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

DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FREANEL & SON GILBERT, LLC, dba GILBERT TOWNE CENTER, Plaintiff/Appellee/ Cross-Appellant, v. FASHIONABLE EXPECTATIONS, LLC, an Arizona limited liability company; MICHAEL GOODMAN and ANGELA WILSON-GOODMAN, husband and wife, Defendants/Appellants/ Cross-Appellees.	1 CA-CV 08-0853 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-007382

The Honorable Bethany G. Hicks, Judge

AFFIRMED IN PART; MODIFIED IN PART

Tiffany & Bosco, P.A. — Phoenix
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Attorneys for Defendants/Appellants/Cross-Appellees

B R O W N, Judge

¶1 Fashionable Expectations, LLC, Michael Goodman, and Angela Wilson-Goodman (collectively "Tenant") appeal from the trial court's judgment after a bench trial finding that Tenant unjustifiably vacated the premises it leased from Freanel & Son Gilbert, LLC ("Landlord"), and was not constructively evicted. Landlord cross-appeals from the court's damages award, asserting that the court improperly reduced its claimed damages for renovation expenses and commissions incurred for re-leasing the premises, when such costs were included in the lease. For the following reasons, we find that the trial court set an incorrect accrual date for the interest on renovation costs, lease commissions, and the attorneys' fee award and should have credited Tenant with its security deposit. We otherwise affirm the judgment.

BACKGROUND

¶2 Landlord is the owner and lessor of a shopping center known as Gilbert Towne Center. In June 2004, Tenant signed a three-year lease with Landlord to lease Suite 142 for use as a retail store selling maternity, infant, and children's clothing and accessories. Angela Wilson-Goodman and her husband Michael Goodman executed a personal guarantee of the lease.

¶3 By letter dated July 18, 2005, Lisa Baranowski, the managing agent of the Gilbert Towne Center, advised Tenant that

Tenant had violated the lease by installing a new air conditioning unit. She also stated:

> Secondly, in regards to the roof leaks, we have had our contractor out to access [sic] the roof repairs and are currently waiting for a proposal. Once we have reviewed and receive approval from the owner, we will schedule the repairs. However, please be advised, that your A/C contractor will be responsible for any penetrations or leaks as a result of the installation of the A/C unit and will be responsible for any and all such repairs as caused by such.

Standard Roofing subsequently submitted an invoice for work performed for several rental units. With regard to Suite 142, the invoice stated: "leak in [bathroom], 3-coursed split. [A/C] condensate line needs to be checked by [A/C] tech." An earlier invoice from Standard Roofing, dated February 28, 2005, stated: "Not a roof leak, A/C problem." On or about October 15, 2005, Tenant vacated the premises.

¶4 The tenant adjoining Suite 142, Bed Depot, took over Suite 142 as an expansion of its existing space pursuant to a lease dated March 29, 2006. Bed Depot received three months' free rent, and Landlord made $26,497.99 worth of modifications to the suite to accommodate Bed Depot's expansion. Bed Depot agreed to lease the new space for five years and then extended its existing lease to correspond to the new lease on Suite 142. The lease commenced on September 19, 2006, with the payment of prorated rent for September.

¶5 In May 2006, Landlord filed a complaint against Tenant for breach of contract. The complaint alleged that Tenant vacated and abandoned the premises without Landlord's consent. Tenant denied it abandoned the premises and filed a counterclaim for the return of its $2,750 security deposit. Tenant alleged that Landlord breached the contract because Landlord failed to repair the roof after Tenant gave notice that the roof leaked during rainy weather. Tenant asserted that Landlord had knowledge of the leaking roof for at least a year prior to Tenant's vacating the premises. Tenant claimed that flooding caused by the leaking roof made the suite "untenable as a place of business."

¶6 Prior to trial, the superior court granted Landlord's motion *in limine* and request for sanctions based on Tenant's discovery violations and failure to comply with preparing the joint pretrial statement. The court precluded Tenant from presenting any exhibits or witnesses, except for the testimony of Angela Goodman-Wilson.

¶7 The court conducted a two-day bench trial. Michael Crook, President of Nobeus Property Management, Inc. ("Nobeus"), the property management company for Landlord, testified that on October 15, 2005, during a periodic inspection of the Gilbert Towne Center, he noticed a "Going Out of Business" sign taped to Tenant's front windows, and instructed Baranowski to contact

Tenant about the sign. He further testified that after Tenant vacated the premises, Nobeus negotiated with four potential tenants for the vacated premises. He explained that his company was entitled to a commission of $10,856.60 for obtaining the replacement tenant. He testified that the renovations were necessary to secure Bed Depot's occupancy. He also testified that any leaking because of the air conditioner was Tenant's responsibility under the lease. He stated that he inspected the property after Tenant vacated the premises but before the renovations were made and saw no evidence of any water damage on the property.

¶8 Baranowski testified that she also visited the property after Tenant moved out and saw no signs of water damage. She had several conversations with Angela Wilson-Goodman about roof leaks and hired contractors on several occasions to address the complaints. She noted that the roofer indicated that the condensate line for the air conditioning unit needed to be checked and stated that she told Wilson-Goodman, but she did not know whether Tenant ever checked or fixed the air conditioning unit. Baranowski also explained that repairs were made to the roofs over other suites, but that those other suites were not in the same building as Suite 142 and did not share the same roof. She further testified that in January 2006, the entire roof was sealed with an elastomeric coating,

but that the project was not precipitated by any complaints or any leaks related to Suite 142. She could not remember receiving any letter from Tenant regarding problems with the roof or any letter in October 2005 informing her that Tenant was going to terminate the lease and vacate the premises because of flooding issues.

¶9 Angela Wilson-Goodman testified that the roof of Suite 142 leaked for the first time in July 2004, soon after Tenant took possession of the property. She notified the property management company, which was someone other than Nobeus at the time, but did not know if that company took any action because in July the following year the roof leaked again. She said that she sent a letter to Baranowski on July 23, 2005, because the roof was still leaking and nothing was being done. According to Wilson-Goodman, the letter noted that the bathroom was under water and a carpeted children's play area was drenched. She described the bathroom as having water running down the walls and bubbling paint on the ceiling and described the ceiling in the center of the store as also having a major leak. Wilson-Goodman testified that Nobeus sent someone to pull up the carpet to dry it, to vacuum up the water, and to replace a ceiling tile that had crumbled. She stated that, after the July 23 letter, the store flooded every time it rained. Wilson-Goodman testified that, on October 18, 2005, the store flooded again,

and she faxed and mailed a letter to Baranowski, saying that because Nobeus failed to repair the roof, she considered Landlord to be in breach of its obligations and so she was vacating the premises. She denied that she was ever told that the leak was caused by the air conditioning unit. She testified that the store did not have a "going out of business" sign on the window, but had a sign indicating fifty percent off and that the sign, advertising varying discounts, had been placed on the window in early 2005.

¶10 In rebuttal, Baranowski testified that Nobeus maintains a log of telephone calls it receives regarding maintenance issues and that, except for a call in June 2005 about the air conditioning, the log reflected no calls from Wilson-Goodman. She testified she received an e-mail regarding leaks some time prior to July 18, 2005, and that in response Nobeus sent Standard Roofing to check the problem.

¶11 Randy England, general manager of Standard Roofing, testified regarding two invoices from his company dated February 28, 2005, and July 29, 2005. Tenant objected to his testimony on the grounds that England had no personal knowledge of the service listed in the invoices because he had not performed the work. Overruling the objection, the trial court indicated that it would accept the evidence as an interpretation of business records. England testified that the "three-course split" that

appeared in the July invoice was a minor repair needed when a roof penetration, as with a pipe, vent, or duct, caused a small split requiring new plastic cement. He further explained that an air conditioning condensate line drains the condensation from an air conditioning unit, but that if the condensate line becomes blocked, the water builds up inside the unit, overflows, and can come through the roof, appearing to be a roof leak. He also noted that an air conditioning unit produces more condensation when it rains, resulting in overflows and leaks, giving the impression that the leak is caused by a defective roof. The court ruled in favor of the Landlord, rejecting Tenant's constructive eviction defense. The court awarded Landlord damages for unpaid rent plus interest and attorneys' fees. As to Landlord's claim for damages for commissions and renovation expense, the court awarded Landlord one third of the claimed amount based on evidence presented at trial. Landlord filed a motion for new trial, arguing that it was entitled to all its renovation costs and leasing commissions under the lease. The court denied the motion.

¶12 The court ultimately entered judgment in favor of Landlord in the amounts of $36,689.71 for unpaid rent (which included rent up to September 18, 2006); $13,394.93 of interest on unpaid rent through April 9, 2008, at the rate of eighteen percent; interest at the rate of eighteen percent on the

principal amount of unpaid rent from April 9, 2008, until paid; $12,451.33 for renovation costs and leasing commissions, plus interest at the rate of eighteen percent "from September 18, 2006 (the date that the new tenant [Bed Depot] began paying rent in the leased premises vacated by defendants), until paid"; attorneys' fees in the amount of $34,730.00 plus interest at eighteen percent from the date awarded until paid; and costs in the amount of $535.80.

¶13 Tenant appealed and Landlord cross-appealed the trial court's reduction of damages with respect to the renovation expenses and leasing commissions. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶14 On appeal from a trial to the court, we are bound by the trial court's findings of fact unless they are clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We are not bound by the trial court's conclusions of law. *Id.* We view the evidence in the light most favorable to supporting the trial court's decision and must affirm if any evidence supports the judgment. *In re Estate of Pouser*, 193 Ariz. 574, 576, 975 P.2d 704, 706 (1999).

A. Constructive Eviction

¶15 Tenant argues that it was constructively evicted from the property. "Constructive eviction occurs through intentional conduct by the landlord which renders the lease unavailing to the tenant or deprives [the tenant] of the beneficial enjoyment of the leased property, causing [the tenant] to vacate the premises." *Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 16, 628 P.2d 52, 53 (App. 1981).

¶16 Tenant relies extensively on the testimony of Angela Wilson-Goodman. She testified that the premises suffered extensive damage on July 23, 2005, that the roof leaked almost every time it rained, and that Nobeus failed to respond to numerous calls regarding the leaks. She testified that she decided to close the business after a bad rainstorm on October 18 again resulted in flooding and appeals to Nobeus received no response. Although this testimony might support a finding of constructive eviction, it does not require such a finding in light of other evidence.

¶17 Baranowski testified that logs of telephone calls requesting maintenance did not show any calls from Tenant for roof leaks, although she acknowledged such requests could have been received by e-mail or letter. She acknowledged that she had conversations with Wilson-Goodman about leaks, but testified that Nobeus responded whenever it received a complaint from her,

and Wilson-Goodman’s testimony confirms that Nobeus responded to Tenant’s written complaint in July 2005. Landlord also submitted evidence showing that a leak in the bathroom ceiling was repaired in July 2005 and that the air conditioners condensate line needed to be checked, which under the lease was Tenant’s responsibility. Although Tenant denied being informed of the need to address the air conditioning condensate line, Baranowski testified that she told Wilson-Goodman the air conditioner needed to be checked. Crook testified that on October 15, 2005, prior to the date Wilson-Goodman stated she decided to vacate the premises because of the leaks, he saw a going out of business sign in Tenant’s window. Wilson-Goodman claimed the sign was for a sale, not because she was going out of business. Crook memorialized his observation, however, in an e-mail sent October 15 and introduced into evidence. The e-mail directed Baranowski to “Contact Fashions due to GOB sign on front windows.” Both Baranowski and Crook testified that the premises showed no sign of water damage when they inspected it after Tenant left.

¶18 Tenant argues that “other tenants in the same building were having similar leak problems.” Although the record includes evidence of roof repairs involving other tenants, Baranowski testified that those other tenants were not in the same building as Tenant and did not share the same roof.

¶19 Tenant also argues that the testimony of England regarding the effect of humidity and rain on a condensate line should have been excluded as expert testimony. Landlord argues that Tenant waived the issue by failing to object and that, even if the evidence should have been excluded, its admission was harmless.

¶20 The court had previously ruled that England had not been properly noticed as an expert although he had been disclosed as a witness. The court therefore ruled that England's testimony would be limited to factual testimony. Tenant subsequently objected to England's testimony about the invoices from Standard Roofing on the grounds that England lacked personal knowledge since he had not repaired the roof himself. The court permitted that testimony about the invoices, saying it would treat the invoices as business records. Tenant voiced no objection, however, to England's testimony regarding how condensate lines work and the effect of rain or humidity on a condensate line. Tenant did object to England's testifying about the application of elastomeric coating on the grounds that the testimony was expert testimony, and the court sustained that objection.

¶21 Although the court had previously ruled expert testimony by England to be inadmissible, Tenant was still obligated to object when testimony in violation of that ruling

was offered. *See Goldthorpe v. Farmers Ins. Exch.*, 19 Ariz. App. 366, 368, 507 P.2d 978, 980 (1973) (incumbent on plaintiff to have objected to admission of inadmissible evidence regarding refusal to take polygraph). Because Tenant failed to object, the testimony was properly before the court. *Id.*

¶22 In any event, even if the admission was error, this court reverses for error only when the record shows that the error was prejudicial to the substantial rights of the party. Ariz. R. Civ. P. 61; *Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27 (1997). Tenant has not demonstrated that to be the case. In addition to England's testimony, the invoices from Standard Roofing showed the cause of the leak to be the condensate line of the air conditioning unit.

¶23 The parties presented conflicting evidence as to the nature of the problem, the condition of the premises, and the responsiveness of Landlord; it is for the fact finder to weigh the evidence and resolve the conflicts. *Aranda v. Cardenas*, 215 Ariz. 210, 218, ¶ 30, 159 P.3d 76, 84 (App. 2007) (recognizing that "the fact-finder determines credibility, weighs the evidence, and draws appropriate inferences from the evidence"). Substantial evidence supports the trial court's conclusion that Tenant was not constructively evicted.

B. Surrender of Premises

¶24 The trial court found that the expenses incurred by Landlord for renovations and commissions in re-letting the premises were inconsistent with the obligation to mitigate damages and were instead intended to benefit Landlord. Tenant contends that this finding requires the conclusion that Landlord accepted Tenant's surrender of the premises, thereby terminating the lease as a matter of law and limiting damages to unpaid rent prior to the date of acceptance of the surrender.

¶25 When a tenant of a commercial lease abandons the premises, the lessor can either accept or refuse to accept the surrender of the property. *Roosen v. Schaffer*, 127 Ariz. 346, 349, 621 P.2d 33, 36 (App. 1980). If the landlord accepts the surrender, the lease is terminated and the landlord can recover only any rent due prior to the termination. *Id.* If the landlord refuses to accept the surrender, it may recover possession of the property, but must make reasonable efforts to rent the property at a fair rental. *Id.; Lee Dev. Co. v. Papp*, 166 Ariz. 471, 477, 803 P.2d 464, 470 (App. 1990). The unqualified retaking of the premises by the landlord is a surrender as a matter of law. *Riggs v. Murdock*, 10 Ariz. App. 248, 251, 458 P.2d 115, 118 (1969). The intent of the landlord is generally a question of fact in light of all the circumstances, and the trier of fact must determine whether the

control over the property exercised by the landlord was for the landlord's own benefit, thereby evidencing acceptance of the surrender, or for the benefit of and on behalf of the tenant so as to mitigate damages. *Id.* However, these principles governing whether a landlord has unqualifiedly retaken possession of the property apply "in absence of lease provisions dealing with the problems." *Id.*

¶26 Paragraph 30 of the lease provides various options to the Landlord in the event of Tenant's default, including maintaining the lease and re-letting the premises at its discretion or re-entering the premises and accepting surrender. Tenant contends that since the lease provides for surrender and the facts support it, the court's factual finding that Landlord's actions were for its own benefit requires a finding that Landlord accepted surrender and terminated the lease. Paragraph 30, however, clearly states: "No such re-entry or execution of any other remedy by Landlord shall constitute a termination of this Lease unless Landlord notifies Tenant in writing of such termination." In addition, Paragraph 35(d) states:

> No act or conduct of Landlord, including, without limitation, the acceptance of the keys to the Demised Premises, shall constitute an acceptance or the surrender of the Demised Premises by Tenant before the expiration of the term of this Lease. Only a notice from Landlord to Tenant shall

constitute acceptance or the surrender of the Demised Premises.

The lease further provides that notices must be in writing. No such writing exists, therefore no surrender or termination occurred under the lease.

C. Calculation of Damages

¶27 Tenant also challenges the calculation of damages awarded by the trial court. Tenant contends that the court's award of damages for unpaid rent was erroneous because it was inconsistent with its earlier minute entry ruling. In its minute entry, the trial court awarded rent from November 1, 2005, to August 31, 2006, as damages. In its proposed form of judgment, Landlord listed damages for unpaid rent through September 18, 2006—the date Bed Depot began paying rent. Tenant objected on the grounds that the proposed judgment was inconsistent with the minute entry, but the court entered judgment including the September rent. On appeal, Tenant argues that including the rent for September was inconsistent with the trial court's minute entry ruling and was clearly erroneous and an abuse of discretion.

¶28 We find no error. Superior court judges may reconsider non-final rulings. *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App. 2003). The court had the benefit of Tenant's objection but, nevertheless, revised its

earlier ruling by adopting the damages award proposed by Landlord. Because the minute entry ruling was not a final ruling, the court was permitted to modify or correct its earlier minute entry. Although Tenant argues an entirely different amount as the correct amount for unpaid rent, it does not explain the basis for this amount, nor does it allege that the amount awarded by the judgment is not supported by the record. Landlord submitted its calculation for unpaid rent during the trial and the evidence supports the trial court's ruling.

¶29 Tenant further argues that the court improperly applied an interest rate of eighteen percent to the late fees, the amount awarded for renovation and leasing commissions, and the attorneys' fees. Tenant contends that, although the lease provides for an eighteen percent interest rate on unpaid rent, it is silent as to interest on these other damages, and therefore ten percent interest applies pursuant to A.R.S. § 44-1201 (2003).

¶30 Paragraph 9 of the lease provides in pertinent part:

> In the event Tenant is late in the payment of Minimum Guaranteed Rental or other sums of money required to be paid under this Lease, Tenant agrees to pay to Landlord a late charge[.] In addition to the late charge referred to above, any and all payments in arrears for more than fifteen (15) days shall bear interest, from the due date, payable as additional rent to Landlord at the interest rate of eighteen (18%) percent per annum.

The late fees, renovation costs, leasing commissions, and attorneys' fees are all payments or "other sums of money" to which Landlord is entitled under the lease. Paragraph 9 provides that "any and all payments" in arrears accrue at eighteen percent interest. We find no error in the trial court's application of the eighteen percent interest rate.

¶31 Tenant also argues that the interest on the renovation costs and leasing commissions as well as attorneys' fees should accrue from the date of the judgment. The judgment provides that interest on the renovation costs and leasing commissions accrues as of the date Bed Depot began paying rent, and that interest on attorneys' fees accrues as of the unsigned minute entry establishing the amount of fees, which was issued several months prior to judgment. In essence, the judgment provides for prejudgment interest on the renovation costs and lease commissions as well as the attorneys' fees.

¶32 A party is entitled to prejudgment interest on a liquidated claim. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996). A claim is liquidated if there is a basis upon which the amount claimed can be precisely calculated. *Id.* (citation omitted). Prejudgment interest is then calculated from the date the claim becomes due. *Id.* (citation omitted).

¶33 Here, neither the renovation costs nor the leasing commissions claimed by the Landlord were liquidated until the court determined the final amount due. Landlord presented evidence about the renovation costs and leasing commissions in the form of testimony and exhibits. For the reasons explained, *infra* ¶¶ 37-42, the court acted within its discretion in awarding Landlord only a portion of its claimed damages for renovation costs and leasing commissions. The award, therefore, was not liquidated until the court determined the amount owing; thus, interest accrues from the date of the judgment.

¶34 Similarly, the award of attorneys' fees was not liquidated until the court determined the amount of award for the fees. Because the lease provides for an award of "reasonable" attorneys' fees, the amount of the award was subject to the discretion of the trial court. *See Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (App. 1985) (where contract provides for award of reasonable attorneys' fees, the determination of the reasonable amount is within trial court's discretion). Consequently, interest on the award of attorneys' fees accrues from the date of the judgment.

¶35 Tenant argues that the interest awarded on unpaid rent was incorrectly calculated. Tenant offers no explanation of the error in support of this claim and therefore we do not address it. *See Modular Sys. Inc. v. Naisbitt*, 114 Ariz. 582, 587, 562

P.2d 1080, 1085 (App. 1977) (appellant must state with particularity how the trial court erred or issue is deemed abandoned).

¶36 Tenant also argues that the trial court erred in not crediting Tenant for the $2,750.00 security deposit it paid to Landlord upon signing the lease. Landlord concedes that Tenant is entitled to credit for this deposit, but argues modifying the judgment is unnecessary as it will apply the credit regardless of the language of the judgment. Given the concession by Landlord, we find the judgment should be modified to credit Tenant for the security deposit.

D. Lease Commissions and Renovation Costs

¶37 On cross-appeal, Landlord argues that the trial court abused its discretion in reducing the damages awarded for the renovation costs and leasing commissions. Although Landlord presented evidence indicating it had incurred $37,354.59 in expenses and commissions relating to the new lease with Bed Depot, the trial court found this amount to be excessive and unreasonable and reduced it by two-thirds. Landlord argues that, under the terms of the lease, it is entitled to all renovation costs and leasing commissions and the trial court had no discretion to reduce the amount. We disagree.

¶38 When a tenant in a commercial lease transaction abandons the premises, the landlord has a "duty to make

reasonable efforts to rent [the premises] at a fair rental." *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 449, 528 P.2d 637, 641 (1974) (emphasis added); *see also Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 255, 603 P.2d 513, 526 (App. 1979) (noting that the "key requirement [in mitigation] is that the injured party exercise [r]easonable care to mitigate damages"). Whether a landlord acts reasonably in seeking a new tenant and preparing the premises for the new tenant's use is determined by examining the totality of the circumstances. *Dushoff*, 22 Ariz. App. at 449, 528 P.2d at 641. Whether the duty to mitigate damages has been violated is a question of fact for the trier of fact. *Fairway*, 124 Ariz. at 256, 603 P.2d at 527. "We will affirm the trial court's decision if it is correct for any reason[.]" *Glaze v. Marcus,* 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

¶39 The lease here provides that in the event of Tenant's default, "Landlord shall be entitled to recover from Tenant all damages incurred . . . including, without limitation thereof, . . . any other costs incurred by Landlord including the installation of improvements for Tenant or any replacement tenant and any leasing or rental commissions paid on account of this Lease or any subsequent lease made during the period which was to be the term hereof[.]"

¶40 Landlord argues that this language does not expressly limit renovations or commissions nor does it impose a reasonableness standard. Landlord further contends that the expenses incurred for the renovations and commission was consistent with its duty to mitigate damages. Tenant counters that some "rational maximum" reflecting the parties' intent in relation to incurring expenses associated with mitigation must be recognized on the grounds of unconscionability, lest the Landlord be permitted to make extravagant and unreasonable renovations for its own benefit or the benefit of a new tenant at Tenant's expense.

¶41 In this case, the record reflects that Landlord made significant changes to the premises to accommodate Bed Depot, including knocking down walls, demolishing a bathroom, and installing a roll-up door. In exchange for making such extensive modifications, Bed Depot agreed to a lease term of five years, more than four years beyond Tenant's original term,[1] and extended its existing lease on the adjacent space to correspond to the new lease terms for Suite 142.

¶42 The trial court considered the evidence presented regarding the reasonableness of the expenses incurred by

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[1] Tenant's lease was scheduled to terminate June 14, 2007. Bed Depot's lease extended to September 2011.

Landlord in its efforts to mitigate damages by re-letting the space and concluded:

> [T]estimony concerning the nature and extent of the renovations, together with the extended duration of the successor lease[,] [and] the payment of a commission in the purported amount were inconsistent with the [Landlord's] duty to mitigate damages and, on the contrary, represented an effort on the part of the [Landlord] to derive greater revenues over a longer period of time from a more credit-worthy tenant and, as such, were excessive and unreasonable.

We agree with the reasoning of the trial court. Notwithstanding the language of the lease provision regarding damages in the event of default, we find that the actions by Landlord in re-letting the premises exceeded what was necessary to reasonably mitigate its damages and instead worked to benefit Landlord in excess of its damages at the expense of Tenant. We therefore find that the trial court did not abuse its discretion in determining that a reduced amount of damages was appropriate under the circumstances.

E. Attorneys' Fees

¶43 Both parties seek an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003). In the exercise of our discretion, we decline to award attorneys' fees to either party. We award costs incurred on appeal to Tenant upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).

CONCLUSION

¶44 Based on the foregoing, we find that the trial court erred in awarding prejudgment interest for the attorneys' fees award and the award for the renovation costs and lease commissions. We modify the judgment to read that interest on those awards shall accrue from the date of judgment. We further modify the judgment to reflect that Tenant is entitled to credit in the amount of $2,750 for the security deposit paid to Landlord. We affirm the remainder of the trial court's judgment.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

____

PATRICK IRVINE, Presiding Judge

/s/

____

DONN KESSLER, Judge