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	

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.

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 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, 2018 (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 under a lease with a new landlord to Metlars Lane, New Brunswick. 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.

[1] Defendant's counterclaim alleges that the plaintiffs 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 utility on lease agreement dated 5/5/2008 and amendment dated 10/31/13 (Count Three); nonpayment of utility 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 wherein 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

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 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 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

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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 see head on, and were tried therefore, the Court, and therefore conformed the proceedings to the proofs adduced.

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 on 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.

[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.

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 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.[4]

[4] 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.

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, was an attempt by the Landlord to force Tenants 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,

[5] By way of background, in April 2013, the bubble gym was discussed, and Mr. Jimmy Hwang, (the heard of the 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 on October 30, 2019. (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 by Resolution of the Board.

Jimmy Hwang, 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 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, defendants 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, New Brunswick, New Jersey in July of 2016.

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.

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, which decisions are on appeal.

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.

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.

[6] Other than this anecdotal testimonial evidence, no statue, rule, or state BOE regulation was cited to the Court in support of that assertion.

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 in New Brunswick.

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 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.

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

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 in New Brunswick, New Jersey (90,000 square 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. <u>CONSTRUCTIVE EVICTION:</u>

Plaintiff, Charter School claims that its lease obligations have been 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.

Second, New Jersey courts have never recognized a constructive eviction claim grounded in an alleged, non-physical "threat" of interference. In Puccini, the Tenant argued that it was constructively evicted when its Landlord threatened to lock out the Tenant and deem it to be a trespasser. However, the Appellate Division held that New Jersey courts have never recognized a constructive eviction claim grounded in an alleged non-physical interference.

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.

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 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 proffered 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.

Moreover, a tenant's unreasonable delay in departing from the Premises negates what could have been a cognizable claim for constructive eviction under JS Props., L.L.C. See, JS Props., L.L.C. v. Brown & Filson, Inc., 389 N.J. Super. 542 (App. Div. 2006). While this jurisdiction does not recognize a claim for constructive eviction based on nonphysical interference, there is

guidance on this point from the Appellate Division in its opinion in JS Props., L.L.C. Ibid. Wherein the Appellate Division opined that it need not consider whether New Jersey common law should recognize a constructive eviction claim based upon the Tenant being hauled into court on a malicious or non-meritorious suit for possession, because the Tenant in that case did not immediately or within a reasonable period of time vacate the Premises as a result of the landlord's lawsuit. Ibid. In that case, the Tenant did not vacate the Premises for six months after the alleged non-physical interference by the landlord. Ibid. Instead, what the Tenant did was, meet the suit head on, sought its transfer to the Law Division and then filed a multi-count counterclaim, while remaining in the Premises for more than six months after the suit was commenced, by reason of which he forfeited his constructive eviction claim. Ibid.

Based on this the Appellate Division opined that, "[b]ecause of its unreasonable delay in departing from the Premises when sued by the landlord, the tenant's constructive eviction claim, even if maintainable in this jurisdiction, could not succeed." Ibid. Similarly, here, the tenant's claim cannot succeed because the Tenant remained on the Premises for almost two years after the Landlord filed its Summary Dispossess action. The case here is that the first dispossess action was commenced in October 2015, and the Tenant did not vacate until September 2017. This disposes

of the constructive eviction claim of tenant based on "malicious prosecution" of the numerous actions by the Landlord for possession.

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 because the Landlord cannot be subjected to punishment for exercising its legal right to file a lawsuit.

However, 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 that 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 must still be adjudicated.

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.

In the case at bar this court does not find that the landlord’s interference affected the use of the entirety of the Premises leased by the Tenant or that it was substantial. In fact, Tenant’s evidence at trial did not establish Landlord’s interference of “beneficial enjoyment” and did not constitute Landlord’s deprivation of Tenant’s use of the “entire” premises. In Order to establish a claim constructive eviction, plaintiff must show that the landlord’s “act or omission . . . renders the premises substantially unsuitable for the purposes for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises.” Reste Realty Corp. v. Cooper,53 N.J. 444, 457 (1969). However, the interference must affect use of the entire premises. “The payment of rent is not suspended by a reason of a partial eviction unless the deprivation of such part is in character and degrees sufficient to prevent the beneficial enjoyment by the tenant to the entire

property. Chelsea Hotel Corp. Gelles, 129 N.J.L. 102 , 105 (E. & A. 1942). See also, Duncan Dev. Co. v. Duncan Hardware, Inc. 34 N.J. Super. 293, 298 (App. Div.) (stating "partial eviction" must prevent enjoyment of "entire property" and landlord's obstruction of driveway did not suffice), certif. denied, 19 N.J. 328 (1955).

In the instant case, plaintiff failed to establish that Landlord's acts or omissions "affected [Plaintiff's] use of the entire premises" At best, the plaintiff established that is was prevented from constructing a bubble gym on defendant's property. The absence of a bubble gym, however, did not affect plaintiff's use of its entire leased premises.

Instead what the defendant proved, quite convincingly and the Tenant's witness Dr. Sarchan confirmed numerous times during his testimony, is that the Tenant's school was expanding. Thus, it needed more classroom space not just an air supported bubble gymnasium. On October 8, 2019 Dr. Sarchan specifically testified on cross examination that in the end of December of 2015, he started speaking to Mr. Spira regarding the options a commercial tenant has. Moreover, when pressed for an answer on whether it was in December that the school started communicating with the contractor to find a new location for the school, Dr. Sarchan conceded once more that the school was speaking to real estate contractors all the time, it was 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-6 to K-12. Thus, this Court is not convinced by the Tenant's position that it was forced to leave due to the Landlord's interference, and not for some other reason. Instead this Court is convinced that the Tenant was not forced to leave, it intended to leave.

In fact, on cross-examination Mr. Sarchan conceded that contemporaneous with its negotiations to purchase the Chinese Community Center building at 15 Schoolhouse Lane, the charter school was in contact with realtors and analyzed another location for it to operate, if negotiations did not result in its purchase of 17 School House Ln. He went on so far as to comment on consulting with a construction contractor to determine whether 101 Metlars Ln. could be fit to accommodate a school.

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 add grade 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.)

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 portions 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 (a prerequisite to a tenant processing such an application). The application and site plan were approved by Resolution of the Board after that hearing (at which Mr. Hwang was in attendance).

Immediately after, the meeting, Mr. Hwang 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 proposed construction and the Tenant determined that it would not be prudent to move forward with an 800K project in light of the Landlord's 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 the municipal approval and 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.

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 not going to construct the improvements unless the defendant agreed to sell the building, but was prepared to construct the bubble gym pursuant to the approval from the zoning board. After it failed to reach an agreement with the landlord about purchasing the building, the plaintiff abandoned the premises and moved its operation to 101 Metlars Lane New Brunswick. (D-10, lease dated 7/21/16).

The evidence does not support the plaintiff's claim that the tenant was constructively evicted. The plaintiff Charter School received zoning board approval and could have applied for a building permit, the evidence revealed that during the eight months after the date the plaintiff received the approval from the zoning board to construct the bubble gym (D-15 emails dated 6/26/15-12/14/15), the parties were negotiating for Landlord's sale of the premises to Tenant.

Plaintiff's witnesses Tarkan Topcuoglu and Namik Sarchan, the charter school's principals, testified that the plaintiff' was able to operate for 8 months without the bubble gym and that the plaintiff has always had the use of an interior gym.

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 to inconvenience Tenant and interfered with its use of the premises, but not amounting to constructive eviction.

In Tenant's subjective view, its 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 vacated the premises to void the terms of its lease agreement with Defendant.

The court address plaintiff's claims ad seriatim.

Count One – Constructive Eviction

Plaintiff's witnesses Tarkan Topcuoglu and Namik Sarchan, the Charter School's principals, confirmed that Defendant's actions had no substantial effect on its operations. Plaintiff testified that 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, despite anything the landlord did. Plaintiff never had to shut down or delay opening for any reason and in fact continued to add grade levels each year.

Plaintiff's allegation that the addition of the K-5 students could not be accommodated by the existing interior gym, and must have the bubble gym, is not supported by evidence. Plaintiff

opened and operated Kindergarten, 1st and 2nd grades as planned in 2015-16 and 3rd grade as planned in 2016-17, all without a bubble gym.

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 not 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.

In Reste Realty, the purpose for which the ground floor of an office building was leased was to conduct meetings with clients.

The tenant here continued to use the leased premises for the purpose for which it was leased and for which it was intended. Plaintiff continued to run its school and was never deprived of the purpose for which the premises were leased. Plaintiff's theory of "virtual real estate" is a new concept, albeit interesting, but as the plaintiff by its own evidence admits, landlord's actions had no effect on its operations. In fact, the plaintiff's virtual real estate argument is no different than any other constructive eviction argument. The landlord's action, here, allegedly preventing the tenant from building the bubble gym, had no effect on its operations.

Plaintiff's Count Two – Breach of Contract

According to the plaintiff's argument, the lease permits the gym construction. D-5, the lease amendment of October 31, 2013, clearly states that the tenant only has the right to construct a bubble gym in the parking area it currently uses. The lease did not give the tenant the right to construct the bubble gym on top of the landlord's loading dock or on the driveway.

However, the landlord's agreement to the site plan did by leave, what the lease did not require.

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

landlord must therefore, pay the Charter School Tenant for costs incurred in anticipating a bubble gym proximately caused by landlord's breach of Contract.

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 their agreement. i.e. Landlord was estopped to withdraw its consent thereafter. Tenant relied on the Landlord's action to its detriment in funding and securing the Variance and pursuing their business projections anticipating its grant.

> 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 security deposit was paid. No cancelled checks or bank statements were provided. Furthermore, under Paragraph 3 of D-3, the 5/5/2008 lease agreement and Paragraph 5 of D-6, the

April 22, 2015 lease agreements, any security deposit "shall be returned only after the tenant has performed according to this lease agreement". Plaintiff therefore is not entitled to the return of any additional 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. 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).

Plaintiff's Count Six – Landlord Retaliation

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").

Defendant's duty to the plaintiff other than what is set forth in the parties' contract.

Plaintiff's Count Seven – Abuse of Process

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.

In summary, plaintiff operated its school at the Defendant's location for over ten years without a bubble gym. Plaintiff cannot reasonably claim that the absence of a bubble gym deprives it of beneficial enjoyment of this entire premises or that is substantially frustrates the purpose of the lease.

Here the Tenant's argument that their needs for space were increasing and had increased from the time of the initial lease is immaterial. In fact, this argument goes to the point contrary to the Tenant's theory of the case. The Court is convinced that under the current state of this State's

Commercial Lease law, a landlord does not have an obligation to accommodate the Tenant's self-created increasing needs for additional facilities and space. This is especially true because this was never contemplated at the inception of the lease term.

Tenant finally argues that Landlord's action in the aggregate put the school in the untenable position of possibly leaving a 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 some merit in logic, but not 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. THIS COURT FINDS THAT THE TENANT BREACHED ITS LEASE AGREEMENT WITH THE LANDLORD AND IS LIABLE TO RESPOND IN DAMAGES THEREFORE.

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 constructive eviction, Tenant may be authorized to vacate the premises without further liability to pay rent under the lease. Reste Realty *supra*, 53 N.J. at 459-60.

However, in this case the interference (such as it was) did not affect use of the entire premises. Landlord's obstruction of Tenant's use does not suffice to establish constructive eviction and relieve tenant of its obligation under the Lease. The interference did not affect the entire leasehold and the Tenant was not forced to vacate the building to conduct business elsewhere. The doctrine of constructive eviction cannot be properly invoked where there has not been a physical interference with the tenant's use of the premises. This court, declines to apply this doctrine to a *nonphysical* interference with the right of quite enjoyment, such as is argued here.

This court also concludes that the filing of an eviction suit by the landlord was not a reasonable basis for Tenant to conclude it was constructively evicted and to vacate the premises. 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 was unreasonable and continued possession operated as a waiver.

Applying the above principles, this court discerns sufficient credible evidence in the record to support the determination with adequate support in the record, that the Tenant has failed to meet its burden to establish constructive eviction. More importantly, the court finds even assuming the thrust of the majority of Tenant's interference claims, the alleged interference with use did not rise to the level necessary to constitute constructive eviction.

Sufficient credible evidence exists in the Trial record supporting the Court's conclusion that Landlord's alleged interference did not render the premises "substantially unsuitable" nor did it "seriously interfere[]" with the tenant's beneficial use and enjoyment thereof.

I. MITIGATION OF DAMAGES:

After calculation of Landlord's potential damages, its obligations to mitigate those damages must be considered. In an action for rent, the lessor of a commercial lease has a duty to mitigate damages by making reasonable efforts to relet, just as with a residential lease (McGuire v. City of Jersey City, 125 N.J. 310, 593 A.2d 309, 314–315 (1991); Fort Lee v. Banque Nat. de Paris, 311 N.J. Super. 280, 710 A.2d 1, 7 (App. Div. 1998)). 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 "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.

[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 reach of the lease which Landlord alleges. After Tenant allegedly breached the lease and vacated 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 responsibility to repair and maintain? (See discussion infra).

[9] Mr. Buhanpuwallah's opinion testimony regarding estimated cost to constitute 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 or other and 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.

a. Addressing the remaining damages and estimations as presented in D-45, 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 repairs, 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, in order to permit a reliable estimate to be made, and then replace the floor at its expense, 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 area in need of repair or 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 objective and 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 are 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 replace 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 the part of the total footprint Tenant operated under, 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. However, no evidence was offered as to cost of repair (tenants' responsibility under the Lease) or even, whether source of water infiltration was on Tenant's part of roof. The Court took judicial notice (RE 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 notes *supra.*

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 represented to permit this court to determine the functionality of any of that equipment or to ascertain the necessity for, or cos 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).

b. Ms. Hwang crossed plaintiff's rebuttal witness Dr. Sarchan, he 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.

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 got

involved in parking lot repair, in that he would have a paving contractor "patch" the parking lots every year. Mr. Sabahoglu said that the parking lot was so old that it really would need to be repaved. Mr. Sabahoglu also testified that they never needed to repair any of in the kitchen equipment. This evidence is 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, eliminating defendant's damages (other than rent).

This court has carefully considered all of the circumstance presented by this case, and has sympathy for plight of the Tenant faced with an increasingly obstructionist and hostile Landlord. But however vexatious the situation was, the drastic self help remedy employed creates a risk to Tenant, which it exposes itself to at its peril. That is, he risks liability for rent for the unexpired term. That risk is real and substantial where, as here, the actions of the Landlord albeit disconcerting, do not rise to the level of constructive eviction. This tenant obviously engaged in a risk/benefit analysis of its actions, and choosing its course of action is bound to it. The Landlord, no paragon of admirable business practice, is entitled to enforce his contract and its remedies render the totality of circumstances here.

Defendant is entitled to loss of rent, from September 17, 2017 to July 14, 2020, 33 months at:

21,125/ month x 10 =	$211,250 9/14/17- 7/14/18
27,463/month x 12 =	$329,556 7/14/18 – 7/14/19
35,701/month x 12 =	$428,412

Total loss of rent =	$969, 218.00
	less security deposit ($100,000)
	plus bubble gym costs ($52,477)
Total loss of rent=	$921,695.00

Plaintiff's claim for relocation cost of $31,449.50 is rejected, as Tenant was not constructively evicted. 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.

Finally, as to the claims of each party against the other, for counsel fees and costs, the parties have not addressed the recovery of counsel fees incurred for and upon Tenant's breach of the Lease.

Both parties have engaged in this litigation in vigorous pursuit of their respective interest, 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.