Landlord Consents

Reasonableness, Good Faith, and Remedies

by Lori Mayer

Years ago, a colleague caught up in negotiations over his client's proposed alterations to leased space grumbled, "Every requirement for a landlord's consent is just an opportunity for extortion." In contrast, recently a landlord client when refusing to agree to a lease clause that he would not unreasonably withhold his consent to various matters, complained, "Every time I agree to not unreasonably withhold my consent I act perfectly reasonably but the tenant hauls me into court and the judge tells me I'm being unreasonable."

As is set forth in more detail below, case law establishes that the universe of issues a landlord may consider in order to reasonably withhold its consent likely is much smaller than the universe of pertinent issues a typical landlord would consider to be reasonable. On the other hand, when a lease gives a landlord broad discretion to refuse to grant consents, or limits a tenant's remedies when a landlord refuses to grant a consent in breach of a lease, the tenant can be left with no practical remedy, and can remain at the mercy of its landlord.

Some Background: Is a Lease a Conveyance or a Contract?

In the past, a lease was considered a conveyance of an interest in real estate, and the duties and obligations of the landlord and tenant were dealt with according to the law of property and not of the law of contracts. Under the law of property, the landlord's and tenant's respective obligations under a lease were considered to be independent of each other, which left the tenant obliged to continue to pay rent even if the landlord failed to perform its obligations under the lease.[1]

The New Jersey Supreme Court ruled, in *Sommer v. Kridel*,[2] that a residential lease should be treated as a contract, and, in *Conklin Farm v. Leibowitz*,[3] stated that a lease, whether residential or commercial, "is a set of mutually dependent covenants." While the New Jersey Supreme Court never has expressly declared a commercial lease to be solely a creature of contract, some courts have stated that both commercial and residential leases are considered contracts, not conveyances, under New Jersey law.[4]

Whether or not a commercial lease retains some aspect of a conveyance under New Jersey law, it appears that some legal principles that follow from the ancient concept of a lease as a transfer of real estate continue to be binding precedent. These principles include the rule that restrictions on assignment and sublet included in a lease are to be strictly construed,[5] and that an assignment and sublet are totally distinct transactions, so that a covenant against one does not include the other.[6] Nevertheless, a landlord's agreement to not unreasonably withhold its consent has long been considered an independent, affirmative covenant applied in accordance with the law of contracts,[7] the breach of which gives rise to a full panoply of contract remedies.[8]

What Factors May Be Considered if a Landlord May Not Unreasonably Withhold Consent

When a lease prohibits a landlord's unreasonable refusal to consent to an assignment or sublet, the standard to be applied in determining whether the landlord acted reasonably is an objective one: "the action of a reasonable man in the landlord's position."[9]

A clause requiring the landlord's reasonable consent for an assignment or sublet is deemed to be for the protection of the landlord's ownership and operation of the *particular* property involved, and not for the general economic protection of the landlord.[10] In this regard, in the case of a shopping center or multi-tenant building, the 'property' the landlord is permitted to protect is not just the particular premises that would be the subject of the assignment or sublet, but the entire shopping center or multi-tenant building.[11]

Courts have ruled that a landlord who is prohibited from unreasonably withholding its consent to an assignment or sublet may *not* consider any of the following:[12]

- In general, any factors unrelated to the property where the premises to be assigned or sublet are located
- The fact that the proposed new tenant or subtenant occupies space in property owned by the landlord
- The fact that rent under the existing lease is below market rates
- The landlord's desire to enter into a new lease with the proposed new tenant or sub-tenant at a higher rent than is provided for under the existing lease
- The fact that the proposed new use of the premises is prohibited by the lease if the proposed use is suitable for the premises and general business area

Case law indicates that a landlord required to act reasonably may consider the following factors in deciding whether to approve an assignment or sublet:[13]

- The financial solvency of the proposed new tenant or sub-tenant
- The nature of the business to be conducted at the premises and its suitability for the premises and general business area
- The necessity of altering the premises to suit the new tenant or sub-tenant's business
- The proposed new tenant or sub-tenant's willingness to guarantee the payment of rent and performance of all other tenant covenants under the lease
- At least in the case of a percentage lease, the proposed new tenant or sub-tenant's skill and experience

No New Jersey court has specifically ruled on the enforceability of lease clauses that allow a landlord to consider factors that otherwise would be considered unreasonable in deciding whether to approve an assignment or sublet. However, the general principle of contract construction that a court will not make a new contract for the parties to it, or supply material stipulations or conditions that contravene their agreements, applies to leases.[14]

When a Lease is Silent on the Issue of Reasonableness

Regarding leases that neither require a landlord to act reasonably in granting or withholding consents nor specifically allow a landlord to act in its sole discretion, it appears that the current law in New Jersey finds that the landlord is *not* required to act reasonably in this circumstance.[15] Nevertheless, some courts have expressed doubts about this principle in *dicta*.[16] Further, under New Jersey law, all leases, both commercial and residential, are deemed to include a covenant of good faith and fair dealing,[17] which places some limitation on the discretion of a landlord that is not obligated to act reasonably, or is specifically permitted to act in his or her sole discretion, in granting or withholding consents.

If a landlord has the legal right to refuse to consent to a proposed assignment or sublet, the landlord is free to propose lease amendments, including a change in the rent, which will induce it to grant its consent.[18]

Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implied in every contract in New Jersey.[19] As a result of the existence of this implied covenant, even if a party is granted discretionary rights under a contract, those rights are "tempered by the implied covenant of good faith and fair dealing and the reasonable expectations of the parties."[20]

"[A] party exercising its right to use discretion...under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract."[21] However, the covenant is not breached when a party granted discretion acts "based on its own reasonable beliefs concerning business strategy."[22]

Proof of bad motive or intention is vital to establish a breach of the covenant of good faith and fair dealing.[23] Contract law does not require parties to behave altruistically toward each other, and, absent bad motive or intention, the covenant of good faith and fair dealing is not violated by a discretionary decision that results in economic disadvantage to the other party.[24]

A landlord can be guilty of unreasonably withholding a consent in breach of a lease without being guilty of a breach of the covenant of good faith and fair dealing.[25] The former occurs if the landlord refuses to grant a consent based on consideration of improper factors, while the latter requires subjective, improper motivation.

Remedies for Breach, Limitations on Remedies, and Mitigation of Damages

It appears that all contract remedies are available for breach of a lease, including a landlord's breach of its obligation to not unreasonably withhold its consent.[26] The remedies that have been granted to a tenant for a landlord's unreasonable refusal to grant a consent in breach of a lease have included termination of the lease by the tenant,[27] specif-

ic performance,[28] and money damages.[29]

Damages for breach of a lease, whether claimed by the landlord or the tenant, and related burdens of proof, are governed by general principles of contract law. The measure of damages is the reasonably foreseeable and quantifiable injury suffered as a result of the default,[30] and the party claiming damages generally bears the burden of proving both that there was a breach and what damages were proximately caused by the breach.[31] However, it appears that a tenant claiming a landlord unreasonably withheld a consent in breach of a lease always bears the burden of proving unreasonableness, whether the issue is raised as an affirmative claim or a defense or set-off.[32]

The United States District Court for the District of New Jersey, in *Buck Consultants, Inc. v. Glenpointe Associates,* ruled that a limitation on the tenant's remedies for the landlord's unreasonable refusal to grant a consent in breach of the lease is enforceable.[33] The lease at issue provided that the tenant's sole remedy for the landlord's unreasonable refusal to grant a consent in breach of the lease was the granting of the withheld consent, unless the landlord had acted in bad faith or maliciously, in which case the tenant was entitled to money damages.[34] In earlier proceedings, the landlord had been found to have acted unreasonably when it refused to approve a proposed sublease.

Regarding the damages available to the tenant under the lease, the court stated that, if the landlord's refusal had been made in bad faith, the tenant could both withhold rent for the sublet space and terminate the lease.[35] However, if the landlord had not acted in bad faith, the court stated, the tenant's withholding of rent for the sublet space was a violation of the lease, and the tenant would be liable for the difference between the rent it would have collected under the rejected sublease and the rent payable under the lease.[36]

The court gave no explanation for its statement that, in the latter circumstance, the tenant would be entitled to a credit for the lost sublet rent, notwithstanding the lease clause denying all remedies other than the granting of a consent to sublet (to the, of course, long-gone sub-tenant). Perhaps the court interpreted the provision to give the tenant the right to be placed in the economic situation that would have subsisted if the consent to sublet had been granted in a timely manner, given that the remedy of retroactive consent was illusory under the circumstances.

If a tenant breaches its obligations under a lease, the landlord is obligated to make reasonable efforts to mitigate its damages,[37] and also bears the burden of proof on this issue. If the tenant has vacated the property, the landlord is required to prove that it "used reasonable diligence in attempting to re-let the premises."[38]

The factors to be considered in determining whether the landlord has met the burden of proof include whether the landlord, either personally or through an agency, offered or showed the premises to prospective tenants or advertised them in local newspapers. The tenant can attempt to rebut the landlord's evidence by showing that it proffered suitable tenants who were rejected. However, there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts.[39]

An Illustrative Case

The three *Buck Consultants, Inc. v. Glenpointe Associates* opinions[40] offer a good illustration of the issue of reasonableness in the context of a request for approval of a sublet, and also address the interplay of reasonableness and bad faith.

The *Buck Consultants* case involved the refusal of a landlord, Glenpointe Associates, to approve a proposed sublet by Glenpointe's tenant, Buck Consultants, Inc., to Eisai Corporation of North America. The structure at issue in the case was a seven-story building containing approximately 350,000 square feet of space. Esai already was leasing approximately 100,000 square feet of space in the building, half under a direct lease with Glenpointe (the Esai lease) and the balance under various subleases. The Esai lease and subleases all expired on Feb. 28, 2007. In September 2002, Esai and Buck agreed that Esai would sublease approximately 50,000 square feet of Buck's space for a term that would expire on Feb. 28, 2007, at the same time as the Esai lease and Esai's other subleases.

Glenpointe's initial, formal rejection of the sublease was based on a claim that the Esai lease prohibited Esai's sublease of space in the building. However, there was no such prohibition in the Esai lease. Glenpointe later claimed that its refusal to approve the sublease was reasonable because of various economic concerns relating to a single tenant occupying close to half of the space in the building. However, at the same time it was asserting these concerns as grounds for refusing to approve the sublease, Glenpointe had offered to approve the sublease if Esai would lease 99,000 square feet of space in the building for a term of 15 years (later lowered to six years), and also had offered to lease up to 240,000 square feet in the building to Esai for a term expiring in 2010.

In its first decision, in 2004, the Federal District Court for the District of New Jersey, on motions for summary judgment, concluded that Glenpointe's proffered reasons for refusing to approve the sublet were pretextual, and that Glenpointe had breached both the lease provision that prohibited the unreasonable withholding of consent to a sublet and the implied covenant of good faith and fair dealing.

On appeal, the Third Circuit affirmed the district court's ruling on the issue of reasonableness, stating that Glenpointe's offer to lease up to 240,000 square feet to Eisai for a term expiring in 2010 was

inconsistent with its claims of serious fears of the consequences of Eisai's vacating 150,000 square feet in 2007, and that the facts indicated Glenpointe had withheld consent based on the type of general economic concerns that are considered unreasonable under New Jersey law.

However, the Third Circuit disagreed with the district court on the issue of the covenant of good faith and fair dealing. The Third Circuit ruled that the district court's decision on the issue was made based on an inadequate record, and held that the district court had "blurred to the point of nonexistence the fine line between unreasonable and bad faith actions."[41]

To prove that Glenpointe had unreasonably refused to approve the proposed sublease in breach of the lease, the Third Circuit stated, Buck only had to "show that Glenpointe denied consent to the sublease with only its own general economic considerations in mind."[42] However, to establish a breach of the covenant of good faith and fair dealing, Buck was required to show that Glenpointe had acted with the "subjective, improper motivation of depriving Buck the benefit of its bargain."[43]

On remand, the district court denied Glenpointe's motion for summary judgment on the issue of the covenant of good faith and fair dealing.

Implications for Landlords and Tenants

When a lease, or any contract, is being drafted, there always is a trade-off between length and complexity, on the one hand, and anticipating and covering the many issues that might arise under the contract in the future, on the other hand. Of course, the relative bargaining power of the parties affects the extent to which the contract will be more favorable to one party or the other, and there is a limit to the amount of time and legal fees clients will devote to negotiation of lease clauses that might never be an issue.

Obviously, the landlord would be best protected by a lease that allowed it to grant or withhold all consents in its sole and absolute discretion, and limited the tenant's remedies for wrongful withholding of the consent to the granting of the consent. Beyond this, there are a myriad of factors the landlord might desire to include in the lease for its protection in deciding whether to grant its consent to particular matters. Such factors are particularly important in leases where the landlord agrees to not unreasonably withhold consent to an assignment or sublease.

Among other issues, the landlord likely would want to be allowed to deny a tenant's request for an assignment or sublease if the landlord has comparably sized space available for a comparable term and the proposed assignee or subtenant either already is a tenant in the building or already is negotiating with the landlord for space in the building—considerations that clearly would be prohibited if the lease were silent regarding the issue.

In addition, the right to recapture space proposed to be assigned or sublet by the tenant would allow the landlord to try to negotiate a direct lease with a proposed assignee or subtenant at higher rents if the existing rents were at below-market rates.

A tenant, of course, wants the landlord to be obligated to act reasonably and promptly whenever the landlord's consent is required, and wants to limit the factors the landlord is permitted to consider in deciding whether to grant or withhold its consent. A tenant also wants a real and prompt remedy if a landlord withholds a consent in breach of a lease. Given the time and expense of litigation, a lease clause that limits the tenant's remedy for the landlord's wrongful withholding of consent to the granting of the consent denies the tenant any remedy as a practical matter. If the landlord insists on this type of clause, the tenant should request that all remedies, plus legal fees, be available if the landlord acts in bad faith.

In all cases, a tenant probably would like a lease to include time limits for responding to requests for consents under a lease, with the approval deemed to have been granted if the landlord does not respond within the required time period. The tenant might be successful in getting the landlord to agree that specific alterations, such as nonstructural alterations that cost less than a stated dollar amount, will not require the landlord's approval.

As a practical matter, a tenant can avoid difficulties by obtaining required approvals for planned alterations contemporaneously with the signing of the lease, to the extent possible, and by setting parameters for approvals in situations, like a sale of the business, that can be anticipated.

Endnotes

1. *Sommer v. Kridel*, 74 N.J. 446, 453-454, 378 A.2d 767, 771 (1977), *Marini v. Ireland*, 56 N.J. 130, 141, 265 A.2d 526, 532 (1970), *citing Michaels v. Brookchester, Inc.*, 26 N.J. 379, 382 (1958).
2. 74 N.J. 446, 454, 378 A.2d 767, 771 (1977).
3. 140 N.J. 417, 427, 658 A.2d 1257, 1262 (1995).
4. *Jaasma v. Shell Oil Co.*, 412 F.3d 501, 507 (3d Cir. 2005); *Matter of Barclay Industries, Inc.*, 736 F.2d 75, 78 (3d Cir. 1984); *Westrich v. McBride*, 204 N.J. Super. 550, 556, 499 A.2d 546, 548 (Law Div. 1984), *citing Drew v. Pullen*, 172 N.J. Super. 570, 412 A.2d 1331 (App. Div.1980); *Carisi v. Wax*, 192 N.J. Super. 536, 539, 471 A.2d 439. 441 (Dist. Ct. 1983).
5. *Corporate Board of Union Lodge No. 11, of Free and Accepted Masons of Orange, N.J. v. J.R. Evans Co.*, 102 N.J.L. 435, 437, 131 A. 880, 881 (E. & A. 1926); *Town of Kearny v. Municipal Sanitary Landfill Authority*, 143

N.J. Super. 449, 453-454, 363 A.2d 390, 393 (Law Div. 1976).

6. *Corporate Board of Union Lodge No. 11, of Free and Accepted Masons of Orange, N.J. v. J.R. Evans Co., supra*, 102 N.J.L. at 436, 131 A. at 881.
7. *Passaic Distributors, Inc. v. Sherman Co.*, 386 F. Supp. 647, 650, 651 (S.D.N.Y. 1974); *Broad & Branford Place Corp. v. J.J. Hockenjos Co.*, 132 N.J.L. 229, 235-236, 39 A.2d 80, 84 (Sup. Ct. 1944); *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 303, 379 A.2d 508, 513 (Law Div. 1977), *aff'd in relevant part*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979).
8. *Passaic Distributors, Inc. v. Sherman Co., supra*, 386 F. Supp. at 651; *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 309, 379 A.2d at 516; *Cohen v. Wozniak*, 16 N.J. Super. 510, 512-513, 85 A.2d 9, 10-11 (Ch. Div. 1951).
9. *Broad & Branford Place Corp. v. J.J. Hockenjos Co., supra*, 132 N.J.L. at 232, 39 A.2d at 82; *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 301, 379 A.2d at 511.
10. *Krieger v. Helmsley-Spear, Inc.*, 62 N.J. 423, 424, 302 A.2d 129 (1973).
11. *Buck Consultants, Inc. v. Glenpointe Associates*, 217 Fed. Appx. 142, 150 (3d Cir. 2007), *citing Ringwood Associates, Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 303, 379 A.2d 508, 512 (Law Div. 1977).
12. *Krieger v. Helmsley-Spear, Inc., supra*, 62 N.J. at 424; *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 309, 379 A.2d at 516; *Buck Consultants, Inc. v. Glenpointe Associates, supra*, 217 Fed. Appx. at 148-149.
13. *Matter of Barclay Industries, Inc., supra*, 736 F.2d at 80; *Jonas v. Prutaub Joint Venture*, 237 N.J. Super. 137, 567 A.2d 230 (App. Div. 1989), *certif. denied*, 121 N.J. 628, 583 A.2d 324 (1990); *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 301-302, 379 A.2d at 511-512; *Buck Consultants, Inc. v. Glenpointe Associates, supra*, 217 Fed. Appx. at 148-149.
14. *Marini v. Ireland, supra*, 56 N.J. at 143, 265 A.2d at 533; *Housing Authority of City of East Orange v. Mishoe*, 201 N.J. Super. 352, 360, 493 A.2d 56, 61 (App. Div. 1985); *Brower v. Glen Wild Lake Co.*, 86 N.J. Super. 341, 346, 206 A.2d 899, 902 (App. Div.), *certif. denied*, 44 N.J. 399, 209 A.2d 139 (1965).
15. *Housing Authority of City of East Orange v. Mishoe, supra* (dealing with a requirement for the landlord's consent before a washing machine could be installed in a residential apartment); *Brower v. Glen Wild Lake Co., supra* (dealing with assignment or sublet in a residential vacation community); *Mayfair Supermarkets, Inc. v. Acme Markets, Inc.*, 1989 WL 32133 at 7 (D.N.J. April 3, 1989) (dealing with assignment of a commercial lease). All of the courts based their rulings on the general principle that a court will not rewrite a contract to replace clearly expressed provisions with a new or different ones.
16. *Reilly v. Riviera Towers Corp.*, 310 N.J. Super. 265, 271 n.5, 708 A.2d 728, 731 n.5 (App. Div.), *certif. denied*, 156 N.J. 406, 719 A.2d 638 (1998) (stating, in the context of a proprietary lease for a cooperative apartment, "consent to a lease or sublease is arguably subject to the requirement that it will not unreasonably be withheld"); *Jonas v. Prutaub Joint Venture, supra*, 237 N.J. Super. at 141-142, 567 A.2d at 232 (noting "the developing so-called minority view which, despite the nonassignability clause of a commercial lease, requires the landlord to consent to a commercially reasonable assignment request by the tenant" but refusing to address the issue).
17. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates*, 182 N.J. 210, 224, 864 A.2d 387, 395 (2005); *Central Paper Distribution Services v. International Records Storage and Retrieval Service, Inc.*, 325 N.J. Super. 225, 232, 738 A.2d 962, 967 (App. Div. 1999), *certif. denied*, 163 N.J. 74, 747 A.2d 283 (2000).
18. *Jonas v. Prutaub Joint Venture, supra*, 237 N.J. Super. at 142, 567 A.2d at 233.
19. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates, supra*, 182 N.J. at 224, 864 A.2d at 395; *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244, 773 A.2d 1121, 126 (2001); *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420, 690 A.2d 575 (1997).
20. *Wilson v. Amerada Hess Corp., supra*, 168 N.J. at 250, 773 A.2d at 1130.
21. *Id.*, 168 N.J. at 251, 773 A.2d at 1130.
22. *Ibid.*
23. *Ibid. See also Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates, supra*, 182 N.J. at 225, 864 A.2d at 396.
24. *Wilson v. Amerada Hess Corp., supra*, 168 N.J. at 251, 773 A.2d at 1130.
25. *Buck Consultants, Inc. v. Glenpointe Associates, supra*, 217 Fed. Appx. at 151; *cf. Interstate Realty Co., L.L.C. v. Sears, Roebuck & Co.*, 2009 WL 1286209 (D.N.J. April 27, 2009).
26. *Westrich v. McBride, supra*, 204 N.J. Super. at 555, 499 A.2d at 548; *Cohen v. Wozniak, supra*, 16 N.J. Super. at 512, 85 A.2d at 10-11.
27. *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc.*, 166 N.J. Super. 36, 45, 398 A.2d 1315, 1320 (App. Div. 1979).
28. *Cohen v. Wozniak, supra*, 16 N.J. Super. at 512, 85 A.2d at 10.
29. *Passaic Distributors, Inc. v. Sherman Co., supra; Borough of Fort Lee v. Banque National de Paris*, 311 N.J. Super. 280, 710 A.2d 1 (App. Div. 1998); *Whitcomb v. Brant*, 76 N.J.L. 246, 69 A. 1086 (Supreme Court 1908).
30. *Borough of Fort Lee v. Banque National de Paris, supra*, includes a detailed

discussion on the proper computation of a landlord's lost rents proximately caused by a tenant's default and burdens of proof on the matter. *See also Passaic Distributors, Inc. v. Sherman Co., supra*, 386 F. Supp. at 651 (tenant's damages for a landlord's unreasonable refusal to approve sublet are "the difference between the reasonable rental at the time and place of breach...and the rental obtained by plaintiff in mitigation of its damages"); *Westrich v. McBride, supra*, 204 N.J. Super. at 556, 499 A.2d at 549 ("The measure of abatement or rebate is the difference between the rent due and the reasonable rental value of the premises in its defective condition."); *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 309, 379 A.2d at 516 ("The measure of damages [for breach of a lease] is governed by the same principles of contract law applicable to all other kinds of contract breaches."); *Cohen v. Wozniak, supra*, 16 N.J. Super. at 512-513, 85 A.2d at 10-11 (same).

31. *Borough of Fort Lee v. Banque National de Paris, supra.*
32. *Broad & Branford Place Corp. v. J. J. Hockenjos Co., supra*, 132 N.J.L. at 223, 39 A.2d at 82; *Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., supra*, 153 N.J. Super. at 301, 379 A.2d at 512; *Buck Consultants, Inc. v. Glenpointe Associates, supra*, 217 Fed. Appx. at 148.
33. *Buck Consultants, Inc. v. Glenpointe Associates*, 2009 WL 749855 (D.N.J. March 19, 2009) at 6.
34. *Id.* at 2.
35. *Id.* at 6.
36. *Ibid.*
37. *McGuire v. City of Jersey City*, 125 N.J. 310, 320, 593 A.2d 309, 314 (1991); *Sommer v. Kridel, supra*, 74 N.J. at 456-457, 378 A.2d at 772-773; *Borough of Fort Lee v. Banque National de Paris, supra*, 311 N.J. Super. at 292, 710 A.2d at 7; *Harrison Riverside Ltd. Partnership v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470, 473, 707 A.2d 490, 491 (App. Div.), *certif. denied*, 156 N.J. 384, 718 A.2d 1213 (1998); *Fanarjian v. Moskowitz*, 237 N.J. Super. 395, 397, 568 A.2d 94, 95 (1989); *Carisi v. Wax, supra.*
38. *Sommer v. Kridel, supra*, 74 N.J. at 457, 378 A.3d at 773; *Fanarjian v. Moskowitz, supra*, 237 N.J. Super. at 403, 568 A.2d at 98.
39. *Sommer v. Kridel, supra*, 74 N.J. at 458-459, 378 A.3d at 773-774.
40. 2004 WL 5370571 (D.N.J. July 23, 2004), 217 Fed. Appx. 142 (3d Cir. 2007), and 2009 WL 749855 (D.N.J. March 19, 2009).
41. *Buck Consultants, Inc. v. Glenpointe Associates, supra*, 217 Fed. Appx. at 151 and n 11.
42. *Id.* at 151.
43. *Id.* at 151-152 and 151 n 11.

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