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*In the*  
**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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MAHMOOD NAWAZ,

*Appellant,*

v.

BNSIC TITLE HOLDING CORPORATION, ET AL.,

*Appellees.*

On Appeal from the Superior Court of the District of Columbia  
*Case No. 2020 CA 003226 B*  
*(The Honorable Florence Pan)*

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**BRIEF OF APPELLANT MAHMOOD NAWAZ**

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JANUARY 19, 2022

**STATEMENTS PURSUANT TO RULES 28(a)(2)**

The Appellant Mahmood Nawaz (“Mr. Nawaz”), is the defendant in Case No. 2020 CA 003226 B. Mr. Nawaz is represented by Richard J. Bianco, Esq., and Nicholas Loch, Esq., of RJB Law, 2001 L Street N.W., Washington, D.C., 20036. Mr. Nawaz was *pro se* prior to the entry of current counsel into the case following the Court’s grant of summary judgment to the Respondents.

The Appellee BNSIC Title Holding Corporation, et al., (“BNSIC”), the plaintiff in Case No. Case No. 2020 CA 003226 B. BNSIC is represented by Mr. Russell S. Drazin, Esq., and Mr. Jason A. Pardo, Esq., of Pardo Drazin, LLC

The Appellee 1265 Raum Street NE Tenants Association (the “Association”) is the plaintiff/counter defendant in Case No. 2020 CA 003226 B. The Association is represented by Mr. Terrance Leverne Frierson, Esq., of Eisen and Rome, PC.

There are no intervenors or *amici curiae*.

Date: January 19, 2022

\_\_\_\_\_/s/\_\_\_\_\_  
Richard J. Bianco

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**I. STATEMENT THAT THE APPEAL IS FROM A FINAL ORDER OR JUDGMENT**

The instant appeal is taken from a final order that disposes of all parties' claims, thereby establishing this Honorable Court's jurisdiction.

**II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**A. WHETHER THE APPELLEES' TIME TO EXERCISE RIGHTS UNDER THE TENANT OPPORTUNITY TO PURCHASE ACT EXPIRED RESULTING IN THE APPELLANT'S THIRD PARTY CONTRACT BEING PRIMARY**

**B. IF THE COURT ANSWERS THE PREVIOUS QUESTION IN THE NEGATIVE, THE REMAINING ISSUE IS WHETHER AN AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER THE CIRCUMSTANCES**

**III. STATEMENT OF THE CASE**

On April 25, 2019, Appellee BNSIC Title Holding's Corporation (hereafter "Seller") and Appellant Mr. Mahmood Nawaz ("Mr. Nawaz"), entered into a contract (hereafter the "Nawaz Contract") for the sale of the property located at 1265 Raum Street NE, Washington, D.C. 20002 (the "Subject Property").

Thereafter, the Seller issued Offers of Sale & Tenant Opportunity to Purchase to the four (4) occupied units at the Subject Property, including a copy of the Nawaz Contract, on or about April 29, 2019, as required by the Tenant Opportunity to Purchase Act (hereafter "TOPA").

The tenants responded to the offer by forming the Association and submitting a Letter of Interest in Purchasing (the "LOI"). The LOI was received by DHCD on

May 16, 2019, and purportedly by Plaintiff on or about May 20, 2019. BNSIC's response to the LOI followed on May 22, 2019.

One Hundred Thirteen (113) days later, on September 9, 2019, the Association tendered a counteroffer to the TOPA Notice (the "Tenant Counteroffer"). The Tenant Counteroffer was sent under a covering email from the Association's counsel, specifying a different purchase price and a settlement date of 90 days post ratification which could be extended to 120 days.

During discovery neither the Seller nor the Association produced any communications extending the 90-day negotiation period or indicating that the Association and Seller were meaningfully engaging in any negotiations, notwithstanding Mr. Nawaz's multiple requests.

On October 28, 2019, One Hundred Sixty-One (161) days after the LOI, the Seller ratified the Tenant Counteroffer without further modification ("Tenant Contract"). Closing under the Tenant Contract was scheduled for February 25, 2020. Following the Tenant Contract, the Seller contacted Mr. Nawaz to secure release of the Nawaz Contract. In response to the Seller's request, on or about January 15, 2020, Mr. Nawaz refused, correctly asserting that the Association had failed to adhere to statutory TOPA timelines in the exercise of their rights, demanding the Seller proceed to closing under the Nawaz Contract.

The Nawaz Contract requires the Seller to “immediately notify Buyer in writing of receipt of written intent to purchase by Tenants or acceptance of a contract by Tenants.” The Seller did not notify Mr. Nawaz of the tenants’ exercise of rights on May 20, 2019, tender of the Tenant Counteroffer on September 9, 2019, or acceptance of the Tenant Contract on October 28, 2019. Since the Seller did not point out any contractual or statutory provision obligating Mr. Nawaz to release the Nawaz Contract, he declined to sign the release. The Seller and Association failed to consummate settlement by the February 25, 2020 contractual deadline.

The Seller filed the Complaint on July 22, 2020, naming both Mr. Nawaz and the Association as Defendants and requesting declaratory judgment that (1) Seller met their TOPA obligations; (2) the Nawaz Contract is subordinate to the Tenant Contract; and (3) the Nawaz Contract shall be released as of closing under the Tenant Contract. Seller further requested attorney's fees and costs, pursuant to the Nawaz Contract.

On November 19, 2020, Mr. Nawaz, proceeding *pro se*, filed a Counterclaim against the Seller and the Association, requesting a declaratory judgment: (1) the Tenant Contract has lapsed and is void; (2) Seller complied with TOPA; (3) Nawaz Contract remains valid and binding; and (4) Seller must convey the Subject Property to Mr. Nawaz. Mr. Nawaz also requested costs.

On April 22, 2021, Seller filed their Motion for Summary Judgment, arguing that they are entitled to summary judgment because Seller complied with TOPA despite the Association's submission of the non-conforming Tenant Counteroffer outside of the Right of First Refusal Period. The Seller and Association did not ratify the Tenant Contract until six (6) weeks after the untimely Tenant Counteroffer. The parties then failed to complete settlement by their self-imposed February 25, 2020, deadline.

On May 17, 2021, Mr. Nawaz filed his *pro se* Motion for Summary Judgment, asserting that Seller and the Association failed to comply with TOPA as a matter of law. In addition to his Answer, Mr. Nawaz's filings consistently assert noncompliance with the TOPA timeline and Seller's failure to disclose required information to Mr. Nawaz.

On July 15, 2021, the Superior Court granted Summary Judgment to the Seller and directed the sale of the Subject Property to the Association.

Thereafter on August 2, 2021, the undersigned counsel entered an appearance on behalf of Mr. Nawaz and moved for reconsideration on August 12, 2021. Nawaz argued, through counsel, that the court erred because there were sufficient factual findings to support a grant of summary judgment in favor of Mr. Nawaz. Specifically, the court found that that the Association delivered the LOI to Seller on May 20, 2019 but did not deliver the Tenant Counteroffer until September 9, 2019,

one hundred thirteen (113) days later. Nawaz pointed out on reconsideration that this is not within the relevant TOPA timelines. The September 9 Tenant Counteroffer fell outside of the statutory 15 day Right of First Refusal Period which is non-extendable.

Mr. Nawaz further argued that since the Association and Seller did not produce any evidence that the parties agreed to an extension of the Negotiation Period, despite being asked, Nawaz was entitled to purchase the Subject Property.

The lower court denied the Motion for Reconsideration on grounds that Mr. Nawaz failed to previously assert the right of first refusal argument. The court made no findings on the substance of Nawaz's argument nor did it discuss the express references to TOPA deadlines in his *pro se* Answer, Motion for Summary Judgment, and Opposition to Seller's Motion for Summary Judgment.

The court further awarded attorney's fees pursuant to the terms of the purportedly void Nawaz Contract, finding that he failed to execute a release, in breach of the TOPA compliance provision. This finding was made despite Seller's own breach of contract by failing to notify Mr. Nawaz of all communications with tenants during the TOPA process.

#### **IV. STATEMENT OF FACTS**

The instant case arises from a dispute in D.C. Superior Court over the sale of a four (4) unit residential property located at 1265 Raum Street NE, Washington,

D.C. 20002 (hereafter the “Subject Property”) and related compliance with the Tenant Opportunity to Purchase Act of 1980 ("TOPA"). *See id.*

On April 25, 2019, Seller and Nawaz entered into the Nawaz Contract, for purchase of the Subject Property for \$605,000.00. *See* Compl. ¶ 8 (JA-0007), Nawaz Contract. (JA-0013-0047).

The Nawaz Contract gives Mr. Nawaz the right, “in his sole discretion” to declare the contract null and void without penalty upon receipt of notice from the Seller that a tenant contract has been accepted. *See* Nawaz Contract. Multi-Unit or Non-Residential Addendum ¶1 (A) at 33 (JA-0118). There is no reciprocal Seller’s cancelation right. ¶3(B) (JA-0116-0117) (“TOPA Compliance and Buyer Right to Void Contract”).

The Nawaz Contract further requires that the Seller “immediately notify Buyer in writing of receipt of written intent to purchase by Tenants or acceptance of a contract by Tenants.” (JA-0118).

On or about April 29, 2019, Seller issued TOPA Notices to the tenants of the Subject Property. Compl. ¶ 9 (JA-0122-0166).

Thereafter, on May 20, 2019, the Association tendered the LOI asserting their interest in purchasing the Subject Property and triggering the statutory 90-day Negotiation Period. Compl. ¶ 11 (JA-0006-0011). The LOI requested specific documents from Plaintiff within seven (7) business days which the Seller provided

two (2) days later. *See* LOI (JA-0168) (requesting “[a] floor plan. . . and. . . . [a]n itemized list of monthly operating expenses, utility consumption rates, and capital expenditures for each of the two (2) preceding calendar years[.]”). The Seller did not notify Mr. Nawaz of the LOI.

One Hundred Thirteen (113) days after the LOI, on September 9, 2019, the Association delivered its Tenant Counteroffer. *See* Seller’s MSJ ¶ 5 (JA-0078); Tenant Counteroffer (JA-0170-0176). The Tenant Counteroffer was sent under a covering email from the Association’s counsel, stating in relevant part:

Please see the draft contract addendum. There are two main differences in this addendum that differ from the purchase contract. The first difference is the purchase price. The tenants are requesting a purchase price of \$500,000 which is consistent with the appraisal which was provided. The second difference is the settlement date. The tenants are requesting a settlement of 90 days post ratification, which can be extended to 120 days. In order to avoid any repeat of the previous experience with Bryant and Girard, this addendum makes clear that the tenants are not entitled to settle after 120 days except with the consent of both parties.

*See id.* (emphasis added) (quoted text at JA-0170). Again, the Seller did not contemporaneously disclose the correspondence concerning the Tenant Counteroffer to Mr. Nawaz.

In discovery, Mr. Nawaz requested “all documents, including notices and responses exchanged between each of Tenant(s) and Landlord Seller.” Nawaz Discovery Requests (“Nawaz Requests”) (JA-0337-0344) (quoted text at JA-0340). The Plaintiff did not produce any communications either extending the 90-day

Negotiation Period or indicating that the Association and Plaintiff engaged in negotiations between May 20, 2019, when Seller received the LOI and September 9, 2019, when the Tenant Counteroffer was tendered.

Approximately six (6) weeks later, on October 28, 2019, the Seller ratified the Tenant Counteroffer without further modification. (“Tenant Contract”) *See* Seller's SUMF ¶ 6 (JA-0078); Email, 10/29/19 (JA-0222) (email from Seller confirming receipt)

The Tenant Contract required closing by February 25, 2020. (JA-0222) ("Hi Jason, [c]onfirming receipt and that the 120<sup>th</sup> day is February 25. Thanks."); RTC Addendum (JA-0178) (“The closing of the transaction contemplated by this Agreement (the “Closing”) shall occur as provided in the attached Tenant Rights Addendum.”)

According to the complaint the Seller contacted Mr. Nawaz to secure release of the Nawaz Contract. *See* Compl. ¶ 16 (JA-0008). On January 15, 2020, Mr. Nawaz responded to Seller’s request correctly asserting that the Association and Seller had failed to adhere to statutory TOPA timelines in the exercise of its rights.

Tenant(s) [the Association] failed to exercise their rights to purchase subject Property under TOPA laws, therefore Tenant(s) right to acquire subject property is extinguished.

The [Nawaz] Contract ratified between Buyer and Seller remain valid and binding. Any attempts to sell subject property to anyone else is not legal and any transfer of title shall not be valid. By providing this notice undersigned [Mr. Nawaz] demand [Seller] to complete closing

as required under the terms of said [Nawaz] Contract. {Mr. Nawaz} remains ready, able and willing to complete closing pursuant to the Terms of [the Nawaz] Contract. Please be advised [Mr. Nawaz] has not signed any release or otherwise abandoned any rights to acquire subject property. [Mr. Nawaz] shall be taking all necessary steps to protect its interests including filing legal action and lis pendens.

*See* JA-0224-0225 (quoted text at JA-0225) (emphasis added). In their Complaint and Motion for Summary Judgment, Seller correctly acknowledged that Nawaz’s January 15 Letter contested timeliness of exercise of TOPA rights under the Tenant Contract. *see* Compl. ¶ 17 (JA-0009) (“On January 15, 2020, Defendant Nawaz sent Plaintiff a letter stating that the Association had failed to exercise timely its rights under TOPA, and such rights had expired, Defendant Nawaz, therefore, demanded that Plaintiff proceed to closing under the Nawaz Contract.”) (emphasis added); Seller’s SUMF ¶ 9 (JA-0077-0079) (On January 17, 2020, Defendant Nawaz sent [Seller] a letter dated January 15, 2020, stating that the Association failed to exercise timely its rights under TOPA and such rights had expired.”) (quoted text at JA-0078) (emphasis added). The Nawaz letter was attached with Seller’s Motion for Summary Judgment as Exhibit G. (JA-0224-0255).

### **Order Granting Summary Judgment to Seller**

On July 15, 2021, the trial court granted Summary Judgment in favor of Seller. (JA-0266-0274). The Order only considered whether the parties to the Tenant Contract could agree to a reasonable extension of time beyond the February 25, 2021, closing date. It merely states that the closing deadlines are minimum

requirements and may be extended. The relevant text from the July 15, 2021, Order discussing the closing deadline is set forth as follows:

In the instant case, plaintiff ratified the Nawaz Contract for the purchase of the Property on April 25, 2019. . . Plaintiff sent the requisite TOPA Notices on April 29, 2019; and timely received a Statement of Interest from the President of the Association on May 20, 2019. . . see D.C. Code§ 42-3404.10(1). Plaintiff and the Association ratified the Tenant Contract on October 28, 2019. (cleaned up).

Order Granting SJ to Seller (JA-0266-0273) On this analysis alone, the court makes specific factual findings, apparent on the face of the record, necessary to conclude that the Tenant Contract was invalid from its inception since it was presented outside of the TOPA timelines. The trial court did not discuss the substance of Nawaz's Right of First Refusal Period argument.

Mr. Nawaz's refusal to release the Nawaz Contract came well after the TOPA rights expired as a matter of law, because no agreement was reached within the ninety (90) day Negotiation Period, there is no evidence to suggest the period was extended, and the Association failed to match the price and material terms of the Nawaz Contract prior to expiration of the fifteen (15) day right of first refusal period. The trial court also failed to recognize that Mr. Nawaz raised the Association's failure to comply with TOPA timelines in his responsive pleadings and motions practice.

Thereafter, Mr. Nawaz engaged counsel and moved for reconsideration based on the arguments set forth herein. The trial court denied Mr. Nawaz's motion and this appeal follows.

## **V. APPLICABLE STANDARD OF REVIEW**

The standard of review on the grant of summary judgment is *de novo*. *Johnson v. District of Columbia*, 144 A.3d 1120, 1125 (D.C. 2016) ("The question whether summary judgment was properly granted is one of law. . ." which is reviewed *de novo*.) (citation and internal quotation marks omitted);

The standard of review on the trial court's award of attorneys' fees is likewise *de novo*. *McClintic v. McClintic*, 39 A.3d 1274, 1277 (D.C. 2012). (We generally review 'a trial court's decision to grant or deny a request for fees and costs' for abuse of discretion. However, where...the issue is whether the trial court possessed the statutory authority to award particular fees and costs, our review is *de novo*.")

## **VI. SUMMARY OF THE ARGUMENT**

Mr. Nawaz's arguments here track closely with the his Motion for Reconsideration. Seller and the Association failed to enter into a contract by the end of the *non-extendable* right of first refusal period. *See* D.C. Code § 42-3404.08. The Seller's receipt of the LOI marked the beginning of the ninety (90) day Negotiation Period. *See* D.C. Code § 42-3404.10. That period ran from May 21, 2019, through August 18, 2019. Since the parties to the Tenant Contract did not agree to an

extension of the Negotiation Period the TOPA rights expired on September 2, 2019, 15-days after the close of the Negotiation Period.

Additionally, the trial court erred in affording no weight to Mr. Nawaz's assertions in his *pro se* pleadings, motions and attachments that the Seller and Association failed to adhere to TOPA timelines in determining that the argument was not raised prior to Mr. Nawaz's Motion for Reconsideration.

Further, the Court's fallback finding that the Negotiation Period was automatically extended due to Mr. Nawaz's refusal to release the Nawaz Contract on January 15, 2021, is obviously flawed for the same reason that his refusal was justified. Having failed to agree to a reasonable extension prior to expiration of the negotiation period, the Tenant Contract expired on September 2, 2019, well over four (4) months before Seller apparently sought a release of the Nawaz Contract. By the time Seller had requested the release of the Nawaz Contract, no valid Tenant Contract. Moreover, the Court cites no authority to support the finding that the Negotiation Period can be retroactively extended after expiration of the Right of First Refusal Period and indeed none exists.

Finally, Seller should not be granted attorney's fees because Mr. Nawaz's refusal to release the Nawaz Contract was based on an actual and legal defect with the competing Tenant Contract, thereby vindicating his refusal. Even if the court finds that the Nawaz Contract was subordinated, the contractual attorney's fees

provision requires a finding of default by the Buyer. However, the evidence on the record overwhelmingly supports that it was the Seller, rather than Mr. Nawaz, who failed to perform under the terms of the Nawaz Contract.

## **VII. ARGUMENT**

### **A. BY THE TIME THE ASSOCIATION PRESENTED THE TENANT COUNTER-OFFER THE STATUTORY, NON-EXTENDABLE 15-DAY “RIGHT OF FIRST REFUSAL” PERIOD HAD EXPIRED.**

The trial court erred in granting the Plaintiff’s Motion for Summary Judgment, and denying Mr. Nawaz’s Motion for Reconsideration, by refusing to consider that the 15-day “right of first refusal” period in D.C. Code § 42-3404.08 expired on September 2, 2019. *See* Order Granting SJ to Seller (JA-0266-0276), Order denying Motion for Reconsideration (JA-0550-0554) (“This argument has been forfeited, and the Court will not consider it.”) (quoted text at JA-0552). The Tenant Contract was not presented to the Seller until after the Right of First Refusal period expired, so the Seller’s case fails as a matter of law.

#### *i. The TOPA Rights Expired on September 2, 2019 Rendering the Tenant Counteroffer of September 9, 2019 Invalid.*

Since the Nawaz Contract was presented to the tenants with the TOPA Notice, the 15 day Right of First Refusal Period began to run at the conclusion of the Negotiation Period and ended on September 2, 2019, prior to the Association’s tender of the Tenant Counteroffer. As such, there was never a valid contract between the Seller and Association for purchase of the Subject Property.

Under TOPA, in a 2–4-unit building, once an owner receives a tenant or tenant organization’s letter of interest in purchasing, the parties must negotiate in good faith towards the signing of a contract for a period of at least 90 days (the “Negotiation Period”). “*See* D.C. Code § 42-3404.10(2)(A) ; *see also* D.C. Code § 42-3404.05.

Additionally, once the owner enters into a purchase contract with a third-party buyer, the tenants or tenant organization is/are afforded a right of first refusal to match the third-party contract for a period of fifteen (15) days. *See* D.C. Code § 42-3404.08. Where the third-party contract is presented to the tenants with the original TOPA Notice, the 15-day period begins to run at the end of the negotiation period. *Id.* Unlike the negotiation period, the right of first refusal period is not extendable. *Coburn v. Heggstad*, 817 A.2d 813 (D.C. 2003) (Act only allows extension of time for negotiation and settlement with a tenant who has expressed in writing an interest in purchasing the property).

If the tenant does not respond with a matching contract within the 15-day period, the existing contract is automatically deemed to be the "primary" contract and the landlord is then free to sell the property to the third party. *Lealand Tenants Ass’n, Inc. v. Johnson*, 572 A.2d 431, 434 (D.C. 1990). The Act manifestly does not contain any provision for extensions of time of the 15-day period covering "right of first refusal."

*See id.* at 818.

Here, the Seller and Mr. Nawaz entered into the Nawaz Contract on April 25, 2019. *See* Seller’s SUMF ¶ 1 (JA-0077); *see* Nawaz Contract (JA-0013-0047 and

JA-0086-JA-0120). On April 29, 2019, the Seller served the TOPA Notice, *including* a copy of the Nawaz Contract. *See id.* ¶ 2 (JA-0077). Service of the TOPA notice triggered a twenty-two (22) day period within which the tenants, jointly or severally, could express an interest in purchasing. D.C. Code § 42-3404.10.

The tenants formed the Association and responded to the TOPA Notice with the LOI on or about May 20, 2019<sup>1</sup>, within the twenty-two (22) day period. *See* Seller's SUMF ¶ 4. JA-0077 and LOI at JA-0168. The LOI marked the beginning of the ninety (90) day Negotiation Period. *See* D.C. Code §42-3404.10. That period, ran from May 21, 2019, through August 18, 2019.

The Negotiation Period can be extended in two (2) ways: 1) by agreement of the parties; or 2.) if the owner delays in providing the Association certain requested information. *See* D.C. Code § 42-3404.08. Based on the parties' filings and the information produced in discovery, neither of these extensions applied to this transaction. *See* JA-0077-0084; *see also* JA-0328 (Pardo Letter) (Letter Responding to LOI); JA-0337-0344 (Response to Def. Interrogatories).

Seller has not alleged, nor have they produced any information which demonstrates that there was an agreement to extend the Negotiation Period beyond

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<sup>1</sup> The Association's Letter of Interest in Purchasing is dated May 15, 2019, is stamped received by DHCD on May 16, 2019, and purportedly received by the Plaintiff on May 20, 2019.

90 days. In his discovery requests Mr. Nawaz requested that the Seller provide a “timeline and copies of all documents, including all notices and responses exchanged between each of Tenant(s) and Landlord Seller.” Def. Interrogatory No. 5. (JA-0337-0344) (quoted text at JA-0340)

In response, the only communications produced were the TOPA Notice (JA-0122-0166), the LOI (JA-0168), a letter from Plaintiff’s Counsel providing certain requested information about the Property on May 22, 2019 (JA-0328), and an email exchange between Seller and the Association on October 28 and 29, 2019, setting February 25, 2020, as the closing deadline. (JA-0222) (email exchange between Plaintiff and the Association confirming ratification of the Tenant Contract); Seller’s SUMF ¶ 6 (JA-0078). None of these documents contained any representations or reference to extending the Negotiation Period.

The LOI requested that the Seller produce, within seven (7) days, a floor plan of the building, if available and an itemized list of operating expenses, utility consumption rates, and capital expenditures for each of the last two calendar years. (JA-0168). On May 22, 2019, within the seven (7) day period, the Plaintiff produced the responsive information. (JA-0328). Consequently, the Negotiation Period was not extended due to delay.

As the Negotiation Period was not extended by agreement or delay, it expired on August 18, 2019. Thereafter, the 15-day Right of First Refusal Period began,

which ran from August 19, 2019, through September 2, 2019. During this period, the Association had the right to match the Nawaz Contract, but not to negotiate more favorable terms.

On September 9, 2019, after the Right of First Refusal Period, the Association tendered the Tenant Counteroffer, which did not match the price and material terms of the Nawaz Contract. *Compare* Nawaz Contract (JA-0013-0047) *with* Tenant Contract (JA-0196-0176). Acknowledging the nonconformity, the covering email from the Association’s counsel states, “[t]here are two main differences in this addendum that differ from the [Nawaz Contract]. . . [t]he first difference is the purchase price,” recognizing that the proposed contract contained a price of \$500,000 which is less than the amount specified in the Nawaz contract. *See id.* (quoted text at JA-0170). “The second difference is the settlement date. . . [t]he tenants are requesting a settlement date of ninety (90) days post ratification, which can be extended 120 days.” *See id.*

There was no extension of the Negotiation Period and the Association failed to match the Nawaz Contract by September 2, 2019. Therefore, the Association’s TOPA rights expired prior to tender of the Tenant Counteroffer and the trial court erred in denying Nawaz judgment as a matter of law.

- ii. *The Trial Court Erred in Deeming Forfeit Mr. Nawaz's Argument that the Tenant Counteroffer was Presented After Expiration of TOPA Rights.*

Mr. Nawaz is permitted to argue on appeal that the Tenant Contract was presented after expiration of the Right of First Refusal Period for two reasons: (1) his *claim* that the Nawaz Contract is primary is preserved even if he did not make the precise *argument* at summary judgement that was presented on reconsideration; and (2) he sufficiently raised the argument that the TOPA timeline expired both at and prior to the summary judgement stage given the liberal pleading standard afforded to *pro se* litigants.

**a. Mr. Nawaz is not limited to arguments identical those presented at summary judgment.**

As more fully set forth below, Mr. Nawaz does not concede that he failed to raise the argument that the Tenant Contract is invalid for failure to comply with TOPA timelines. However, even assuming *arguendo* that Mr. Nawaz insufficiently articulated the argument, he is not foreclosed from presenting the argument on appeal.

The Supreme Court of the United States and this court have distinguished between 'claims' and 'arguments' holding that although 'claims' not presented in the trial court will be forfeited, parties on appeal are not limited to the precise arguments they made in the trial court

*Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001)

Mr. Nawaz unquestionably raised the claim that the Nawaz Contract was primary, due to the Association and Seller's noncompliance with TOPA. He may not have made the argument as clearly as experienced counsel would have but, the claim was before the trial court which made specific findings of fact sufficient uphold his claim.

[Seller] sent the requisite TOPA Notices on April 29, 2019; and timely received a Statement of Interest from the President of the Association on May 20, 2019. [Seller] and the Association ratified the Tenant Contract on October 28, 2019.

Order Granting SJ (JA-0266-0275) (quoted text at JA-0271). On these facts alone the court could, and should have found that the October 28, 2019 Tenant Contract fell well outside of the TOPA timelines.

**b. Alternatively, Mr. Nawaz sufficiently raised the TOPA expiration argument presented on summary judgment in his pleadings and motions practice.**

In considering the parties dueling motions for summary judgment, the lower court did not afford any weight to the statements made in Mr. Nawaz's filings, asserting his position that the Tenant Contract was invalid because the parties did not adhere to the requirements of TOPA.

Mr. Nawaz's *pro se* assertions, although stated more generally than would have been by an attorney, were legally and factually correct and go to the heart of the argument now on appeal. It is well settled that "Courts in this jurisdiction are

required to construe *pro se* pleadings liberally” and this case should not be an exception. *Flax v. Schertler*, 935 A.2d 1091, 1100 (D.C. 2007)

Specifically, in his communication of January 15, 2021, declining to release the Nawaz Contract which was attached and incorporated in numerous filings, Mr. Nawaz wrote that the Association and Seller were not in compliance with TOPA and the Tenant Contract was void and unenforceable as a matter of law. (JA-0225)

In his Counterclaim Mr. Nawaz clearly establishes that the evidence on the record was insufficient and raised questions about the ratification of the Tenant Contract, “[d]espite repeated requests, [Seller] did not establish by providing enough documentation that alleged Tenant Contract. . . was ratified pursuant to and in compliance with the TOPA regulations.” *See* Nawaz Counterclaim ¶ 3 (JA-0069).

In his Opposition to Seller’s Motion for Summary Judgment Mr. Nawaz represents that the January 15, 2020, Letter, “was provided following [Seller’s] refusal to provide any information regarding [the Tenant Contract].” (JA-0241). Mr. Nawaz reasonably believed Seller was withholding information regarding the negotiation of the Tenant Contract, specifically related to TOPA timelines. Seller had not and cannot establish that they are entitled to judgment as a matter of law, because there is no evidence that the Tenant Counteroffer was timely.

Finally, in his own *pro se* Motion for Summary Judgment Mr. Nawaz argues that the Seller failed to comply with TOPA and asserts in his supporting Statement

of Undisputed Material Facts, “[d]espite repeated requests from Nawaz, [Seller] did not establish by providing documentation. . . alleg[ing] Tenant Contract was ratified pursuant to and in compliance with TOPA regulations.” *See* (JA-0255-0257) (quoted text at JA-0256).

As a *pro se* litigant Mr. Nawaz sufficiently articulated the defects with the Tenant Contract to put the Court on notice that these issues were material to the ultimate decision.

iii. *The Parties Under The Tenant Contract Failed To Close Before The Closing Date Specified Therein.*

As forcefully argued in Mr. Nawaz’s *pro se* pleadings and summary judgment briefings, the parties to the Tenant Contract failed to negotiate a reasonable extension to the settlement date beyond the 120-day deadline set forth in the Tenant Contract. Nawaz Counterclaim. (JA-0069-JA-0072). The communications between the parties unequivocally show that any further extension required mutual consent, the occurrence of which has not been established on the record. Pardo Letter (JA-0170)

As with the negotiation period, once a property is under contract with a tenant organization, "[t]he owner shall afford the tenant [organization] a reasonable period prior to settlement [to] secure financing. . . and shall not require less than 90 days after the date of contracting." *See* D.C. Code § 42-3404.10(3). "The time periods for

negotiation of a contract of sale and for settlement. . . are minimum periods, and the owner may afford the tenant [organization] a reasonable extension of such period, without liability under a third-party contract." *See* D.C. Code § 42-3404.04.

Although TOPA rights to settle are extendable by the agreement, in *William J. Davis, Inc. v. Tuxedo LLC*, the Court of Appeals addressed the kind of communications between a seller and tenant necessary to form a “reasonable” agreement to extend. In doing so, the Court articulated that “reasonableness” under TOPA,

. . . is a concept that requires a relatively precise timetable, grounded in industry norms or standard practice—one that is not unduly distant into the future—in order to assure that the tenants' right to supplant a third-party contract is not inordinately prejudicial to the third-party purchaser and the property owner. It follows that, to assure the required precision, any extension—a word implying both a beginning and an end—must be determined prospectively and set forth a finite period; it cannot simply be an open-ended arrangement.

*See William J. Davis, Inc. v. Tuxedo LLC*, 124 A.3d 612, 620-21 (D.C. 2015) (holding parties did not agree to wave the initial settlement date under tenant contract based on email exchange refusing to close under contract).

In this case, the communications between the parties do not establish that they agreed to a reasonable extension of the settlement date beyond February 25, 2020. Instead, the parties to the Tenant Contract expressly contemplated an already extended 120-day settlement period in the Tenant Contract. Contract Offer

Forwarding Letter (JA-0170) (“There are two main differences in this addendum that differ from the purchase contract. . . [t]he second difference is the settlement date. The tenants are requesting a settlement of 90 days post ratification, which can be extended to 120 days.”). Additionally, the cover letter accompanying the Tenant Counteroffer clearly establishes the expectation between the parties that any extension beyond 120 day was conditioned on both parties consenting to said extension. *See id.* (“In order to avoid any repeat of the previous experience with Bryant and Girard, this addendum makes clear that the tenants are not entitled to settle after 120 days except with the consent of both parties.”) Notwithstanding the language in the letter specifying a procedure for extending the settlement date, the parties have not produced communications showing that the procedure was followed and the settlement date was actually extended. By entering into the Tenant Contract, which specifies a fixed closing date that cannot be extended without the consent of both parties, the parties were bound to proceed to closing without such an extension.

**B. EVEN IN THE EVENT THAT THE TENANT CONTRACT IS  
UPHELD AN AWARD OF CONTRACTUAL ATTORNEYS’  
FEES AGAINST MR. NAWAZ IS NOT APPROPRIATE.**

If, as Mr. Nawaz urges above, the Court finds that the Tenant Counteroffer was untimely and the Tenant Contract void, the fee award against him should clearly be vacated. However, even if the Court finds that the Tenant Contract is valid and

primary, a contractual fee award against Mr. Nawaz is improper as he did not fail to perform any contractual or legal obligation under the Nawaz Contract or TOPA.

In the July 15, 2021, Order, the Court found Mr. Nawaz liable for the Seller's costs including attorney's fees because

The Nawaz Contract provides that "[i]n any action or proceeding between Buyer [Nawaz] and Seller based, in whole or in part, upon the performance of the terms and conditions of this Contract...the prevailing party...shall be entitled to receive reasonable Legal Expenses from the other party as determined by the Court[.]" *See* Nawaz Contract at 4.

Order Granting SJ, July 15, 2021 (JA-0266-0274) (quoted text at JA-0273) (emphasis added).

The Seller's case is predicated in part, on the notion that Mr. Nawaz breached the Nawaz Contract by refusing to sign a document releasing the Nawaz Contract. *See* Compl. ¶23 (JA-0009) ("Defendant Nawaz is in breach of the Nawaz Contract as [a] result of his refusal to execute a release of the Nawaz Contract"). However, the evidentiary support that the Seller cites, namely Paragraph 25 of the contract, (JA-0017), does not expressly or implicitly require Mr. Nawaz to sign such a release.

It states that a party could be liable for the other's Attorneys' Fees where the Court finds that the Party "should have" executed the release. *See id.* However, that Paragraph is a remedies provision, entitled "Default," and is predicated on "Buyer fail[ing] to complete Settlement for any reason other than a breach by the Seller" or

otherwise failing “to perform at Settlement in accordance with the terms of this Contract.” *Id.*

Mr. Nawaz never defaulted on any obligation in the Nawaz Contract, certainly not at Settlement; nor did Seller ever allege a default in performance. Contrary to the trial court’s finding the Seller was in breach by failing to produce communications with the Association as required. It was Nawaz, and not the Seller demanding settlement following expiration of the TOPA Rights.

The Attorneys’ fees remedy provision must be read in context and not cherry picked to yield the desired result. The Seller does not cite, and indeed there is no contractual provision requiring Mr. Nawaz to sign a release. In the same regard, nothing in TOPA requires a third-party purchaser to sign a release.

The Court’s July 15, 2021 Order goes on to state,

A condition of the Nawaz Contract specifies that the parties must comply with TOPA before settlement can occur. See, e.g., *id.* at 32 (“Buyer and Seller acknowledge that Seller must accomplish TOPA Compliance prior to the Settlement Date”) Plaintiff needed a release of the Nawaz contract in order to fulfill the requirements of TOPA, and defendant Nawaz’s obstruction of plaintiff’s efforts to comply with TOPA constituted non-performance of the terms and conditions of the Nawaz Contract.

*See id.* (JA-0266-0273) This analysis assumes that Mr. Nawaz has an obligation “to comply with TOPA.” He does not. TOPA compliance is purely a seller’s obligation both statutorily and (in this case) contractually. Indeed, the above quoted section of

the Contract expressly acknowledges “Seller must accomplish TOPA Compliance prior to the Settlement Date.” Tenancy Addendum. (JA-0044). This language does not create a parallel obligation requiring Mr. Nawaz to release the contract so that the Seller can accomplish TOPA compliance under the Tenant Contract, which Mr. Nawaz is not a party to.

Moreover “TOPA Compliance” is a defined term in the Nawaz Contract, as a set of constituent conditions that must be achieved by the Seller.

To ensure Buyer’s ability to procure an owner’s title insurance policy without exception to TOPA, Seller agrees to contact Settlement Agent within 10 Business Days of Ratification to determine that Seller is either in compliance with both TOPA Notice requirements and title insurance underwriting requirements pertaining to TOPA or to establish the necessary steps to be in compliance with such requirements (either of which shall constitute “TOPA Compliance”).

Accomplishing TOPA compliance requires Delivery to the Settlement Agent of specific documentation satisfactory to the title insurance underwriter, including but not limited to the following:

1. Copies of required TOPA Notices and evidence of their Delivery in compliance with D.C. Code § 42-3404 et seq.; and
2. Collectively completed and executed TOPA Affidavits and/or Assignments executed by all Tenants (as required by the title insurer), evidencing that all Tenants have elected to not exercise their right to purchase and their right to first refusal, and have not assigned said rights, or that they have assigned their TOPA rights to Buyer or Seller for consideration.

In the event that Seller has not accomplished TOPA Compliance by 30 days following the Date of Ratification (“Deadline”), Buyer may, at any time thereafter, but prior to Seller accomplishing TOPA Compliance, deliver Notice to Seller

declaring this contract void. If Buyer Delivers such Notice, this Contract will become void at 6:00 p.m. on the third day following Delivery of Buyer's Notice, unless prior to that date and time Seller has accomplished TOPA Compliance.

*See* Nawaz Contract. Tenancy Addendum. ¶ 3B (JA-0044) ("TOPA Compliance and Buyer's Right to Void Contract"). Based on the plain language of the Nawaz Contract, Mr. Nawaz, in no way prevented the Seller from achieving "TOPA Compliance" under the Nawaz Contract. The Nawaz Contract further sets forth the consequence for the Seller's failure to achieve TOPA Compliance. Specifically, that Mr. Nawaz, in his sole discretion, can cancel the Nawaz Contract if he so chooses. *See id.* It does not obligate Mr. Nawaz to cancel or to sign any acknowledgement with respect to TOPA whatsoever.

To award fees the Court must conflate the parties' obligations under the Nawaz Contract and the Tenant Contract. By definition, if "TOPA Compliance" were achieved under the Nawaz Contract, the Plaintiff would be obligated to settle with Mr. Nawaz.

Nothing in the Nawaz Contract expressly states or even suggests, that there are circumstances under which Mr. Nawaz is required to acknowledge a legal conclusion that is part of a separate contract between Seller and tenants that TOPA has been complied with.

Many sellers in TOPA contracts deal with the conundrum of an un-released third party contract by simply inserting a contractual provision requiring a release.

For whatever reason, the Plaintiff, who was professionally represented by a licensed broker in the sale, did not do so in this case and the Court should not read obligations into the Nawaz Contract that are outside of the four corners of the document.

The release sought by the Seller is neither a statutory nor contractual requirement. It is evidently a title insurance underwriting requirement related to the Tenant Contract, which Mr. Nawaz is not a party to. The Court should not reform the Nawaz Contract by requiring him to take active steps to aid the Plaintiff in closing another contract.

#### **VIII. CONCLUSION**

The Seller and the Association failed to enter into a contract by the end of the *non-extendable* right of first refusal period under D.C. Code §42-3404.08. Mr. Nawaz raised the claim that the Tenant Contract was void due to noncompliance with TOPA in pleadings and other filings throughout the litigation and that claim is preserved for this appeal. Whether or not the Court finds in favor of Mr. Nawaz on the validity of his contract, under no circumstances is an attorneys' fee award appropriate. The Seller accuses Mr. Nawaz of breaching the contract because he refused to release the contract yet there is nothing in the Nawaz Contract requiring him to give such a release. In order to award fees to the Seller, the Court would have to find a default by Mr. Nawaz. The trial court did not identify such a breach, nor should this Court.

WHEREFORE, based on the foregoing, Mr. Nawaz respectfully requests that the Court reverse the trial court's grant of summary judgment and remand the matter for entry of summary judgment in Mr. Nawaz's favor.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

On this 20<sup>th</sup> day of January 2022, the undersigned hereby certifies that a true and correct copy of the foregoing Brief was sent by Electronic Filing and Service to:

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# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

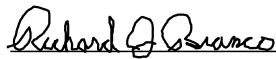
I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



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Email Address

21-CV-662

Case Number(s)

1/20/22

Date