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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

PROSPECT REAL ESTATE, LLC,

Plaintiff,

v.

WAWA, INC.,

Defendant.

CIVIL ACTION

CASE NO. 20-cv-

Document Electronically Filed

**COMPLAINT FOR BREACH OF CONTRACT,
BREACH OF DUTY OF GOOD FAITH AND
FAIR DEALING, AND UNJUST
ENRICHMENT**

DEMAND FOR JURY TRIAL

Plaintiff, Prospect Real Estate, LLC, by way of
Complaint against defendant, Wawa, Inc., hereby states as follows:

INTRODUCTION

1. Plaintiff seeks a judgment declaring the rights and obligations of the parties under the terms of a Lease between plaintiff and defendant, dated May 9, 2019. A copy of the Lease is attached as Exhibit A.

PARTIES

2. Plaintiff, Prospect Real Estate, LLC ("Prospect") is a real estate development company with an address of 401 Madison Avenue, Lakewood, New Jersey, 08701.

3. Defendant Wawa, Inc. ("Wawa"), is a convenience and gas station chain with its corporate headquarters located at 260 West Baltimore Pike, Wawa, Pennsylvania, 19063.

JURISDICTION AND VENUE

4. This declaratory judgment action is based upon Section 2201 of Title 28 of the United States Code, 28 U.S.C.A. §2201.

5. The jurisdiction of this court is based upon diversity of citizenship existing between the parties.

6. This matter in controversy exceeds \$75,000.00, exclusive of interest and costs.

7. The venue for this matter is properly laid in the District Court of New Jersey because the Property at issue in this action is located in Ocean County, New Jersey.

FACTUAL BACKGROUND

8. Prospect is the owner and developer of a 1.79-acre property in Lakewood, New Jersey, known as Block 420, Lots 12 and 16 and Block 420.01, Lots 14 and 23 on the tax map of Lakewood Township (the "Property").

9. On May 9, 2019, Prospect and Wawa entered into a Land Lease Agreement (the "Lease"), whereby Prospect agreed to lease

the Property to Wawa for the construction of a new Wawa convenience store and gas station on U.S. Route 9 in Lakewood Township.

10. The Lease was for a term of twenty (20) years, during which Wawa was obligated to pay rent to Prospect in the total amount of seven million one hundred ninety-three thousand five hundred and fifty dollars (\$7,193,550.00).

11. Under Section 9(b) of the Lease, Wawa had a 180-day Due Diligence Review Period until November 6, 2019, during which time it could have terminated the Lease based on the results of its due diligence.

12. Pursuant to its obligation under Section 10(b) of the Lease, Prospect delivered a Phase I environmental report prepared by its consultant, the Lewis Consulting Group ("Lewis"), dated September 20, 2019, to Wawa during the Due Diligence Review Period.

13. Thereafter, Wawa requested that Prospect commission a separate, new Phase I report because Lewis was not on Wawa's list of approved vendors.

14. Prospect then retained Pennoni Associates Inc. ("Pennoni") to prepare a new Phase I report, dated January 31, 2020, which concluded that there were no Recognized Environmental Conditions ("RECs") or Controlled Recognized Environmental Conditions ("CRECs") identified in connection with the Property.

15. Pennoni's Phase I report was submitted to Wawa on February 3, 2020, after which Wawa did not express any concerns or identify any issues with Pennoni's Phase I report.

16. Under Section 7 of the Lease, Prospect was responsible for obtaining all municipal, county and regional land use approvals and state agency permits required to build a Wawa convenience store and gas station on the Property, with the exception of building permits, health department approvals, pump or tank permits or other business-related licenses.

17. Prospect has pursued all requisite municipal, county and regional land use approvals and state agency permits and expended substantial sums in good faith in furtherance of its obligations under the Lease.

18. To date, Prospect has applied for and obtained site plan and subdivision approval from the Lakewood Township Planning Board, site plan and subdivision approval from the Ocean County Planning Board, and soil erosion and sediment control certification from the Ocean County Soil Conservation District.

19. Prospect also applied to the New Jersey Department of Transportation ("NJDOT") for major access permits to provide the Property with ingress and egress from U.S. Route 9.

20. On November 1, 2019, NJDEP issued "draft" major access permits, which would result in NJDEP's issuance of final major

access permits upon Prospect's submission of a permit fees, guarantees and additional documentation.

21. On May 18, 2020, Prospect and Wawa entered into a First Amendment to the Land Lease Agreement ("First Amendment"), under which the parties agreed that "all time periods in this Lease and the performance of all obligations under the Lease are hereby tolled until the expiration of the Tenant Stand-Still Period." A copy of the First Amendment is attached as Exhibit B.

22. Section 2 of the First Amendment defines the Tenant Stand-Still Period as "the period commencing on March 1, 2020 and expiring ninety (90) days after the later of (a) the Amendment Effective Date and (b) the date on which the occurrence of any local, state or national restriction on activities in the region in which the Leased Premises is located, a declaration of national emergency, any state and local "Shelter at Home" Order or similar restrictions on business or travel (collectively, the "Restrictions") ends absolutely, ceases or is lifted, removed or expired (collectively, "Cessation")."

23. In July 2020, Prospect's site engineer inquired Prospect about finalizing the NJDOT major access permits because the draft permits were set to expire that month.

24. Prospect forwarded its site engineer's correspondence to Wawa, prompting Wawa to send Prospect a "cease and desist" letter, dated July 15, 2020, in which Wawa claimed that the actions of

Prospect's site engineer violated Section 2 of the First Amendment, which provides that "Landlord covenants to suspend all of Landlord's obligations under the Lease, including, without limitation, the pursual of any Landlord's Approvals and the performance of any Landlord's Work, until the expiration of the Tenant Stand-Still Period."

25. Wawa "cease and desist" letter attempted to use the Tenant Stand-Still Period as a pretext for delaying the Rent Commencement Date indefinitely.

26. If Covid 19-related restrictions stay in effect in some form until 2024, as some government officials have predicted, Wawa's interpretation of Section 2 of the First Amendment would have allowed it to remain in the Lease for over five (5) years without paying any rent, all while keeping the property available to itself for future development and unavailable to other convenience store competitors.

27. Upon receiving Wawa's "cease and desist" letter, Prospect instructed its engineer to not finalize the draft NJDOT major access permits and to instead request a six-month extension of the major access permits.

28. After not hearing from Wawa for an additional two months, Prospect sent a response letter to Wawa, dated September 17, 2020, in which Prospect made clear it took no actions violative of the Tenant Stand-Still Period and that notwithstanding the same,

Prospect rejected Wawa's position that the Tenant Stand-Still Period could continue indefinitely.

29. Since the draft NJDOT major access permits, as extended, were set to expire before the end of 2020, Prospect had to move forward with finalizing those draft permits. By doing nothing, as demanded by Wawa, Prospect would have lost years of effort and substantial costs invested towards the NJDOT permitting process.

30. Section 2 of the First Amendment did not preclude Prospect from pursuing approvals indefinitely based on the existence of any governmental Covid-19 restriction, no matter how minimal or irrelevant the restriction is to the parties' obligations under the Lease.

31. The only reasonable interpretation of Section 2 of the First Amendment was that the Tenant Stand-Still Period was in effect only as long as a government restriction materially affects the parties' ability to apply for government approvals and engage in construction activities or operate a convenience store and gas station.

32. As of July 15, 2020 and September 17, 2020, there were no Executive Orders by Governor Murphy or Administrative Orders by the Office of Emergency Management that would have affected Prospect's ability to apply for and obtain land use approvals and permits, nor were there any Orders that would have precluded

construction activities or the operation of a convenience store and gas station, subject to certain minimal mitigation protocols.

33. Prospect advised Wawa that it could not reasonably rely upon the existence of more stringent government restrictions that are applicable to other types of businesses, such as bars and restaurants, as justification for prolonging the Tenant Stand-Still Period indefinitely because those restrictions bore no rational relationship to the parties' ability to apply for land use approvals and permits, engage in construction activities or operate a convenience store and gas station.

34. On November 3, 2020, Wawa sent two separate notices to Prospect, advising that as of that date, (1) Wawa deemed the Tenant Stand-Still Period expired; (2) Wawa exercised its "right to terminate the Lease as outlined in Section 10(b) 'Environmental' of the Lease."

35. Wawa's reliance upon the environmental provisions related to the Due Diligence Review Period, as set forth in Section 10(b) of the Lease, were pretextual and improper, as the Due Diligence Period expired long ago on November 6, 2019, and Wawa never expressed any concerns with environmental issues on the Property until one full year later, on November 3, 2020.

COUNT ONE
Breach of Contract

36. Prospect repeats and realleges Paragraphs 1 to 35 as if fully set forth herein.

37. The signed Lease between the parties, dated May 9, 2020, constitutes a legally binding contract.

38. The Lease is for term of 20 years, during which Wawa was obligated to pay rent to Prospect in the total amount of seven million one hundred ninety-three thousand five hundred and fifty dollars (\$7,193,550.00).

39. Prospect has expended substantial sums in good faith performance of its obligations under the Lease, doing so with the expectation that it would recoup those expenditures over the course of the lease via the rent payments that Wawa is obligated to pay.

40. Wawa has breached the Lease by terminating it without justification and in violation of the terms of the Lease.

41. As a direct result of its actions, Wawa has breached the Contract with Prospect, causing Prospect to suffer economic loss.

WHEREFORE, Prospect respectfully requests that this Court enter judgment in favor of plaintiff and against defendant, finding defendant in breach of the Lease and liable for all damages for its breach, including but not limited to the actual rent that Wawa was obligated to pay during the term of the Lease, plus reasonable

attorney's fees and costs and for such other and further relief as this Court deems just and proper.

COUNT TWO

Breach of Covenant of Good Faith and Fair Dealing

42. Prospect repeats and realleges Paragraphs 1 to 41 as if fully set forth herein.

43. Wawa's conduct, which resulted in the breach of the Lease, constitutes a breach of the covenant of good faith and fair dealing between the parties, which is implied in every contract.

44. As a direct result of Wawa's breach of the covenant of good faith and fair dealing, Prospect has suffered economic loss.

WHEREFORE, Prospect respectfully requests that this Court enter judgment in favor of plaintiff and against defendant, finding defendant in breach of the Lease and liable for all damages for its breach, including but not limited to the actual rent that Wawa was obligated to pay during the term of the Lease, plus reasonable attorney's fees and costs and for such other and further relief as this Court deems just and proper.

COUNT THREE

Unjust Enrichment

45. Prospect repeats and realleges Paragraphs 1 to 44 as if fully set forth herein.

46. The Lease shifted the responsibility for obtaining approvals and permits and installing site improvements, utilities and stormwater management facilities to Prospect.

47. By structuring the Lease in this way, Wawa induced Prospect to shoulder the risk of the development of the Property, and obligated Prospect to expend substantial resources in performance of the objectives of the Lease.

48. Wawa has therefore been unjustly enriched at the expense of Prospect by failing to fulfill its contractual obligations under the Lease.

WHEREFORE, Prospect respectfully requests that this Court enter judgment in favor of plaintiff and against defendant, finding defendant in breach of the Lease and liable for all damages for its breach, including but not limited to the actual rent that Wawa was obligated to pay during the term of the Lease, plus reasonable attorney's fees and costs and for such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby request a jury trial on all claims that are triable.

**Respectfully submitted,
Hill Wallack LLP**

s/ Eric I. Abraham

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