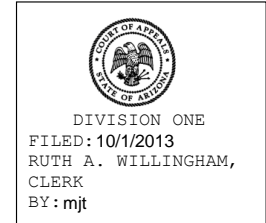


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

J3 HARMON, LLC, a Nevada limited liability company.)
)
)
 Plaintiff/Appellee,)
)
 v.)
)
 LIVEDEAL, INC., a Nevada corporation fna Y.P. Net, Inc.,)
)
)
 Defendant/Appellant.)
)

1 CA-CV 13-0002
DEPARTMENT D
MEMORANDUM DECISION
(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2012-001133

The Honorable Robert Oberbillig, Judge

AFFIRMED AS MODIFIED

Sanford J. Germaine, P.C. Phoenix
By Sanford J. Germaine
Attorneys for Plaintiff/Appellee

Reade & Associates Las Vegas
By R. Christopher Reade
Attorneys for Defendant/Appellant

K E S S L E R, Judge

¶1 LiveDeal, Inc. ("LiveDeal") appeals the summary judgment entered in favor of J3 Harmon, LLC ("J3"). We find

that summary judgment was appropriate because no material facts are genuinely in dispute. We modify the damage award, however, because we find no legal basis to charge LiveDeal rent beyond the expiration of the lease term.

FACTUAL AND PROCEDURAL HISTORY

¶2 J3 sued LiveDeal for defaulting on rent owed under the parties' lease ("the Lease"). J3 requested damages for unpaid rent and other sums, including late charges, interest on past due amounts, and attorneys' fees.

¶3 The relevant lease term extended from July 1, 2006 to June 30, 2011. Monthly base rent from July 1, 2010 through the expiration of the term was \$10,734.08, plus taxes and fees. The Lease included neither an option to extend nor any right to hold over past its expiration. Instead, the Lease provided that LiveDeal's monthly rent would double for any additional months that it remained in possession of the premises beyond the expiration of the lease term.

¶4 The Lease included several non-exclusive remedies provisions, including the following:

13.2 Remedies. If Lessee fails to perform any affirmative duty or obligation of Lessee under this [L]ease . . . Lessor may:

a) Terminate Lessee's right to possession of the Premises . . . in which case this Lease . . . shall terminate and Lessee shall immediately surrender possession of the Premises to Lessor. In

such event, Lessor shall be entitled to recover from Lessee: (i) the worth at the time of the award of the unpaid rent which had been earned at the time of termination; (ii) *the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the Lessee proves could have been reasonably avoided*; (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the Lessee proves could be reasonably avoided

(Emphasis added.) Thus, J3's remedies included recovering unpaid rent for the balance of the lease term minus any rental losses that LiveDeal could prove were reasonably avoidable.

¶15 J3 submitted a tenant ledger ("the Ledger") to prove the amount owed under the Lease. The Ledger's itemized accounting of charges accrued since April 1, 2011 totaled \$56,737.40 and included \$12,075.81 of base rent and fees for July 2011, and \$4,025.28 of prorated rent and fees for the first ten days of August 2011.

¶16 LiveDeal asserted various affirmative defenses in its answer, including that J3 failed to mitigate its damages. However, LiveDeal's answer lacked factual support for those defenses. Thereafter, J3 moved for summary judgment. LiveDeal opposed the motion, arguing that the amount owed and whether J3 reasonably mitigated its damages were facts genuinely in dispute.

¶17 In his sworn affidavit, J3 property manager Gregg Nelson ("Nelson") stated that the Ledger accurately reported the amount of rent and other charges owed. Meanwhile, LiveDeal employee John Isaac stated that he was unaware of any efforts by J3 to relet the premises, and that "on information and belief" the damage request included rent beyond the expiration of the lease term. In response, Nelson stated in a supplemental affidavit that at all times since April 15, 2008¹ the premises has been listed as "available" on the commercial listing service Co-Star, that "available" signs had been posted at the premises, and that Cutler Commercial-J3's property management company-had repeatedly sent out e-mails and flyers to commercial brokers and other potential clients. J3 also presented copies of the flyers to the trial court.

¶18 Additional documents showed that on May 27, 2011, J3 locked LiveDeal out of the premises and asserted a landlord's lien over personal property remaining on the premises. J3 notified LiveDeal that its repossession and assertion of a landlord's lien was not an election to terminate the Lease, nor a waiver of any remedy available under it. The personal property was sold at auction on August 10, 2011 for \$500.00, which J3 credited toward LiveDeal's unpaid balance.

¹ LiveDeal moved out of the premises in June 2008 but continued paying rent while Cutler Commercial searched for a sublessee.

¶9 The trial court granted J3's motion for summary judgment, noting that LiveDeal conceded that it failed to pay rent when due. The court explained that although mitigation is usually a question of fact, the record established that no reasonable juror could find for LiveDeal on that issue. The court awarded J3 \$56,737.40 for rent and other amounts owed under the Lease, plus interest, costs and attorneys' fees. LiveDeal timely appealed.² We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).³

STANDARD OF REVIEW

¶10 We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the opposing party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). "We will affirm the trial court's decision if it is correct for any reason" *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 112, 952 P.2d 754, 756 (App. 1997). However, "[s]ummary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled

² Although LiveDeal did not file its notice of appeal within thirty days after the entry of summary judgment, the trial court properly extended the time for appeal pursuant to Arizona Rule of Civil Appellate Procedure 9(a) after finding that LiveDeal did not receive notice of the judgment within twenty-one days after its entry.

³ We cite to the current versions of statutes unless they have been materially amended after the proceedings below.

to judgment as a matter of law." *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 14, 38 P.3d 12, 20 (2002).

DISCUSSION

¶11 This dispute is about damages. No party denies the existence and validity of the Lease, nor does LiveDeal deny that it stopped paying rent in April 2011. Instead, LiveDeal disputes the amount owed to J3 as a result of the breach. Specifically, LiveDeal argues that three issues potentially affecting the damage award are genuinely in dispute: (1) whether J3 reasonably mitigated its damages; (2) whether J3 accepted LiveDeal's abandonment of the premises; and (3) whether the Lease substantiates the damage award. We consider each of these issues in turn.

I. There Is No Genuine Dispute Over J3's Mitigation Efforts Because LiveDeal Produced No Evidence Putting Mitigation at Issue.

¶12 LiveDeal argues that whether J3 reasonably mitigated its damages is genuinely in dispute. If a lessee abandons the premises and the lessor refuses to accept surrender of the lease, the law requires that the lessor make reasonable efforts to relet. *Wingate v. Gin*, 148 Ariz. 289, 291, 714 P.2d 459, 461 (App. 1985). If the lessor reasonably but unsuccessfully tries to relet, he is entitled to the full amount of rent owed under the lease. *Tempe Corporate Office Bldg. v. Ariz. Funding*

Servs., Inc., 167 Ariz. 394, 399, 807 P.2d 1130, 1135 (App. 1991).

¶13 Contrary to LiveDeal's assertions, J3 presented evidence of mitigation. Nelson stated that at all times since April 15, 2008 the premises has been listed as "available" on the Co-Star commercial listing service, that numerous "available" signs had been posted on the property and that Cutler Commercial repeatedly sent out e-mails and flyers advertising the property to commercial brokers and other potential clients.

¶14 Although the moving party has the burden of proving each element of its claim, it need not disprove its adversary's defenses. *Vig v. Nix Project II P'ship*, 221 Ariz. 393, 396, ¶ 11, 212 P.3d 85, 88 (App. 2009). "If the moving party meets its burden, the burden then shifts to the opposing party to produce sufficient competent evidence to show that there is an issue of material fact" *Id.* Thus, once J3 submitted evidence of mitigation the burden shifted to LiveDeal to present competent evidence disputing those efforts.⁴

¶15 Here, LiveDeal merely stated that mitigation was at issue but failed to produce any competent evidence establishing a factual dispute. "The opponents of a motion for summary

⁴ We note, too, that section 13.2 of the Lease placed on *LiveDeal* the burden of proving damages that could have been reasonably avoided.

judgment do not raise a genuine issue of fact by merely stating in the record that such an issue exists. Rather, they must show that competent evidence is available which will justify a trial on the issue." *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499, 616 P.2d 955, 959 (App. 1980). Thus, a trial court can decide on summary judgment whether mitigation efforts were reasonable. See *Wingate*, 148 Ariz. at 292, 714 P.2d at 462. Summary judgment is appropriate where—as here—the landlord establishes reasonable efforts to relet and the tenant produces no specific controverting facts. See *id.*

II. Whether J3 Accepted LiveDeal's Abandonment of the Premises Is Immaterial to the Damage Calculation Because the Lease Permits Recovery of Unpaid Rent for the Entire Lease Term.

¶16 Next, LiveDeal argues that whether J3 accepted its abandonment of the premises is a disputed issue that affects the damage calculation. Absent a contrary lease provision, the lessor in a commercial lease has two options if the lessee abandons the premises. The lessor can refuse to accept the surrender of the lease and recover both the unpaid rent prior to abandonment and future rent owed for the balance of the lease term, subject to its duty to mitigate. *Roosen v. Schaffer*, 127 Ariz. 346, 349, 621 P.2d 33, 36 (App. 1980). Alternatively, the lessor can accept the surrender—thereby terminating the lease—and can recover only the unpaid rent owed prior to the

termination. *Id.* Thus, whether the lessor accepted the lessee's abandonment ordinarily affects the damages available to the lessor.

¶17 However, parties to a lease may limit or expand the remedies available in the event of a breach. *Wilson v. Pate*, 17 Ariz. App. 461, 462, 498 P.2d 535, 536 (1972); see also *Camelback Land & Inv. Co. v. Phoenix Entm't Corp.*, 2 Ariz. App. 250, 256, 407 P.2d 791, 797 (App. 1965) (holding that where lease provides exclusive remedies, the lessor cannot seek remedies outside the lease terms). Upon LiveDeal's breach, section 13.2 of the Lease allowed J3 to terminate the Lease and recover rent owed for the balance of the term—minus losses that LiveDeal proves could be reasonably avoided. Therefore, the Lease's remedies provision renders the common law abandonment rule immaterial to the damage award.

¶18 Furthermore, J3 unequivocally notified LiveDeal that its repossession of the premises was not an election to terminate the Lease or to waive any remedies available under it. Thus, even in the absence of the damage provision, the facts show that J3 did not accept LiveDeal's surrender of the Lease. Indeed, J3 communicated the opposite intent.

**III. The Lease Does Not Substantiate the Damage Award
Because the Calculation Includes Rent Beyond the
Expiration of the Lease Term.**

¶19 Finally, LiveDeal argues that the Lease does not substantiate the damage award because the calculation includes rent charges beyond the Lease's expiration. The Lease expired on June 30, 2011 and it did not include an option to extend. Indeed, no provision supports charging rent beyond the Lease's expiration. J3 points to the Lease's holdover clause, but LiveDeal had vacated the premises prior to the Lease's expiration and therefore was not a holdover. Furthermore, the Ledger shows that LiveDeal was not charged the holdover rental rate for July and August 2011.

¶20 The additional rent accrued while LiveDeal's personal property remained on the premises pending sale. The property was sold on August 10, 2011, which explains the prorated August rent charge. However, nothing in A.R.S. §§ 33-361 (2007), -362 (2007) or -1023 (2007) permits a landlord asserting a lien over a tenant's personal property to charge rent for the presence of that property. Instead, the statutes allow a landlord to sell personal property left behind by a defaulting tenant and to apply the proceeds toward the unpaid balance. See A.R.S. §§ 33-361(D), -362 and -1023(A). Here, LiveDeal had no right to reenter the premises or to remove the property once J3 completed the lockout. J3 has cited no authority for charging rent for

the presence of personal property that LiveDeal was not allowed to remove, nor do we find any. Indeed, the purpose of the statutes—namely, to help landlords mitigate losses by selling a breaching tenant’s residual personal property—would be undermined if a landlord could incur more rental losses for the presence of personal property than it is able to mitigate by selling it.⁵

¶21 Under the circumstances, we have authority to modify the judgment. See A.R.S. § 12-2103(A) (2003); *Acuna v. Kroack*, 212 Ariz. 104, 115, ¶ 42, 128 P.3d 221, 232 (App. 2006). Accordingly, we vacate the amount of the damage award that is based on rental charges beyond the expiration of the lease term.

IV. We Decline to Award Attorneys’ Fees to Either Party.

¶22 Both parties requested attorneys’ fees incurred in this appeal pursuant to A.R.S. § 12-341.01(A) (Supp. 2012), Arizona Rule of Civil Appellate Procedure (“ARCAP”) 21(c), and section 31 of the Lease. When contracting parties agree to a provision governing attorneys’ fees, the contract provision controls the award. See *Geller v. Lesk*, 230 Ariz. 624, 627, ¶ 9, 285 P.3d 972, 975 (App. 2012). Here, the Lease entitles the prevailing party to reasonable attorneys’ fees and defines

⁵ Such is the case here. J3 charged LiveDeal an additional \$16,101.09 in rent and associated fees, but recovered only \$500.00 by selling the personal property for which it apparently charged the rent.

"prevailing party" as a party that "substantially obtains . . . the relief sought." LiveDeal sought reversal of the trial court's order by challenging the damage calculation. J3 sought affirmation of the trial court's order and damage award. Because we affirm the summary judgment but reduce the damage award, we cannot say that either party substantially obtained the relief it sought and therefore decline to award attorneys' fees. Pursuant to A.R.S. § 12-342(A) (2003), however, LiveDeal is entitled to its taxable costs on appeal upon timely compliance with ARCAP 21.

CONCLUSION

¶123 There is no genuine issue of material fact concerning LiveDeal's liability under the Lease. However, because we find no legal basis for charging rent beyond the expiration of the lease term we reduce the damage award by \$16,101.09—the value of rent and associated taxes and fees from July 1 to August 10, 2011.

/s/ _____
DONN KESSLER, Judge

CONCURRING:

/s/ _____
ANDREW W. GOULD, Presiding Judge

/s/ _____
MICHAEL J. BROWN, Judge