PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2370

NCO FINANCIAL SYSTEMS, INC., now known as EGS Financial Care, Inc.,

Plaintiff - Appellant,

v.

MONTGOMERY PARK, LLC,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:11-cv-01020-GLR)

Argued: May 3, 2022 Decided: July 5, 2022

Before GREGORY, Chief Judge, and NIEMEYER and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Gregory and Judge Harris joined.

ARGUED: Stephen Warren Nichols, OFFIT KURMAN, PA, Bethesda, Maryland, for Appellant. Howard G. Goldberg, GOLDBERG & BANKS, PC, Pikesville, Maryland, for Appellee. **ON BRIEF:** Frances C. Wilburn, OFFIT KURMAN, PA, Bethesda, Maryland, for Appellant. John Edward McCann, Jr., MILES & STOCKBRIDGE PC, Baltimore, Maryland, for Appellee.

NIEMEYER, Circuit Judge:

This protracted litigation concerning a 12-year commercial lease comes to us on the merits for the third time.

On the first occasion, we held that NCO Financial Systems, Inc. failed to satisfy the conditions for exercising the lease's early termination option and that its vacation of the leased premises left it potentially liable for the payment of rent for the full term. *See NCO Fin. Sys., Inc. v. Montgomery Park, LLC*, 842 F.3d 816, 818 (4th Cir. 2016).

On the second occasion, we held that Montgomery Park, LLC's obligation to mitigate damages was not a condition precedent to an award of damages and that it also did not require Montgomery Park to "develop a unique, preferred plan for leasing the NCO space . . . at the expense of its other vacant spaces" in the building. *NCO Fin. Sys., Inc. v. Montgomery Park, LLC*, 918 F.3d 388, 393–94, 396 (4th Cir. 2019). We concluded that it was required only "to reasonably market NCO's space on an equal footing with the other spaces that it was seeking to rent" in the building. *Id.* at 390. Accordingly, we directed the district court to determine whether Montgomery Park's "generalized marketing efforts" of the entire building, including NCO's vacant space, were commercially reasonable. *Id.* at 396.

And now we are presented with the question of whether the district court, on remand, clearly erred in finding that Montgomery Park's efforts to mitigate damages were commercially reasonable. NCO also raises the question of whether the damages award can include both late fees and interest.

For the reasons that follow, we affirm.

I

By a lease agreement dated October 8, 2002, NCO leased roughly 100,000 square feet of commercial space from Montgomery Park in its large commercial building in Baltimore, Maryland, which has over 1.2 million leasable square feet. When NCO entered into its lease, roughly 780,000 square feet were still vacant in the building, and when NCO vacated the property in 2011, after its ineffective effort to terminate the lease early, Montgomery Park was left with roughly 500,000 vacant square feet to lease.

While both the terms of the lease and common law required Montgomery Park to mitigate damages after NCO breached the lease by using commercially reasonable efforts to re-lease NCO's space, the reality confronting that effort was nonetheless formidable because NCO's space was but part of some 500,000 vacant square feet — a difficult situation, to which NCO's breach of its lease contributed.

After we held that Montgomery Park was not required to give preference to re-leasing NCO's space over its other vacant space, we directed the district court to assess the commercial reasonableness of Montgomery Park's efforts at leasing its vacant space as a whole, including NCO's vacant space. *See NCO Fin. Sys.*, 918 F.3d at 390, 396.

On remand, the district court received briefing, conducted a hearing, and made findings of fact supporting its conclusion that Montgomery Park did indeed use commercially reasonable efforts to re-lease NCO's space. It found that those efforts included "the creation of brochures, hanging banners, engaging with prospective tenants, conducting tours of the premises, including several tours of the NCO space, as well as holding meetings regarding leasing of the Montgomery Park space in general." The court

also noted that Montgomery Park hired the firm Colliers International, which it found was "an international brokerage firm which is designed to lease space which provided notice nationally and even internationally, but certainly nationally of the property and the space that was available." At bottom, it found that "Montgomery Park did engage in commercially reasonable efforts to lease this property for the time that it was vacated by NCO through the damage period of time." It noted that following those efforts, offers were made, but unfortunately "very few, if any, were accepted for the purpose of leasing any space within Montgomery Park, much less the NCO space in this case." The court observed that not only were there no offers made to re-lease the NCO space, but that Montgomery Park did not receive offers during the damage period to lease *any* of its vacant 500,000 square feet, except for a relatively small 7,000-square-foot space.

After finding that Montgomery Park satisfied its obligation to mitigate damages by using commercially reasonable efforts to re-lease NCO's space, the court awarded Montgomery Park damages, including both late fees and interest, in the total amount of $9.85 million.

II

NCO does not challenge any historical fact found by the district court. Rather, it contends, for its main argument, that the conclusions that the district court reached in finding Montgomery Park's re-leasing efforts commercially reasonable were inconsistent with its earlier conclusions, reached before our last decision, when it found the efforts were *not* commercially reasonable. In particular, NCO notes that before our last decision, the

district court itemized Montgomery Park's marketing efforts, characterizing them as a "significant effort," but finding them not to be commercially reasonable. The court explained that the efforts were directed only to Montgomery Park's entire vacant "space [in the building] as a whole, *with no serious effort to target or re-lease NCO space*." (Emphasis added). NCO notes that now, after our remand, the district court, relying essentially on *the same facts*, found Montgomery Park's efforts commercially reasonable. This inconsistency, it argues, renders the court's factfinding "clearly erroneous due to incoherence and lack of subsidiary fact findings."

While most of the mitigation facts were developed in the prior proceeding, where the district court found Montgomery Park's marketing efforts to lack commercial reasonableness, the court reconsidered those facts on remand, along with others it found in a subsequent hearing, to conclude that Montgomery Park had in fact engaged in commercially reasonable efforts. The difference in conclusions, it explained, was attributable to the different standard that it applied the second time around.

In its first ruling on the mitigation of damages, the district court acknowledged Montgomery Park's "significant effort," but it concluded that such efforts were not commercially reasonable because they were directed at the entire vacant space in the building — some 500,000 square feet — and not just NCO's vacant space of 100,000 square feet. The court explained:

> Simply put, if you had the real estate space that you need to lease, reasonable efforts require that you advertise it and promote it *specifically and not generally* as part of an overall scheme to fill a larger vacant space.

(Emphasis added). Under that standard, the court concluded that despite Montgomery Park's substantial efforts to lease any or all of the vacant space in its building, the efforts were not commercially reasonable as to NCO's space because Montgomery Park was required "to target" NCO's space.

On appeal, we recalibrated the standard that the district court applied and held that "[r]easonable commercial efforts to mitigate damages did not require Montgomery Park to favor NCO's space over other vacant space in the building." *NCO Fin. Sys.*, 918 F.3d at 390. Rather, in recognition that it was NCO that breached the lease, "commercial reasonableness only required Montgomery Park to reasonably market NCO's space on an equal footing with the other spaces [in the building] that it was seeking to rent." *Id.* We thus concluded that the district court had erred in determining that "Montgomery Park became obligated to develop a unique, preferred plan for leasing the NCO space and then to market that space at the expense of its other vacant spaces." *Id.* at 396.

Accordingly, after remand, the district court began its findings by recognizing the recalibrated standard, stating:

> This case was remanded to me for the purpose of making a determination on whether or not Montgomery Park attempted to mitigate its damages by leasing the NCO space in a commercially reasonable manner, the standard is by which the space should be marketed as a whole and the building as a whole without a specific obligation to market the NCO space by Montgomery Park.

The court noted that it had "reviewed the record, conducted a trial in this case, [and] made findings of fact." It then reiterated its earlier findings and found further that "there were tours that were offered as well as conducted by Montgomery Park in an attempt to woo

prospective lessees. There were offers made. Unfortunately, very few, if any, were accepted for the purpose of leasing any space within Montgomery Park, much less the NCO space in this case." Indeed, the court specifically noted that during the damage period, Montgomery Park was only able to lease a 7,000-square-foot space within the 500,000 square feet that were available for rent, which included NCO's space. The district court then concluded:

> I am going to find based upon what I stated here, as well as what's contained based upon the record in this case and submissions and oral argument that I've heard that Montgomery Park did engage in commercially reasonable efforts to lease this property for the time that it was vacated by NCO through the damage period of time.

Based on the court's findings, this was not a case where Montgomery Park sat on its hands so that it could benefit from NCO's ongoing rent obligation. Rather, it made substantial efforts to mitigate damages in the context of leasing its vacant space. Unfortunately, these efforts were made in the context of a difficult market with a difficult building — a situation made yet more difficult by NCO's breach. NCO certainly has not demonstrated a likelihood of a better result with any other combination of marketing tactics.

In these circumstances, we do not find that the district court's findings were clearly erroneous.

III

NCO also focuses on particular strategies that Montgomery Park did not pursue to argue that the district court's failure to consider them or be influenced by their omission

rendered its findings clearly erroneous. It points mainly to the fact that Montgomery Park failed to list NCO's vacant space on CoStar, "the dominant online multiple listing service for commercial real estate." But it also points to Montgomery Park's failure to develop a written plan to re-lease NCO's space, and its misdirection of prospective NCO-space tenants to other building spaces. Particularly with respect to the failure to list on CoStar, NCO argues that inasmuch as Montgomery Park listed other vacant spaces in its building on CoStar but not NCO's space, it did not give NCO's space equal treatment.

The record shows that at the time that NCO's space became vacant and was available for re-lease, Montgomery Park already had over 400,000 square feet available for rent, and all of that space was listed on CoStar. When the NCO space became available with yet another 100,000 square feet — and other spaces in the building subsequently became available — Montgomery Park made a strategic decision not to add any of them to the CoStar listings. It concluded that doing so would hinder, not help, the effort to re-lease any space, including NCO's space. And the district court agreed, finding: "[T]he reason for the failure to list the NCO areas, as well as these other areas[,] was primarily designed [to avoid] the impression that the building was somehow sick or not able to be leased. And, indeed, the building itself suffered from this." The court added that this strategy did not result in NCO's space being treated differently from other spaces during the damage period. And indeed, the record shows that, during that period, four additional spaces became vacant and were likewise not listed on CoStar for the same strategic reason.

In short, despite NCO's contrary argument, the court did indeed consider the absence of a CoStar listing and found as fact that the decision not to list the NCO space on

CoStar was designed to benefit the marketing effort and did not, as NCO argued, constitute a failure of commercial reasonableness. And, in any event, Montgomery Park was unable to rent any space in the building, even those spaces that it had earlier listed on CoStar, except for the one inconsequential 7,000-square-foot space.

Similarly, as to Montgomery Park's failure to develop a written marketing plan, NCO has presented no evidence of any consequence from the failure. Yet, it has the burden to demonstrate a failure to mitigate damages, not a failure to employ every idea that it believes would have increased the chances of re-leasing the space.

Finally, NCO focuses on general anecdotal reports of prospective tenants' being "steered" to other spaces in the building, other than to NCO's space. Yet, quibbling with the district court's failure to address every encounter with a prospective tenant achieves little, as *none* of these tenants ultimately decided to rent *any* space in the building. As the district court found, tours were conducted and offers were made, but "unfortunately, very few, if any, were accepted for the purpose of leasing any space within Montgomery Park, much less the NCO space in this case."

While NCO's arguments are designed to effect body punches against the district court's findings, NCO has, in the end, failed to demonstrate that any of the district court's findings were clearly erroneous.

IV

Finally, NCO contends that the district court erred in awarding Montgomery Park *both* late fees (over $300,000) and interest (over $3.8 million), because doing so left

"Montgomery Park in a *far* better position than it would have been in had NCO not breached the Lease and, thus, would be a windfall prohibited under Maryland law." We find no error in this, however.

First, Section 2.06 of the lease agreement explicitly provides for both late fees and interest, stating that late rent "shall be subject to a late payment charge of 5% of the amount overdue" and, "*[i]n addition*," "shall bear interest at the Default Rate from the due date until paid." (Emphasis added).

In addition to enforcing these lease provisions, the district court also concluded that they did not violate Maryland law, citing Md. Code Ann., Com. Law § 14-1315(b) and *Noyes Air Conditioning Contractors, Inc. v. Wilson Towers Ltd. Partnership*, 712 A.2d 126, 131 (Md. Ct. Spec. App. 1998). Section 14-1315 authorizes a lease to require the payment of a late fee, stating that "[a] late fee imposed under this section is *not . . . [i]nterest* [or] . . . [a] penalty." Md. Code Ann., Com. Law § 14-1315(d) (emphasis added). Moreover, the statute goes on to provide that "[t]his section *does not affect . . . interest*, or any other fee or charge otherwise allowed under applicable law." *Id.* § 14-1315(e) (emphasis added); *see also Swinson v. Lords Landing Vill. Condo*., 758 A.2d 1008, 1010, 1013 (Md. 2000) (affirming an award of both interest and late fees); *Roger E. Herst Revocable Tr. v. Blinds to Go (U.S.) Inc*., No. ELH-10-3226, 2011 WL 6409129, at *2, *29 (D. Md. Dec. 20, 2011) (awarding both late fees and prejudgment interest in accordance with a provision of a commercial lease). NCO has provided no authority holding that such provisions are contrary to law.

To make its argument, NCO relies exclusively on the general principle stated in *WSC/2005 LLC v. Trio Ventures Associates*, 190 A.3d 255, 269 (Md. 2018), that "[i]n an action for breach of contract, courts attempt to put the injured party in as good a position as it would have occupied had the contract been fully performed by the breaching party." But that same case also provides that damages may include that which "may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Id.* (citation omitted). And, in this case, the parties did expressly agree to the payment of both late fees and default interest, thus signaling that they contemplated that both would be payable upon default.

Accordingly, we conclude that the district court's award of both late fees and interest was not only authorized by the lease agreement but also was consistent with Maryland law.

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For the reasons given, the judgment of the district court is

AFFIRMED.