducible only for the purpose of interpreting the writing — not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said.*** So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

Conway v. 287 Corporate Center Associates, 187 N.J. at 269 (quoting Schwimmer, 12 N.J. at 302) (emphasis added).

Therefore, New Jersey law holds that, when interpreting a contract, a court must conduct "an examination solely into that intent which is expressed or apparent in the writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. 134, 148 (App. Div. 1960), certif. den. 34 N.J. 134 (1961). "An actual intent which is not made known in the instrument will not be given effect." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 148.

In the end, "the law will not enforce a different contract than the parties have seen fit to express in their writing." Deerhurst Estates v. Meadow Homes, 64 N.J.Super. at 148. "It has been decided many times and in many cases that the court will not make a different or a better contract than the parties themselves

have seen fit to enter into." Washington Const. Co. v. Spinella, 8 N.J. 212, 217 (1951).

POINT II

THE LAW DIVISION ERRED BY HOLDING THERE WAS NO COMMON LAW DUTY TO MAINTAIN [Raised At Pa549-1040; Decided at Pa1-2]

The Law Division also dismissed all of Plaintiffs' common law claims by holding that, generally speaking, a commercial tenant in a retail mall does not have a duty to maintain parking areas. (See Transcript, citing Kandrac v. Marrazzo's Market at Robinsville, 429 N.J. 79 (App. Div. 2012)). Nonetheless, a more careful inspection of Kandrac demonstrates that this principle was announced in a case in which the lease agreement – in contrast to the leases in this case – "squarely assigns the duty to maintain the area where plaintiff was injured to the landlord." Kandrac, 429 N.J.Super. at 89.

Tellingly, the Kandrac court critically observed "the assignment of responsibilities in the lease, within the context of a multi-tenant shopping center, also impacts the scope of tenant's ability to address conditions in the parking lot." Id. Thus, in Kandrac, the fact that the lease did, in fact, place an exclusive duty on the landlord to maintain the parking lot, where the plaintiff fell, was essential to the outcome. Kandrac, 429 N.J.Super. at 482.

Critically, this language or any form of similar language, does not appear in the leases of the Respondents. In fact, as the earlier review of Article 3 demonstrates, the language of these leases did not include language placing the Landlord under such an "exclusive" duty at all; and, in fact, included language which ***three times*** placed the Respondents under a duty to maintain the property.

In their briefs, Respondents essentially ignore Plaintiffs' discussion of Kandrac and Nielsen v. Walmart Store #2, 2171, 429 N.J.Super. 251, 260 (App. Div. 2013). Plaintiffs respectfully refer the Court to that discussion as if set forth at length here.

POINT III

THE LAW DIVISION SHOULD HAVE GRANTED PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS [Raised at Pa548-1040; Decided at Pa1-2]

A party is entitled to summary judgment upon a showing that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c). An issue of fact is genuine if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Id. A nonmoving party must oppose a summary judgment motion with more than a mere "scintilla of evidence." *Brill v. Guardian Life*

Ins. Co. of America, 142 *N.J.* 520, 532 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 252 (1986)).

Plaintiffs contend that there are no material disputes of facts over the following dispositive circumstances:

- The leases executed by the Landlord and each of the Tenant Defendants were similar -- and identical with respect to the issues presented by the Motion. At Article 3 of the leases, each of the Tenant Defendants assumed an unambiguous and broad duty "at [their] own expense and at all times, [to] maintain the premises in and safe condition."
- Article 3 also imposed on the Tenant Defendants the responsibility "for all repairs required, excepting the roof, exterior walls and structural foundations." Therefore, according to the terms of the leases, the Landlord Defendant had exclusive responsibility to maintain and repair "the roof, exterior walls and structural foundations." But these were the only matters of maintenance or repair over which the Landlord Defendant maintained exclusive duty.
- Article 3 explicitly placed each of the Tenant Defendants under an explicit duty to "maintain in good repair such portions adjacent to the premises such as sidewalks, driveways, lawns, shrubbery, which would otherwise be required to be maintained by [Landlord]."

- Article 17 does not establish that the walkway where Mr. Collucci was injured was a "common area" or that "common area" fees were paid for the purposes of maintaining that area.
- The term "common area" was not defined in the lease.
- That the Tenant Defendants, by virtue of their leases, owed a duty to Mr. Collucci.

SECTION B – THE CROSS APPEAL

POINT I

FICTITIOUS PARTY PLEADING AND RELATION BACK ALLOWS FOR PLAINTIFFS' CLAIMS

Two of the Respondents, the Restaurant and the Realty Executives, challenge entry of the Law Division's order permitting Plaintiffs to amend their pleadings and join them as defendants by way of the Second Amended Complaint. The Nail Salon, which managed to hide its presence at the premises even longer, challenges entry of the Law Division's order permitting Plaintiffs to amend their pleadings to join the Nail Salon as a defendant by way of the Third Amended Complaint[3]. To its credit, the Deli accepts the proper ruling below that it was joined correctly by way of the "John Doe" pleading mechanism.

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[3] The Nail Salon was not joined by way of the Second Amended Complaint, joining the other Respondents, because they were not included on the list of tenants, as of the date of the accident, provided by Respondents' law firm. Plaintiffs discovered their presence later, requiring a motion to file a Third Amended Complaint.

One statement made by the Nail Salon can be summarily addressed and dismissed. The Nail Salon claims that, after the Law Division denied their motion challenging its joinder in discovery, information was provided in discovery that showed that Plaintiffs knew more about their presence and did not convey this information when opposing the Nail Salon's motion.

Apart from being just tossed into its appellate brief, this vague assertion was never raised below by way of a motion for reconsideration to the Law Division. Therefore, there is nothing before this Court to review.

A. Respondents Do Not Address The Lower Court's Determinations Of the Equities Under The Applicable Abuse of Discretion Standard

As an initial matter, the Cross Appellants do not address this issue before this Court on the proper abuse of discretion standard that applies on appellate review of a lower court's exercise of discretion under Rule 4:26-4. Rather, they seek to invoke *de novo* review because their motions below sought "summary judgment" based on the two-year statute of limitations.

Nonetheless, the basis of these requests for "summary judgment" was that the Plaintiffs asserted did not "do enough" to set forth the causes of action against them, as John Doe defendants under Rule 4:26-4, and Plaintiffs "should have" joined them before the lapse of the two-year anniversary of the accident.

Accordingly, they are challenging the Law Division's orders permitting amendment of the pleadings under Rule 4:26-4. Although this Court's review of the legal issue of whether a statute of limitations applies is *de novo*, this Court's application of "that law" to a ruling under Rule 4:26-4 accords substantial deference to the lower court's evaluation of the equities. Thus, when resolution of the "legal issue" is governed by the lower court's evaluation of equitable and factual concerns, an abuse of discretion standard applies to the lower court's determinations of the pertinent facts and equities. Baez v. Paulo, 453 N.J.Super.

422, 437 (App. Div. 2018); Ahn v. Kim, 281 N.J.Super. 511, 531 (App. Div, 1995) (reviewing lower court's order under Rule 4:26-4 for an abuse of discretion), aff'd in part, rev.'d in part on other grounds, 145 N.J. 423 (1996).

In other words, this Court reviews *de novo* the lower court's application of the law to the equities, but it defers to the lower court's evaluation of the equities. This Court should thus accept the Law Division's finding that the equities weighed in favor of Plaintiffs; that Plaintiffs had vigorously pursued this information for an extended period without ever surrendering their intent to discover this information; and that Plaintiffs had been misled by information that had been provided in discovery. [1T 47:24-48:22]. The Law Division weighed what the Cross Appellants had to say and, giving these arguments more credit than they were worth, determined that Plaintiffs had made "not perfect" but certainly sufficient efforts to obtain the leases, and analyze whether they had a claim under those leases, rather than making unfounded and reckless allegations. The Law Division stated: "But at the end of the day I think that the plaintiff was misled by the landlord" and "I cannot fault the plaintiff for not including these defendants if he didn't really have a theory of liability against them." Further, the Law Division observed "[t]he landlord was not forthcoming with the leases" and that this required motion practice and repeated efforts to get the leases."

In a case concerning review of a lower court's order under Rule 4:26-4, this Court wrote:

> The question as to whether a statute of limitations applies in a given case is ordinarily a legal matter and "traditionally within the province of the court." Lopez v. Swyer, 62 N.J. 267, 274 (1973). To the extent we have to reach the estoppel issue depending on the outcome of the first issue, we accord substantial deference to the trial court's equitable authority.

Here, the Law Division determined that the equities favored Plaintiffs before evaluating the legal issue of the Statute of Limitations to amendment made under Rule 4:26-4. As the Cross Appellants fail to address the issue under the appropriate standard, this Court should affirm without consideration of Respondents' position.

Appellants note that Cross Appellants cannot raise arguments under the applicable standard of review by way of their reply briefs. *State v. Smith*, 55 *N.J.* 476, 488 (1970) (where party used reply brief to "enlarge[] on his main argument, the Supreme Court observed "[s]uch use of a reply brief is improper"); *A.D. v. Morris County Board of Social Services*, 353 *N.J.Super.* 26, 30-31 (App.Div. 2002) ("It is improper to raise an argument for the first time in a reply brief. Typically, such an argument will not be recognized"). Accordingly, the Cross Appellants are barred from arguing that the Law Division abused its discretion in determining that the equities favored Plaintiffs.

B. The Law Division Properly Exercised Its Equitable Discretion

Review of the Law Division's decision demonstrates the court's serious weighing of the equities and the contentions, made in hindsight, that the Plaintiffs might have done more to uncover the identity of the tenants and the potential basis for claims against them before the second-year anniversary. Frankly, Plaintiffs contend that, even in making these observations, the lower court was giving these bare assertions by the Respondents more value than they were actually worth.

The record reflects that Plaintiffs made numerous and repeated efforts, over the course of ***ten months***, to secure what should have been readily provided to Plaintiffs long before the second anniversary of the accident: a list of tenants on the date of the incident; and a copy of their leases.

By way of background, Plaintiffs' first Complaint, filed on July 3, 2018, named as defendant the Landlord of the strip mall, Cosima Cassese and Cassese's Enterprises, Inc. (the "Landlord"). [PA514; Pa118-133]. On that same day, Plaintiffs' counsel served and docketed a letter asking the Landlord to provide Plaintiffs with a list of all tenants at the strip mall as of March 16, 2017, along with copies of their leases. [Pa514; 206-208]. When the Landlord did not respond to that letter, Plaintiffs formalized their demand through written interrogatories and document demands. [Pa514; 209-213].

As the Court can see by a review of the docket, the Landlord repeatedly thumbed its nose at these demands for the leases and a list of tenants -- requiring an enormous amount of effort on the part of the Plaintiffs, and a number of motions, in order to obtain this information.

In response to a written interrogatory asking the identity of any other potentially liable party, the Landlord identified a single party: PL Landscaping (the "Landscaper"), which was identified as the snow and ice removal contractor. [Pa514-515; 214-226] On October 15, 2018, Plaintiffs moved to amend their complaint to add the Landscaper. [Pa214-226].

It turns out, however, that this answer provided in discovery by the Landlord was materially incorrect. Indeed, the Law Division concluded that the Landlord, whether intentionally or not, misled Plaintiffs.

In any event, after ***ten months*** of trying to get a list of tenants as of the date of the incident, and copies of their leases -- and only after having obtained an order to compel production -- Plaintiffs first received the list of tenants as of the date of accident. Plaintiffs also received copies of leases, but only one that was in effect on the date of the accident. [Pa515-516; Pa227-232; Pa195-196; 187-188; 189-190; 191-194].

Plaintiffs promptly reviewed the lease that was produced and, upon that review, noticed a relevant term concerning maintenance of the walkways.

[Pa233-278]. Under the lease, the Landlord had a duty to maintain common areas and to provide snow and ice removal – but the lease also provided that the tenant was obligated to perform maintenance of the walkways adjacent to the premises.

This meant that the Owner's answer to the interrogatory seeking information about other potentially liable parties was incorrect, as per the terms of the leases that the Landlord had concealed for a period of ten months. Operating under the assumption that all leases contained this term, Plaintiffs moved shortly thereafter, on May 21, 2019, to add the tenants which the Landlord had just identified as in occupancy at the strip mall on the date of the accident.[4]

This means that a mere twenty-six months passed between the time of the accident and the motion to join the tenants as the "John Doe" lessees who had an obligation to maintain the area where Mr. Collucci fell. These Cross Appellants now try to claim the benefit of the alleged twenty-four months statute of limitations.

Plaintiffs named "John Doe" lessors because, on the date they filed their original complaint, they did not know the identity of the strip mall tenants ***on***

[4] Of the leases produced by the law office, and Respondents, only Amore Restaurant's (NIROAL, LLC), lease was in effect on March 16, 2017.

the date of the accident; or whether any tenant was potentially liable for the accident. Plaintiffs further had no knowledge of the content of any leases between the Landlord and the Respondents.

Accordingly, rather than file a complaint that violated Rule 1:4-8, Plaintiffs responsibly proceeded to seek discovery of the lease terms before adding any tenants to the complaint.

Plaintiffs made repeated efforts over the course of the next ten (10!) months to obtain this information from the landlord and a third-party source, but ran into repeated obfuscation. All of this is set forth at pages four to five of the Procedural History, as well as in Certifications of record. It was not until April 30, 2019 – about twenty-five months after the accident and after 10 months of seeking the information – that Plaintiffs were first provided the names and other information concerning the Cross Appellants. Promptly thereafter, Plaintiffs moved to join Respondents to the Complaint by way of a motion filed May 21, 2019.

In seeking relief below, and here, Respondents argued that they are "long term" tenants and their identities could have been discovered, but for a lack of "due diligence." This argument is specious, of course, because it ignores the valid and repeated efforts used by Plaintiffs to try to obtain the identity of the tenants on the date of the accident. In fact, eighteen months into the case, the

docket to that point reveals this case had all been about Plaintiffs trying to obtain the identity of the tenants.

No reasonable person would have gone to the mall in the months after the accident to create such a list of tenants. Even if the Plaintiffs did so, they would have had no way of being sure whether any tenant they identified was a tenant on the day of the accident – or a new tenant since the date of the accident.[5] The same holds true for Plaintiffs' attorneys. Even if they drove to the mall to identify tenants, they would have had no way of knowing whether any tenant they observed that day was actually a tenant on the day of the accident. That the Respondents may have been tenants for many years does not matter. No person arriving a few weeks or months after the accident, layperson or lawyer, would have had any reason to know how long any particular tenant had been operating at the strip mall.

Instead, Plaintiffs did what responsible litigants do. They sued the Landlord and then served discovery seeking the identity of the potential "John Doe" lessor defendants. It took numerous demands, repeated motion practice, and enormous amount of perseverance over ten months, before Plaintiffs' simple

[5] The argument that Plaintiffs would have known all tenants in the mall on the date of the accident, because he had gone to the restaurant is fatuous. People patronize at a store in a strip mall all the time without ever taking note of what other stores are present in the mall.

demand for a list of tenants, and copies of the respective leases, received a response.

C. When plaintiffs amended to name Respondents, the fictitious pleading requirement under NJ R. 4:26-4 was satisfied

Rule 4:26-4 allows for the "fictitious name practice" to be utilized by allowing a plaintiff to name fictitious parties as "John Doe" defendants, when the identity of a potential defendant is unknown. This pleading device allows the plaintiff to take discovery from the known defendants in an effort to determine whether additional defendants should be joined to the lawsuit. The rule aids plaintiffs, who may not have been aware of the names of responsible parties, by tolling the running of the statute or by permitting them to institute suit prior to the running of the Statute. The purpose of this rule is to allow a plaintiff faced with a time limitation to institute his or her action, and thereafter, upon learning the true name of his "John Doe" defendant, amend his or her Complaint to specifically name that individual or entity even after the running of the statute of limitations. Farrell v. Votator Div. of Chematron Corp., 62 N.J. 111, 119-20 (1973).

The rule specifically permits the late amendment to relate back to the filing of the original timely-filed complaint. Id., supra, 62 N.J. at 120-123; Viviano v. CBS, Inc., 101 N.J. 538, 546-548 (1986). Accordingly, R. 4:26-4, has been liberally interpreted: "such situations, in which these complexities

make the identity of the culpable party uncertain, that resort to the fictitious-name procedure of R. 4:26-4 is both appropriate and necessary to assure the survival of a meritorious cause of action." Hernandez v. St. James Hosp., 214 N.J. Super. 538, 544 (App. Div. 1986).

Our courts have held that where the plaintiff proceeds with diligence in discovering the identity of the fictitious defendant, periods of months were not unreasonable delays to amend the complaint after the expiration of the statute of limitations. See Jarusewicz v. Johns-Manville Products Corp., 188 N.J. Super. 638, 648 (Law Div.1983); Hernandez v. St. James Hosp., 214 N.J. Super. 538 (App. Div. 1986); and, Fede v. Clara Maass Hosp., 221 N.J. Super. 329 (Law Div. 1987).

Here, Plaintiffs did not know with sufficient proof who the tenants were on the date of the accident, other than the Restaurant; and did not have any of the leases and could not ascertain what duty they may have undertaken to maintain the walkway in their leases.

D. When plaintiff amended to name Cross Appellants, the Complaint related back to the original Complaint pursuant to Rule. 4:9-3

The relation-back doctrine, "R. 4:9-3 permits relation back of a pleading when a plaintiff is unable to ascertain the identity of a proper party or makes a mistake concerning his identity. Fede, supra, 221 N.J. Super. at 335 (citing

Carrino v. Novotny, 78 N.J. 355, 367 (1979); Farrell, supra; Aruta v. Keller, 134 N.J. Super. 522 (App.Div.1975); Hernandez, supra; Lombardi v. Simon, 266 N.J. Super. 708 (Law Div. 1993)). The New Jersey Supreme Court in Viviano, supra, set forth a three-part test for when an amendment for a claim against a new defendant should be permitted to relate back in time to the filing of the original complaint:

> (1) the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence alleged or sought to be alleged in the original complaint;
>
> (2) the new defendant had sufficient notice of the institution of the action not to be prejudiced in maintaining his or her defense; and
>
> (3) the new defendant knew or should have known that, but for the misidentification of the proper party, the action would have been brought against him or her.

Id. at 553.

Plaintiffs satisfied the requirements of R. 4:9-3, which then permits the adding of the Cross Appellants as defendants, which is amended pleading is related back to the filing of the original Complaint.

First, the claim asserted against Respondents in the Second Amended Complaint arose out of the conduct, transaction, or occurrence alleged or sought to be alleged in the original Complaint. Specifically, it is undisputed that

Plaintiffs' original Complaint contained allegations concerning the conduct of lessees who may be liable for Plaintiffs' injuries. It was just that the Cross Appellants were not identified by name, just as "John Doe" defendants.

Second, the Cross Appellants had sufficient notice of this action and were not prejudiced in maintaining their defenses. The motion to join the Cross Appellants was filed just twenty-six months after the accident – or just two months after, as they assert, the statute of limitations lapsed. Discovery up to that date had been limited to written exchanges and document productions, which were all served on the Cross Appellants after their addition to the lawsuit. Even as of the date they were joined, no depositions had been taken, given the time and effort which, by necessity, needed to be expended on efforts to obtain discovery and motions to compel.

E. The Restaurant's Claim That Plaintiffs Certainly Knew They Were a Tenant

The Restaurant claims to stand on different footing because Plaintiffs plainly knew were tenants on the date of the accident, because that was the business the Plaintiffs were visiting at the time of the accident. That is true enough. Even if Plaintiffs did not know about the contractual terms until after the leases were produced, the Restaurant claims that Plaintiffs could have sued them under a violation of the common law duty.

That is not really an accurate statement of the law. New Jersey does not impose a general common law duty on a tenant to remove snow and ice from premises not abutting their storefront. Rather, New Jersey law allows for the imposition of a common law duty, under such circumstances, upon consideration of various factors which involve, among other things, whether the tenant has assumed such a duty under a lease with the landlord. . See, e.g, Kandrac v. Marrazzo's Market at Robinsville, 429 N.J. 79 (App. Div. 2012) (resolving a plaintiff's claim against a tenant by reference to the terms of the lease, and specifically whether the tenant had assumed any duty for snow and ice maintenance). Indeed, as Kandrac and Nielsen v. Walmart Store #2, 2171, 429 N.J.Super. 251, 260 (App. Div. 2013) make clear, the existence of a contractual duty is a significant factor in weighing the scope of the overall duty owned by the tenant to a customer.

It bears noting that, alternatively, Plaintiffs argued below their causes of action against the Cross Appellants should not have been deemed to have accrued until they had access to the leases. If that happened after the two-year anniversary of the accident, it was only because the Landlord and Respondents' law firm failed to produce the leases after many demands and delays. They caused the issue now before this Court.

N.J.S.A. 2A:14-2 embodies the Statute of Limitations applicable for actions for injuries to a person by a wrongful act. See also Caravaggio v. D'Agostini, 166 N.J. 237, 244 (2001). The statute outlines that a claimant must commence an action within two years "after the cause of any such action shall have accrued." See N.J.S.A. 2A:14-2. New Jersey courts have held that a claim does not "accrue" within the meaning of the statute until the plaintiff knows or reasonably should know that his or her injury was due to negligence of an identifiable person or entity. Lopez v. Swyer, 62 N.J. 267, 272 (1973); Vispisiano v. Ashland Chemical Co., 107 N.J. 416, 426-27 (1987); see also Martinez v. Cooper Hosp., 163 N.J. 45, 52 (2000) (quoting Baird v. American Medical Optics, 155 N.J. 54, 66 (1998)).

Quite simply, for the Statute of Limitations to run, the injured party need not know the state of the law positing a right of recovery upon the facts. See Baird, 155 N.J. at 68. Rather, the Statute of Limitations runs when the injured party possesses actual or constructive knowledge of that state of facts which may equate in law with a cause of action, and the basis of such a cause of action is constituted solely by the material facts of the case. Id., see Burd v. N.J. Tel Co., 76 N.J. 284, 291-92 (1978).

In fashioning New Jersey's "discovery" principles, the New Jersey Supreme Court has recognized that steadfast, mechanical applications of statutes

of limitations can inflict obvious and unnecessary harm upon individual plaintiffs without advancing any Legislative purpose. White v. Violent Crimes Compensation Bd., 76 N.J. 368, 378-379 (1978). Thus, the Supreme Court has recognized that it would be derelict to strictly and uncritically apply a statutory period of limitations without conscientiously considering the circumstances of the individual case at issue and assessing the Legislature's objective in prescribing the time limitation as it relates to the particular claim sub judice. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 338 (1978).

On numerous occasions, the Supreme Court has found that the particular circumstances of the case "dictate not the harsh approach of literally applying the statute of limitations but the application of the more equitable and countervailing considerations of individual justice." Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 109 (1965). See Kaczmarek, supra, 77 N.J. at 338; Fox v. Passaic Gen'l Hosp., 71 N.J. 122, 125-126 (1976); Lopez, supra, 62 N.J. at 273-274 (1973). Indeed, a just accommodation of individual justice and public policy requires that in each case the equitable claims of the opposing parties must be identified, evaluated and weighed. Lopez, supra, at 274. Whenever dismissal would not further the Legislature's objective in prescribing the limitation in light of the equities involved, the plaintiff should be given an

opportunity to assert his or her claim. Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 193 (1980); Kaczmarek, supra, 77 N.J. at 338.

Accordingly, the "discovery rule" is a doctrine developed by the New Jersey courts "to deal with the harsh results that would ensue where causes of action are deemed to accrue at the moment an alleged wrongful act is committed." Lawrence v. Bauer Publishing & Printing Ltd., 78 N.J. 371 (1979). It is essentially a principle of equity whose purpose is to mitigate the unjust results that would flow from strict adherence to statutes of limitations such as N.J.S.A. 2A:14-1. O'Keefe v. Snyder, 83 N.J. 478, 491 (1980); Lopez, supra, 62 N.J. at 273-274. Without the discovery rule, "an injured person, unaware that he has a cause of action, [will be] denied his day in court solely because of his ignorance, if he is otherwise blameless." Lopez, supra 62 N.J. at 274. The discovery doctrine postpones the accrual of a cause of action so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity. Vispisiano, 107 N.J. at 426-27.

"'Critical to the running of the statute is the injured party's awareness of the injury and fault of another.'" Martinez, 163 N.J. 45 at 52 (quoting Baird, 155 N.J. at 66). "The question is whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due

to someone else's fault." Troum v. Newark Beth Israel Med. Ctr., 338 N.J. Super. 1, 16 (App. Div. 2001). The standard is based on an objective one: whether the plaintiff "knew or should have known" of sufficient facts to start the Statute of Limitations to run. Id., see also Martinez, 163 N.J. at 52, Mancuso v. Necklaces ex rel. Necklaces, 163 N.J. 26, 29 (2000), and Gallagher v. Burdette Tomlin Mem. Hosp., 163 N.J. 38, 43 (2000).

For the discovery rule to apply, a plaintiff must have been reasonably unaware that he or she was injured or, although aware of the injury, that the injury was attributable to the fault of another. Caravaggio, 166 N.J. at 245-46. As the New Jersey Supreme Court has articulated, the cause of action does not accrue "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973).

The genesis of the discovery rule in New Jersey is found in Fernandi which involved a foreign object: a wing nut that was inadvertently left inside the plaintiff's body during surgery in April 1955. The plaintiff continued to see the surgeon through 1958 complaining intermittently of back pains. In August of 1958, an x-ray of the plaintiff disclosed the presence of the errant wing nut. Plaintiff filed suit in August 1959. The trial court granted summary judgment to the defendant because more than two years had elapsed between the date of

the operation and the institution of the lawsuit. Reversing the lower court's decision, the Fernandi Court emphasized that Statutes of Limitations are designed to stimulate the prompt assertion of claim; however, the New Jersey Supreme Court held that these considerations do not come into play in a case involving a latently-discovered foreign object. Fernandi, 35 N.J. at 439-40.

The discovery rule was refined by the Lopez Court, which held that the determination as to the expiration of the Statute of Limitations is a question of law for the trial court. "[W]henever a plaintiff claims a right to relief from the bar of the statute of limitations by virtue of the so-called 'discovery' rule, the question as to whether such relief is properly available shall be deemed to be an issue for determination by the court rather than by the jury. The discovery rule focuses on the injured party's knowledge, specifically injury and fault. Grunwald v. Bronkesh, 131 N.J. 483, 492-493 (1993). The New Jersey Supreme Court has recognized two types of injured parties: (1) plaintiffs unaware of the alleged injury until after the statute of limitation has expired or *(2) plaintiffs aware of their injury but unaware that said injury is attributable to another.* Id. at 493. In this latter category, New Jersey courts have observed that a party who is aware that his injury was caused by some third persons, but is not aware of the involvement or identity of other third persons, may utilize discovery principles to join that defendant after the asserted limitations period. See

Mancuso v. Neckles, 163 N.J. 26, 35 (2000) (cause of action accrued against different defendants at different times, depending on the quality of information known as to each defendant).

Here, Plaintiffs would not have known of their potential claim against the Cross Appellants until the Cross Appellants were identified to them as tenants in place as the date of the accident, and until Plaintiffs received a copy of leases from the strip mall. As stated above, Plaintiffs moved promptly to join Cross Appellants after their "discovery."

CONCLUSION

For the foregoing reasons, this should vacate the Order; and remand to the Law Division to enter partial summary judgment in favor of Plaintiffs; to deny the Tenant Defendants' motion for summary judgment; and to set the matter down for trial on liability and damages.

Respectfully submitted,

LYNCH LAW FIRM, P.C.
Attorneys for Plaintiffs/Appellants

By:/s/ *Joseph M. Cerra*
Joseph M. Cerra

Dated: May 6, 2024

VITO COLLUCCI AND LUCILLE COLLUCCI, as husband and wife and Individually, *Plaintiffs-Appellants-Cross-Respondents,* vs. COSIMA CASSESE, CASSESE'S ENTERPRISE, INC., *Defendants-Respondents,* REALTY EXECUTIVES and NIROAL, LLC, *Defendants-Respondents-Cross-Appellants,* *(For Continuation of Caption See Inside Cover)*	APPELLATE DIVISION DOCKET NO.:A-003655-22 ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-2221-18 Sat Below: Hon. DARREN J. DEL SARDO, J.S.C. HON. VICKI A. CITRINO, J.S.C. HON. FRANK COVELLO, J.S.C.

REPLY BRIEF FOR DEFENDANT-RESPONDENT-CROSS APPELLANT-KYONG NAMKOONG I/P/A KYONG HUI NAM KOONG

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Date Submitted: May 19, 2024

TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG, JEONG HE PAK,

Defendants-Respondents,

KYONG HUI NAM KOONG,

Defendant-Respondent-Cross Appellant,

-and-

JOHN DOES 1-10 and/or ABC CORPORATIONS 1-10, in their corporate capacity and as to the principles and owners individually (Names being fictitious and unknown but described as corporate or individual owner(s), manager(s), lessor(s), supervisor(s), who had control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed to the March 16, 2017 loss),

Defendants-Respondents.

TABLE OF CONTENTS

PAGE

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING CROSS-APPEALED

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF TRANSCRIPTS

TRANSCRIPTS **Page**

PRELIMINARY STATEMENT

This reply brief is submitted on behalf of defendant-respondent-cross appellant, Kyong Namkoong i/p/a Kyong Hui Nam Koong ("Namkoong"), in reply to plaintiffs' response to Namkoong's cross appeal seeking to reverse the Law Division's denial of Namkoong's motion to dismiss in lieu of answer and motion for summary judgment, both, on statute of limitations grounds and in the interests of justice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations, and, upon reversal, granting Namkoong summary judgment and dismissing the third amended complaint with prejudice, for plaintiffs' failure to file the action against Namkoong within the applicable statute of limitations.

PROCEDURAL HISTORY

Defendant, Namkoong, will rely on the procedural history of this matter as set forth in its initial brief as though fully set forth herein.

STATEMENT OF FACTS

Defendant, Namkoong, will rely on the statement of facts of this matter as set forth in its initial brief as though fully set forth herein.

CROSS-APPEAL REPLY LEGAL ARGUMENT

Namkoong hereby and hereinafter adopts and incorporates herein by reference and in their entirety the representation of facts and arguments of law

contained in the reply brief of defendant-respondent-cross-appellant, Roberto Arcucci Niroal LLC d/b/a Amore Ristorante (Improperly Pled As Niroal, LLC) (hereinafter referred to as "Amore") and further, hereby and hereinafter adopts and incorporates herein by reference and in their entirety the representation of facts and arguments of law contained in the reply brief of defendant-respondent-cross-appellant, Real Estate Consultants, LLC d/b/a Realty Executives.

ARGUMENT

POINT I

THE LAW DIVISION SHOULD HAVE GRANTED NAMKOONG MOTION TO DISMISS IN LIEU OF ANSWER AND MOTION FOR SUMMARY JUDGMENT, BOTH, ON STATUTE OF LIMITATIONS GROUNDS

[Raised at Pa530-542; Decided at Pa11-12 and Raised at Pa590-1172; Decided at Pa1-2]

Plaintiffs continue to refuse to disclose to this Court, and previously to the Trial Court, that their private investigator, Enrique Calderin, went to the premises in issue on April 7, 2017, **twenty two (22) days after the plaintiff's allegd slip and fall accident** on March 16, 2017 (emphasis added). Plaintiffs continue to refuse to disclose to this Court that on April 7, 2017 Mr. Calderin interviewed an owner of defendant, Robert Arcucci Niroal LLC d/b/a Amore Ristorante (improperly pled as Niroal, LLC) (hereinafter "Amore"), Mr. Calderin obtained photographs of the premises and Google Earth imagery of the premises. Mr.

Calderin obtained copies of police reports generated by the Woodland Park, NJ Police Department, regarding accidents at the premises prior to March 16, 2017. Mr. Calderin issued a report, dated July 1, 2017, concerning his investigation of the alleged accident and discovery he had obtained as part of that investigation.

Plaintiffs continue to refuse to disclose to this Court, and previously to the Trial Court, that on January 29, 2019 Mr. Calderin continued his investigation, on plaintiffs' behalf, to identify the party or parties allegedly responsible for causing Mr. Collucci's alleged injuries and Mr. Calderin interviewed defendant, PL Landscaping's owner, Pablo Lopez, and obtained a written statement from him.

There is no indication that plaintiffs made any effort and/or enaged in any due diligence to use Mr. Calderin's investigation information, including his two (2) reports, to identify Namkoong and to commence a timely action against Namkoong.

At oral argument before the Hon. Frank Covello, J.S.C., on January 24, 2020 and again on February 14, 2020 in opposition to defendants/tenants', including Namkoong's, motion to dismiss based upon the expiration of the statute of limitations, plaintiffs' counsel made the following representations:

"We never voluntarily slept on our rights". 1T, P. 11, line 9.

"We certainly could not knock on people's doors". 1T, P. 11, line 15-16.

"We're attorneys we have to be ethical and upfront". 1T, P. 11, line 17-18.

"We just have to demonstrate that we are engaged in dilgence sufficient to demontsrate that we are actively pursuing the information". 1T, P. 12, line 19-22.

"It's what did you do, not what could you have done better". 1T P. 12, line 24-25.

"The question then is did we do diligence sufficent so that the Court would make a determination we didn't voluntarily sleep on our rights". 1T, P. 13, line 17-21.

"But what we did do is what this Court has to look at". 1T, P. 15, line 2-3.

"All we have to do is prove to this Court that we enagaged in diligent- -due diligence sufficient to- -so that the Court can make a finding that there was no voluntary or involuntary decision to sit on rights". 1T, P, 29, line 15-19

"I submit to you it's impossible on this record to find anything other than diligence and proper diligence". 1T, P. 34, line 24-25.

It is respectfully submitted that had plaintiffs disclosed to Judge Covello that Mr. Calderin had undertaken a significant investigation of the accident and issued two (2) reports of his findings to plaintiffs, **all before the statute of limitations expired**, then Judge Covello would have, at minimum, had a comprehensive basis to determine that plaintiffs' counsel's representations at oral argument were inaccurate and did not provide the necessary credibility and evidentiary foundation upon which the Court could find that, prior to the expiration of the statute of

limitations, plaintiffs acted with due diligence in determining whether Namkoong was a tenant of the premises and should have been named as a defendant and served with a complaint in the action.

Now, armed with the knowledge of the existence of Mr. Calderin's investigation, including his investigation reports, this Court can re-visit plaintiffs' counsel's representations to Judge Covello as follows:

"We never voluntarily slept on our rights". 1T, P. 11, line 9. There is no indication that plaintiffs made any effort or enaged in due diligence using Mr. Calderin's investigation information to identify Namkoong and to commence a timely action against Namkoong.

"We certainly could not knock on people's doors". 1T, P. 11, line 15-16. Mr. Calderin did knock on Amore's door and interviewed an owner of Amore. Did plaintiffs disclose the existence of Mr. Calderin's investigation to Judge Covello or the Hon. Vicki Citrino? No.

"We're attorneys we have to be ethical and upfront". 1T, P. 11, line 17-18. Did plaintiffs disclose the existence of Mr. Calderin's investigation to Judge Covello and Judge Citrino? No.

"We just have to demonstrate that we are engaged in dilgence sufficient to demontsrate that we are actively pursuing the information". 1T, P. 12, line 19-22. There is no indication that plaintiffs made any effort or enaged in due diligence

using Mr. Calderin's investigation information to identify Namkoong and to commence a timely action against Namkoong.

"It's what did you do, not what could you have done better". 1T, P. 12, line 24-25. Did plaintiffs' counsel disclose the existence of Mr. Calderin's investigation to Judge Covello amd Judge Citrino? No.

"The question then is did we do diligence sufficent so that the Court would make a determination we didn't voluntarily sleep on our rights". 1T, P. 13, line 17-21. There is no indication that plaintiffs made any effort or enaged in due diligence using Mr. Calderin's investigation information to identify Namkoong and to commence a timely action against Namkoong.

"But what we did do is what this Court has to look at". 1T, P. 15, line 2-3. Did plaintiffs' counsel disclose the existence of Mr. Calderin's investigation to Judge Covello and Judge Citrino? No.

"All we have to do is prove to this Court that we enagaged in diligent- -due diligence sufficient to- -so that the Court can make a finding that there was no voluntary or involuntary decision to sit on rights". 1T, P, 29, line 15-19. Did plaintiffs' counsel disclose the existence of Mr. Calderin's investigation to Judge Covello and Judge Citrino? No.

"I submit to you it's impossible on this record to find anything other than diligence and proper diligence". 1T, P. 34, line 24-25. Did plaintiffs' counsel

disclose the existence of Mr. Calderin's investigation to Judge Covello and Judge Citrino? No.

Plaintiffs' counsel's failure to disclose to the Court at oral argument on January 24, 2020 and February 14, 2020 that, based upon Mr. Calderin's investigation and report, as of March 16, 2017, April 7, 2017 and July 1, 2017 and January 29, 2019, plaintiffs knew or should have known (i) the location of where Mr. Collucci allegedly slipped and fell; (ii) the mechanism of injury that allegedly caused him to fall; and (iii) the identity of the party or parties allegedly responsible for causing his alleged damages, resulted in the Court erroneously denying Namkoong's motion to dismiss in lieu of filing an answer on the ground that plaintiffs failed to file an action against Namkoong within the applicable statute of limitations.

The February 14, 2020 Order denying Namkoong's motion to dismiss in lieu of answer, did not state that the denial was with prejudice. In the absence of a denial with prejudice, Namkoong was/is within its rights to file the motion again at the close of discovery. *Lombardi v. Masso*, 207 N.J. 517 (2011). Nor was the denial of the motion to dismiss in lieu of answer subject to the time limits and/or the standard for filing a motion for reconsideration.

At bar, plaintiffs knew the factual basis for their claims immediately upon the day of the alleged slip and fall accident. The "discovery rule" analysis plaintiffs

seek to apply to support their commencement of an action against Namkoong after the expiration of the statute of limitations does not apply. *Burd v. N.J. Telephone Company*, 76 N.J. 284 (1978); *Lopez v. Swyer*, 62 N.J. 267 (1973); *Fernandi v. Strully*, 35 N.J. 434 (1961).

Plaintiffs' failure to disclose to the Court Mr. Calderin's investigative activities and issuance of investigative reports, all before the expiration of the statute of limitations to file a timely complaint as against Namkoong, serves to completely undermine plaintiffs' contention that they were not obligated to file a complaint until receipt of tenants' leases.

Ultimately, plaintiffs must answer the question, why, if they argued so vociferously that they engaged in due diligence to identify the tenants in the shopping mall in issue and it was the lack of tenants' leases which hampered their efforts, did they not tell Judge Covello or Judge Citrino that they even retained a private investigator to undertake the investigative activities Mr. Calderin performed and about which he issued reports. It is respectfully submitted that plaintiffs did not disclose Mr. Calderin's activities because plaintiffs "slept on their rights" and made no effort to utilize Mr. Calderin's information regarding tenants in the shopping mall, including Namkoong, for approximately two (2) years prior to the statute of limitations expiring.

CONCLUSION

For all the foregoing reasons and those set forth in its initial brief, Defendant, Kyong Namkoong i/p/a Kyong Hui Nam Koong, respectfully requests that this Court affirm the judgment in Defendant's favor.

Dated: May 19, 2024

Respectfully submitted,
Law Offices of Linda S. Baumann
Attorneys for Defendant-Respondent-Cross Appellant, Kyong Namkoong i/p/a Kyong Hui Nam Koong
By: *Michael F. Lynch*
Michael F. Lynch, Esq.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket no. A-003655-22T2

VITO COLLUCCI and LUCILLE COLLUCCI, as Husband and Wife And Individually,	:	CIVIL ACTION
Plaintiffs-Appellants-Cross Respondents	:	ON APPEAL FROM THE LAW DIVISION PASSAIC COUNTY
vs.	:	DOCKET NO. PAS-L-2221-18
COSIMA CASSESE and CASSEE ENTERPRISES, INC.,	:	Sat Below: HON. FRANK COVELLO, J.S.C. HON. VICKI J. CITRINO, J.S.C.
Defendants-Respondents,	:	
(For continuation of Caption see next page)	:	

REPLY BRIEF FOR DEFENDANT- RESPONDENT-CROSS-APPELLANT REAL ESTATE CONSULTANTS, LLC d/b/a REALTY EXECUTIVES

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Date submitted: May 20, 2024

REALTY EXECUTIVES and NIROAL, LLC,

Defendants-Respondents-Cross-Appellants

TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG and JEONG HE PAK,

Defendants-Respondents,

KWONG HUI NAM KOONG,

Defendant-Respondent-Cross-Appellant

and

JOHN DOES 1-10 AND/OR ABC CORPORATIONS 1-10, in their Corporate Capacity and as to the Principals and Owners Individually (Names being fictitious and Unknown but described as Corporate or Individual Owner(s), Manager(s), Lessor(s), Supervisor(s), who had Control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed To the March 16, 2017 loss)

Defendants-Respondents

TABLE OF CONTENTS page

TABLE OF ORDERS, JUDGMENTS AND RULINGS ON THE CROSS APPEAL

TABLE OF CASES AND AUTHORITIES page

PRELIMINARY STATEMENT

As they did at the trial level, plaintiffs continue to confuse the concepts of the "discovery rule" and "relation back." As set forth in this defendant's initial brief, the "discovery rule" pertains to claims, not to parties. Moreover, it pertains to the factual basis for a claim, not the legal underpinnings thereof. Plaintiff Vito Collucci knew of the factual basis for the instant matter as soon as he hit the ground. Therefore, he is not entitled to the benefit of the "discovery rule." Since the "discovery rule" does not apply to this claim, the legal standard to be applied to such claims is irrelevant to the outcome of this action. Plaintiff cannot circumvent the consequences of his and/or counsel's inaction based upon the "discovery rule."

Plaintiff retained counsel within weeks of the March 16, 2017 accident. Counsel, in turn, retained EJC Investigative Services. E.J. Calderin visited the strip mall on April 7, 2017 and submitted his report to plaintiff's counsel on July 1, 2017. Although the report does not specifically name the tenant defendants other than Amore Ristorante, it does note that there were other tenants in the strip mall. (Pa694) Assuming arguendo that neither plaintiff nor counsel knew the tenants' identities, either plaintiff, counsel, or someone on plaintiff's behalf could have (and

should have) gone to the strip mall to ascertain their identities upon receipt of the report. As previously set forth, the name of Real Estate Consultants' business, Realty Executives, was prominently displayed at the property.

Plaintiff's belated attempt to bring the tenant defendants into this case was nothing more than a hindsighted fishing expedition for a nonexistent remedy. Plaintiff should not have been permitted to avoid the consequences of his and/or counsel's inaction due to the alleged difficulties in obtaining the tenants' leases or defendant Cassese Enterprises' answers to interrogatories. Both pertain to the legal basis for a potential claim; not the identities of the potential defendants. As plaintiff had ample opportunity to have ascertained the identities of the potential defendants prior to the expiration of the statute of limitations, he was not entitled to the benefit of the "relation back" doctrine. In the event that this court disagrees with the trial court's determination on liability, it should still affirm the summary judgment in favor of this defendant based upon his failure to comply with the statute of limitations.

PROCEDURAL HISTORY

Defendant Real Estate Consultants will rely on the procedural history of this matter as set forth in its initial brief as though fully set forth herein with one correction. Defendant's second motion for summary judgment was argued on June 25, 2021. (see page 6 of defendant's initial brief)

STATEMENT OF FACTS

Defendant Real Estate Consultants will rely on the statement of facts of this matter as set forth in its initial brief as though fully set forth herein, with one correction. On page 9 of its initial brief, the date of loss is listed as March 16, 2016 due to a typographical error. It is March 16, 2017.

POINT I

IN THE EVENT THAT THIS COURT DISAGREES WITH THE TRIAL COURT'S DECISION ON ITS SUMMARY JUDGMENT MOTION ON LIABILITY, IT SHOULD AFFIRM THE SUMMARY JUDGMENT ORDER OF JUNE 25, 2021 BASED UPON PLAINTIFFS' FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS. PLAINTIFF WAS NOT ENTITLED TO THE BENEFIT OF THE "DISCOVERY RULE" OR THE "RELATION BACK" DOCTRINE UNDER THE CIRCUMSTANCES OF THIS CASE. (1T47-19 TO 48-22; Pa5-6; 3T65-4 to 66-18; Pa1-2)

As set forth in defendant's initial brief, Judge Covello improperly focused on whether or not plaintiff knew or should have known of a legal basis for his claims against the tenant defendants, and then found (without a factual basis) that plaintiff had been misled by Cassese Enterprises' answers to interrogatories. Judge Citrino compounded Judge Covello's initial error when she declined to consider plaintiff's deposition testimony (Pa846-849, Pa1149-1151; Pa832-834; Pa882-883) and the July 1, 2017 Caldarin report (Pa694-697) on defendant's second motion for summary judgment. The January 24, 2020 order denying the motion for summary judgment did not state that the denial was with prejudice. (Pa5-6) In the absence of a denial with prejudice, this defendant was clearly entitled to bring the motion again after the exchange of discovery. See e.g., Lombardi v. Masso, 207 N.J. 517, 534-537 (2011) Moreover, defendant was not subject to the time constraints or the standard for a motion for reconsideration. (Id.)

Plaintiff would have this court believe that he and/or counsel were acting diligently by failing to move to amend the complaint until after receipt of some of the tenants' leases. In fact, the exact opposite is true. Plaintiff and/or counsel are using the fact that they didn't obtain the leases prior to the expiration of the statute of limitations as a smokescreen to disguise the fact that they knew or certainly should have known of the identities of the strip mall's tenants prior to the statute of limitations. As previously stated, they were neither obligated nor permitted to delay amending their complaint until they ascertained a potential legal theory upon which to justify the amendment. See e.g., Burd v. N. J Telephone Company, 76 N.J. 284, 292 (1978); Lopez v. Swyer, 62 N.J. 267, 273 (1973); Fernandi v. Strully, 35 N.J. 434 (1961)

An examination of plaintiff's second amended complaint (Pa319-330) further belies plaintiff's stated reasons for the delay in amending the complaint. The first count of the complaint alleges negligence against all named defendants. The second count of the complaint alleges vicarious liability on the part of any or all named defendants for the alleged negligence of PL Landscaping in performing snow removal. The third count of the complaint contains a per quod claim on behalf of Lucille Collucci that incorporates counts one and two by reference. Plaintiff and/or

his counsel did not need the leases in order to assert common law negligence claims. As fully explained in this defendant's initial brief, the provisions of the lease could not create a common law duty or a tort remedy for plaintiff. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 314, 316 (2002) Therefore, plaintiff's contention that he was not obligated to file his complaint until receipt of the leases must fall of its own weight.

CONCLUSION

Plaintiff clearly knew of facts that gave rise to a potential cause of action the minute he fell. In fact, he believed that he had a cause of action against the tenant defendants as of the date of loss. Therefore, the "discovery rule" does not postpone the accrual of his claim until receipt of some of the tenants' leases. Moreover, he is not entitled to the benefit of the fictitious name practice and/or the "relation back" doctrine because he knew or, in the exercise of reasonable diligence, certainly should have known the identities of the tenant defendants well within the two year statute of limitations. For all of the reasons stated herein, as well as those stated in Real Estate Consultants' initial brief, the summary judgment in its favor should be affirmed.

Respectfully submitted,

s/ Murray A. Klayman

Murray A. Klayman, Esq.

In the Superior Court of New Jersey
Appellate Division

Filed: May 16, 2024

DOCKET No: A-003655-22

VITO COLLUCCI and LUCILLE COLLUCCI, as husband and wife and Individually, Plaintiff, v. COSIMA CASSESE, CASSESE'S ENTERPRISES, INC., REALTY EXECUTIVES, NIROAL LLC, TUYEN KIM NGUYEN, MY SISTER'S GOURMET DELI, GOLDEN STYLES BARBER STUDIO, PL LANDSCAPING, SANG HWANG, JEONG HE PAK, KYONG HUI NAM KOONG, JOHN DOES 1-10 and/or ABC CORPORATIONS 1-10, in their corporate capacity and as to the principles and owners individually (Names being fictitious and unknown but described as the corporate or individual owner(s), manager(s), lessor(s), supervisor(s), who had control of the premises located at 140 Rifle Camp Road, Woodland Park, New Jersey, who contributed to the March 16, 2017 loss), Defendants	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION PASSAIC COUNTY Docket No. PAS-L-2221-18 Sat Below: Hon. Frank Covello, J.S.C. Hon. Vicki J. Citrino, J.S.C.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT ROBERTO ARCUCCI NIROAL LLC D/B/A AMORE RISTORANTE (IMPROPERLY PLED AS NIROAL, LLC)

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Table of Contents

Table of Authorities

Cases

Court Rules

A. Preliminary Statement

In response to Amore's cross-appeal which demonstrated that the statute of limitations was violated in this case, Plaintiff has made a number of arguments seeking to justify the decision of the Hon. Frank Covello, J.S.C., who choose not to dismiss Plaintiff's complaint under the statute of limitations. In doing so, Plaintiff made a number of statements which require specific refutation.

Accordingly, Amore will address each of those statements and further asks this Court to affirm the decision below dismissing the complaint.

B. Cross-Appeal Reply Legal Argument

ISSUE I: DEFENDANT DID NOT NEED TO ADDRESS THE TRIAL JUDGE'S EQUITABLE DETERMINATIONS AS THE STATUTE OF LIMITATIONS BAR IS PRESENT REGARDLESS OF THE EQUITIES.

First, Plaintiff notes that Defendant did not address the trial judge's determination of the equities under the abuse of discretion standard concerning his finding whether plaintiff exercised adequate effort in applying the fictitious pleading requirements. However, because Defendant's argument is that the statute of limitations should have applied to preclude Plaintiff's claim entirely, and that argument does not incorporate nor rely on any "determination of the equities," that point is irrelevant and need not be examined to find that the statute of limitations was, in fact, violated.

However, Plaintiff is wrong when he asserted that Amore never challenged Judge Covello's exercise of discretion in evaluating the equities. To the contrary, Amore specifically addressed why Judge Covello's reasoning was erroneous. (Amore's initial brief at pp. 39-41)

As such, this first argument is without merit.

ISSUE II: WHETHER JUDGE COVELLO PROPERLY EXERCISED HIS DISCRETION IS IRRELEVANT, BECAUSE HE ERRED BY NOT APPLYING THE STATUTE OF LIMITATIONS.

Next, Plaintiff argues that Judge Covello properly exercised his equitable discretion. This argument is wrong. The Defendant's argument is premised on the fact that the two-year statute of limitations barred the claim regardless of any equitable considerations, so Judge Covello's discretion was abused, as it should never have been exercised in the first place. For example, while New Jersey has a long history of applying equitable considerations to the statute of limitations questions, such considerations will only prevent the statute of limitations from barring a claim when it is the defendant's own acts which make it inequitable for the statute of limitations defense to apply. See, Lopez v. Swyer, 62 N.J. 267, 275 fn.2 (1973)

Here, Plaintiff pointed to nothing done by Amore upon which equitable relief might be based. Plaintiff solely relied on the actions of the landlord, but that would not preclude the dismissal of the claim against Amore.

Moreover, as detailed in Amore's initial brief, (Amore's initial brief at pp. 39-41), Judge Covello's reasoning was faulty because the Plaintiff did not need the lease to know, on the date of his fall, he had been injured by the fault of another. Thus, the statute of limitations began to run on that date. J.P. v. Smith, 444 N.J. Super. 507, 526-27 (App. Div. 2016)

Further, Judge Covello's reasoning that the landlord's answers to interrogatories might be misleading cannot as a matter of law extend the time to file against Amore, because Amore took no action in answering interrogatories which constituted an inequitable conduct. Henry v. New Jersey Dep't of Human Servs., 204 N.J. 320, 338 (2010) (equitable tolling tolls the statute of limitations against party who misleads the plaintiff into not filing sooner.)

As such, this argument is without merit.

ISSUE III: THE FICTITIOUS PLEADING RULE DOES NOT APPLY HERE AT ALL, BECAUSE AT EVERY MOMENT RELEVANT TO THIS CASE PLAINTIFF WAS AWARE, AND ADMITS HE WAS AWARE, OF AMORE'S IDENTITY.

Next, Plaintiff asserts that he satisfied the fictitious pleading requirements under R. 4:26-4. This is false. Plaintiff is confusing two separate and distinct concepts. The first being the fictitious pleading rule and the second being the discovery rule. The fictitious pleading rule applies when, and only when, a party cannot reasonably discover the identity of a potential

defendant but is aware of a potential claim. Viviano v. CBS, Inc., 101 N.J. 538, 547 (1986) (noting that the rule "suspends the statute when the plaintiff is unaware of the true identity of the defendant.")

The discovery rule, on the other hand, applies when, and only when a party is not reasonably aware that they have been injured or that it is the fault of another. McDade v. Siazon, 208 N.J. 463, 475 (2011); Caravaggio v. D'Agostini, 166 N.J. 237, 240 (2001). In order for the discovery rule to apply, the plaintiff does not need to know the precise nature of any potential claim nor have a legal certainty that applies. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) ("...legal and medical certainty are not required for a claim to accrue.")

In this case, Plaintiff was aware of Amore's identity at the time of his injury, and concedes as much in his brief. (Plaintiff's second brief, at 32) As such, the fictitious party pleading rules do not apply, because Amore was not a party whose identity the plaintiff did not know.

Consequently, regardless of what information Plaintiff may or may not have had regarding any potential claims which Plaintiff may or may not have

asserted, the fictitious pleading rule simply does not apply here because Plaintiff knew Amore's identity.[1]

Furthermore, because plaintiff knew immediately upon falling that he had been injured, and because he had to have known that any injury was the fault of another, given his position that he fell on an improperly maintained parking lot, the discovery rule also did not apply here.

As such, there was nothing to toll the running of the statute of limitations and Plaintiff had two years from the date of the accident to file suit. As he did not file suit against Amore within that time, he is barred by the statute of limitations.

ISSUE IV: BECAUSE THE FICTITIOUS PARTY RULE DOES NOT APPLY, THE RELATION BACK DOCTRINE DOES NOT APPLY EITHER.

Next, Plaintiff seeks to take advantage of the relation back doctrine in order to make the complaint filed against Amore timely, notwithstanding the fact that it was filed beyond the statute of limitations. Because neither the fictitious party pleading rules nor the discovery rule apply to Plaintiff's claim

[1] Further, the notion that plaintiff needed discovery to identify the other tenants in the shopping center is simply false. Not only could the plaintiff have simply looked at the storefronts on the day of the accident or in the days following, but also a simple review of Google Streetview's history would have shown that the identities of the stores in every unit except for that occupied by Golden Styles was identical between October 2015 and September 2018.

against Amore, Plaintiff's failure to file within two years of the accident bars his claim against Amore forever.

> Applying the governing principles to the foregoing facts, we conclude that because the statute of limitations has run, the relation-back doctrine of Rule 4:9-3 is inapplicable. The relation-back Rule does not authorize amendment of the pleading to allege a new cause of action against another party to the litigation that is barred by the running of the statute of limitations. That is because ordinarily, after the statute of limitations has run, the opposing party acquires a vested right to be forever free of the relevant claim.
>
> [Molnar v. Hedden, 138 N.J. 96, 104 (1994) (internal cites, quotes and bracketing omitted.)]

As such, the relation back doctrine has no application in this case.

ISSUE V: PLAINTIFF'S ATTEMPT TO ARGUE THAT HE DID NOT VIOLATE THE STATUTE OF LIMITATIONS EVEN THOUGH HE KNEW AMORE'S IDENTITY MUST FAIL.

Finally, Plaintiff concedes that he knew the identity of Amore at the time of the accident because he was a patron of the restaurant. (Plaintiff's second brief, at 32) Plaintiff attempts to avoid the logical conclusion that his lawsuit was untimely by arguing that even though he asserted a common-law claim against Amore after the statute of limitations had run, and even though neither the discovery rule nor the fictitious party pleading rule applies, the claim is nevertheless timely because he did not possess Amore's lease agreement and

New Jersey law concerning whether a common-law exists takes into consideration the terms of the lease.

Plaintiff wants to have it both ways. Plaintiff wants to assert a common-law duty but, at the same time, does not wish to be bound by the fact that he had two years to file a common-law duty claim but failed to do so.

Moreover, contrary to his arguments, Plaintiff was not required to review Amore's lease prior to asserting a common-law claim, even in light of the law contained in Kandrac v. Marrazzo's Market at Robinsville, 429 N.J. 79 (App. Div. 2012) and Nielsen v. Walmart Store #2, 2171, 429 N.J. Super. 251 (App. Div. 2013). In neither of those cases was the lease reviewed to establish whether a duty was adequately pleaded, but to find whether such a duty was untimely to be imposed.[2]

In both cases, the lease's importance was limited the question of whether the claim could ultimately ***succeed***, not whether it could be ***asserted*** in the first place. A party has sufficiently asserted a cause of action when the allegations made, "if proven, would constitute a valid cause of action." Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App.Div.2001). See, also, Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (for purposes of a motion to

[2] The Kandrac court ultimately declined to impose a common-law duty, while the Nielsen court found that a common-law duty existed on the fact pattern of that case.

dismiss for failure to state a cause of action, Plaintiff does not need to be able actually prove the cause of action, must merely assert one.) See, also, Escoett v. Aldecress Country Club, 16 N.J. 438, 452 (1954) (noting that a complaint based, in part, on "information and belief" does not, on that basis, fail to assert a valid complaint.); Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011) (citation omitted) (A pleading has asserted a cause of action if it states a basis for relief which discovery will provide.)

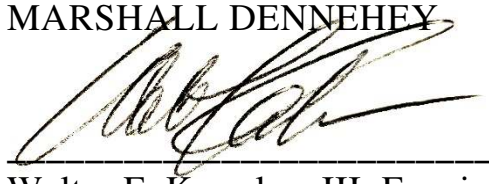
Thus, because Nielsen stands for the proposition that a common law cause of action is not *per se* barred because the defendant is a lessee, Plaintiff was not required to plead anything about the lease in order to plead a viable cause of action. Alternatively, if Plaintiff believed he needed to address the lease, he could have made his assertions on information and belief and then sought the lease in discovery.

Consequently, Plaintiff's failure to assert the cause of action against Amore within two years of the accident precludes it thereafter.

C. Conclusion

For all the foregoing reasons and those set forth in its initial brief, Defendant Roberto Arcucci Niroal LLC d/b/a Amore Ristorante, respectfully requests that this Court affirm the judgement in Defendant's favor.

Respectfully Submitted,
MARSHALL DENNEHEY



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