NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1395-14T2

HARRIET R. WENDELL,

Plaintiff-Appellant,

v.

22 GROVE ASSOCIATES L.P.;
THE ADVANCE GROUP, INC.,
THE GENERAL PARTNER OF
22 GROVE ASSOCIATES, L.P.;
and PNC BANK, N.A.,

Defendants-Respondents,

and

22 GROVE ASSOCIATES, L.P.,

Defendant/Third-Party
Plaintiff,

v.

MUSNUFF GROUP, LLC,

Third-Party Defendant-
Respondent.

Argued March 14, 2016 – Decided June 23, 2016

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1342-13.

Timothy P. McKeown argued the cause for appellant (Norris, McLaughlin & Marcus,

P.A., attorneys; Richard J. Schachter, of counsel and on the briefs; Mr. McKeown and Nicholas A. Duston, on the briefs).

James M. Turteltaub argued the cause for respondents 22 Grove Associates, L.P. and The Advance Group. Inc., the General Partner of 22 Grove Associates, L.P. (Carlin & Ward, P.C., attorneys; Mr. Turteltaub and Scott A. Heiart, of counsel and on the brief).

Roy J. Evans argued the cause for respondent PNC Bank, N.A. (Schenck, Price, Smith & King, LLP, attorneys; Mr. Evans and Thomas J. Cotton, on the brief).

Thomas A. Harley argued the cause for respondent Musnuff Group, LLC.

PER CURIAM

In this commercial tenancy dispute, plaintiff Harriet R. Wendell appeals from the October 10, 2014 Law Division order, which denied her motion for summary judgment and granted partial summary judgment to defendant 22 Grove Associates, L.P. (22 Grove), and its general partner, defendant The Advance Group, Inc.[1] Plaintiff also appeals from the October 30, 2014 order for final judgment. We affirm, but for reasons other than those expressed by the trial judge. Aquilio v. Cont'l Ins. Co. of N.J., 310 N.J. Super. 558, 561 (App. Div. 1998).

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary

[1] We shall hereafter collectively refer to 22 Grove Associates, L.P. and The Advance Group, Inc. as 22 Grove.

judgment motion, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Plaintiff owns commercial property located in Bridgewater. On January 21, 1972, plaintiff and her husband, now deceased,[2] entered into a lease with Bridgewater National Bank (BNB) (the ground lease). The ground lease restricted use of the leased property for "the erection and use of a building for banking purposes only[.]" The ground lease permitted use for other purposes, but only with the written consent of plaintiff and her husband and upon the conditions contained in the ground lease.

BNB subsequently merged with United National Bank (UNB). As part of the merger, UNB assumed tenancy of the leased property and BNB's obligations under the ground lease. Beginning in December 1993, UNB commenced efforts to obtain plaintiff's and her husband's consent to assign the ground lease to 22 Grove, a non-banking entity, and amend the ground lease to permit 22 Grove to use the leased property for non-banking purposes.

As of March 1995, plaintiff still had not consented to the assignment or amendment of the ground lease. UNB decided to

[2] Plaintiff's husband died in 1994.

proceed with the assignment nonetheless and on March 30, 1995, UNB executed an assignment of its rights under the ground lease to 22 Grove. Because plaintiff had not consented to the assignment, UNB also executed an indemnity agreement, which indemnified and held 22 Grove harmless for and against any claims relating to the assignment. To induce plaintiff's consent, on March 30, 1995, UNB executed a guarantee to her, guaranteeing 22 Grove's payment and performance (the 1995 guarantee).

Approximately one year later, on March 12, 1996, plaintiff and 22 Grove executed an amendment to the ground lease, which changed the permitted use of the leased property to "general commercial office and/or retail purposes" (the first amendment). The first amendment was for a term of fifty years with 22 Grove having the right to renew. Except for these and other specified amendments, the terms and conditions of the ground lease remained in full force and effect.

Regarding the amount of annual rent, the first amendment required an appraisal of the leased property once every five years to determine its market value pursuant to its "current use." Once market value was determined, the annual rent for the first year of the five-year period would be ten percent of the market value. The annual rent thereafter for each of the

remaining four years would be determined "by taking the market value, adjusting it for the year in question to reflect the percentage increase in the Consumer Price Index over the immediately preceding year and then calculating ten percent [] of said adjusted amount." Three months after the parties executed the first amendment, on June 14, 1996, UNB executed a guaranty to plaintiff, which superseded the 1995 guarantee and continued UNB's guarantee of 22 Grove's payment and performance of the ground lease as amended (the 1996 guarantee).

On June 17, 1999, 22 Grove executed a mortgage note to UNB for $750,000 (the June 1999 note). The June 1999 note precluded 22 Grove from entering into any modification or termination of the terms of the ground lease and permitted UNB to declare the note immediately due and payable in full and foreclose on the mortgage in the event of default.

In order to establish annual rent for the five-year period at issue in this appeal, March 12, 2011 through March 11, 2016, the parties jointly retained an appraiser to determine the market value of the leased property as of March 12, 2011. Although the parties agreed that the leased property's current use was "general office[,]" the appraisal, dated November 7, 2011, determined market value based on its "highest and best use" as an "[o]ffice [b]uilding or [b]ank [b]ranch" (the 2011

appraisal). The 2011 appraisal used the sales comparison approach to value the leased property based on five purported comparable sales. However, some of those sales were not consummated and others involved properties whose uses were not the same as the leased property's current use. The 2011 appraisal also made no adjustments to account for the fact that there were speculative sales prices based on listings, not actual sales, or to account for the differences in market value between the uses.

The 2011 appraisal valued the leased property at $840,000, resulting in an annual rent of $84,000, or $7000 per month. The $840,000 valuation reflected a $290,000 increase in the leased property's market value, or 52.73%, from a prior appraisal conducted in 2006, which had valued the leased property at $550,000.

22 Grove objected to the 2011 appraisal. Although the appraiser agreed to review the appraisal and make appropriate changes, plaintiff refused to consent to any change. 22 Grove declined to pay $7000 per month, and instead, paid $5000 per month from March 2012 to June 2012, and $3600 per month beginning in June 2012.

Over one year later, the parties finally agreed to resolve the rent dispute via a second amendment to the ground lease (the

second amendment). The second amendment set rent at $5000 per month from March 12, 2011 to June 12, 2012, and $3600 per month from June 12, 2012 to March 11, 2016. The second amendment required the parties to appraise the leased premises "on or about December 15, 2015 to determine its market value at its current use and to establish a new annual rent[]" to begin on March 12, 2016.

The second amendment was contingent on UNB, or its successor, consenting thereto and guaranteeing 22 Grove's performance. At the time of the second amendment, defendant PNC Bank, N.A. (PNC) was UNB's successor by merger. The second amendment contained no deadlines for 22 Grove's execution of that document or submission of PNC's consent, nor did it make time of the essence. The second amendment also did not specify the manner or form of the consent, provide any instructions regarding submission of the consent, or require a new guaranty or reaffirmation of the 1996 guarantee. Rather, the second amendment merely required a guarantee of 22 Grove's performance. 22 Grove and PNC admitted that the 1996 guaranty remained in effect.

Plaintiff signed the second amendment on March 7, 2013, and sent it to 22 Grove on March 11, 2013. 22 Grove did not immediately execute the second amendment or submit PNC's

consent; however, it continued paying, and plaintiff accepted, rent in the amount set forth in the second amendment.

In an August 13, 2013 letter, plaintiff's attorney unilaterally set a five-day deadline for 22 Grove to submit a signed second amendment and advise of its efforts to obtain PNC's consent. The attorney threatened to withdraw the second amendment if 22 Grove did not timely respond, but also stated that plaintiff was willing to grant an additional five-day extension for submission of the signed second amendment "provided that there [was] a satisfactory explanation of [22 Grove's] efforts to obtain [PNC's] consent and that [22 Grove] represents that the consent will be forthcoming within that time."

On August 14, 2013, 22 Grove advised plaintiff's attorney of its efforts to obtain PNC's consent. In an August 15, 2013 letter, plaintiff's attorney replied that unless 22 Grove confirmed that it received PNC's consent within the five-day deadline, "we will revert to the [first amendment] that was and, in our opinion, is still in place." On August 16, 2013, within the five-day deadline, 22 Grove submitted a signed copy of the second amendment and advised plaintiff's attorney of its continued efforts to obtain PNC's consent.

In an August 19, 2013 letter, plaintiff's attorney unilaterally set a new deadline of August 23, 2013 for submission of PNC's consent, stating that if he did not receive the consent by the close of business that day, "it is our position that the [second amendment is] void." The record does not reflect any further correspondence between the parties. 22 Grove continued paying, and plaintiff accepted, rent in the amount set forth in the second amendment.

On September 27, 2013, 22 Grove submitted a copy of a September 26, 2013 letter from PNC, which stated that 22 Grove's execution of the second amendment constituted a default under the June 1999 note; however, PNC was waiving its right to declare the amount of the note immediately due (the waiver). PNC admitted that the waiver constituted its consent to the second amendment.

Plaintiff did not consider the waiver to be a consent or an indication that PNC was continuing and reaffirming a guarantee of 22 Grove's performance. She instituted the present action, seeking additional rent in the amount established by the 2011 appraisal. 22 Grove filed a counterclaim and third-party complaint against the appraiser, and PNC filed a crossclaim against 22 Grove.

The parties filed motions for summary judgment. In an October 10, 2014 written opinion, the trial judge denied plaintiff's and PNC's motions and granted 22 Grove's motion. The judge found that 22 Grove timely complied with plaintiff's attorney's demands to return a signed second amendment and advise the attorney of its efforts to obtain PNC's consent. The judge determined that plaintiff's attorney's letters illustrated plaintiff's failure to exercise good faith in unilaterally establishing a deadline for 22 Grove's submission of PNC's consent. The judge emphasized that PNC admitted the waiver constituted consent and found that plaintiff cited no authority supporting her contention that the waiver was not a consent. This appeal followed.

On appeal, plaintiff argues that PNC's consent was a condition precedent to the formation of the second amendment and because she withdrew her "offer of settlement" before the condition was satisfied, the second amendment was invalid and unenforceable. Plaintiff also argues that the "offer" expired before the condition was met; the judge's incorrect reading of plaintiff's attorney's letters did not affect either the revocation or expiration of her "offer;" and the waiver did not constitute consent.

22 Grove counters that the second amendment was a binding and enforceable agreement, not an "offer" which plaintiff could withdraw. 22 Grove argues that the second amendment was formed by execution and performance; plaintiff could not withdraw an agreement that was fully executed and being performed; PNC's consent was a condition precedent to performance; and plaintiff acted in bad faith in setting an arbitrary deadline for PNC's consent that was not set forth in the second amendment. 22 Grove also argues that PNC consented to the second amendment as a matter of law and, notwithstanding PNC's consent, the 1996 guarantee remained in effect.

PNC counters that there was a binding agreement between plaintiff and 22 Grove, and the second amendment contained no provision regarding the form of the consent or the time for its submission. PNC also argues that the waiver constituted a valid consent and was submitted to plaintiff within a reasonable time.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). As the Court stated,

> That standard mandates that summary judgment be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the

> moving party is entitled to a judgment or order as a matter of law.
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> [Ibid. (quoting R. 4:46-2(c)).]

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). "[F]or mixed questions of law and fact, [we] give deference . . . to the supported factual findings of the trial court, but review de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 576-77 (2015) (citations omitted).] Applying these standards, we conclude that 22 Grove was entitled to summary judgment as a matter of law and entry of final judgment.

Generally, the requirements essential to contract formation are: (1) competent parties, (2) proper, legal subject matter, (3) valid consideration, (4) mutuality of agreement (offer and acceptance), and (5) mutuality of obligation. See, e.g., West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958). "A contract arises from [an] offer and acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." Weichert Co.

Realtors v. Ryan, 128 N.J. 427, 435 (1992) (citation omitted). "Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Ibid.

"[I]t is elementary that a contract comes into being by the unconditional acceptance of an offer before its communicated withdrawal. Such acceptance completes the manifestation of assent requisite to a contractual obligation." Culver v. Dziki, 123 N.J.L. 66, 67 (1939). However, an offeror is the master of his own offer. Synnex Corp. v. ADT Sec. Servs., Inc., 394 N.J. Super. 577, 585-86 (App. Div. 2007). As stated in 1-2 Corbin on Contracts:

> At the time of making the offer, the offeror has full control of its terms, of the person who shall have power to accept, of the mode of acceptance, and of the length of time during which the power of acceptance shall last. The offer may specify in it the time within which acceptance must occur; if it does so, the power of acceptance is limited accordingly.
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> [1-2 Corbin on Contracts § 2.14 (4th ed. 2015).]

See also Synnex Corp., supra, 394 N.J. Super. at 585-86.

Hence, if there is a specified time within which to accept an offer, "[t]here is no question that an offeree must accept [the] offer within the time specified in the offer[.]" State v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 613 (App. Div.

2006). Accordingly, an offeror may revoke an offer "so long as he does so before the offeree accepts it[.]" Am. Handkerchief Corp. v. Frannat Realty Co., 17 N.J. 12, 17 (1954). It is equally "well-settled that where no time is fixed for the performance of a contract, by implication a reasonable time was intended." Becker v. Sunrise at Elkridge, 226 N.J. Super. 119, 129 (App. Div.), certif. denied, 113 N.J. 356 (1988). "What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made." Ernst & Young, L.L.P., supra, 386 N.J. Super. at 613 (citation omitted).

Contracts may contain conditions precedent, but they are disfavored because "failure to comply with [them] works a forfeiture." Liberty Mut. Ins. Co. v. President Container, Inc., 297 N.J. Super. 24, 34 (App. Div.) (citation omitted), certif. denied, 149 N.J. 406 (1997). "Given this, a condition precedent must be expressed in clear language or it will be construed as a promise." Ibid. (citation omitted).

There are two types of conditions precedent: a condition precedent to formation of a contract; and a condition precedent to performance of a contract. Conditions precedent to the formation of a contract typically relate to whether it goes to the offer and acceptance of the contract. See Corbin on

Contracts § 628 (1960 & Supp. 1990). Conditions precedent to formation have become disfavored by our courts. See In re Fairfield General Corp., 75 N.J. 398, 411-15 (1978) (stating that courts that found conditions precedent to be conditions to formation of a contract were "questionable authority" and citing cases from other jurisdictions supporting the proposition that conditions precedent are typically to performance).

As stated in 13 Williston on Contracts:

> Generally in contracts, when reference is made to conditions, what is meant are conditions to performance - that is, conditions which become operative after formation of the contract and qualify the duty of immediate performance of a promise or promises in that contract - not conditions to the creation or formation of a contract or promise.
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> [13 Williston on Contracts § 38:4 at 420 (Lord ed. 2013).]

In a condition precedent based on performance,

> [t]he parties may make contractual liability dependent upon the performance of a condition precedent . . . . Generally, no liability can arise on a promise subject to a condition precedent until the condition is met. . . . A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen.
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> [Duff v. Trenton Beverage Co., 4 N.J. 595, 604-05 (1950).]

"The fact that no duty of performance on either side can arise until the happening of a condition does not, however, make the validity of the contract depend on its happening." 13 Williston on Contracts § 38:4 at 422.

Here, the parties agreed on the essential terms of the second amendment, manifested an intention to be bound by those terms, and commenced performance. The second amendment did not specify a time within which 22 Grove had to accept it or submit PNC's consent, nor did it make time of the essence for these conditions or imply that prompt performance was essential. The second amendment also did not specify the manner or form of the consent, or provide any instructions regarding its submission. Nevertheless, two days before the first arbitrary deadline of August 18, 2013, 22 Grove accepted the second amendment and complied with plaintiff's attorney's demand to advise of its efforts to obtain PNC's consent. 22 Grove submitted PNC's consent less than forty days later.

Given the circumstances of this case, we are satisfied that the time in which 22 Grove accepted the second amendment and submitted PNC's consent was more than reasonable. Plaintiff delayed nearly three years in consenting to the assignment of the ground lease to 22 Grove and executing the first amendment, and she accepted the 1996 guarantee three months after the

parties executed the first amendment. In addition, it took over one year for the parties to resolve the present rent dispute. Accordingly, the second amendment became a fully formed and legally binding and enforceable contract as of August 16, 2013. Plaintiff could not change the terms of the second amendment thereafter by setting a deadline for the submission of PNC's consent.

The contingency in the second amendment requiring PNC's consent does not change this outcome, as that condition was a condition precedent to performance, not formation. A valid contract existed independent of this condition and had no bearing on the validity or formation of the contract itself. See Williston on Contracts § 38:4. 22 Grove satisfied the condition precedent by submitting the waiver.

It is well-settled that "material alteration[s] or variance[s] by a party to a contract discharge[] the guarantor who does not authorize or consent to the alteration or variance. However, if the guarantor authorized or consents or assents to the same, he is estopped to interpose the alteration or variance as a defense." Mosaic Title Co. v. Jones, 111 N.J.L. 385, 391 (1933). A guarantor "is not released by changes made [] with his knowledge and consent, and his assent to the change or modification will bind him[.]" Ibid.

PNC's waiver specifically referred to the second amendment and waived 22 Grove's default under the June 1999 note, thus demonstrating that PNC, the guarantor, had "knowledge" of the second amendment and "consented" or assented to it by providing the waiver. Ibid. In addition, by law, a waiver is often synonymous to consent:

> "Waiver" is the intentional relinquishment of a known right. It is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on. It is requisite to waiver of a legal right that there be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. "Waiver" presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact.
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> [W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-153 (1958).]

Absent any specification in the second amendment as to the form or manner of the consent, we conclude that the waiver constituted a valid consent.

Notwithstanding the issue of consent, the 1996 guaranty remained in effect. The second amendment did not require a new

guaranty or a reaffirmation of the 1996 guaranty, and PNC has acknowledged its continuing obligation to guarantee 22 Grove's performance. This is exactly what plaintiff wanted and what the second amendment required.

Affirmed.