CENTER JERSEY COLLEGE PREP	
CHARTER SCHOOL	SUPERIOR COURT OF NEW JERSEY
PLAINTIFF	SOMERSET COUNTER
V.	LAW DIVISION
NEW JERSEY CHINESE	DOCKET NO: SOM-L-1305-16
COMMUNITY CENTER	**CIVIL ACTION**
DEFENDANT	Revised Decision and Judgment

Over the course of seventeen days during September, October, December 2019 and January 2020, this matter was before the Court for trial without a jury, which trial was presided over by the Honorable Robert B. Reed (retired and temporarily assigned on recall). The plaintiff was represented by Mr. Arthur L. Skaar, Esq and the defendant/counterclaimant was represented by Cynthia M. Hwang, Esq and Joel Seltzer, Esq. The court rendered its decision and entered judgment in favor of the defendants and against the plaintiffs on April 22, 2020.

This matter is now back before the court on Defendant's Motion for Reconsideration of the Court's Judgment entered on April22, 2020 in favor of defendant and for damages assessed against plaintiff, in the amount of $92,695.00.

On May 22, 2020, after reviewing defendant's written argument of April 27, 2020, plaintiff's response of May 13, 2020, and defendant's reply of May 15, 2020, a teleconference with counsel was held, during which the court entertained oral argument. The court granted the Motion to Reconsidered, reserved on the reconsidered decision and set a further briefing schedule. The defendant's motion for reconsideration was granted based upon a palpably incorrect calculation of damages by the court. This error was occasioned by the court's confusing the two separate leases between these parties, and calculating damages under the "wrong lease". It is now determined sua sponte, that based on a failure to considered critical evidence in the record but not before the court at trial, the decision must be revisited.

During the course of trial, evidence established that there were two separate leases at issue here. The first of which was commonly referred to as the "lower school" lease, i.e., the original 45,000 sq. ft. leased by plaintiff in defendant's premises beginning in 2005. Thereafter, the parties entered into a second lease referred to as the "upper school" lease, for additional space to be used by the plaintiff.

The court, in its judgment denied plaintiff's constructive eviction claim and found that defendant was entitled to loss of rent under the lower school lease because defendant

occupied the leased lower school space for its own benefit after plaintiff vacated. For reasons too convoluted to reconstruct at this time, suffice to say that the court just calculated damages under the wrong lease Under the "upper school" lease (grades 6-12) plaintiff is potentially liable to defendant for damages (loss of rent) in the gross amount of $2,171,865 calculated as follows:

9/14/2017- 7/15/201	$523,881.00
7/14/2018 to 7/14/2019	$774,564.00
7/14/2019 to 7/14/2020	$873,420.00

The court in its April 22, 2020 Decision, denied defendant's claim for lost rent under the lease for the "upper school" although without adequate explanation therefor in the decision. Then the court mistakenly calculated damages to the defendant under the "lower school" lease. In fact, that scenario should have been juxtaposed. The defendant's damages should have been calculate under the "upper school" lease, the defendant's claim for damages (loss of rent) under the lower school lease, should have been denied.

The reason for that latter result, i.e. denying damages under the "lower school" lease, is because the space leased by plaintiff to operate the grades k-5 was used by both the plaintiff and defendant, albeit at different scheduled times, and upon plaintiff vacating

the premises in September 2017, the defendant took over and occupied that space exclusively for its use and benefit. That action constituted defendant's election in mitigation of its damages by occupying that space for its own use and benefit. This court finds that landlord's reentering that portion of the premises, theretofore occupied on a shared basis by both parties, bars the defendant from seeking future rent. That is, the defendant has the option upon the plaintiff's breach, to repossess the property and seek damages that have accrued to that point or to claim lost rent as damages during the remaining period of the lease. However, that is all indeed moot by this reconsidered and revised decision.

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

Parenthetically, the “flavor” of this multi-year, many judge odyssey of this case is precisely and economically stated by plaintiff’s counsel in his May 13, 2002 letter brief. It is excerpted below, although not adopted wholesale, to inform the reader.

> The matter is a commercial landlord-tenant case where the plaintiff removed the summary dispossess actions to Law Division for consolidation with its declaratory judgment action. Events overtook the court calendar, the plaintiff tenant moved out of the defendant’s premises and so the defendant filed a counterclaim of some $4 million dollars for damages to the premises and for unpaid rent. . .
>
> Pretrial motions were heard commencing September 25, 2020 and the trial commenced October 7, 2020, with 9 trial sessions in October and 4 trial sessions in December. . .
>
> The Court presided in various courtrooms throughout the courthouse and the Court took copious hand-written notes, totaling through the trial between 120 and 140 pages. The Court was without staff but was able to obtain some assistance from a law clerk of another judge. Pretrial proceedings in this case had been handled by Judge Ciccone who conducted multiple case management conferences and made numerous interim orders on various civil motions. Settlement conferences were attempted before Judge Ballard, Judge Rogers and Judge Miller. Motions for summary judgment were heard by Judge Rogers. At one point the case was sent over to Hunterdon County and conferenced before Judge O’Neill. We were under the impression that it would be tried in Hunterdon until Judge Reed appeared on the scene.
>
> Because of Judge Reed’s need to become familiar with a case with an extensive record, he was at a disadvantage. This is evidenced by the footnote 6 on page 15 of the Decision. Attached hereto is a true copy of plaintiff’s reply brief as to plaintiff’s motion for summary judgment, which reply brief was filed July 8, 2019 and is part of the record of the case. Page 6 of that reply brief contains

> the legal basis for plaintiff's claim that it is required to provide a gym for its students. That this was not before the Court in arriving at its decision in this case is a product of so many judges having been involved in this case over the three (3) years and one (1) day it was pending from filing to commencement of trial.

[Plaintiff's Opp. Br. To Motion to Reconsider May 13, 2020].

I. BACKGROUND

1. This case involves a commercial lease between these parties and has had a lengthy

history before the Court which, before this trial, included two Summary Dispossess actions (SOM-L-1399: SOM-L-1414-17 appellate review, and complex motion practice before seven previous trial judges from 2016- 2019. There were also Prerogative Writ Actions brought by the defendant against the Franklin Township Board of Adjustment for declaratory relief, (not relevant here) Those matters are referenced hereinafter anecdotally, but while properly informing the court, do not control its decision here.

Plaintiff, Central Jersey College Prep Charter School, (hereinafter "Charter School", "Plaintiff" or "Tenant") is a New Jersey Nonprofit Corporation, which operates a public charter school. Defendant, New Jersey Chinese Community Center, Inc. (hereinafter "Community Center" "Landlord" or "Defendant") is a New Jersey nonprofit corporation. Community Center conducts its not for-profit activities in premises consisting of a total of 90,000 square feet at 17 Schoolhouse Road, Franklin Township (PO Somerset 08873), Somerset County, New Jersey (hereinafter, the "Premises"). Defendant owns the Premises where it operates a daycare, senior center, and a private school. The Central Jersey College Prep Charter School leased a portion (roughly one-half or 45,000 square feet) of the Premises from Landlord at 17 Schoolhouse Road, Franklin Township. Its occupancy commenced pursuant to a lease dated May 5, 2008 (P-2). Until September of 2017, the Tenant Charter School and Landlord Community Center, each occupied roughly half of the 90,000 square feet building located at 17 Schoolhouse Road. That lease was succeeded by "Letter Agreement" dated June 19, 2011 (P-3) and another dated October 31, 2013 (P-4), and successor Lease dated April 22, 2015 (P-5). Plaintiff, claiming constructive eviction, moved out in September of 2017 and relocated its school. Plaintiff occupied the Premises pursuant to the above lease as amended, and under the successor lease the term was extended to 2020, but as indicated, the Charter School vacated the premises in or about August – September 2017 because it claims it

was constructively evicted by the defendant Chinese Community Center. Plaintiff Charter School filed the complaint herein against the Chinese Community Center in 2016 seeking declaratory and other relief.

Those claims are summarily stated as follows:

Count One: Constructive Eviction

> Plaintiff argues that commencing on October 1, 2015 and continuing thereafter defendants pursued a pattern of "abusive, retaliatory and unlawful" actions against the plaintiff, violating the covenant of quiet enjoyment of the premises by the plaintiff, and which constituted constructive eviction.

Count Two: Breach of Contract

> Plaintiff seeks $52,477.33, in compensatory damages related to cost to obtain approval of the bubble gym plus $31,449.50 for the costs to move its operations to its new facilities.

Count Three: Return of Security Deposit.

> Plaintiff alleges it deposited a tenant security deposit with Landlord in the amount of $100,000.00, to which it claims entitlement.

Count Four: Conversion

> Plaintiff alleges that defendant retained approximately $17,500.00 worth of personal property. Thus, plaintiff seeks a judgment against defendant in that amount.

Defendant responded by way of Answer and Counterclaim, arguing that the plaintiff Charter School violated the lease terms with the Landlord before the lease term expiration in year 2020. The Landlord's counterclaim consists of seventeen counts, claiming, *inter alia*, that the Tenant breached the lease agreement and acted in bad faith in bringing the within lawsuit to

"fraudulently and unethically" void its remaining obligations under their lease agreement.[1] and is liable to the defendant therefore.

After years of contentious history between the parties and a plethora of ancillary lawsuits, the trial of this matter commenced on September 25, 2019 continuing intermittently until concluding on December 20, 2019[2], subject to post trial written summations and replies. The threshold issues

---

[1] Defendant's counterclaim alleges that the plaintiff is liable to it for breach of contract including nonpayment of rent on lease agreement dated 5/5/2008 and amendment dated 10/31/13 (Count One); nonpayment of rent on lease agreement dated 4/22/2015 (Count Two); nonpayment of utilities on lease agreement dated 5/5/2008 and amendment dated 10/31/13 (Count Three); nonpayment of utilities on lease agreement dated 4/22/2015 (Count Four); failure to repair and maintain the leased Premises under the lease agreement dated 5/5/2008 and amendment dated 4/22/2015 (Count Five); failure to repair and maintain the leased Premises under the lease agreement dated 4/22/2015 (Count Six); nonpayment of holdover rent under the lease agreement dated 5/5/2008 and amendment dated 10/31/2013 (Count Seven); structural alterations made to the leased Premises without written consent of the Landlord (Count Eight); nonpayment of additional security deposit on the lease agreement dated 5/5/2008 and amendment dated 10/31/13 (Count Nine); nonpayment pursuant to a settlement agreement dated 11/3/2009 (Count Ten), and; failure to repair and maintain parking lot, driveway and parking lot lighting, and denying landlord's access to the leased Premises (Count Fifteen).

Defendant further sued the plaintiff for fraud and negligent misrepresentation alleging that the plaintiff misrepresented its gym plan to defendant and its intention to construct a gym to induce the defendant to sign the plaintiff's application for a use variance to the township zoning board. Defendant further maintained that despite receiving the zoning approval, the plaintiff did not construct the approved gym and instead used its gym approval as leverage to get out of its lease agreement. As a result of the fraud, defendant asserts that it has suffered monetary damage. (Counts Eleven and Twelve).

Defendant further sues the plaintiff for unjust enrichment alleging that the plaintiff was unjustly enriched as a result of perpetrating fraud against the defendant, including inducing the defendant to sign the plaintiff's zoning board application even though plaintiff never intended and never constructed the approved gym and instead used its approval as leverage to get out of its lease agreement and file the within lawsuit. defendant further contends that by using the so called "bubble" gym as an excuse, plaintiff broke its lease with the defendant costing the defendant the remainder of rent due under the lease as well as utility, repair and maintenance costs that were the plaintiff's responsibility under the lease. In addition, the defendant was required to incur substantial attorneys' fees, legal costs and other expense to defend plaintiff's lawsuit. (Count Fourteen). Defendant is further suing the plaintiff for bad faith and abuse of process as plaintiff and plaintiff's attorney instituted the within lawsuit in bad faith in an attempt to void its remaining obligations under the lease. (Counts Sixteen and Seventeen). Count Thirteen was previously dismissed.

[2] Upon the conclusion of trial, plaintiff moved to amend its complaint. The court set a briefing schedule and hearing a date of January 7, 2020 on the matter. The court determined that the proposed amendments were within the umbrella of the Plaintiff's claims, which defendant had notice of and opportunity to be heard hereon, and were tried before, the Court, and therefore conformed the proceedings to the proofs adduced.

before this court are whether the Tenant was constructively evicted warranting a finding that absolves the Tenant of its contractual liability under the lease agreement, or whether the Tenant breached the lease agreement with the Landlord by vacating the Premises in September of 2017 and is liable to landlord for consequential damages. All of the requested relief by each party flows from those core issues.

II. PLAINTIFF'S CONTENTIONS

The Charter School's occupancy commenced in 2007, whereafter Plaintiff occupied the Premises (45,000 Sq. Ft. at that time) pursuant to the Lease dated May 5, 2008. The Lease was amended by Letter Agreement dated June 9, 2011 and further amended by Letter Agreement dated October 31, 2013. On or about October 7, 2015, Landlord filed a summary dispossess action against the Charter School, the object of which was to gain possession of the Premises from the Charter School.

That tenancy action came to trial before Hon. Kevin Shanahan on October 30, 2015 and Judge Shanahan entered a *Sua Sponte* Order removing the case to the Law Division. (L-1444-15). That matter was tried on August 23, 2016 before Judge Shanahan, and an Order for Judgment was

entered in favor of the Charter School on September 1, 2016, followed by an amended Order entered September 6, 2016. A Statement of Reasons was attached to the Order and that Statement of Reasons hereafter is referred to as the "Shanahan Judgment". [3]

Landlord then filed a Motion for Reconsideration which was denied on October 24, 2016, and Landlord then appealed to the Appellate Division, (A-000769-16T3). In an unpublished Per Curiam Opinion, the Shanahan Judgment was affirmed by the Appellate Division on December 1, 2017.

The issue before the Court in that (first) summary dispossess action was whether an interior portion of the Premises located at 17 Schoolhouse Road, Somerset, New Jersey, specifically designated as the "gym" had been included in the lease entered into between the parties on May 5, 2008.

Paragraph 12 of the 2008 Lease reads in pertinent part as follows:

> "The Tenant agrees to be responsible for the cost of approvals and construction for interior alterations affecting the leased premises. Landlord agrees to permit Tenant to construct a gymnasium and classrooms in the leased premises. Tenant shall obtain Landlord's written approval prior to the commencement of all other interior alterations

---

[3] The Shanahan Judgment is, at this time, final and binding on the parties as law of the case in regard, and limited to, the issues adjudicated therein.

> requiring the issuance of construction permits, which approval shall not be unreasonably withheld…"

Prior to the inception of the Lease, the gym area was used by the Landlord for classrooms and as a storage area. Its physical dimensions made it the only area in the facility which practicably could be used as gym space because of footprint and height requirements to accommodate that purpose. Tarkan Topcuoglu, the CEO and COO of the School testified that a public school must meet certain physical education standards, and gymnasium space is essential to satisfy that requirement. [4]

Shortly after the Lease's inception, the Charter School began to physically convert the aforementioned space into an indoor gymnasium and continually used it as such for the duration of its occupancy.

Between 2008 and April 22, 2015, (when a second Lease was entered into) that "gym" was only used by the Charter School. The language of Paragraph 12 of the Lease clearly indicates that the parties intended the interior gym space to be included as part of the leased premises. The Tenant alleges that the Summary Dispossess Action filed by the Landlord on or about October 7, 2015,

---

[4] At trial that was the only evidence presented as to the physical education curriculum required for a public school.

was an attempt by the Landlord to force Tenant to enter a better contract (Lease) than the one Landlord made for itself. (Shanahan Judgment).

On or about October 31, 2013, an Amendment to the original Lease agreement was drafted by the Landlord and accepted by the Charter School. This amendment extended the Lease until July 14, 2015. It did not, however, change the description of the leased premises, but did, however, include the following language:

> "Tenant has permission from Landlord to construct an air bubble gym in the rear parking area that it currently uses, at its own cost.
>
> ALL OTHER TERMS OF THE ORIGINAL LEASE REMAIN IN EFFECT." (emphasis in original)

It is clear that October 31, 2013 lease amendment between the parties anticipated the defendant expanding its space and the premises footprint by constructing an "air bubble gym," to accommodate additional need created by expanding the Charter School from K-5 to K-12. The Charter School filed an application for a Use Variance (a so called "D" variance under NJ Land Use Statutes) to the Franklin Township Zoning Board which the School alleges cost it between $50,000 - $60,000. The application was approved after the Landlord "signed off" on the application, submission of a site plan which Landlord approved by signing, and hearing before the

municipal Zoning Board of Adjustment on February 5, 2015.[5] Mr. Hwang attended the hearing and on the application and did not voice any objection.

Plaintiff obtained approval of the use variance from the Franklin Township Zoning Board of Adjustment, on February 5, 2015. On February 5, 2015, literally within hours after the Franklin Township Board of Adjustment approved the Charter School's application, Landlord's president, Jimmy Hwang, repudiated his agreement to approve the variance application and expressed disapproval of the design of the "bubble gym" to the Tenant, Charter School, indicating that the plan presented (and just approved) "will not work". This set in motion the cascade of events resulting in the demise of the parties' commercial relationship.

On April 22, 2015, Landlord and the Tenant Charter School, despite disagreement over the bubble gym construction, entered a second amendment to the Lease. This Lease amendment

---

[5] By way of background, in April 2013, the bubble gym was discussed, and Mr. Jimmy Hwang, (the heard of the Chinese Community Center) was given a sketch showing the location of the bubble gym the Charter School intended to construct. He had no objection and signed the application. (Hwang Dep, 23:5-8.) In order to obtain municipal approval for the bubble gym, it was necessary for the Charter School to prepare and file an application for development with the Franklin Township Zoning Board of Adjustment. The application for development was approved on February 5, 2015 subject to a Resolution of the Board, which was adopted after first and second reading thereafter.

greatly expanded the amount of space to be occupied by the Tenant, Charter School. This expansion was contemplated to be gradual, as evidenced by the wording of Paragraph 1:

> "1. Leased Premises. Landlord leases to Tenant and Tenant leases from Landlord the space as highlighted in the attached floor plans in the building located at 17 School House Road, Somerset, New Jersey 08873, for a total rent of $1,356,468 during the term of the Lease. The parties understand and agree that the size of the Lease Premises will increase year after year as shown in the attached floor plans and that some of the common area or part of it as described in the next paragraph may become exclusive area to the Tenant over the time."

It is clear from Mr. Hwang's testimony at trial that the Chinese Community Center anticipated its own need for that additional gymnasium space once all the space contemplated in the 2015 lease was occupied by the Charter School. Of note is that use of the previous interior gymnasium was not addressed specifically in the April 22, 2015 lease.

Subsequently, the Landlord repudiated its approval for the so-called "bubble gym" causing the Charter School to abandon plans to construct it. Later in 2015, Landlord decided to construct its own gym in the same area where plaintiff's gym had been approved and intended to proceed with its own application before the Franklin Township Zoning Board of Adjustment. Pursuant to its Application, on or about October 1, 2015, the landlord met with the Zoning Officer for Franklin Township to discuss landlord's proposal for construction of its own so called "bubble gym". At

that meeting the Zoning Officer advised the Landlord that it could not obtain approval for a different gym in the same location where the Tenant Charter School already had zoning approval to construct a gym, unless Tenant abandoned the approval it had obtained on February 5, 2015. That is although the Charter School had not pursued any post approval action to construct the bubble gym, e.g. “pulling” permits, the Community Center could not apply for zoning approval to construct a gymnasium on the same spot.

Plaintiff produced the testimony of its witness(es) providing evidence that, commencing on October 1, 2015, defendant allegedly pursued a pattern of “abusive, retaliatory and unlawful” actions against plaintiff, violating the terms of the lease and particularly the covenant of quiet enjoyment of the Premises. Plaintiff’s witness(es) testified that defendant entered plaintiff’s Premises repeatedly without prior notice, that Defendant-Landlord denied Tenant access to common areas after October 1, 2015 (as retaliation for plaintiff’s refusal to abandon its municipal approval for the bubble gym) and that Defendant-Landlord refused to perform its obligations under the lease relating to repair and maintenance of the premises.

On October 1, 2015, (after meeting with the Zoning Officer) Jimmy Hwang sent an e-mail to Tarkan Topcuoglu, the Charter School's principal, demanding that the Charter School abandon its bubble gym approval. Also, on October 1, 2015, Jimmy Hwang sent another e-mail to Tarkan Topcuoglu, denying the Charter School further use of common areas of the Premises and claiming that plaintiff was not entitled to occupy the space currently being used as an indoor gymnasium.

Subsequent to that October 1, 2015 meeting with the zoning officer, Landlord commenced a Prerogative Writ action (SOM-L-1526-15) against the Zoning Officer, which action was ultimately dismissed by Order and Decision of Hon. Thomas C. Miller, PJSC, Civ. entered on April 1, 2016.

On October 5, 2019, Jimmy Hwang sent another e-mail to Tarkan Topcuoglu, the Charter School's principal, again denying use of common areas of the Premises to the plaintiff.

To digress, but for completeness of the record, the following additional proceedings are noted: After receiving Judge Shanahan's Order for Judgment (L-1444-15), the Landlord commenced another Summary Dispossess action against the Charter School (LT-2071-16). That case was removed to the Law Division, by order of Judge Shanahan dated October 31, 2016. (L-1399-16). Landlord next filed a motion with the Superior Court Appellate Division for Leave to File an

Interlocutory Appeal of Judge Shanahan's Order. (Docket No. AM-000166016T4). Which motion was denied by the Appellate Division on December 12, 2016.

On or about October 2, 2017, the Landlord filed a third Summary Dispossess action against the Charter School (LT-2406-17). The Charter School succeeded in removing that case to Law Division, by order of Judge Ballard dated November 16, 2017, (L-1414-17). The Landlord, immediately filed an Application for leave to File Emergent Motion appealing Judge Ballard's Order with the Appellate Division on or about November 19, 2017. (AM-115-17). That application was denied by Order of the Appellate Division on November 27, 2017.

The Landlord then filed a motion for Leave to File an interlocutory Appeal of Judge Ballard's order on December 5, 2017. (AM-000210-17T3). The Appellate Division denied that motion by Order dated January 22, 2018.

To return to the trial, Plaintiff's witness(es) testified that the Charter School was, by reason of Landlord's actions resulting in Tenants' constructive eviction, forced to locate replacement Premises and entered into a lease with a new Landlord at 101 Medlar's Lane, Franklin Township, New Jersey.

The Plaintiff's witness(es) testified that the new Landlord pursued an application for site plan approval and use variance to permit development of a school to accommodate the Charter School's occupancy, before the Franklin Township Board of Adjustment. Approval therefore was obtained in 2017 and the Charter School vacated 17 Schoolhouse Lane and commenced its tenancy on Metlars Lane in on about September, 2017.

The Landlord then commenced Prerogative Writ actions with respect to both approvals, and those actions were decided against the Landlord on May 4, 2018 and June 20, 2018.

Plaintiff's witness(es) testified that the Charter School cannot operate a public school without a gymnasium, under New Jersey State Board of Education (BOE) regulations.[6] Thus, plaintiff argued that it was prevented from its use and enjoyment of the leased premises, and thus the common intention of the parties as to use of the premises under the lease was thwarted. The Tenant's claim of constructive eviction is based on that argument.

[6] Other than this anecdotal testimonial evidence, no statute, rule, or state BOE regulation was cited to the Court in support of that assertion, at trial. However, it now appears that it was a part of the record developed in pre-trial proceedings conducted over the years before the matter came to this court's attention in the immediate "run up" to trial and at trial. Specifically, in its reply brief to the defendant's Motion for Summary Judgment filed July 18, 2019, plaintiff cited to that requirement in Tittle 18, N.J.S.A. and in the NJ Admin. Code, Title 6A.

The Charter School moved out of the Premises as soon as its new Premises were available for occupancy, in September 2017, after its alleged constructive eviction by the Landlord. Chinese Community Center argued that the Tenant was not evicted but rather just found a more attractive alternative to its obligations under the lease with the Chinese Community Center.

Plaintiff's witness(es) testified that after plaintiff ceased operations at the Premises, but before plaintiff could remove all of its items of personal property, Landlord accomplished a self-help lockout, and refused to allow plaintiff access to the premises, creating a cause of action for damages. According to Plaintiff, because of the self-help lockout, defendant wrongly has retained personal property belonging to plaintiff with a value of approximately $17,500.00.

Further, the plaintiff claims damages of $34,449.50 which it paid to a mover for the purpose of removing and relocating its property from the Premises at 17 Schoolhouse Road to Metlars Lane.

I. DEFENDANTS' CONTENTIONS[7]

Defendant New Jersey Chinese Community Center is the owner of a building located at 17 Schoolhouse Lane, in Somerset, (Franklin Township) NJ where plaintiff leased space to operate a

[7] The court notes that it gleaned the defendants' contentions from its Trial Memorandum.

public charter school. The Charter School has occupied that space and operated there since 2007. The parties' existing lease provides for a term that does not expire until 2020.

The Defendant maintains that the Plaintiff's actions have always been motivated by a desire to have its own building in which to operate. In 2013, it made an offer to purchase the defendant's building, negotiations for which continued, on and off for several years, from 2013-2015. With the hope and expectation of buying the building, plaintiff planned several capital improvements on the property including constructing a bubble gym, replacing the roof, resurfacing the parking lot, and interior alterations.

Despite the fact that the plaintiff had received approval from the Zoning Board of Adjustment to construct the bubble gym and had gotten an estimate for replacing the roof Defendant alleges, after negotiations for purchase of the building fell apart, the plaintiff suspended all planned capital improvements and instead began looking for a way to get out of the lease, even after the Landlord offered to build a larger gym at the expense of the Landlord for joint use, as an inducement for the Tenant Charter School to remain in the premises.

Instead, the Tenant entered into a new lease in 2016 with the owner of the property on Metlars Lane (90,000 square feet building) for the Defendant's exclusive use and occupancy to operate its Charter School.

After signing the lease with the owner of Metlars Lane in July 2016, on October 16, 2016, plaintiff brought the within lawsuit against the defendant alleging that it was constructively evicted as a pretext to void the terms of its lease agreement with defendant. Defendant countersued the plaintiff for breach of lease.

IV. DECISION AND DISCUSSION:

A. MOTION FOR RECONSIDERATION:

Although a criminal case, State v. Puryear, 441 N.J.Super. 280 (App.Div. 2015) is a very recent case which nicely summarizes the law in this area:

> Reconsideration is not to be granted lightly and the grounds for reconsideration are generally limited. The proper object of reconsideration is to correct a court's error or oversight. Palombi v. Palombi, 414 N.J.Super. 274, 288, 997 A.2d 1139
> (App.Div.2010). As we have explained, a motion for reconsideration is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but "should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." [Ibid. (quoting D'Atria v. D'Atria, 242 N.J.Super. 392, 401, 576 A.2d 957 (Ch.Div.1990)).]

[See also R. 1:7–4(b) (governing reconsideration of final orders or judgments); Cummings, supra, 295 N.J.Super. at 384, 685 A.2d 60 (explaining the grounds appropriate for reconsidering a final judgment)].

RENT:

The Court's decision clearly states that there were two (2) leases and that defendant claimed unpaid rent as to both leases. It is not true, as defendant asserts, that the Court was unaware of the fact that there were two (2) leases and claims for rent as to each lease.

The issue of the total rent claimed by the defendant was resolved by the court in error via a document admitted without comment (see infra). In an effort to establish the amount of the unpaid rent and other alleged damages, the court simply calculated rent under the wrong lease. Thus, reconsideration is appropriate.

B. CONSTRUCTIVE EVICTION:

Next, Plaintiff, Charter School claimed that its lease obligations were abrogated by the actions of the Chinese Community Center which constituted the "constructive eviction" of the Charter School from the premises.

Our Supreme Court has held, that:

> Under the doctrine of constructive eviction, any act or omission of the Landlord or of anyone who acts under authority or legal right from the landlord, or of someone having superior title to that of the landlord, which renders the Premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a

> breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant. (emphasis added).

[Reste Realty Corp. v. Cooper, 53 N.J. 444, 447 (1969)]

> . . . .
>
> A tenant's right to vacate leased Premises is the same from a doctrinal standpoint whether treated as stemming from breach of a covenant of quiet enjoyment or from breach of any other dependent covenant. Ibid.
>
> . . . .
>
> A tenant's right to claim a constructive eviction will be lost if he does not vacate the Premises within a reasonable time after the right comes into existence. **What constitutes a reasonable time depends upon the circumstances of each case. In considering the problem courts must be sympathetic toward the tenant's plight. Vacation of the Premises is a drastic course and must be taken at his peril.** If he vacates, and it is held at a later time in a suit for rent for the unexpired term that the landlord's course of action did not reach the dimensions of constructive eviction, a substantial liability may be imposed upon him. That risk and the practical inconvenience and difficulties attendant upon finding and moving to suitable quarters counsel caution.

[Ibid. (emphasis added)]

In order to establish a claim for constructive eviction, **"the interference must affect the use of the entire premises."**(emphasis added) Puccini Foods, LLC v. Abbott Indus., Inc., No. A-5639-11T3, 2013 N.J. Super. Unpub. (App. Div. Dec. 2, 2013). For example, a landlord's obstruction of a driveway, if it did not affect tenant's use of the entire leased premises, does not entitled the Tenant to claim constructive eviction.

In Puccini, plaintiff and defendant entered into a lease of seven "parcels" of Premises that constituted the whole property. Plaintiff argued that it was barred access to three of the seven

"parcels" and was therefore constructively evicted by defendant from the premises depriving tenant of the beneficial enjoyment thereof. The New Jersey Appellate Division in that case, held that in order to constitute constructive eviction, "the interference must affect use of the entire premises." Therefore, even if defendant "barred the tenant's access to some of the parcels, it was at most partial eviction" and does not entitle the Tenant to claim constructive eviction. The Court found that while tenant's access was barred to part of the property, plaintiff continued to "collect rent from subtenants, readied Parcel Five for retail business, and continued to solicit subtenants." However, under the "entirety" doctrine Puccini has not been reconciled with the language of Reste supra, which turns on sustainability of "purpose" and interference with "beneficial enjoyment" and does not require landlord's deprivation of tenant's use of the "entire" premises.

Finally, Landlord argues that a substantial delay by the Tenant in leaving the Premises after the development of a particular condition later claimed to constitute constructive eviction, would indicate Tenant had not been ousted by the Landlord rather than that he had waived his right to make such a claim. In other words, a tenant's right to claim constructive eviction as justification to abrogate its obligations under a lease will be lost if he does not vacate the Premises within a reasonable time after the right comes into existence. This results in requiring Tenant to vacate the

premises and accept the risk of potential liability for all damages flowing from surrender of possession because if the Tenant remains on the Premises for an unreasonable period of time after the alleged constructive eviction, such delay may waive the right to claim constructive eviction. Reste Realty Corporation v. Cooper, 251 A.2d 268 (1969); Weiss v. I. Zapinsky, Inc. 65 N.J. Super. 351 (App. Div. 1961); Duncan Development Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293 (App. Div. 1955). That is, a tenant cannot claim to have been constructively evicted while continuing to occupy the premises he claims to have been evicted from.

Another case on point is JS Props., L.L.C. v. Brown & Filson, Inc., 389 N.J. Super. 542 (App. Div. 2006). In JS Props., L.L.C., an appellant, a commercial Tenant challenged the judgment of the Superior Court of New Jersey, Law Division, Sussex County, which dismissed the tenant's constructive eviction claim asserted via a counterclaim against respondent Landlord and that awarded the Landlord damages. JS Props., L.L.C. v. Brown & Filson, Inc., 389 N.J. Super. 542 (App. Div. 2006). The Landlord brought a suit for possession of the commercial leasehold and the case was tried without a jury. Ibid. Tenant argued at trial that he was constructively evicted as a result of water leaks which interfered with his quite enjoyment. The trial court dismissed the complaint and the Appellate Division agreed that dismissal was appropriate. Id. at 548.

i. Constructive Eviction based on Suit for Possession.

However, at trial the Tenant also argued that his constructive eviction claim was also based upon the landlord's suit for possession. Ibid. The trial judge in that case did not address this latter point. Id. In this case Tenant also claims that Landlord's numerous suits for possession support its claim of constructive eviction.

The Appellate Division held that the issue of whether a constructive eviction claim may be maintained merely because a Tenant has been sued for possession has not been determined in this jurisdiction. Id. On this point, the Appellate Division concluded that it need not decide whether a constructive eviction may be based upon the landlord's commencement of litigation because the undisputed facts revealed that the Tenant delayed his departure from the Premises for an unreasonable period of time (six months) after being sued for possession. JS Props., L.L.C. v. Brown & Filson, Inc., 389 N.J. Super. 542 (App. Div. 2006).

The Appellate Division noted that:

> In this State, the doctrine of constructive eviction has been held properly invoked where there has been a physical interference with the tenant's use of the premises, such as when the Landlord has failed to provide heat, Higgins v. Whiting, 102 N.J.L. 279, 280-81, 131 A. 879 (Sup. Ct. 1926), or repair defective plumbing, McCurdy v. Wyckoff, 73 N.J.L. 368, 369, 63 A. 992 (Sup. Ct. 1906), or prevent water seeping through exterior walls, Reste Realty Corp. v. Cooper, 53 N.J. 444, 457, 251 A.2d 268 (1969), or fix a leaky roof, Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351 (App. Div. 1961). But our

> courts have never applied this doctrine to a nonphysical interference with the right of quiet enjoyment, such as is argued here. (emphasis added)

[Id. at 549.]

The Appellate Division further explained, and in doing so comes close to reconciliation of the competing decisions referenced above Reste and Puccini, that even in jurisdictions that recognize the theory asserted by the tenant, it is generally understood however that a landlord's filing of an eviction suit alone is not enough to support a tenant's constructive eviction claim. Id. at 549 citing (Restatement (Second) Property, § 4.3(d) (1977)). However, the Appellate Division acknowledged that, some courts have held that a tenant may have a valid basis for a constructive eviction claim when there is evidence that the suit was brought with malice or in bad faith or when there was a lack of probable cause for the suit. Ibid., citing, (See. e.g., Guntert v. City of Stockton, 126 Cal. Rptr. 690 (Ct. App. 1976); Kuiken v. Garrett, 51 N.W.2d 149 (Iowa 1952); Roseneau Foods v. Coleman, 374 P.2d 87 (Mont. 1962); D. M. Dev. Co. v. Osburn, 625 P.2d 157 (Or. Ct. App. 1981)).

The Appellate Division further noted that one court has held that a landlord's demand letters are insufficient and that a single suit alone is not sufficient, holding that there must be "substantial evidence of repeated acts of malice or bad faith" for there to be a "nonphysical constructive

eviction." Ibid. citing (El Paso Nat. Gas Co. v. Kysar Ins. Agency, Inc., 645 P.2d 442 (N.M. 1982)). Other jurisdictions however have held that even a malicious or non-meritorious eviction suit cannot support a constructive eviction claim. See, e.g., Weisman v. Middleton, 390 A.2d 996, 1001-02 (D.C. App. 1978); Rahman v. Federal Management Co., Inc., 23 Mass. App. Ct. 701, 505 N.E.2d 548, 550 (1987). While this provided an opportunity for the Court to reconcile the perceived incompatible decisions of Reste and Puccini, the Appellate Division did not undertake to definitively resolve the conflict.

Nonetheless, it offered cautionary guidance by stating:

> We question whether the recognition of a constructive eviction claim based upon the malicious filing of a landlord's suit or upon the filing of a suit without probable cause would represent a salutary addition to our common law because, as persuasively observed by the Massachusetts court in Rahman, such claims would have a tendency to chill a landlord's right to lawfully seek possession for fear of retaliation in the form of a constructive eviction claim. Id. at 551; see also D.M. Dev., supra, 625 P.2d at 158. We also question the necessity of such a claim because it presupposes that the mere filing of one or more suits against a Tenant has the tendency to oust the Tenant from the premises.

[Id. at 551.]

New Jersey courts have also held that the filing of an eviction suit is not a reasonable basis for a Tenant to conclude it was constructively evicted justifying it to vacate the premises. See JS Properties, L.L.C. v. Brown & Filson, Inc., 389 N.J. Super. 542, 548-49 (App. Div. 2006). In this case the Landlord's initiation of suits for possession do not support a constructive eviction claim.

A party has a right to pursue its legal remedies as it perceives them, and to rule otherwise would have a chilling effect on a party's resort to seek legal remedies for its claims.

Tenant argued however, that if any of Landlord's attempts to evict the tenant was successful, it would have to shut down its educational operations, leaving 300 students without an alternative to public school, and necessitate layoff of sixty to seventy staff members, (testimony of Tarkan Topchuoglu October 8, 2019) and therefore, the School could not operate. However, that argument is similarly unavailing because a Tenant cannot maintain a right to continued possession after a breach of its lease, on the basis that it is engaged in an educational endeavor.

In JS Properties, LLC v. Brown & Filosn, Inc., 389 N.J. Super. 542, 548049 (App. Div. 2006), the New Jersey Appellate Division held that "the filing of an eviction suit is not a reasonable basis of a tenant to conclude it was constructively evicted and to vacate the premises." Plaintiff here cannot use the summary dispossess action filed against it to argue that it was constructively evicted, even when faced with a suit for eviction and threat of lockout because a post judgment lockout must be judicially approved.

Furthermore, in Ash v. Cohen, 119 N.J.K. 54 (1937), the New Jersey Supreme Court held that "the legal pursuit of one's right, no matter what may be the motive of the promotor of the action, cannot be deemed either illegal or inequitable." Furthermore, if the act be a proper one, the motive is immaterial. See also, O'Connor v. Harms ("one may not be punished civilly for what he had a legal right to do and did legally"; "malice, in the exercise of one's legal right, does not give rise to an action for money damages"); Jenkins v. Flower (Malicious motives….cannot make that wrong which in its own essence, is lawful"); Louis Kamm, Inc v. Flink (Justification connoted just, lawful excuse; it excludes malice); Levin v. Kuhn Loebe & Co., 417 A. 2d 79 (1980) ("that which one has the right to do cannot become a tort when it is done.")

Plaintiff has no legal basis to claim constructive eviction based upon a complaint for possession because the Landlord cannot be subjected to punishment for exercising its legal right to file a lawsuit.

ii. Constructive Eviction Based on Abuse of Process

In Count Seven of Plaintiff's complaint, the plaintiff asserts a cause of action for Abuse of Process, after defendant brought multiple suits against plaintiff, and defendant reentered portions

of the premises for its own use as a school thus, engaging in acts subsequent to its misuse of legal process. The elements of malicious abuse of process are "(1) an ulterior motive and (2) some further act after an issuance of process representing the perversion of the legitimate use of the process." Saddy v. Morris, App. Div., No. A-0454014T3 (January 26, 2016).

The landlord's act of re-entering the tenant's space after Tenant vacated the leased premises was legal and does not constitute "some further act after an issuance of process representing the perversion of the legitimate use of the process." Id. Not only is the Landlord's re-entering of the Tenant's space after abandonment provided for in the parties' lease agreement, it is legally required for the landlord to mitigate damages.

While the foregoing disposes of Tenant's constructive eviction claim based on being sued for possession and alleged abuse of process, the Tenant's constructive eviction claim based on substantial interference with Tenant's use of the premises, must still be adjudicated.

iii. Constructive eviction based on Landlord's Interference with Tenant's Access:

In order to establish a substantial interference claim for constructive eviction, "the interference must affect the use of the entire premises." Puccini Foods, LLC v. Abbott industries,

Inc., No. A-5639-11T3(2013) (emphasis added). For example, a landlord's obstruction of a driveway, if it did not affect tenant's use of the entire lease premises, does not entitle the Tenant to claim constructive eviction. Plaintiff argued in Puccini that it was barred access to three of the seven "parcels" and was therefore constructively evicted by defendant. The New Jersey Appellate Division held that in order to constitute eviction, "the interference must affect use of the entire premises."

Therefore, even if, as Tenant claims here, the defendant barred Tenant's access to some of the premises it was at most partial eviction and does not entitle the Tenant to claim constructive eviction sufficient to relived of its contractual allegation under its lease on that basis.

iv. Constructive Eviction Based On Preventing Tenant's Construction of The "Bubble Gym".

In the instant case, plaintiff failed to establish that Landlord's acts or omissions "affected [Plaintiff's] use of the entire premises" in regard to litigation against tenant or interference with plaintiff. Plaintiff however, also claimed that is was prevented from using the property for the purpose contemplated because the landlord prevented it from constructing a bubble gym on the leased premises. The absence of a bubble gym, the court previously held, did not affect plaintiff's

use of its entire leased premises. That conclusion was in error, considering the entirety of the record, and must be reconsidered and revised.

The plaintiff proved, quite convincingly and the Tenant's witness Dr. Sarchan confirmed numerous times during his testimony, that the Tenant's school was expanding. Thus, it needed more classroom space as well as a larger gymnasium. On October 8, 2019 Dr. Sarchan specifically testified on cross examination that in the end of December of 2015, he started considering the options the School has. Moreover, when pressed for an answer on whether it was in December that the school started communicating with third parties to find a new location for the school, Dr. Sarchan conceded once more that the school was speaking to real estate agents all the time, always looking for a new place. The sum of Dr. Sarchan's testimony, coupled with the nature of the landlord's interference in this case, provides overwhelming evidence that the school was expanding from K-5 to K-12, and that it could not meet New Jersey Board of Education requirements because defendant thwarted construction of the gym necessary to the educational purpose contemplated under the lease. Thus, this court is now convinced of the Tenant's position that it was forced to leave due to the Landlord's interference in constructing the gym, and that although the Tenant may have considered or even intended to leave, the action of the Landlord in

preventing Tenant from constructing the “bubble gym”, in turn prevented the tenant from using the entire premises as contemplated by the parties. Under New Jersey State law, to which the court is now privy, if Tenant could not construct a gym, it could not meet its educational objective to operate a school, which was clearly the purpose for which the premises were leased.

Tarkan Topchuoglu was the first witness for the Plaintiff– Tenant. Mr. Topchuoglu was Head of the school for the CJCPS from August 2011 to July 2016. First he identified the original lease between the parties, which inter alia, placed the responsibility for maintenance on the landlord (Lease P-2, para 11). He then testified that the lease was modified by amendment, on October 31, 2013 assigning repair to Tenant and authorizing them to construct a so-called “bubble gym", a dome shaped structure supported by interior air pressure. Mr. Topchuoglu indicated that the school expanded from K-5 by adding grades 6 -12 and that they needed a larger gymnasium to accommodate the upper grades (Previously, the "gym" consisted of two-three combined classrooms with sufficient ceiling height to be used for that purpose which space was used by both parties. (<u>See</u> further discussion, supra).

Discussions commenced with Mr. Jimmy Hwang, the CEO of the landlord, the Chinese Community Center in regard to the bubble gym being constructed over a portion of the parking lot

at the corner of the building. Tenant obtained a construction estimate from Arizona structures, prepared architectural drawings and engineering, and made application to the Franklin Twp. Zoning Board of Adjustment for a “D” (use) variance. The Landlord and the Tenant appeared for a hearing on February 5, 2015 before the Board after the Landlord approved the site plan and application by signing the application (a prerequisite to a tenant processing such an application). The application and site plan were approved by of the Board at that hearing (at which Mr. Hwang was in attendance), and a Resolution adopted in due course after first and second reading.

Immediately after the meeting however, Mr. Hwang knowing that the Tenant applicant and the Board had just relied on his approval of the application, advised Mr. Topchuoglu that “I cannot agree with the current design” and that began a further series of communications between the parties. Mr. Hwang, on behalf of the landlord, made it clear that he would not agree to the just approved proposed gymnasium construction. The tenant then reasonably determined that it would not be prudent to move forward with an 800K project in light of the Landlord’s stated “withdrawal” of approval.

Mr. Topchuoglu testified that the Landlord then demanded that the Tenant cease use of the interior gym, and the common areas of the building and demanded that the Tenant withdraw its municipal approval, which would permit the Landlord to apply for a variance to build a brick and mortar gym for the joint use of the parties' respective education facilities. (The Chinese Community Center also operated a school in another portion of the Landlord's building). Mr. Topchuoglu testified that the situation got to the point where he "didn't know what was coming next" from the Landlord, and it was impossible to run the school under continual threats and demands of the Landlord. The witness testified that he could not operate a public charter school under New Jersey DOE standards without a gymnasium and that proposition is a matter of law which the court takes judicial Notice of under NJRE 201. That compels the court to reach a different result here, than it announced in its April 22, 2020 Decision.

With hopes of buying the building, Plaintiff had planned a number of capital improvements on the property including constructing a bubble gym, replacing the roof, resurfacing the parking lot, interior alterations, etc. (Email 6/25/150 12/14/15, P-7 and D-15).

However, the trial evidence clearly shows that plaintiff was prepared to construct the bubble gym pursuant to the approval from the zoning board. After the landlord reneged on its approval and it failed to reach an agreement with the landlord about purchasing the building, the plaintiff vacated the premises and moved its operation to 101 Metlars Lane New Brunswick. (D-10, lease dated 7/21/16).

The evidence also clearly supports the plaintiff's claim that it was constructively evicted. The plaintiff Charter School received zoning board approval and conceivably could have applied for a building permit, but the evidence revealed the landlord after reneging on its agreement, made it clear that during the eight months after the date the plaintiff received the approval from the zoning board, that the landlord would not permit construction (D-15 emails dated 6/26/15-12/14/15), as an alternative to more litigation the parties entered negotiation for Landlord's sale of the premises to Tenant. Those efforts failed.

The evidence shows that when the parties failed to reach an agreement on sale of the property, the defendant engaged in a calculated course of conduct designed to inconvenience Tenant and interfere with its use of the premises, amounting to constructive eviction. Simply

stated, no gym – no school, interfered with Tenant's use of the entire premises as contemplated by the lease(s) between the parties.

Objectively, Tenants continued use of the premises was untenable. After signing a new lease with the owner of Metlars Lane in July 2016, on October 16, 2016, plaintiff brought the within lawsuit against the defendant alleging that it was constructively evicted and vacated the premises to void the terms of its lease agreement with Defendant.

The court addresses plaintiff's claims in further detail below, ad seriatim.

Count One – Constructive Eviction

Although plaintiff's witnesses Tarkan Topcuoglu and Namik Sarchan, the Charter School's successive principals, confirmed that Defendant's actions did not prevent its operations. Plaintiff's witnesses testified that in the ensuing eight months, its students were able to attend school, its teachers and staff were able to go to work, the leased premises was usable, contractors were able to do repair and maintenance vendors and suppliers were able to deliver food and supplies, and it was able to run its school. Plaintiff however, in fact continued to add grade levels each year.

Plaintiff's allegation that the expansion of the school to add 7th to 12th grade students could not be accommodated by the existing interior gym, and required construction of the bubble gym, is supported by the evidence.

In Puccini Foods, LLC v. Abbott Industries, Inc., No. A-5639-11T3 (2013), the New Jersey Appellate Division held that in order to establish constructive eviction, "the interference must affect the use of the entire premises." "i.e. unless the deprivation of such part is in character and degree sufficient to prevent the beneficial enjoyment by the tenant of the entire property." That is the case here.

As to the term "beneficial enjoyment," Reste Realty Corp. v. Cooper, 53 N.J. 444, 457 (1969) and Puccini and are instructive in defining for what is considered "beneficial enjoyment."

In Reste Realty, the Court held that in order to establish a claim for constructive eviction, plaintiff must show that the landlord's "act or omission … renders the premises substantially unsuitable for the purpose for which they are leased …" Puccini and *Chelsea* also focus on the purpose for which the premises were leased in deciding whether the tenants were constructively evicted. Here, the purpose for which the premises were leased was to run a school. No gym, no school, e.g., the purpose of the lease was thwarted.

Although, the tenant here continued to use the leased premises for the purpose for a period of time, the use contemplated under the lease was thwarted by landlord by preventing Tenant's compliance with the law, and use of the premises for which it was intended. Plaintiff was thus, deprived of the purpose for which the premises were leased. Plaintiff's theory of "virtual real estate" is an interesting concept, but the plaintiff's "virtual real estate" argument is no different than any other constructive eviction argument. The landlord's action, here, prevented the tenant from building the bubble gym permitted under the lease, and thus, had a debilitating effect on its operations, preventing the use of the entire premises as contemplated.

Plaintiff's Count Two – Breach of Contract

According to the plaintiff the lease permits the gym construction. The lease, D-5 amendment of October 31, 2013, clearly states that the tenant had the right to construct a bubble gym in the parking area. Even though the lease did not authorize tenant to remove landlord's loading dock or driveway, the landlord's agreement to the site plan did by leave and partial novation, what the lease did not require.

The evidence shows that the landlord did prevent the charter school from constructing the bubble gym, after Landlord's agreement, on which Tenant relied to its financial detriment. The

landlord could therefore be ordered pay the Charter School Tenant for costs incurred in anticipating construction of a bubble gym proximately caused by landlord's breach of Contract. That result however, is not ordered here. Further, Tenant's claim for damages (i.e. moving expenses) is subsumed in its success on its constructive eviction claim.

The real impact of Landlord's approval of Tenant's Use Variance application is that the Tenant had the right to believe that the Landlord approved the application when the Landlord signed the application and remained silent at the Board hearing, and it would be inequitable to permit Landlord to rescind that agreement. i.e. Landlord was estopped to withdraw its consent thereafter. Having done so however, Landlord's action in thwarting the Variance constructively evicted Tenant.

> Lopez v. Patel, 406 N.J. Super 79 (A.D., 2009) [Equitable estoppel is designed to prevent injustice by not permitted a party to repudiate a course of action on which another party has relied to his detriment.]
>
> Anske v. Boro of Palisades Parks, 139 N.J. Super 342 (A.D., 1976) [Equitable estoppel and estoppel in pais are convertible terms; there embody doctrine, grounded in equity and justice, that one shall not be permitted to repudiate acts done or positions assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon.]

Plaintiff's Count Three – Return of Security Deposit

Defendant alleges that plaintiff never paid the additional security deposit of $30,000 pursuant to D-3, the May 5, 2008 lease agreement. There was no credible evidence presented by

plaintiff that this or other security deposit was paid. No cancelled checks or bank statements were provided. Plaintiff therefore is not entitled to the return of any security deposit.

Plaintiff’s Count Four – Conversion

Plaintiff's claim for conversion is insufficiently supported by the evidence. Plaintiff's witness Namik Serkin testified that Plaintiff moved out of the leased premises in September 2017. Any property it left behind was abandoned according to the lease agreement. The lease speaks for itself. According to paragraph 27 of D-3, the May, 5, 2008 lease agreement, it states, “if Tenant moves out or is dispossessed and fails to remove any trade fixtures or other property prior to vacating the Leased Premises, then the fixtures and/or other property shall be deemed abandoned by Tenant, and shall become the property of Landlord or, at the landlord’s option, it may cause the fixtures or property to be removed at Tenant’s expense.”

Plaintiff’s Count Five – Tortious Interference

The elements of tortious interference are (1) a protectable interest (2) malice (3) a reasonable likelihood that the interference caused the loss of a prospective gain and (4) damages. Plaintiff fails to establish a protectable interest. Plaintiff has no legal right to attorneys’ fees and expenses relating to defending a prerogative writ action. Plaintiff fails to establish any prospective

economic or contractual gain it failed to receive as a result of defendant's action. Nothing the landlord did affected the charter school's ability to move to 101 Mettlers Road or to operate its school at that location. Plaintiff also fails to establish a wrongful act, which is required to establish "malice."

Defendant has a legal right to file summary dispossess actions and prerogative writ actions. "The legal pursuit of one's right, no matter what may be the motive of the promoter of the action, cannot be deemed either illegal or inequitable." Ash v. Cohn, 119 N.J.L. 54, 58, 194 A. 174 (Sup.Ct. 1937).

<u>Plaintiff's Count Six – Landlord Retaliation</u>

Plaintiff sets forth no basis for asking the Court to recognize this cause of action. Where the damages sought are for breach of contract, plaintiff cannot bring a tort action unless the breaching party owes an independent duty imposed by law. The independent tort doctrine precludes the tort liability of parties to a contract when the relationship between them is based on a contract. ("unless the breaching party owes an independent duty imposed by law").

<u>Plaintiff's Count Seven – Abuse of Process</u>

The elements of abuse of process are (1) an ulterior motive and (2) some further act after an issuance of process representing the perversion of the legitimate use of the process. Here, there was no "further act … representing the perversion of the legitimate use of the process." The only "act" claimed by plaintiff claims is that "after plaintiff charter school vacated the premises in early September 2017, the defendant took over some of the space formerly occupied by defendant."

Not only was Defendant's re-entering the space after the tenant abandoned the leased premises justified and provided for in the parties' lease agreement, it was necessary for the landlord to mitigate damages. No "acts" establishing a cause of action for abuse of process have been proffered by the plaintiff at trial.

Tenant finally argues that Landlord's actions in the aggregate, put the plaintiff in the untenable position of possibly leaving its school with no reliable continuity of operations. Therefore, Tenant argues it was constructively evicted and forced to seek another location in which to operate. Those arguments have merit in logic, and under existing law in this State.

DEFENDANT'S CAUSES OF ACTION

Counterclaims One through Four

1. Non Payment of Rent on the First Lease

2. Non Payment of Rent on the Second Lease

3. Non Payment of Utilities on the First Lease

4. Non Payment of Utilities on the Second Lease

The evidence shows that the lease agreement before it expired, called for a total of $2,653,416.00 under the parties' contract calculated as follows (D-55):

Rent – Lease Grade 6-12 34 months x $37,084.00 =	$1,260,856
PSE&G Utilities 34 months x $7,500 =	$255,000
Sewer 2.5 years x $7,500 =	$18,750
Fire, Sprinkler, Hydrant, water 2.5 years x $3,979 =	$9,948
Rent – Lease, Grade K-5, 34 months x (varies year by year) =	$969,218
Utilities Grade K-5, 34 months x (varies year by year) =	$139,644

B. <u>THIS COURT FINDS THAT THE TENANT DID NOT BREACH ITS LEASE AGREEMENT WITH THE LANDLORD AND IS NOT LIABLE TO RESPOND IN DAMAGES THEREFORE.</u>

A lease is an agreement by the owner of real property to transfer the property to the exclusive possession of another for a definite period of time and for a consideration called rent.

The person transferring the interest is called the lessor or Landlord and; the person to whom the interest is transferred is called the lessee or Tenant.

Although a lease is both a contractual agreement and a transfer of an estate in land, commercial leases under New Jersey law are primarily governed by principles of contract law [Matter of Barclay Industries, Inc., 736 F.2d 75, 78 (3rd Cir. 1984); see Ringwood Associates v. Jack's of Route 23, 153 N.J.Super. 294, 379 A.2d 508, 514–516 (Law Div. 1977), aff'd, 166 N.J.Super. 36, 398 A.2d 1315 (App. Div. 1979)]. As with contracts, ambiguities in a lease are construed against the party who drafted the agreement [Buscaglia v. Owens-Corning Fiberglas, 68 N.J.Super 508, 172 A.2d 703, 710 (App. Div. 1961), aff'd, 36 N.J. 532, 178 A.2d 208 (1962); Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 228 A.2d 674, 680 (1967)]. However, the courts will attempt to construe an ambiguous lease so as to affect the presumed intention of the parties [Alexander's Dept. Stores of N.J., Inc. v. Arnold Constable Corp., 105 N.J.Super. 14, 250 A.2d 792, 798 (Ch. Div. 1969)], and, wherever possible, lease clauses will be construed so as to prevent a forfeiture of the lease [Porter and Ripa Assoc. v. 200 Madison Ave., Etc., 167 N.J. Super. 48, 400 A.2d 508, 512 (App. Div. 1979)]. As such, the lease before this court is interpreted in accordance with contract law principles.

Furthermore, neither the lessor nor the lessee is restricted to statutory remedies for breach of a lease agreement; an action for damages under principles of contract law may also be available [Ringwood Associates v. Jack's of Route 23, 153 N.J. Super. 294, 379 A.2d 508, 516 (Law Div. 1977). What amounts to a constructive eviction is a question of fact." Reste Realty Corp v. Cooper, 53 N.J. 444, 457, 251 A.2d 268, 293, 431 A. 2d 851 (App. Div. 1981). Upon its constructive eviction, Tenant was authorized to vacate the premises without further liability to pay rent under the lease. Reste Realty *supra*, 53 N.J. at 459-60.

In this case, the interference of landlord did affect use of the entire premises, interfered with quite enjoyment and frustrated the purpose of the parties under the lease. Landlord's obstruction of Tenant's use is sufficient to establish constructive eviction and relieve tenant of its obligation under the Lease. The interference affected the entire leasehold and the Tenant was forced to vacate the building to conduct business elsewhere. The doctrine of constructive eviction can be properly invoked where there has been interference with the tenant's use of the premises as contemplated by the parties. This court, applies this doctrine to Landlord's interference with the Tenant's right of quite enjoyment, such as is argued here.

A tenant claiming constructive eviction must also show that it vacated the premises within a reasonable time after constructive eviction from the premises. This Court finds occupancy after the alleged constructive eviction for a time was reasonable and such transient possession did not operate as a waiver. Applying the above principles, to the case at bar, this court discerns sufficient credible evidence in the record to support its determination, that the Tenant has by a preponderance of credible evidence, met its burden to establish constructive eviction. The court finds that, the landlord's interference with Tenants' use did rise to the level necessary to constitute constructive eviction, thereby relieving plaintiff- tenant from continuing liability under the lease.

Sufficient credible evidence exists in the record supporting the Court's conclusion that Landlord's alleged interference did render the premises "substantially unsuitable" and "seriously interfere[]" with the tenant's beneficial use and enjoyment of the entire premises.

I. GENERAL DAMAGES (OTHER THAN) AND MITIGATION OF DAMAGES:

After calculation of Landlord's potential damages, its obligation to mitigate those damages must be considered. In an action for damages, the lessor of a commercial lease has a duty to mitigate damages. Offsets against those damages to which Tenant may be entitled, must also be considered.

Plaintiff's first witness, Tarkan Topcuoglu, the head of school from 2011 to July of 2016 testified that parties original lease, (P-2) at Page 2. Para 11, assigns responsibility for repairs and maintenance of the leased premises, to defendant, Landlord. That responsibility continued until 2020 when the parties agree that Tenant would be permitted by the Landlord to build a "bubble gym" (a domed structure supported by internal air pressure) in return for which, among other things, tenant agreed to assume responsibility for repairs and maintenance of the leased Premises from the landlord.[8]

Hussain Burhanpuwalla was offered by defendant under NJRE 702 as an expert in the area of commercial construction costs, including costs of repair/replacement of items/elements of commercial buildings. Mr. Burhanpuwalla was so qualified at an R. 104(a) hearing during trial and his testimony was offered on the estimated cost of the bubble gym contemplated ($2-2.5 Million) and the cost of repair and maintenance of elements /items of which Landlord claims Tenant is liable for $1.395 Million[9].

Damages (other than rent):

a. Mr. Burhanpuwallah opined that the estimated cost to repair or replace items damages, and for which Landlord Claims Tenant is liable is, $1,229,900.00, the breakdown for which is set out in Exhibit D-46. In that regard, the court excluded costs estimated for

[8] This is important in that it informs that court to a degree as to the effect of tenant's liability to respond in damages for its breach of the lease which Landlord alleges. After Tenant allegedly breached the lease and vacated the premises, Landlord replaced the floor and parking lot. The issue is thus raised if Tenant is liable to Landlord for damages, can they exceed tenant's responsibility under the lease (repair) to include the costs of replacing elements Tenant was only responsible to repair and maintain? (See discussion infra).

[9] Mr. Burhanpurwalla's opinion testimony regarding estimated cost to construst the bubble gym was barred by the Court on plaintiff's motion. Although the witness was suitably qualified and possessed of sufficient knowledge to offer an expert opinion, he was unable to adequately explain the basis of the opinion by reference to factual evidence thus rendering his opinion a mere conclusion, i.e. inadmissible as a net opinion. The reason for this ruling was placed on the record by the Court on October 22, 2019.

“Roof top heater” repair and replacement ($42,500.00), replace bathroom fixtures ($75,000); remove and restore partitions ($17,500.00); and “replace light poles and lights” ($13,000.00) for reasons placed on the record on October 22, 2019, reducing the gross estimate to $1,081,9000.

a. Addressing the remaining damages and estimations as presented in D-46, the Court finds as follows:

   i. Replacement of the floor covering estimated to cost – “high $251,750.00”. This illustrates the problem of defendant Landlord’s estimates. Tenant is responsible under the lease, for “repair and maintenance” and not replacement. In fact, here the Landlord determined to replace not just the limited area of damaged vinyl flooring, but the entire floor (53,000 square feet at $4.75 per square feet) with “commercial carpet titles.” This appears not to be a matter of degree of damage repair, but rather a matter of replacing the entire existing floor with a substantially different type of flooring. The Court finds this to be a matter of landlord’s decision or preference to replace the entire floor of the school (53,000 square feet). While, Landlord could claim damage for floor repair for which Tenant could be liable, no estimate of repair was made or provided. Although, Mr. Burhanpuwallah testified that carpet tile is “cheaper: than vinyl, he does not quantify that term. However, on cross examination, he testified to the opposite, that is, the cost for basic shed resistant vinyl, including installation, was approximately $3.00 per square foot as opposed to $4.75 per square foot for carpet tile, i.e. carpet tile is actually $1.75 per square

foot more expensive. Without quantifying the area in need of repair or providing further cost specificity, the Court is left to impossible speculation, as opposed to specific findings based up competent evidence. As a result, Landlord fails to meet its burden of proving damages by a preponderance of evidence. As a result, defendant landlord's damages are adjusted downward by an additional $251,700, i.e. to $830,200.00 gross.

b. Next, we move to the matter of estimated costs to "resurface driveway and parking lot" at an estimated cost of $343,750.00. Mr. Burhanpuwallah testified that the "cost and breakdown for the renovations to 17 Schoolhouse Road." in Exhibit D-46 was presented to the Landlord as a proposal to be used as a basis for an AIA standard construction contract. That is, Brunswick Builders was submitting these estimates as a "teaser" (the Court's term) in an effort to secure the work, and that methodology lends significant credibility to the estimate. In another words, a contactor would not submit inflated cost estimates, for litigation, if its objective is to be chosen to do the work.

c. However, here Mr. Burhanpuwallah's testimony renders his estimates irrelevant, as it revealed that the paving work was awarded to another contactor which actually did the paving of 275,000 square feet of driveway and parking lot. As a result, landlord's claimed damages could be ascertainable to a certainty by simply providing proof of what it paid the actual contactor for doing the paving. That was not done, and the court is again left to speculate or use an estimate not reflective of actual costs incurred. This eliminates the necessity of discussing tenant's potential liability for replacement (total resurfacing) as opposed to repair.

Landlord again fails to carry its burden of proving alleged damages in this regard, thus furthering adjusting damages downwards by $343,700.00 to $486, 500. Parenthetically, in the expert's testimony he opined that this surface had outlived its useful life expectancy raising an issue of whether Tenant had any responsibility to repair the driveway and the parking lot surface which had reached functional obsolescence. He further testified that the surface had a functional use expectancy of 15 years. This raises another issue of Tenant's responsibility to install a surface which will outlive the lease tern by 12-14 years. As a result, of the ruling here, the Court need do no more than mention it.

d. Next, we move to the replacement item, "removal and replace EPMD roofing membrane only", for the 53,000 square feet of roof over the Tenant's leased space in the building, at an estimated cost of $238,500.00. Again, replacement, as opposed to repair, is problematic. Although, one can assume that 53,000 square feet was used because that is part of the total footprint Tenant operated under, literally, and for which ostensibly Tenant would be responsible to keep in good repair. However, there is no evidence before the Court that after two years post the tenant's departure, any part of the roof has been replaced, inherently placing in doubt the necessity to replace the roof. There was credible testimony from Mr. Topcuoglu, Mr. Hwang (head of the Chinese Community Center) and Mr. Burwangpuwalla that the roof leaked, because the evidence thereof could be seen on the interior ceiling. However, no evidence was offered as to cost of repair (tenants' responsibility under the Lease) or even, whether the source of water infiltration was on Tenant's part of the roof. The Court took judicial notice (NJRE

201) that water does not necessarily appear directly under the point of exterior infiltration. Water my infiltrate roofing and then migrate between layers (e.g. shingle membrane, roofing material) before interior infiltration and perhaps far from, the point of exterior intrusion. This is a fact so generally accepted as not to be in dispute. That deficiency of proof eliminates another $238, 500, of Landlord's claim for damages, now down to a gross amount of $248,000.

e. The next itemized replacement cost is to "remove and replace reflective ceiling resulting from roof leak." The court concludes form the evidence that replacement is appropriate but the proofs as to the etiology of the leaks (and the responsibility therefore) suffer from the same deficiency, as the court noted above.

f. Diverting from the order of presentation of evidence at Trial, the Court addresses and sets aside Defendant's claim for damages for the cost of replacement of equipment used by Tenant as follows: Commercial Refrigerator ($48,000); Commercial Fryer ($16,000); Ice Machine ($24,000); Commercial Dishwasher ($15,000); Rooftop Air Handler ($95,000). No evidence of sufficient reliability was presented to permit this court to determine the functionality of any of that equipment or to ascertain the necessity for, or cost of repair. Therefore, Defendant's damage claim is reduced further. To do otherwise is to invite speculation, conjecture and guesswork, none of which have any place or utility in the Court's decision. Thus $50,000 ($248,000 less $198,000) is now the maximum amount of defendant's counterclaim for damages.

b. Plaintiff's rebuttal witness, Dr. Sarchan, went over a chart of damages that he created. This court finds the Chart to be unreliable because Dr. Sarchan was not able to explain the

discrepancies in his chart and what the most recent lease agreement actually states. This is mentioned only for completeness of the record.

c. Mr. Sabahoglu, was the plaintiff's second rebuttal witness. He testified that the parking spaces usage depended on the year of the lease. Mr. Sabahoglu testified that he did become involved in parking lot repair, in that he would have a paving contractor "patch" the parking lot every year. Mr. Sabahoglu said that the parking lot was so old that it really needed to be repaved. Plaintiff Mr. Sabahoglu also testified that they never needed to repair any of in the kitchen equipment. Plaintiff this evidence is also referenced for completeness of the record, but does not influence the Court's decision.

d. Next, Defendants claims $45,000.00 as damages to "repair" walk-in freezer compressor. That claim goes the way of the above equipment replacement, for the same reasons, reducing damages to $5,000.00 gross.

e. Next, $76,500 to "supply and install custom wall panel" is rejected in the absence of proof as to the necessity therefore. Now, resulting in total elimination of defendant's damages.

This court has carefully considered the totality of circumstance presented by this case, and recognizes the plight of the Tenant faced with an increasingly obstructionist and hostile Landlord. In this situation, the drastic self-help remedy employed was justified under the circumstances, where, as here, the actions of the Landlord rise to the level of constructive eviction. This tenant obviously engaged in a risk/benefit analysis of its options, and chose its course of action. The Landlord, is bound to the consequences of its conduct under the totality of circumstances here.

Defendant is therefore not entitled to loss of rent, from September 17, 2017 to July 14, 2020. Further, Plaintiff's claim for relocation cost of $31,449.50 is rejected. Tenant chose its course of action in response, at its response to being constructively evicted, at its expense. Plaintiff's claim

for $17,000 for wrongful conversion of its personal property is also rejected, as testimony at trial revealed that Tenant had access to the premises after it vacated, and could have retrieved its property.

As to the claims of each party against the other for counsel fees and costs although, the parties have not addressed the recovery of counsel fees and costs, the court finds that both parties have engaged in this litigation in vigorous pursuit of their respective interests in good faith and to an appropriate result, in this Court's opinion. Therefore, under the totally of the circumstances, the Court concludes that each party should bear its own counsel fees and costs (the American Rule) as a matter of equity. The matter is decided, and now concluded. Mr. Skaar will prepare a form of Order consistent herewith.

Finally, as a postscript, the court expresses its appreciation of counsel's diligence, professionalism and courtesy. Counsels conduct throughout has been in the best tradition of our profession, despite seven Judges, years of multiple litigation, trial before a recall judge with inadequate clerical/administrative support, and court closure due to Covid-19. The court acknowledges the effort and consummate professionalism of counsel.

August 3, 2020

Hon. Robert B. Reed, (Retired on Recall).

Hon. Robert B. Reed, J.S.C. (retired on recall)