(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

40 EISENHOWER DRIVE, LLC,

Plaintiff-Respondent,

v.

KAROON CAPITAL MARKETS, INC.,

and KFS CAPITAL MARKETS, INC.,

Defendants-Appellants.

KAROON CAPITAL MARKETS, INC.,

Counterclaim and Third-Party

Plaintiff-Appellant,

v.

40 EISENHOWER DRIVE, LLC, and

DAVID HIRSCHMAN,

Counterclaim and Third-Party

Defendants-Respondents.

December 11, 2014

Argued November 5, 2014 – Decided

Before Judges Yannotti and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2618-09.

Philip L. Guarino argued the cause for appellants (Mavroudis & Guarino, LLC, attorneys; Mr. Guarino, on the brief).

Steven Siegel argued the cause for respondents (Sokol, Behot & Fiorenzo, attorneys; Joseph B.

Fiorenzo, of counsel; Mr. Fiorenzo
and Mr. Siegel, on the brief).

PER CURIAM

Defendants Karoon Capital Markets, Inc. ("Karoon") and KFS Capital Markets, Inc. ("KFS") appeal from a final judgment and related orders entered by the Law Division. We affirm.

I.

We briefly summarize the relevant facts. In November 2006, plaintiff and Karoon entered into a lease for premises in commercial property in Paramus. The lease provided that Karoon would occupy the premises for a term of sixty-one months, commencing on March 31, 2007, and ending on April 30, 2012. Karoon vacated the premises on August 30, 2008, and made no rent payments thereafter. Approximately three and a half years remained on the lease term.

On March 18, 2009, plaintiff filed a complaint naming Karoon and KFS as defendants. Plaintiff claimed that Karoon breached the lease by quitting the premises before the end of the lease term and failing to pay rent. Plaintiff also claimed that KFS was liable for Karoon's debts and obligations since KFS allegedly operates "as the alter ego of" Karoon.

Defendants filed an answer denying liability and asserted a counterclaim. Defendants claimed that Karoon had been compelled to quit the premises. They alleged that plaintiff breached the lease; violated the covenant of good faith and fair dealing; committed fraud; violated the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -195; and failed to mitigate damages.

Prior to trial, the court dismissed defendants' common law fraud and CFA claims. The court determined that plaintiff's claim that KFS should be liable for any damages awarded against Karoon would be reserved and decided by the court, rather than the jury.

The remaining claims were tried before a jury, which found that Karoon breached the lease, and awarded plaintiff $155,485.48 in damages. The jury also found that plaintiff breached the lease, but did not award Karoon any damages on that claim. On October 26, 2012, defendants filed a motion to vacate in part the judgment, and to grant an additur or a new trial on damages.

The court entered a judgment dated November 7, 2012, against Karoon in the amount of $155,485.48, plus costs of suit. The order indicated that plaintiff should file a motion seeking entry of judgment against KFS. The order also provided that plaintiff could file a motion seeking the award of counsel fees, pursuant to the lease. On December 5, 2012, plaintiff filed its motion for entry of judgment against KFS.

The court entered an order dated January 2, 2013, denying defendants' motion, for reasons stated in an accompanying written opinion. The court found that the verdict was "firmly supported by the evidence adduced at trial." In addition, the court filed an order dated January 2, 2013, entering judgment against KFS for reasons stated in a written opinion attached to the order. The court found that KFS was a successor in interest to Karoon.

On January 9, 2013, plaintiff filed a motion seeking an award of counsel fees pursuant to the lease. The court granted the motion, for reasons stated in a written opinion, and entered an amended judgment dated January 25, 2013, awarding plaintiff reasonable counsel fees and costs in the amount of $204,667.44. This appeal followed.

II.

Defendants argue that the trial court erred by denying their motion to vacate the verdict in part, and failing to order an additur or new trial on damages.

Rule 4:49-1(a) provides that a trial court may only grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law."

"A jury verdict, although not sacrosanct, is entitled to great deference." City of Long Branch v. Liu, 203 N.J. 464, 492 (2010). "A motion for a new trial or, alternatively, an additur, based on a claim that a jury award was against the weight of the evidence, should not be granted unless it 'clearly and convincingly appears' that the award was so deficient that it constitutes a 'miscarriage of justice.'" Ibid. (quoting R. 4:49-1(a)); see also Baxter v. Fairmont Food Co., 74 N.J. 588, 596 (1977).

A court "'may not substitute [its] judgment for that of the jury merely because [it] would have reached the opposite conclusion.'" Ibid. (quoting Dolson v. Anastasia, 55 N.J. 2, 6 (1969)). "On a motion for a new trial, all evidence supporting the verdict must be accepted as true, and all reasonable inferences must be drawn in favor of upholding the verdict." Boryszewski v. Burke, 380 N.J. Super. 361, 391 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006).

Defendants note that the jury found that plaintiff and Karoon breached the lease. Defendants assert that plaintiff's breach necessarily pre-dated Karoon's breach, which was based on its failure to pay rent after it vacated the premises. Defendants contend that because plaintiff breached the lease first, Karoon was excused from further performance as a matter of law. We cannot agree.

"When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citing Frank Stamato & Co. v. Borough of Lodi, 4 N.J. 14 (1950)); see also Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285 (App. Div. 1998) (noting that material breach by

party to contract excuses other party from further contractual performance). A breach is material when it goes to "the essence of the contract." Neptune Research & Dev., Inc. v. Teknics Indus. Sys., Inc., 235 N.J. Super. 522, 532 (App. Div. 1989). The question of whether a breach is material is ordinarily for the trier of fact. Magnet Res., Inc., supra, 318 N.J. Super. at 286.

Defendants maintain that plaintiff breached the lease by: (1) leasing space in the building to another securities firm, despite a provision of the lease precluding it from doing so; (2) failing to make certain agreed-upon renovations to the premises, as detailed in a letter appended to the lease; (3) violating the covenant of quiet enjoyment by leasing space in the building to a drug rehabilitation facility, and allowing another tenant to conduct manufacturing and shipping operations in the building; and (4) providing space where the air conditioning did not work properly at times, and which flooded on three occasions. Defendants assert that these were material breaches of the lease agreement, and that the jury could not have concluded otherwise.

We are convinced, however, that the trial judge correctly determined that, based on the evidence adduced at trial, the jury could reasonably have determined that Karoon was able to use the leased premises during the seventeen months of its occupancy, and that the problems Karoon had identified with the building and other tenants did not materially impair its ability to conduct its business in the premises.

Defendants further argue that the trial judge erred by failing to grant an additur or a new trial on damages. We are convinced, however, that the trial court correctly determined that neither a new trial nor an additur was warranted. As the judge found, the jury's verdict was amply supported by the evidence, and the verdict was not in any sense a miscarriage of justice.

We reject defendants' contention that, based on the evidence presented at trial, a jury could only conclude that plaintiff's breaches were material. There also is no basis for defendants' contention that the jury's verdict was the result of confusion and mistake.

We also reject defendants' claim that Karoon was entitled to damages because the jury found that plaintiff breached the lease and Karoon presented evidence that it sustained damages in the form of relocation expenses. The argument is without sufficient merit to warrant discussion. R. 2:11-1(e)(1)(E).

III.

Next, defendants argue that the trial judge erred by awarding plaintiff attorney's fees. As we have explained, the jury determined that Karoon breached the lease and awarded plaintiff the unpaid rent for the remainder of the lease term. Section 19 of the lease agreement provides as follows:

> 19. INDEMNIFICATION BY TENANT. Tenant shall indemnify Landlord against all liability and expense (including reasonable architects' and attorneys' fees) incurred by Landlord by reason of:
>
> (a) Any action by Tenant (or Landlord to cure an Event of Default) on or about the Demised Premises;
>
> (b) Any use, non-use or maintenance of the Demised Premises or adjacent area;
>
> (c) Any negligence of Tenant;
>
> (d) Any injury or damage to any person or property occurring on or about the Demised Premises;

> (e) Any failure by Tenant to perform its obligations under the Lease, which remains uncured by the Tenant after notice by Landlord.

Defendants contend that section 19(a) of the lease does not apply, because it only pertains to actions by a landlord to cure a default regarding the leased premises. According to defendants, section 19(a) does not apply to actions to collect rent. In addition, defendants contend that counsel fees could not be awarded pursuant to section 19(e) because there was no evidence that Karoon failed to pay rent "after notice" by plaintiff. Defendants further contend that it would be inequitable to permit plaintiff to recover counsel fees in view of the jury's finding that it breached the agreement. We are unpersuaded by these arguments.

The trial judge correctly noted that a prevailing party may recover attorneys' fees if they are "expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427 (2001) (citing Dep't of Envtl. Prot. v. Ventron, 94 N.J. 473, 504 (1983)). Plaintiff was entitled to an award of counsel fees and costs pursuant to section 19(a) because plaintiff brought this action to cure an event of default, specifically the non-payment of rent. Section 21 of the lease provides that failure to pay rent constitutes an event of default. In addition, plaintiff was entitled to an award of counsel fees and costs pursuant to section 19(e) because Karoon failed to perform its obligations under the lease.

Moreover, despite defendants' claim to the contrary, plaintiff did provide notice to Karoon demanding payment of the unpaid rent. Plaintiff's management company sent letters dated January 14, 2009, and February 12, 2009, informing Karoon of its obligation for past due rent. Defendants' suggestion that these notices were deficient is without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

IV.

KFS argues that the trial judge erred by entering judgment against it for the damages awarded against Karoon. KFS contends that in the complaint, plaintiff only asserted a claim against it on the basis of an "alter ego" theory. KFS further argues that there cannot be any "alter ego" or successor corporate liability in this matter. Again, we disagree.

We note initially that, while the complaint only sought judgment against KFS on an "alter ego" theory, plaintiff's post-trial motion made clear it was seeking to impose liability upon KFS on the ground that it was the corporate successor to Karoon. Moreover, the parties had engaged in discovery relevant to corporate-successor liability, and evidence was elicited at trial on these issues.

Rule 4:9-2 provides in part that, "When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order." Here, the trial judge did not err by treating the issue of corporate-successor liability as though they had been raised in the pleadings.

The record also supports the imposition of liability upon KFS for the damages awarded against Karoon. Generally, "when a company sells its assets to another [entity], the acquiring company is not liable . . . simply because it has succeeded to the ownership of the assets of the seller." Lefever v. K.P. Hovnanian Enters., 160 N.J. 307, 310 (1999). There are, however, four exceptions to this principle: "(1) the successor expressly or impliedly assumes the predecessor's liabilities; (2) there is an actual or de facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability." Ibid. (citation omitted).

Where, as in this case, the claim is made that "a particular transaction amounts to a de facto consolidation" of the selling and buying companies, or the mere continuation of the selling company by the purchaser, the court considers four factors:

> "(i) continuity of management, personnel, physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders."
>
> [Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 73 (App. Div. 1997) (quoting Glynwed, Inc. v. Plastimatic, Inc., 869 F.Supp. 265, 275-76 (D.N.J. 1994)).]

All of these factors need not be present for finding that a de facto merger or continuation has occurred. Ibid. "Rather, '[t]he crucial inquiry is whether there was an intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets.'" Ibid. (quoting Glynwed, Inc., supra, 869 F.Supp. at 276) (internal quotation marks omitted).

Here, the trial testimony and evidence presented on plaintiff's post-trial motion established that Karoon and KFS shared common members, shareholders, and staff. Lisa Karoon owned 94% of Karoon before its dissolution. She owned 90% of KFS. KFS was formed in December 2008. The only owner of KFS who was not an owner of Karoon is Michael Crane, who owns 1% of KFS. Karoon was dissolved in November 2009 and nothing remained of that entity.

Kayvan Karoon testified that he "ran" both Karoon and KFS. Karoon's principal asset was its customer base. When Karoon shut down, its customers were transferred to KFS. KFS's

customer base includes Karoon's customers. Moreover, in 2008, all of Karoon's employees and brokers moved to new offices, which thereafter became KFS's offices. The brokers under contract to Karoon subsequently came under contract to KFS. Karoon had few physical assets, but they were transferred to KFS. Kayvan Karoon stated that KFS never paid Karoon for the acquisition of its assets.

We are convinced that, based on these facts, the trial court correctly found that KFS was merely a continuation of Karoon and the court properly entered a judgment against KFS, finding it jointly and severally liable for the damages awarded against Karoon.

Affirmed.
