**IN THE DISTRICT COURT OF APPEAL**
**FOURTH DISTRICT OF THE STATE OF FLORIDA**

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CASE NO.: 4D2021-1445

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**HALLANDALE PLAZA, LLC**
Appellant,
**v.**
**NEW TROPICAL CAR WASH, LLC**
Appellee.

**On appeal from a Final Order of the County Court for the Seventeenth Judicial Circuit in and for Broward County, Florida**
**Lower Tribunal Case No. COSO-20-008565**

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# AMENDED BRIEF OF APPELLANT HALLANDALE PLAZA, LLC[1]

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[1] This Brief is Amended to change the font pursuant to Court Order dated July 28, 2021, and to correct the page numbering and bookmarking.

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## PRELIMINARY STATEMENT

This appeal follows a final ruling where the Trial Court dismissed a commercial eviction action at a hearing on a tenant's preliminary Motion to Determine Rent that was filed pursuant to Fla. Stat. § 83.232. Appellant Hallandale Plaza, Inc. was the Plaintiff/Landlord and will be referred to as "Appellant" or "Landlord" in this brief. Appellee New Tropical Car Wash, LLC was the Defendant/Tenant and will be referred to as "Appellee" or "Tenant" in this brief. The proceedings below were conducted by The Honorable Tabitha Blackmon, County Judge.

References to the Appendix are designated by "Appendix [any volume number]. [any page number(s) ¶ [any paragraph number(s)] or :[line(s)]]".

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Legal citations in this brief are intended to comply with Florida Rule of Appellate Procedure 9.800 and The Harvard Law Review Association, *The Bluebook: A Uniform System of Citation*, (20th ed. 2015). All emphasis has been supplied by counsel unless otherwise noted.

Additional terms are defined within the Initial Brief and will be denoted with bold typeface.

## STATEMENT OF THE CASE AND FACTS

### Introduction

The primary issue in this case is rooted in the process where a tenant files a Motion to Determine Rent in an eviction action. For context, when an eviction action has been commenced by a landlord against a tenant for the tenant's failure to pay rent, the tenant generally, must under Florida law, deposit the amount of past due rent that is alleged to be owed in a landlord's complaint and rent as it becomes due under a lease agreement during the pendency of an eviction action into a court registry, (rather than pay the rent to the landlord) to maintain possession of leased real property during the pendency of the eviction action. Further, this requirement must be met for a tenant to be permitted to present their defenses at a trial. Otherwise, the tenant's defenses are waived and the landlord is generally entitled to re-take possession of the property. The court registry essentially operates as an escrow account for the funds, where the rent money can be disbursed to a landlord after the

conclusion of an eviction action, or remitted to a tenant, depending on the outcome of the case.

However, a tenant who disputes the amount of rent alleged to be owed in a landlord's complaint for eviction may alternatively file a preliminary motion to determine rent. The purpose of a motion to determine rent is for the trial court to determine the amount of rent that the tenant must deposit into the court registry at the commencement of an eviction action for past rent alleged to be owed to a landlord in a complaint. Additionally, the court on a motion to determine rent will also determine the amount of rent that a tenant shall pay into the court registry during the pendency of the eviction action as rent becomes due under the lease agreement.

The first issue in this matter is whether a trial court can *sua sponte* dismiss an eviction action at a preliminary hearing on a motion to determine rent, when the court determines that a tenant is current on its rent obligations to the landlord and that the tenant is not required to make any deposit into the court registry, notwithstanding the fact that the tenant never filed or noticed a motion to dismiss and never verbally requested a dismissal of the eviction action at the preliminary hearing. The Landlord (Appellant)

says the answer to that question is "No," while the Tenant (Appellee) says the answer to that question is "Yes."

The second issue in this case can be summarized as follows. Whether a trial court in an eviction action can determine in ruling on a preliminary Motion to Determine Rent, that a Tenant can invoke the affirmative defense of duress, and find that the tenant was under duress when the tenant previously paid rent sought by a landlord even though the tenant never plead duress in its affirmative defenses in the eviction action and when the Tenant failed to meet its burden of proof on duress in the preliminary hearing. The Landlord (Appellant) says the answer to that question is "No," while the Tenant (Appellee) says the answer to that question is "Yes."

The third issue can be summarized as follows. Whether the Trial Court in this matter committed reversible error when it failed to consider whether the Appellee's conduct in paying "additional rent", (described herein) to the Appellant following the prior alleged waiver of the Appellee's obligation to pay rent under the subject lease agreement constituted a waiver by conduct of the prior alleged oral waiver by the previous landlord, of the Appellee's obligation to pay "additional rent". [R. 53 ¶ 7, ¶ 8] The Landlord (Appellant) says the

answer to that question is "Yes," while the Tenant (Appellee) says the answer to that question is "No."

The final issue in the case can be summarized as follows. Whether the Trial Court in this matter committed reversible error by misinterpreting the terms of the lease that is the subject of this action in determining that the Appellee was not required to pay the Appellant a pro rata share of the ad valorem real property taxes on the leased property as part of the "additional rent". [R. 54-55 ¶ 11, ¶ 12]. The Landlord (Appellant) says the answer to that question is "Yes," while the Tenant (Appellee) says the answer to that question is "No."

## ***Facts***

In this case, the parties were operating under a written lease agreement. [R. 6-28]. Appellant acquired the rental property from a prior owner. [R. 110-115]. The prior owner had entered into a commercial lease with Appellee for Appellee to operate a car wash business on the leased property. [R. 110-115]. The Lease required Appellee to pay "base rent" and "additional rent" [R. 8-9, ¶ 3].

The lease sets a consistent amount for "base rent" to be paid by the tenant to the landlord on a monthly basis. [R. 8-9, ¶ 3]. Additionally, the lease has a clause for "additional rent", which in general terms, consists of the tenant's pro rata share of items such as common area maintenance fees, annual operating expenses for the property and taxes associated with the property, including a pro rata share of ad valorem property taxes. [R. 8-9, ¶ 3 and R. 111, ¶ 3]. The additional rent is estimated before each lease year begins, and the amount is divided into twelve (12) payments, that are to be paid concurrently on a monthly basis with the base rent payments. [R. 8-9, ¶ 3].

The Appellee alleges, and the Trial Court found, that the prior Landlord orally waived the requirement for the Appellee to pay the additional rent, which modified the lease to negate the Appellee's obligation to pay additional rent. See [R. 50-5]. After Appellant purchased the property and after negotiations with the Appellee, the Appellee agreed to resume paying the additional rent, and for 2017 paid the additional rent due to the Appellant. [R. 113-114, ¶ 5]. The Appellee also pursuant to the agreement paid the 2018 additional

rent in 2019. [R. 114, ¶ 6 and ¶ 8]. The Appellant provided valuable consideration for the Appellee's agreement to continue payment of the additional rent by making repairs to the Appellee's leased property, which were the Appellee's responsibility under the lease. [R. 114, ¶ 6].

The Appellee was originally billed for the additional rent on a monthly basis but this was then changed to annual billing at the Appellee's request. [R. 114 ¶ 8]. After the parties got into 2020, when the COVID-19 pandemic began to adversely impact businesses, the Appellee expressed to the Appellant that the Appellee would no longer pay the additional rent. [R. 114-115 ¶ 8]. At that point in time, after the Appellee had paid additional rent to the Appellant for two years, the 2019 period of additional rent was due, which was billed and due in 2020. [R. 115 ¶ 8].

Appellant told Appellee that they agreed to and had been paying the additional rent and that if it was not paid, it would need to involve an eviction lawyer. [R. 115 ¶ 10]. Appellant let Appellee know that the additional rent money was needed to pay for the expenses for operating the property. *Id.* However, Appellant did not harass the

Appellee, but let them know why the additional rent funds had to continue to be paid. *Id.* The Trial Court was informed of these facts. [R. 115 ¶ 9].

After the Appellee failed to pay the 2019 additional rent (in 2020), Appellant sent the Appellee a 3-day notice to pay rent or deliver possession of the leased premises on July 20, 2020. [R. 28]. Appellee did not so pay the 2019 additional rent, so Appellant commenced its eviction action against the Appellee on August 4, 2020. [R. 3-28]. In response to the eviction lawsuit, Appellee made two filings in court; its Answer and Affirmative Defenses and its Motion to Determine Rent, both on August 13, 2020. [R. 29-32 and 33-34]. The Trial Court set a hearing on Appellee's Motion to Determine Rent for October 1, 2020 in its Order Setting Zoom Hearing. [R. 36-37]. After the hearing the Trial Court issued its Order on Defendant's Motion to Determine Rent, that is the subject of this Appeal, that dismissed the eviction action on October 13, 2020. [R. 50-56]. Appellant then filed a Motion for Rehearing [R. 57-74]. The trial court denied Appellant's Motion for Rehearing and this appeal followed. [R. 140].

## SUMMARY OF ARGUMENT

What ostensibly appears to be an appeal from a final trial court order dismissing an eviction action and denying Appellant's motion for rehearing, actually raises significant questions regarding a trial court's deprivation of constitutional due process rights from a litigant, statutory interpretation, improper pretrial procedure, failure of a trial court to properly consider evidence and contract interpretation. The incorrect answers to these questions arrived at in the Trial Court combined to result in a completely unwarranted and premature final order being entered against the Appellant, (See [R. 50-56]) following a preliminary hearing that was upheld by the Trial Court in its ruling on the Appellant's Motion for Rehearing And/Or Reconsideration of Appellee's Motion to Determine Rent, following the Trial Court's erroneous final judgment dismissing the litigant's case, (See [R. 140]) notwithstanding the fact that the preliminary hearing was not noticed as a final hearing and that a dismissal of the case was outside the scope of the purpose of the preliminary hearing.

The case involves a commercial eviction action based on the breach of a lease agreement, for a Tenant's failure to pay rent that

was due under the lease. (See [R. 3-28]). What makes this case different from the "run of the mill" eviction case, is that the Trial Court *sua sponte* dismissed the entire action on a preliminary Motion to Determine Rent, filed by the Appellee, notwithstanding the fact that the Appellee never filed a Motion to Dismiss in the action and that a Motion to Determine Rent is a statutorily prescribed preliminary matter, that was never intended to be a venue for the final adjudication of eviction actions. This action resulted in a deprivation of the Appellant's constitutional due process rights, because the Appellant was not given fair notice that the Motion to Determine Rent, would essentially serve as an unfiled and unnoticed Motion to Dismiss.

The case additionally involves the Trial Court's improper consideration and factual findings of an unplead affirmative defense of duress, in regards to a surprise allegation that the Appellant placed the Appellee under duress to waive a prior alleged waiver of a previous contract term to pay what is described in the subject lease agreement as "additional rent" concurrently with "base rent", thus

making the second waiver, or the waiver of a prior alleged waiver invalid. (See [R. 50-56]).

Further, the Trial Court misinterpreted the terms of the lease to determine that ad valorem real property taxes were not included in the lease agreement's definition of the term, "additional rent". (See [R. 50-56]). Lastly, the Appellant asserts that the record on appeal is sufficient to evaluate the contentions of the Appellant despite the failure of the Appellee to secure a transcript of the Motion to Determine Rent hearing in the Trial Court. *Harrison v. Harrison*, 909 So. 2d 318, 319 (Fla. 2nd DCA 2004) (noting that the appellate court must presume that the "trial court's decision is correct only where the appellant fails to provide the appellate court with a record that is sufficient to evaluate the appellant's contentions of error"); *Chirino v. Chirino*, 710 So. 2d 696, 697 (Fla. 2nd DCA 1998) ("[T]he absence of a transcript does not preclude reversal where an error of law is apparent on the face of the judgment.").

## **STANDARD OF REVIEW**

An appellate court reviews a final order dismissing a complaint with prejudice under the de novo standard of review. *Pizzi v. Town of*

*Miami Lakes*, 286 So. 3d 814 (Fla. 3rd DCA 2019). The test that is generally utilized by appellate courts to determine whether a trial court order is final, is whether the order constitutes an end to the judicial participation in the cause, and nothing further remains to be done by the court to bring about the end of a case between the litigants. *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97 (1974) citing *Hotel Roosevelt Co. v. City of Jacksonville*, 192 So. 2d 334 (Fla. 1st DCA 1966). Appellate courts have jurisdiction to review final orders of trial courts that are not directly reviewable by the Florida Supreme Court or a circuit court pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A).

An appellate court can reverse a trial court order based on the abuse of discretion standard. "[T]o justify reversal, it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination." *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149 (Fla. 1st DCA 2000) *citing Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983).

Finally, this case also involves statutory construction and interpretation, on appeal, from a final order construing Fla. Stat. § 83.232. Such a standard of review of a question of statutory interpretation is *de novo*. *Crapo v. Academy for Five Element Acupuncture, Inc.*, 278 So. 3d 113 (Fla. 1st DCA 2019).

## ARGUMENT

Although organized into several sub-categories, the Appellant puts forth four (4) arguments in this Initial Brief, namely: (1) the Trial Court erred and deprived the Appellant of its due process rights in *sua sponte* dismissing Appellant's eviction action at the preliminary hearing on the Appellee's Motion to Determine Rent; (2) the Trial Court improperly found the presence of duress in its Order on Appellee's Motion to Determine Rent, when the Appellee failed to plead duress as an affirmative defense and when the Appellee failed to prove Duress; (3) the Trial Court failed to consider that the Appellee's payment of Additional Rent to the Appellant prior to the Appellant's eviction action constituted a waiver of a prior waiver of the payment obligation by the Appellee's prior landlord; and (4) the Trial Court misinterpreted the lease agreement in determining that

the Appellee was not required to pay a pro rata share of real property taxes on the leased property. The Appellant presents the following arguments in support of its requested relief.

## ARGUMENT

### I. THE TRIAL COURT ERRED AND DEPRIVED THE APPELLANT OF ITS DUE PROCESS RIGHTS BY SUA SPONTE DISMISSING THE APPELLANT'S EVICTION ACTION AT THE PRELIMINARY HEARING ON THE APPELLEE'S MOTION TO DETERMINE RENT.

While the Trial Court found that the Defendant/Appellee was current on its rent obligations under the lease agreement between the parties at the preliminary hearing on the Appellee's Motion to Determine Rent, (See [R. 55]) it was improper for the trial court to *sua sponte* dismiss the action at this preliminary stage of the case. Further, the Trial Court's dismissal of the case amounted to a gross deprivation of the Plaintiff/Appellant's due process rights, because the Appellant had no prior notice that the preliminary hearing might be converted into a final hearing where the Court may dismiss the action at the preliminary hearing, when the Appellee had not filed a Motion to Dismiss. The Trial Court's dismissal was additionally improper because Florida law designates a Motion to Determine Rent in eviction actions as a preliminary step in the course of the eviction

process. This preliminary step was never intended to serve as a venue for final adjudication of eviction actions on the merits.

The Trial Court's final ruling that is the subject of this appeal held that "New Tropical is current with its monthly rental obligations, and is not required to pay "additional rent," such that it is current with its obligations to Hallandale Plaza under the Office Lease, as modified, and this matter is therefore DISMISSED." (See [R. 55]). This dismissal was unjust when the Appellee's Motion to Determine Rent merely sought a determination of "Rent to be paid during pendency of this action…" (See [R. 33]).

**(a) Purpose of a Motion to Determine Rent**

After a review of the relevant statutes and jurisprudence interpreting the statutes, one can infer that a Motion to Determine Rent is a motion filed by a tenant following the commencement of an eviction action, where the tenant seeks a preliminary determination of the amount of rent that a tenant must pay into a court registry at the start of the action and throughout the pendency of the action in order to preserve its right to defend against eviction. Rent determined to be owed at the start of an eviction action on a motion to determine rent, is typically for past due rent. Further, rent as it becomes owed

under a lease agreement to a landlord during the pendency of an eviction action is also required to be deposited into a court registry instead of being paid directly to a landlord, if a tenant maintains possession of leased property during an eviction action. Fla. Stat. § 83.232(1).

Generally, a landlord waives his right to terminate a lease agreement for breach of a lease, when the landlord knowingly accepts rent after the breach. *Moskos v. Hand*, 247 So. 2d 795 (Fla. 4th DCA 1971) referencing *U.S. Properties, Inc. v. Marwin Corp.*, 123 So. 2d 371 (Fla. 3rd DCA 1960) and *Tropical Attractions, Inc. v. Coppinger*, 187 So. 2d 395 (Fla. 3rd DCA 1966). Deposits of rent into a court registry prevents landlords from waiving eviction actions, because accrued rent is maintained by court registries, instead of being accepted by landlords. Funds held in a court registry can eventually be distributed to a landlord following a court ruling in favor of the landlord on an eviction action.

Under Florida law, tenants in both commercial and residential eviction actions, who intend to maintain possession of leased real property during the pendency of such actions are required to either: (1) deposit the amount of rent that is alleged in a complaint to be owed

to a landlord and all rent as it becomes due under a lease agreement during the pendency of an eviction action into the court registry where the action occurs; or (2) seek a preliminary determination of the court on the amount of rent that the tenant must deposit into the court registry at the commencement of the eviction action and during the pendency of the eviction action. The pertinent language requires "the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid." *Axen v. Poah Cutler Manor, LLC*, 2021 WL 2559153 (Fla. 3rd DCA 2021), interpreting the Fla. Stat. § 83.60(2), which governs this requirement for residential eviction actions.

Fla. Stat. § 83.232, which governs the commercial tenant registry deposit requirement during eviction actions mirrors Fla. Stat. § 83.60, which governs the residential tenant eviction registry deposit requirement in its mandate. Fla. Stat. § 83.232(1) provides in pertinent part, "In an action by the landlord which includes a claim for possession of real property, the tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, …. If

the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination." The statute was enacted to remedy the issue of commercial tenants remaining on the premises of leased properties during the pendency of litigation in eviction actions without paying rent. *Premici v. United Growth Properties, L.P.*, 648 So. 2d 1241 (Fla. 5th DCA 1995).

Fla. Stat. § 83.231(2) provides, "If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning: (a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and (b) What properly constitutes rent under the provisions of the lease." "Like the findings in a temporary relief hearing in a chapter 61 case, a finding at a section 83.232 hearing can be modified after discovery and a final hearing on the merits." *Rowe v. Macaw Holdings I, LLC*, 248 So. 3d 1178 (Fla. 4th DCA 2018). In the instant case, the Trial Court wrongfully deprived the Appellant of this opportunity by *sua sponte* dismissing the action in ruling on the Appellee's Motion to Determine Rent.

"[T]he typical eviction case involves a tenant in possession after the commencement of a lease. In such a case, payment of the rent into the registry is the statutory requirement for continued occupancy while the eviction case is prosecuted and decided on its merits." *RSG, LLC v. Lenet*, 107 So. 3d 1187, 1189 (Fla. 3d DCA 2013). "However, this general rule must be read in the context of the entire statute. The pertinent language requires "the tenant to pay the rent into the registry of the court **or to file a motion to determine the amount of rent to be paid** …." Sec. 83.60(2), Fla. Stat. (emphasis added). "Giving effect to and harmonizing all relevant statutory provisions and applying it here, the undisposed-of-motion to determine rent precluded entry of final judgment based on nonpayment." "To hold otherwise would fail to read the statute as a consistent whole and create an absurd result" *Axen v. Poah Cutler Manor, LLC*, (Fla. 3d DCA 2021) WL 2559153, referencing *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007).

The clear and unambiguous language of the statute and the caselaw referenced herein indicate that a Motion to Determine Rent is strictly a preliminary evidentiary hearing that is only for the purpose of determining the proper amount of rent that a tenant shall pay into

the court registry, pursuant to Fla. Stat. § 83.232, after the commencement of an eviction action and during the pendency of an eviction action in order to preserve a Tenant's defenses to the eviction and to protect a Landlord's ability to collect rent. The preliminary motion to determine rent does not serve as a venue to adjudicate the final resolution of eviction actions. "If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute **shall be limited to only** the factual or legal issues concerning: (a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and (b) What properly constitutes rent under the provisions of the lease." Fla. Stat. § 83.232(2), (emphasis added). Even by the language of the Appellee's Motion to Determine Rent, the motion was strictly for preliminary purposes at the outset of the case. "Defendant … hereby serves its Motion to Determine Rent to be paid during pendency of this action…" (See [R. 33]).

Fla. Stat. § 83.232(5) provides, "Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such a case, the landlord is entitled to an immediate default for possession without

further notice or hearing thereon." The statute clearly mandates the payment of rent in an eviction action into the court registry if a tenant decides to assert any defenses other than payment, and a tenant's failure to make any court ordered deposit constitutes an absolute waiver, which authorizes the court to enter immediate default judgment in a landlord's favor. *Stanley v. Quest Intern. Inv., Inc.*, 50 So. 2d 672 (Fla. 4th DCA 2010). "Section 83.232 is designed to protect a commercial landlord from irreparable harm where a tenant holds over during eviction proceedings without paying rent. If the tenant lacks resources to pay rent, or from which the landlord may obtain damages, the landlord suffers irreparable harm in the loss of rental income and could even be in danger of losing the premises. To protect against this harm, the statute requires payment of rent into the court registry." *Famsun Invest, LLC v. Therault*, 95 So. 3d 961 (Fla. 4th DCA 2012). It is evident that the purpose of Fla. Stat. § 83.232 in the commercial context and Fla. Stat. § 83.60 in the residential context is to protect landlord rights to collect rent during the pendency of eviction actions.

In the present eviction action on the Appellee's Motion to Determine Rent, the trial court could have held that on a preliminary

basis, the Appellee tenant did not have to deposit any Additional Rent (which was in dispute as to whether the tenant had to pay it) into the court registry and allowed the case to proceed, with the requirement that the tenant pay all Base Rent as it becomes due under the parties' lease agreement during the pendency of the eviction action into the court registry. After such a ruling on the Appellee's Motion to Determine Rent, there would have been a duly noticed trial where the parties would have had a full and fair opportunity to bring all of their witnesses, by subpoena, if necessary, present all of their documentary evidence, and the parties could have testified about the Additional Rent and whether it was required to be paid or not. That did not occur because the trial court erroneously, prematurely and improperly *sua sponte* dismissed the eviction case at the preliminary rent determination hearing, contrary to Fla. Stat. § 83.232.

**(b) Proper Interpretation of Fla. Stat. § 83.232**

It is well known that under our constitutional system which mandates the separation of powers, the judiciary is tasked with interpreting and applying the law as it is drafted by the legislature and approved by the governor in conformity with the state and federal constitutions. When applying the principle of statutory construction,

a provision should "be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole." *Blandin v. Bay Porte Condominium Ass'n, Inc.*, 988 So. 2d 666 (Fla. 4th DCA 2008), citing *Bush v. Holmes*, 919 So. 2d 392, 406-07 (Fla. 2006).

As a general rule, courts may not re-weigh the competing policy concerns underlying a legislative enactment. *Bush v. Holmes*. When a statute's language is clear and unambiguous, and it conveys a clear and certain meaning, there is no reason for a court to resort to the rules of statutory interpretation; the statute must be given its plain and obvious meaning. *GTC, Inc. v. Edgar*, 967 So. 2d 781 (Fla. 2007) citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). "In analyzing statutory language, reviewing courts must give the statutory language its plain and ordinary meaning, 'and cannot add words which were not placed there by the Legislature.'" *Therlonge v. State*, 184 So. 3d 1120 (Fla. 4th DCA 2015) citing *State v. Little*, 104 So. 3d 1263, 1265-66 (Fla. 4th DCA 2013) (quoting *Brook v. State*, 999 So. 2d 1093, 1097 (Fla. 5th DCA 2009)).

In reviewing the plain language of Fla. Stat. § 83.232 and the

relevant case law, it is apparent that the legislature intended to create the Motion to Determine Rent to serve strictly as a preliminary evidentiary proceeding for courts to determine the amount of rent to be deposited into court registries to satisfy lease obligations to landlords during the pendency of commercial eviction actions, where amounts owed at the outset and during the pendency of eviction actions are disputed by landlords and tenants. The Trial Court in this case was not permitted to *sua sponte* add words to the statute that authorized it to dismiss eviction actions on preliminary Motions to Determine Rent. As previously mentioned, the statute applies for tenants who maintain possession of disputed commercial real property during the pendency of eviction actions. The intention of the statute is to prevent tenants from occupying leased commercial property during eviction actions without paying rent, to the detriment of landlords who may otherwise be placed in precarious positions where they may lose ownership of their property, such as for non-payment of mortgages. Nothing in the plain language of the statute or the jurisprudence interpreting the statute and the residential tenant equivalent statute implies that trial courts are authorized to utilize the statute as an axe to *sua sponte* pre-maturely dismiss eviction

actions if trial courts determine at preliminary Motion to Determine Rent hearings, that tenants are not obligated to deposit funds for rent into court registries. If the trial court in such a situation determined that no rent is due to be deposited into the court registry, a trial court would then allow the case to proceed on its merits to trial for a final adjudication.

In *Custom Marine Sales, Inc. v. Boywic Farms, Ltd.*, 245 So. 3d 791 (Fla. 4th DCA 2018), this Court reversed and remanded the action on an appeal from a tenant who claimed that the trial court improperly entered an order on a Motion to Determine Rent. While this Court agreed with the Tenant/Appellant in *Custom Marine Sales*, that the trial court improperly ordered the Tenant/Appellant to deposit funds into the court registry pursuant to Fla. Stat. § 83.232(2), this Court simply reversed and remanded the case for further proceedings instead of dismissing the action or instructing the trial court to dismiss the action, as the trial court in the instant case did when it determined on the Appellee's preliminary Motion to Determine Rent, that the Appellee was current on its rent obligations to the Appellant.

**(c) The Trial Court Deprived the Appellant of Due Process**

**by *Sua Sponte* Dismissing the Appellant's Eviction Action at the Preliminary Hearing on the Appellee's Motion to Determine Rent**

The trial court committed reversible error and deprived the Appellant of due process in dismissing the Appellant's eviction action in its ruling on the Appellee's preliminary Motion to Determine Rent. The trial court's action amounted to a deprivation of the Appellant's due process rights because the Appellant lacked fair notice that the action could be dismissed at the preliminary hearing, in light of the fact that the Appellee had not filed or noticed any hearing on a motion to dismiss prior to the hearing. The trial court's action was improper because the Appellee's preliminary Motion to Determine Rent was not an appropriate venue for final adjudication of the eviction action, pursuant to Fla. Stat. § 83.232. The trial court further committed reversible error and deprived the Appellant of due process by not providing the Appellant with an opportunity to be heard in opposition to the trial court's surprise *sua sponte* dismissal of the Appellant's eviction action.

"[N]o state shall… deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The procedural component of due process, "provide[s] a guarantee of fair

procedure in connection with any deprivation of … property". *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992). "A trial court cannot dismiss a cause of action without a pending motion or objection." *Bank of New York Mellon Corp. v. Hernandez*, 299 So. 3d 461 (Fla. 3d DCA 2020) citing *Lawson v. Frank*, 197 So. 3d 1269, 1271 (Fla. 2d DCA 2016). When a trial court *sua sponte* dismisses an action on unpleaded grounds, the trial court denies the litigants due process because the claim is being dismissed without 'notice and an opportunity for the parties … to be heard.' *Lawson* citing *Barile v. Gayheart*, 80 So. 3d 1085, 1087 (Fla. 2d DCA 2012) (quoting *Liton Lighting v. Platinum Television Grp., Inc.*, 2 So. 3d 366, 367 (Fla. 4th DCA 2008). The nucleus of due process is the right of notice and an opportunity to respond and be heard. *Carillon Community Residential v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010) referencing *LaChance v. Erickson*, 522 U.S. 262, 118 S. Ct. 753, 139 L.Ed.2d 695 (1998) and *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

In the present case, the trial court dismissed the Appellant's action, at the preliminary hearing on the Appellee's Motion to Determine Rent, notwithstanding the fact that the Appellee had not

filed any Motion to Dismiss prior to the hearing, (or at any other time in the case)(See R) and notwithstanding the fact that the Appellee had not verbally requested a dismissal at the hearing. (See [R. 60]). Further, as outlined above, a Motion to Determine Rent is only a preliminary motion that is not a vehicle for final adjudication of eviction actions. Here, the trial court essentially turned the case into an unfiled and unnoticed motion to dismiss for failure to state a claim based on the trial court's flawed interpretation of the lease, (addressed further herein). This was unfair because the parties did not necessarily bring all of their documents and witnesses to the hearing that they would have brought to trial because they were unaware that this preliminary matter would be converted into a final hearing, when Fla. Stat. § 83.232(2) only permitted the Trial Court to determine rent due into the court registry at the commencement and during the pendency of the action and what rent had already been paid by the Appellee, that should be credited towards any rent due. Where a trial court desires to *sua sponte* raise the sufficiency of a complaint, the trial court must provide the plaintiff with notice and a reasonable opportunity to respond. *Manzano v. Nicoletti*, 15 So. 3d 751 (Fla. 3d DCA 2009) citing *Surat v. Nu-Med Pembroke, Inc.*, 632 So. 2d 1136,

1136-38 (Fla. 4th DCA 1994).

"Where an order adjudicates issues neither presented by the pleadings nor litigated by the parties, it denies fundamental due process and must be reversed." *Jones v. Sayer*, 313 So. 3d 126 (Fla. 4th DCA 2021) *quoting Hancock v. Tipton*, 732 So. 2d 369, 372 (Fla. 2d DCA 1999). "A trial court cannot dismiss a cause of action without a pending motion or objection." *Bank of New York Mellon Corporation v. Hernandez*, 299 So. 3d 461 (Fla. 3d DCA 2020) paraphrasing *Lawson v. Frank*, 197 So. 3d 1269 (Fla 2nd DCA 2016). It is a due process violation for a trial court to *sua sponte* dismiss a claim without notice or a hearing. *Id.* See also, *Surat v. Nu-Med Pembroke, Inc.*, 632 So. 2d 1136 (Fla. 4th DCA 1994), (reversing the trial court's *sua sponte* dismissal for failure to state a claim at a hearing on a motion *in limine* because it was "in essence, a hearing on an unfiled, unnoticed motion for summary judgment and … unfair to the plaintiff.").

The trial court in the instant matter, for the reasons delineated above, committed reversible error in *sua sponte* dismissing the Appellant's eviction action at the preliminary hearing for the Appellee's Motion to Determine Rent, when the Appellee never filed or noticed a Motion to Dismiss. This improper action deprived the

Appellant of fundamental due process.

Finally, the trial court dismissal of the Appellant's eviction action on the Appellee's preliminary Motion to Determine Rent, was improper, because Fla. Stat. § 83.232 does not authorize a trial court to dismiss an eviction action, if a trial court preliminarily determines that a Tenant is not required to deposit any rent into a court registry at the commencement or during the pendency of an eviction action. Additionally, the Appellant had no notice that the hearing would be a final hearing where the action could be dismissed. The trial court at a minimum, should have ordered the Appellee to pay into the court's registry the rent that accrued during the pendency of the Appellant's eviction action, even if that was only the base rent, due monthly under the lease agreement. Therefore, this Court should remand this action to the trial court with instructions to revive the Appellant's eviction action and rehear the Appellee's Motion to Determine Rent and thereafter resume the eviction action, where it can be appropriately adjudicated at trial on the merits, with due process afforded to both parties.

## II. THE TRIAL COURT IMPROPERLY FOUND THE PRESENCE OF DURESS IN ITS ORDER ON APPELLEE'S MOTION TO DETERMINE RENT, WHEN THE APPELLEE FAILED TO PLEAD

**DURESS AS AN AFFIRMATIVE DEFENSE AND WHEN THE APPELLEE FAILED TO PROVE DURESS**

It was improper for the trial court to determine in its Findings of Fact in the Order on the Appellee's Motion to Determine Rent that the Appellee began paying the Appellant "additional rent" while it was under duress from the Appellant. (See [R. 53, ¶ 8]). First it was improper for the trial court to find duress because the Appellee failed to plead anything regarding duress as an affirmative defense in its Answer and Affirmative Defenses to the Appellant's Complaint. Further, it was improper for the court to find duress because the Appellee failed to plead sufficient factual allegations in its Answer and Affirmative Defenses to support this finding. (See [R. 29-32]). Finally, the finding again, deprived the Appellant of due process, because the Appellant was not given adequate prior notice prior to the hearing that the unplead affirmative defense of duress would be asserted at the hearing, because affirmative defenses are not supposed to be adjudicated at preliminary hearings on Motions to Determine Rent.

**(a) The Appellee was required to plead duress as an affirmative defense, in relation to its waiver of the alleged waiver of the requirement for the Appellee to pay "additional rent" under the lease by its prior landlord**.

"In pleading to a preceding pleading a party shall set forth affirmatively … duress …" Fla. R. Civ. P. 1.110(d). Fla. R. Civ. P. 1.140(h)(1) states in relevant part, "A party waives all defenses and objections that the party does not present either by motion… or, if the party has made no motion, in a responsive pleading…" "An affirmative defense is waived unless it is pleaded." *Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island Warehouse, Inc.*, 313 So. 3d 625 (Fla. 4th DCA 2021) citing *Custer Med. Ctr. V. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010). Affirmative defenses shall be pleaded in the answer to a complaint or as separate affirmative defenses. If they are not pleaded, the issues not pleaded are deemed waived. *Paul Gottlieb & Co., Inc. v. Alps South Corp.*, 985 So. 2d 1 (Fla. 2nd DCA 2007). But, if an opposing party fails to object to an unplead affirmative defense, the unplead affirmative defense may not be waived. If unplead affirmative defenses can be proven by pleadings or the proof and if an opposing counsel acquiesces to the introduction of such proof, the unplead defense is not waived. *Narus v. Narus*, 382 So. 2d 144 (Fla. 4th DCA 1980) referencing *Kersey v. City of Riviera Beach*, 337 So. 2d 995 (Fla. 4th DCA 1976).

However, the mere failure of an opposing party to make an

objection at one isolated juncture of a case, whether that is due to a mistake or being caught off guard while not paying attention, does not necessarily establish a party's consent to an unplead affirmative defense under Fla. R. Civ. P. 1.190(b). *Smith v. Mogelvang*, 432 So. 2d 119 (Fla. 2nd DCA 1983). Under what is referred to as the "broad test", an unpleaded issue is considered to have been tried by implied consent under two general criteria, (a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have brought in additional evidence on the issue if it had been properly plead. *Id.* referencing *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977); *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 75 (3d Cir. 1975).

In the present case, the issue of duress was never specifically plead in the Answer and Affirmative Defenses filed by the Appellee or in any other pleading filed by the Appellee. In [R. 32, ¶ 4], the Appellee merely stated, that the eviction action was commenced without basis and that the Appellant "made repeated threats'' that it would essentially seek enforcement of the lease and take possession of the property if the Appellee did not pay the full rent owed under the lease.

The Appellee stated, "New Tropical had begrudgingly been forced to pay such non-rent items…" [R. 32, ¶ 4]. Additionally, counsel for the Appellant objected to the Appellee's duress argument at the hearing on the Appellee's Motion to Determine Rent because the argument was not properly plead prior to the hearing.

Here, the Appellant was deprived of due process because it had no notice before the hearing on the Appellee's Motion to Determine Rent that the Appellee would allege duress as an affirmative defense. At the hearing, the Appellee alleged that it only waived a previous waiver by the prior landlord of the requirement to pay the Additional Rent under the lease, because the Appellant placed the Appellee under duress to do so. The trial court's finding is problematic, because this unplead affirmative defense was raised at the hearing on the Appellee's preliminary Motion to Determine Rent with no prior notice to the Appellant. The failure of the Appellee to plead this affirmative defense, deemed it to be waived. The trial court's finding is further problematic because it unfairly undermined a cornerstone argument of the Appellant by surprise, that serves as a vital foundation to the Appellant's basis for its eviction action against the Appellee.

The Appellant further lacked a fair opportunity to defend against the issue, as it was unplead and not entirely related to a preliminary Motion to Determine Rent. The Trial Court's final ruling on the Appellee's unplead affirmative defense of duress was outside the scope of the hearing, which was only intended to determine rent owed by the Appellee that had to be deposited into the court registry and rent that was to be paid into the court registry throughout the pendency of the eviction action. This was an issue that should have been adjudicated at a trial of this matter, which the Appellant was unjustly deprived of in violation of its due process rights as explained above. Further, had the Appellant been aware of this unplead affirmative defense and that the preliminary hearing would be converted into a final hearing, the Appellant would have gathered more evidence such as witness affidavits or witness testimony and documents to demonstrate that the Appellant at no time placed the Appellee under duress to pay the rent sought by the Appellant.

**(b) The Appellee failed to prove its unplead affirmative defense that the Appellant placed the Appellee under duress to pay additional rent**

"The defendant has the burden of proving an affirmative defense." *Rauch, Weaver, Norfleet, Kurtz & Co., Inc. v. AJP Pine Island*

*Warehouses, Inc.*, 313 So. 3d 625 (Fla. 4th DCA 2021) quoting *Custer Med. Ctr. V. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010). A party asserting an affirmative defense carries the burden of proof on that affirmative defense. *Ellingham v. Florida Dept. of Children and Family Services*, 896 So. 2d 926 (Fla. 1st DCA 2005) referencing *Pub. Health Trust of Dade County v. Holmes*, 646 So. 2d 266 (Fla. 3d DCA 1994).

"To establish duress, two factors must be proven: (1) that the act was effected involuntarily and was not an exercise of free choice or will, and (2) that this condition of mind was caused by some improper and coercive conduct by the other side." *AMS Staff Leasing, Inc. v. Taylor*, 158 So. 3d 682 (Fla. 4th DCA 2015) citing *Francavilla v. Francavilla*, 969 So. 2d 522, 524-25 (Fla. 4th DCA 2007). It is not improper nor does it constitute duress to threaten what one has a legal right to do. *City of Miami v. Kory*, 394 So. 2d 494 (Fla. 3d DCA 1981) citing *Spillers v. Five Points Guaranty Bank*, 335 So. 2d 851 (Fla. 1st DCA 1976) and *Scutti v. State Road Department*, 220 So. 2d 628, 630 (Fla. 4th DCA 1969). A threat to file a lawsuit against a party or to resort to remedies provided under a contract does not constitute duress, to justify the recission of a transaction induced by such

threat, provided that the threat is made with a good faith belief, that one has a valid cause of action against the other party. *Id*.

In the instant case, the Trial Court stated in its findings of facts in its Order on the Appellee's Motion to Determine Rent, that "Hallandale did "harass" New Tropical about the payment of "additional rent," and under duress, New Tropical began paying "additional rent." (See [R. 53, ¶ 8]). The trial court's finding was based on oral argument at the hearing, on the Appellee's unplead affirmative defense of duress and [R. 32, ¶ 4], which states in pertinent part, "Hallandale Plaza's action is further barred by the doctrines of unclean hands and in *pari delecto*, as Hallandale Plaza … has engaged in self-help, retaliatory eviction… based on repeated threats by Hallandale Plaza that it would take possession of the leased premises if New Tropical did not pay real estate taxes and operating expenses, New Tropical had begrudgingly been forced to pay such non-rent items…"

Assuming that duress was a permissible affirmative defense in this case, due to the Appellee's failure to plead duress in its affirmative defenses, this Court should find that the Appellee failed to meet its burden of proof. First, the Appellee did not prove that it paid the rent

sought by the Appellee involuntarily and not as an exercise of free choice. The Appellee stated, it "had begrudgingly been forced to pay…" [R. 31, ¶ 4]. Merriam-Webster's dictionary defines "begrudge" as, "to give or concede reluctantly or with displeasure." "Begrudge". Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/begrudge. Merriam-Webster's dictionary defines "concede" as, "to accept as true, valid, or accurate". "Concede". Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/concede.

Begrudging concession by a party is not an act that is affected involuntarily, free of choice, that is brought on by the improper or coercive conduct of another party. While a party may not be enthused by making a concession, it does not mean that they made their choice under duress and without free will. Further, the Appellant's threats to commence an eviction action to enforce its rights under the lease do not constitute duress. Therefore, this Court should remand this action to the trial court with instructions to revive the Appellant's eviction action and to rehear the Appellee's Motion to Determine Rent and thereafter resume the Appellant's eviction action, where it can be appropriately adjudicated at trial on the merits, on causes of action

and affirmative defenses that are properly plead and noticed.

## III. THE TRIAL COURT FAILED TO CONSIDER THAT THE APPELLEE'S PAYMENT OF ADDITIONAL RENT TO THE APPELLANT PRIOR TO THE APPELLANT'S EVICTION ACTION CONSTITUTED A WAIVER OF A PRIOR WAIVER OF THE PAYMENT OBLIGATION BY THE APPELLEE'S PRIOR LANDLORD

The trial court erroneously failed to consider the fact that the Appellee paid the Additional Rent that the Appellant is seeking on several occasions, prior to the commencement of the Appellant's eviction action. The Appellee's payment of Additional Rent to the Appellant constituted a waiver of any prior waiver of the requirement for the Appellee to pay the Additional Rent that occurred between the Appellee and the prior owner of the leased property, that originally entered into the lease with the Appellee, prior to the Appellant's acquisition of the property and assumption of the lease. (See [R. 110-115]). A waiver is the purposeful relinquishment, either express or implied, of a known right. *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85 (Fla. 2013) referencing *SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526-27 (Fla. 2d DCA 2007). A waiver exists when: (1) at the time of the waiver there was in existence a right, privilege, advantage, or benefit, which may be waived; (2) the actual or

constructive knowledge of the right; and (3) the intention to relinquish that right. *Husky Rose, Inc. v. Allstate Inc. Co.*, 19 So. 3d 1085, 1088 (Fla. 4th DCA 2009).

In this case, it was established at the hearing on the Appellee's Motion to Determine Rent that the Appellee after claiming that the prior Landlord waived the requirement that the Appellee pay "additional rent" as defined by the lease, paid the "additional rent" to the Appellant in 2017 and 2018. Then, the Appellee claimed that it was not required to pay the "additional rent." The trial court failed to consider, as evidenced in the order, that the Appellee's conduct of paying "additional rent" for two years constituted a waiver by the Appellee of any prior waiver of the lease terms requiring that the Appellee pay additional rent by the prior Landlord. Therefore, this Court should remand this action to the trial court with instructions to revive the Appellant's eviction action and to rehear the Appellee's Motion to Determine Rent and thereafter resume the Appellant's eviction action for it to be adjudicated on the merits at a trial.

## IV. THE TRIAL COURT MISINTERPRETED THE LEASE AGREEMENT IN DETERMINING THAT THE APPELLEE WAS NOT REQUIRED TO PAY A PRO RATA SHARE OF ANNUAL AD VALOREM REAL PROPERTY TAXES ON THE LEASED PROPERTY

The trial court erred in improperly reviewing the disputed lease agreement in determining that the Appellee did not owe the Appellant its apportioned share of the annual ad valorem real property taxes assessed to the shopping center, for the portion of the property that the Appellee leased from the Appellant. An actual ambiguity in a contract is not present, merely because a contract can potentially be interpreted in more than one way. Indeed, inconsistent and irrational concerns of plain language can always happen. Thus, it is the duty of the trial court to prevent such erroneous interpretations. *BKD Twenty-One Management Company, Inc. v. Delsordo*, 127 So. 3d 527 (Fla. 4th DCA 2012). Therefore, contract language is ambiguous only if it can likely be subject to more than one reasonable interpretation. *Id*. referencing *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010).

**(a) Analysis of the term "Additional Rent" in the Lease Agreement**

The term "Additional Rent", which is the subject of this dispute is described in Section 3(c) of the subject lease agreement. (See [R. 8-9 ¶ 3]). A basic summary of the additional rent is that it is prorated rent, (additional to the base rent under the lease described in Section

(3)(a)), for the Appellee's leased portion of the Appellant's property that is divided into 12 monthly installments, that the Appellee is required to pay to the Appellant with the monthly base rent payments required under the lease. (See [R. 8, ¶ 3]) The amount of additional rent is to be estimated by the Appellant on or before January 1 of every year. On or before March 31 following each year, the Appellant is supposed to provide an invoice for underpayments to the Appellee of the additional rent, if the Appellant's estimate was too low, or a check to the Appellee if the Appellant's estimate was too high and the Appellee made an overpayment of Additional Rent to the Appellant. Additional Rent is inclusive of the Appellee's proportional share of the: (i) Operating Expenses incurred for operating and maintaining the property and the (ii) annual taxes assessed to the property. Section (3)(c)(i) states, "the annual operating expenses ("Operating Expenses"), as hereafter defined." Section (3)(c)(ii) states, "the annual taxes ("Taxes"), for the Building." (See [R. 8-9 ¶ 3])

**(b) Analysis of the term "Operating Expenses" in the Lease Agreement**

The pertinent parts of Section 3(d)(i) of the lease broadly defines the term "Operating Expenses" as meaning, "any and all costs of

ownership, management, operation and maintenance of the building.…" The section further states, "…However, … Operating Expenses shall not include real property taxes…" In analyzing this section of the lease, one can reasonably infer that the term "Operating Expenses" is generally defined as the Appellee's pro rata share of the costs associated with the ownership, operation, management and maintenance of the property, excluding real property taxes. (See [R. 8-9 ¶ 3])

**(c) Analysis of the Term "Taxes" in the Lease Agreement**

The additional rent includes (i) operating expenses, addressed above, and (ii) annual real estate taxes for the building. In the definition of operating expenses, real estate property taxes are expressly excluded property taxes. That is because the real property taxes are defined in its own section, (d)(iii). However, in the order dismissing eviction complaint, the trial court misinterpreted the lease and found that property taxes were not to be included as additional rent. This is an unfortunate misunderstanding of the lease by the trial court, necessitating reversal by this Court.

The pertinent parts of Section 3(d)(iii) of the lease defines the term, "Taxes" as, "the gross amount of all impositions, taxes,

assessments (special or otherwise)… governmental liens or charges of any and every kind, nature and sort whatsoever, ordinary and extraordinary, foreseen and unforeseen and substitutes therefore, including all taxes whatsoever (except for the following categories which shall be excluded from the definition of Taxes: any inheritance, estate, succession, transfer or gift taxes imposed upon Landlord or any income taxes specifically payable by Landlord as a separate tax-paying entity without regard to Landlord's income source as arising from or out of the Building and/or the land on which it is located) attributable in any manner to the Building, the land on which the Building is located or the rents (however the term may be defined) receivable therefrom, or any part thereof, or any that thereon, of any facility located therein or used in conjunction therewith or any charge or other amount required to be paid to any governmental authority, whether or not any of the foregoing shall be designated "real estate tax", sales tax", "rental tax", "excise tax", "business tax", or designated in any other manner." (See [R. 8-9 ¶ 3])

In analyzing this section of the lease, one can reasonably infer that a pro rata share of annual ad valorem property taxes on the Appellant's property are part of the "Additional Rent" of Section 3(c)(ii)

"Annual Taxes", because Section 3(d)(iii) defines "Taxes" as all taxes, governmental charges of any and every kind, nature and sort whatsoever, including ordinary and foreseen taxes and governmental charges. While Section 3(d)(iii), excludes certain forms of taxes, it does not specifically exclude property taxes or annual ad valorem property taxes attributable to the building. Thus, the trial court made a reversible error in determining that the lease was ambiguous and that the Appellee did not owe a pro rata share of the property taxes of the Appellee's leased portion of the Appellant's property. While Section 3(d)(i), titled "Operating Expenses" specifically excludes property taxes, as part of "Additional Rent" under the lease, Section 3(c)(ii) titled, "Annual Taxes" includes *Ad Valorem* taxes due to the definition of "Taxes" provided in Section 3(d)(iii) of the lease. Therefore, this Court should remand this action to the trial court with instructions to revive the Appellant's eviction action and to rehear the Appellee's Motion to Determine Rent and thereafter resume the Appellant's eviction action for it to be adjudicated on the merits at a trial.

## CONCLUSION

Appellant, Hallandale Plaza, LLC, respectfully requests this Court to reverse the final judgment and deem that the Trial Court

deprived the Appellant of its due process rights by improperly dismissing the Appellant's eviction action at the preliminary hearing on the Appellee's Motion to Determine Rent. Additionally, the Appellant requests that the Court deem that the Trial Court's dismissal of the Appellant's eviction action at the preliminary hearing on the Appellee's Motion to Determine Rent was improper, because a hearing on a preliminary Motion to Determine Rent is not a venue for final adjudication of eviction actions.

Further, the Appellant requests this Court to deem the Trial Court's finding that the Appellee waived a prior waiver of a clause requiring the Appellee to pay additional rent with its base rent, under the subject lease agreement due to duress from the Appellant to be improper, because the Appellee never plead duress and because the record lacked sufficient evidence for the trial court to make this finding. Additionally, the Appellant requests this Court to deem the Trial Court's failure to consider the Appellee's waiver of a prior waiver of the aforementioned lease clause to be erroneous in light of the evidence on record.

Finally, the Appellant requests this Court to deem that the Trial Court misinterpreted the language of the subject lease agreement in

finding that the Appellee was not required to pay a pro rata share of real property taxes on the disputed leased property, and to remand this matter to the Trial Court consistent with this appeal.

Date: July 29, 2021
Broward, FL

RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY on July 29, 2021, a true and correct copy of the foregoing has been electronically furnished to the party listed below.

Date: July 29, 2021

By: /S/ *Corey J. Biazzo, Esq.*
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## CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P.

The undersigned has reviewed the Florida Rules of Appellate Procedure, and hereby certifies that the foregoing document complies with the provisions governing computer-generated documents, as required by Rule 9.045 Fla. R. App. P.

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