CASE NO. S275843

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JJD-ELK GROVE, LLC,

Plaintiff and Appellant,

v.

JO-ANN STORES, LLC,

Defendant and Respondent.

On Review From The Court Of Appeal For the Third Appellate District,
Division One, 3rd Civil No. C094190

After An Appeal From the Superior Court For The State of California,
County of Sacramento, Case Number 34-201900248163,
Hon. Shama H. Mesiwala

ANSWER TO PETITION FOR REVIEW

Mark E. McKeen (Bar No. 130950)
mark.mckeen@us.dlapiper.com
Eva K. Schueller (Bar. No. 237886)
evi.schueller@us.dlapiper.com
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933
Tel: 415.836.2500

Attorneys for Defendant and Respondent
JO-ANN STORES, LLC

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INTRODUCTION

Appellant JJD-HOV Elk Grove, LLC ("JJD") uses a misleading partial quote from the Third Circuit's opinion to attempt to manufacture a "split of authority" where none exists. From there, the remainder of JJD's petition is built entirely on two straw-man arguments, neither of which warrants reconsideration of the Third District's thoughtful application of law to the specific, unique facts of ***this case***.

First, JJD seeks review of a non-existent "conflict" between the Fifth District's opinion in *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332 ("*Grand Prospect*"), decided on review of one set of facts and one form of co-tenancy provision in a commercial lease, and the Third District's opinion in this case ("*JJD v. Jo-Ann*"[1]), decided on review of an entirely different set of facts and entirely different form of co-tenancy provision. The core premise of JJD's request for review is therefore false: the Third District's opinion never made the holdings that JJD wants this Court to now "review."

Second, while ignoring the Third District's language in the *JJD v. Jo-Ann* opinion distinguishing the co-tenancy provision in ***this case*** from the co-tenancy provision in the *Grand Prospect* case, JJD now, for the first time in this litigation, argues the applicability of Civil Code section 3275 to commercial leases in California. As noted in *JJD v. Jo-Ann*, Civil Code section 3275 was not cited in the trial court by either party, not referenced in the trial court's decision, and only quoted by JJD in its appellate brief without any discussion or explanation of its applicability to this dispute.

Because the petition in this case mischaracterizes both the record and Third District opinion, and an even cursory review of both show that

[1] *JJD-HOV Elk Grove, LLC v. Jo-Ann Stores, LLC* (2022) 80 Cal.App.5th 409.

this case does not present either a reconciliation of conflicting authorities or the resolution of important questions of law, review should be denied.

ARGUMENT

I. There is No Existing "Conflict" between the Fifth District's Opinion in *Grand Prospect*, Decided on Review of One Set of Facts and One Form of Co-Tenancy Provision in a Commercial Lease, and the Third District's Opinion in this Case, Decided on Review of an Entirely Different Set of Facts and Entirely Different Form of Co-Tenancy Provision.

In its petition, JJD states "[b]y its published opinion 'declin[ing] to follow the rule announced in *Grand Prospect,*' the Third District has created an explicit and acknowledged split of authority in the Courts of Appeal as to whether commercial parties retain Civil Code § 3275's protection against contractual penalties and forfeitures." (Petition, p. 5.) JJD then states that *JJD v. Jo-Ann* "holds the opposite" [of *Grand Prospect*]; it will enforce any penalty term negotiated by commercial parties." (Petition, pp. 5-6.)

Neither of JJD's above statements are remotely true, as the full sentences from which those quotes are pulled reveal. First, the Third District in *JJD v. Jo-Ann* did not "decline to follow" *Grand Prospect* in ***all*** co-tenancy provision cases, nor did it hold that ***all*** co-tenancy provisions negotiated by commercial parties are enforceable. Instead, at the outset of its opinion, and emphasized and repeated throughout, the Third District made clear that the specific facts and specific co-tenancy provision reviewed in *JJD vs. Jo-Ann* ***distinguished*** it from the specific facts and specific co-tenancy provision reviewed in *Grand Prospect*, as follows:

- "As we will explain in more detail below, we decline to follow the rule announced in *Grand Prospect* ***here***, and instead hold that this case is governed by the general rule that courts enforce contracts as written. We therefore agree with the trial court's

conclusion that the ***co-tenancy provision at issue in this case*** is enforceable, and will affirm the judgment." (Opinion, p. 2; emphasis added.)

- "We decline to follow the rule announced in *Grand Prospect* that a co-tenancy provision reducing rent if a specified condition occurs (e.g., if an anchor tenant is not open or if occupancy drops below a certain level) is an unenforceable penalty unless the reduction has a reasonable relationship to the harm the parties anticipated would be caused thereby. ***We do so because*** the rule is based on Civil Code section 1671, a statute governing the enforceability of contract provisions liquidating damages for breach of contract, and we find ***that statute to be inapplicable to the facts of this case*** because there is no suggestion that reduced occupancy at the shopping center resulted in JJD's breach of the parties' agreement." (Opinion, pp. 12-13; emphasis added.)
- "We do ***not*** hold that a co-tenancy provision ***can never*** be an unenforceable penalty. If a particular co-tenancy provision is "a provision in a contract liquidating damages for breach of the contract" within the meaning of Civil Code section 1671, then it ***may be found*** to be an unenforceable penalty if "the party seeking to invalidate [it] establishes [it] was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671, subd. (b).) ***Here,*** we hold ***only*** that Civil Code section 1671 does not apply ***in this case*** because no one suggests ***this*** particular co-tenancy provision is a provision liquidating damages for breach of the parties' agreement. Indeed, JJD conceded at oral argument that the failure of the co-tenancy provision was not a breach of the lease and also conceded that Civil Code section 1671 therefore does not apply

to the facts of ***this case***." (Opinion, p. 13, fn. 6; emphasis in original, and added.)

The Third District's review of the specific facts and specific co-tenancy provision in *JJD v. Jo-Ann* is entirely consistent with Fifth District's language and instructions in *Grand Prospect* regarding the case-by-case review of such provisions in commercial leases. Specifically, in summarizing co-tenancy language in leases, the Fifth District in *Grand Prospect* expressly noted that ***any*** review of the "***validity of a co-tenancy provision depends on the facts and circumstance proven in a particular case***." (*Grand Prospect, supra,* 232 Cal.App.4th at p. 1334, emphasis added.) As fully stated in *Grand Prospect*:

> The ***variation*** in cotenancy requirements, and the ***remedies*** given to a tenant when the requirements are not met, ***prevents the application of a categorical rule of law regarding enforceability***. For example, there is no general principle of California law holding cotenancy provisions in a commercial retail lease can never be unconscionable. Similarly***, there is no categorical rule holding cotenancy provisions are unreasonable per se and therefore unenforceable penalties***. Instead, the ***validity of a cotenancy provision depends upon the facts and circumstances proven in a particular case***.

(*Id.* at p. 1344; emphasis added.)

This fact-specific analysis is exactly what the trial court and the Third District in *JJD v. Jo-Ann* conducted here, and in great detail. The Court, like the trial court before it, analyzed the specific co-tenancy provision in the parties' commercial lease and the over 15-year course of dealing between the parties before this dispute arose. (Opinion at pp. 3-5, 15-19 [applying the holdings of several other appellate decisions discussing the enforceability of commercial co-tenancy terms to this case's specific facts].) That course of dealing included "several months in late 2004/early 2005" when "Jo-Ann paid Substitute Rent until all three anchor tenants

were open for business." (Opinion at p. 4.) It also included a dispute in 2007, when JJD filed a complaint for declaratory relief against Jo-Ann regarding whether the Substitute Rent was triggered because of the nature of the proposed substitute anchor tenant – JJD then argued that the proposed tenant did not trigger Substitute Rent, not that the co-tenancy term in the parties' lease was unenforceable. (Opinion at p. 4.) As such, and as instructed by the court in *Grand Prospect*, the trial court and the Third District analyzed these unique facts and circumstances of ***this case***, and more, and determined that the co-tenancy provision in the parties' lease is enforceable on numerous grounds.

JJD's attempt to create a non-existent general "conflict" between *Grand Prospect,* on one hand, and *JJD v. Jo-Ann,* on the other hand, is thus disingenuous given the different facts and different co-tenancy provisions reviewed in the two cases – as repeatedly held by the Third District. Those different facts and different provision are what resulted in the enforceability of the co-tenancy provision in *JJD v. Jo-Ann,* as negotiated and agreed between the parties back in 2003 (and amended soon thereafter to JJD's benefit). (Opinion, pp. 3-4.)

II. There is No "Split of Authority" regarding the Applicability of Civil Code Section 3275 to Commercial Leases in California; Further, as Noted by the Third District in *JJD v. Jo-Ann*, Civil Code Section 3275 Was Not Cited in the Trial Court by Either Party, Not Referenced in the Trial Court's Decision, and Only Quoted by JJD in its Appellate Brief Without Argument

With respect to Civil Code section 3275, JJD's newly minted arguments to attempt to manufacture a "split of authority" regarding the applicability of section 3275 to commercial leases in California find no support in the *JJD v. Jo-Ann* opinion. JJD's position here is nothing more than a phantom argument that makes no appearance in the trial court, and

barely appears in the appellate proceedings – and, when it does, JJD never discusses or explains why it is applicable to ***this case***.

Regarding Civil Code section 3275, the Third District in *JJD v. Jo-Ann* spent less than one (1) page discussing this section, primarily noting that JJD had failed to argue the statute in the trial court and that it was similarly only "briefly" addressed by the court in *Grand Prospect*. (Opinion, pp. 13-14.) Specifically, the Third District took no position at all regarding the applicability of Civil Code section 3275 to all commercial leases, as opposed to finding that this section was inapplicable to ***this case*** ("[b]ased on the record before us . . ."), as follows:

- JJD argues that the co-tenancy provision should be viewed under the general law regarding forfeiture, and it cites Civil Code section 3275, stating it supplies "the law" and the "general rule" "governing contractual penalty provisions in California." Other than quoting Civil Code section 3275, both in its [appellate] brief and at oral argument, JJD never discusses that statute or explains its applicability to ***this case***. Moreover, it was not cited in the trial court by the parties, or in the trial court's decision." (Opinion, p. 13; emphasis added.)
- "It thus appears the *Grand Prospect* court equated an unenforceable penalty with a forfeiture within the meaning of Civil Code section 3275. Based on ***the record before us, we decline to do the same.***" (Opinion, p. 14; emphasis added.)
- "Finding the rule announced in *Grand Prospect* to be inapplicable ***here***, we go on to conclude that ***this case*** is governed by the rule posited by Jo-Ann: "[T]he parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing

market in arms-length negotiations and transactions." (Opinion, p. 14, *see also,* fn. 7; emphasis added.)

JJD's attempt to create a non-existent "split of authority" between *Grand Prospect,* on one hand, and *JJD v. Jo-Ann,* on the other hand, on the applicability of Civil Code section 3275 to commercial leases in California is pure fiction. Instead, and to the limited extent that the Third District even addressed section 3275, the Court simply found that this relief from forfeiture section to be inapplicable to the specific facts and specific co-tenancy provision reviewed in ***this case***.

III. JJD's Failure to Argue the Application of Civil Code Section 3275 Prior to this Petition Constitutes Waiver

JJD asserts that this case is "an ideal vehicle for deciding the issue, viz., whether to grant commercial parties a virtually categorical exemption from Civil Code § 3275." (Petition at p. 15.) Not so, for the many reasons detailed above. But even if it were a viable point, JJD itself failed to raise this "ideal vehicle" by making ***any*** Civil Code section 3275 argument to the trial court, as explained by the Third Circuit, and has now waived the issue on appeal. (*See People v. Lowery* (2020) 43 Cal.App.5th 1046, 1054, review den. Mar. 11, 2020 (noting the rule that "a party must raise an issue in the trial court if they would like appellate review"); *Sander v. Superior Ct*. (2018) 26 Cal.App.5th 651, 670 ("It is axiomatic that arguments not raised in the trial court are forfeited on appeal.").) The Third District's decision to "decline" any forfeiture argument under section 3275 "[b]ased on the record before us," should thus not be disturbed on this separate ground as well – JJD waived the issue under well-established California law by failing to make the argument in the trial court at all, or to develop it beyond a bare citation during its appeal. (Opinion at p. 14.)

CONCLUSION

For the foregoing reasons, the Third District's unanimous opinion in *JJD v. Jo-Ann* need not be disturbed.

Dated: August 23, 2022

/s/ *Mark. E. McKeen*

Mark E. McKeen
Eva K. Schueller
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933

Attorneys for Defendant and Respondent
JO-ANN STORES, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the enclosed brief contains 2,137 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 23, 2022

s/ *Mark E. McKeen*

Mark E. McKeen
Eva K. Schueller
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933

Attorneys for Defendant and Respondent
JO-ANN STORES, LLC

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, CA 94105. On August 23, 2022, I served the within documents:

ANSWER TO PETITION FOR REVIEW

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/s/ Mark E. McKeen
MARK E. MCKEEN

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S275843**
Lower Court Case Number: **C094190**

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