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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Spirit Master Funding X LLC,

10 Plaintiff,

11 v.

12 BCB Holdings Incorporated, et al.,

13 Defendants.

No. CV-18-00957-PHX-DLR

ORDER

14
15 In 2015, Plaintiff Spirit Master Funding X, LLC (“Spirit”), as lessor, and Defendant
16 BCB Holdings, Inc. (“BCB”), as lessee, entered a fifteen-year commercial lease for real
17 property located in Denver, Colorado. The property comprises three separate parcels—
18 1298 West Alameda (“1298”), 1330 West Alameda (“1330”), and 1373 West Nevada Place
19 (“1373”)—which were leased collectively for a single monthly rent. Defendants Nicholas
20 Domenico and Frank DeHoff executed a guaranty for Spirit’s benefit. BCB eventually
21 defaulted on its payment obligations, and Domenico and DeHoff on their guaranties.
22 Rather than cure the default, BCB vacated the property. Spirit then filed this action
23 asserting that BCB breached the lease and Domenico and DeHoff breached their
24 guaranties. While this case was pending, Spirit sold parcel 1298 for \$1,100,000. Spirit
25 received \$1,016,201 in net proceeds from the sale. Parcels 1300 and 1373 remain unsold
26 and unleased.¹

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28 ¹ Although Defendants claim on information and belief that Spirit also sold parcels
1300 and 1373, they provide no evidence of these sales, and Spirit’s Asset Manager
declares that the parcels remain unsold. Although at the pleading stage a party can allege
facts on information and belief, summary judgment is the time for proof.

1 At issue are two motions for summary judgment. Spirit seeks complete summary
2 judgment in its favor (Doc. 63); Defendants, while not disputing liability, seek partial
3 summary judgment on the availability of certain damages (Doc. 62). For the following
4 reasons, the Court will grant Spirit’s motion and deny Defendants’ motion.

5 **I. Legal Standard**

6 Summary judgment is appropriate when there is no genuine dispute as to any
7 material fact and, viewing those facts in a light most favorable to the nonmoving party, the
8 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material
9 if it might affect the outcome of the case, and a dispute is genuine if a reasonable jury could
10 find for the nonmoving party based on the competing evidence. *Anderson v. Liberty Lobby,*
11 *Inc.*, 477 U.S. 242, 248 (1986); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061
12 (9th Cir. 2002). Summary judgment may also be entered “against a party who fails to make
13 a showing sufficient to establish the existence of an element essential to that party’s case,
14 and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*,
15 477 U.S. 317, 322 (1986).

16 The party seeking summary judgment “bears the initial responsibility of informing
17 the district court of the basis for its motion and identifying those portions of [the record]
18 which it believes demonstrate the absence of a genuine issue of material fact.” *Id.* at 323.
19 The burden then shifts to the non-movant to establish the existence of a genuine and
20 material factual dispute. *Id.* at 324. The non-movant “must do more than simply show that
21 there is some metaphysical doubt as to the material facts[,]” and instead “come forward
22 with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus.*
23 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal quotation and citation
24 omitted).

25 **II. Discussion**

26 BCB does not dispute that it breached the lease; Domenico and DeHoff do not
27 dispute that they breached the guaranty. Defendants agree that they are liable to Spirit for
28 damages; they just disagree on how much. As Defendants put it, this is “fundamentally a

1 mitigation of damages case.” (Doc. 62 at 1.)

2 Spirit’s economic expert calculates damages at \$4,372,888, reflecting discount
3 adjustments for the present value of the unpaid rent under the lease, less an offset for
4 proceeds that Spirit received or expects to receive from the sale of parcel 1298.
5 Defendants’ economic expert calculated damages at \$2,402,759 by utilizing a higher
6 discount rate. For purposes of summary judgment, Spirit has accepted Defendants’
7 calculation, thereby negating a potential factual dispute on that issue. Defendants agree
8 that these damages are appropriate “*if* the Court finds that the Rent Acceleration Remedy
9 is *enforceable* and that the sale of the property does not end the right to seek damages.”
10 (Doc. 65 at 6 (emphasis in original).) Defendants argue, however, that the Court should
11 not enter judgment for this amount because (1) the rent acceleration provision is
12 unenforceable and (2) Spirit’s sale of a parcel 1298 terminated its right to seek damages
13 for future rents. These arguments present questions of law, which the Court will address
14 in turn.

15 **A. The rent acceleration provision is enforceable.**

16 Section 14.02 of the lease (which is governed by Colorado law) provides that, upon
17 BCB’s default, Spirit is “entitled to exercise, at its option, concurrently, successively, or in
18 any combination, all remedies available at law or in equity, including, without limitation,
19 any one or more” of 11 remedies enumerated in the lease. (Doc. 62-1 48-50.) Section
20 14.02(f) gives Spirit the right to “accelerate and recover from [BCB] all Rental and other
21 Monetary Obligations due and owing and scheduled to become due and owing under this
22 Lease both before and after the date of such breach for the entire original scheduled Lease
23 Term.” (*Id.* at 49.) Section 14.03 explains that all remedies in Section 14.02, subject to
24 applicable law, “shall be cumulative and not exclusive of one another.” (*Id.* at 50.)

25 Defendants argue that Section 14.02(f) is void because it does not contain express
26 language that discounts the accelerated sums by fair rental value and present value of the
27 property. Defendants cite cases in which Colorado courts have upheld acceleration clauses
28 that expressly required the lessor to mitigate damages and discount damages to present

1 value. See *Robert A. McNeil Corp. v. Paul*, 757 P.2d 165, at 167 (Colo. App. 1988); *Emrich*
2 *v. Joyce's Submarine Sandwiches, Inc.*, 751 P.2d 651, 652 (Colo. App. 1987); *GTM Invs.*
3 *v. Depot, Inc.*, 694 P.2d 379, at 381 (Colo. App. 1984). Defendants extrapolate that a rent
4 acceleration clause is a void penalty if it does not expressly account for these matters. This
5 argument is misguided.

6 Damages under a rent acceleration provision in a commercial lease should place the
7 lessor in the same position it would have occupied without a default, taking into account
8 the lessor's duty to mitigate damages. See *La Casa Nino, Inc. v. Plaza Estaban*, 762 P.2d
9 669, 672 (Colo. 1988); see also *Schneiker v. Gordon*, 732 P.2d 603, 612 (Colo. 1987). A
10 court may not award damages for breach of a commercial lease without allowing the lessee
11 to establish an affirmative defense of avoidable consequences or duty to mitigate, and any
12 such award must be reduced to present value regardless of whether the lease contemplates
13 such application. See *Mining Equipment, Inc. v. Leadville Corp.*, 856 P.2d 81, 84-85 (Colo.
14 App. 1993). That is, these common law principles are incorporated into a rent acceleration
15 provision regardless of whether the provision explicitly requires the lessor to mitigate or
16 discount damages to present value.

17 In *Mining Equipment*, for example, the Colorado Court of Appeals considered a
18 commercial equipment lease under which the plaintiff lessor had recovered accelerated
19 future rents. *Id.* at 84. The court remanded for a new trial on damages, holding that the
20 trial court should have allowed the defaulting lessee to raise avoidable consequences and
21 mitigation affirmative defenses. *Id.* Further, the court explained, "insofar as the court on
22 remand determines that [the lessor] is authorized to recover future payments under the
23 lease, those payments must be reduced to their present worth." *Id.* at 85. To reach this
24 decision, the court did not rely on a lease provision expressly contemplating mitigation or
25 present value. *Id.* at 84. Instead, these principles automatically were applied to the rent
26 acceleration provision as a matter of law.

27 Likewise, in *First National Bank v. Dykstra* 684 P.2d 957 (Colo. App. 1984), the
28 Colorado Court of Appeals upheld an acceleration clause without discussing whether the

1 lease expressly obliged the lessor to mitigate damages or discount damages to present
2 value. The court held that the lessee remained liable for unpaid rent, late charges, and
3 common area expenses until the lessor relet the premises because the lease expressly
4 provided this remedy. *Id.* at 958-59. The court did not rely on express discounting
5 language in the lease to conclude that the acceleration clause was enforceable.

6 Accordingly, Spirit is entitled to accelerate BCB's unpaid rents for the remainder of
7 the lease term, but the damage award must account for Spirit's duty to mitigate damages
8 and discount the future rents to present value. These common law principles are implicitly
9 incorporated into the lease, which in any event provides that Spirit's remedies are subject
10 to applicable law.

11 **B. The sale of parcel 1298 does not end Spirit's right to recover future rents.**

12 Next, Defendants contend that Spirit's sale of parcel 1298 terminates Spirit's right
13 to accelerate future rents because Spirit can no longer mitigate damages. Defendants argue
14 that Spirit is limited to its common law damages of unpaid rent and other monetary
15 obligations between the date of default and the date Spirit contracted to sell parcel 1298.

16 The Court has found no Colorado case holding that a lessor may not mitigate by
17 selling the property or a portion of the property, rather than reletting. To the contrary, in
18 *La Casa Nino*, the Colorado Supreme Court said it was "erroneous" to interpret *Schneiker*
19 to "mean that only proceeds received in the form of rent could be applied in mitigation of
20 a lessor's damage." 762 P.2d at 672.

21 Defendants instead rely on three cases from Nebraska, New Jersey, and Georgia to
22 support their argument that a lessor's sale of the property terminates its right to recover
23 future rents from the defaulting lessee beyond the date of sale. Setting aside the fact that
24 these cases do not apply Colorado law, Defendants' reliance is misplaced.

25 In *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of*
26 *Nebraska, Inc.*, the Nebraska Supreme Court held that a lessor may mitigate damages by
27 "making reasonable efforts to relet the premises on the [lessee's] account, to sell the
28 property, or both." 905 N.W. 2d 644, 658 (2018). The court further held that the lessor

1 may normally recover unpaid rent and expenses from the time of the breach to when the
2 sale of the property is completed. *Id.* However, considering the “specific facts presented,”
3 the court determined that the lessor’s efforts to sell the property were unreasonable, in part
4 because the lessor chose to sell the property to a buyer that was “‘notorious for delays,’ to
5 the exclusion of pursuing other bona fide offers to lease the property.” *Id.* at 659. Here,
6 however, Defendants have not challenged the reasonableness of Spirit’s efforts to relet or
7 sell the property. Defendants have not argued, for example, that Spirit failed to adequately
8 market the property, consider fair offers, timely complete the sale of parcel 1298, or attain
9 a fair sale price.²

10 In *McGuire v. City of Jersey City*, the New Jersey Supreme Court held that the
11 lessor’s sale of the property satisfied his duty to mitigate damages arising from breach of
12 the lease, but terminated his right to seek future damages for lost rental income after the
13 time of sale, because “the sale price approximated the value of the future rentals.” 593 A.2d
14 309, 313 (N.J. 2003). The court explained that, because “the sale price of commercial real
15 estate can be correlated to the present value of the property’s future stream of rental
16 income,” the lessor’s sale of the property compensates him for expected future rental
17 income. *Id.* at 315. Unlike *McGuire*, however, Spirit has not sold the entire property such
18 that the sale price of parcel 1298 fully compensates Spirit for its lost income under the
19 lease.

20 Finally, in *Noble v. Kerr*, the Georgia Court of Appeals held that, when a lessor
21 notifies a defaulting lessee that he will attempt to relet the property or sell it and hold the
22 lessee liable for any unpaid rents, the lease is not terminated until the date of the sale and
23 the lessee remains liable for unpaid rents until the sale. 180 S.E.2d 601, 601 (Ga. Ct. App.
24 1971). This case is inapposite, as the court did not discuss whether the sale price adequately
25 compensated the lessor for the value of future rents under the lease.

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27 ² Defendants mention that, after Spirit engaged its broker, Spirit received offers to
28 buy or lease some or all parcels. Defendants have not argued that it was unreasonable for
Spirit to refuse these offers. Defendants also acknowledge that a May 2019 contract for
the sale of parcels 1300 and 1373 for \$3.3 million “fell through because the buyer backed
out” rather than through some fault of Spirit. (Doc. 62 at 3.)

1 In sum, although Defendants are entitled to an offset for proceeds that Spirit
2 received from the sale of parcel 1298 (which already is reflected in the damages
3 calculation), the sale of only part of the property does not terminate Spirit’s right to recover
4 future rents.

5 **C. Attorneys’ Fees and Costs**

6 Lastly, Spirit asks the Court to award attorneys’ fees in the amount of \$238,199.50
7 and costs in the amount of \$9,538.01 because the lease and guaranty allow Spirit to collect
8 these fees and costs in the event of any judicial or other adversarial proceedings concerning
9 the lease. Defendants argue that it is premature to award fees because Local Rule of Civil
10 Procedure (“LRCiv”) 54.2 requires Spirit to submit a separate fee application after entry of
11 judgment. Spirit does not respond to this argument in its reply.

12 By its terms, LRCiv 54.2 does not apply when attorneys’ fees are an element of
13 damages. Under Colorado law, courts have discretion when deciding how to classify
14 attorneys’ fees and, depending on certain factors, such fees might properly be considered
15 an element of damages. *See Butler v. Lembeck*, 182 P.3d 1185, 1189 (Colo. App. 2007).
16 Neither party addresses how these fees should be classified. Moreover, although the lease
17 is governed by Colorado law, Arizona law applies to the guaranty. In Arizona, “courts
18 generally do not construe ‘damages’ to include attorneys’ fees.” *City Ctr. Exec. Plaza,*
19 *LLC v. Jantzen*, 344 P.3d 339, 343 (Ariz. Ct. App. 2015) (collecting cases).

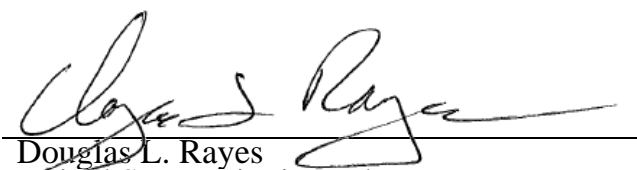
20 The Court exercises its discretion to require a LRCiv 54.2-compliant fee application
21 prior to awarding fees for four reasons: (1) the law is somewhat unclear on whether
22 attorneys’ fees should be considered an element of damages in a case like this; (2) neither
23 party has briefed this issue; (3) the fee request is substantial; and (4) although Defendants
24 provide some documentation of the fees, they have not given the Court the type of task-
25 based itemization LRCiv 54.2 contemplates, making it difficult for the Court to determine
26 whether the fees are reasonable.

27 **IT IS ORDERED** that Defendants’ motion for partial summary judgment (Doc. 62)
28 is **DENIED**.

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IT IS FURTHER ORDERED that Spirit’s motion for summary judgment (Doc. 63) is **GRANTED**. The Clerk is directed to enter judgment in favor Spirit and against Defendants in the amount of \$2,402,759. Spirit may separately apply for an award of attorneys’ fees in accordance with LRCiv 54.2.

Dated this 8th day of May, 2020.



Douglas L. Rayes
United States District Judge