**[Cite as *Chilli Assocs. Ltd. Partnership v. Denti Restaurants, Inc.*, 2023-Ohio-1978.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

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| Chilli Associates Limited Partnership, | : | Case No. 22CA30 |
| Plaintiff-Appellee, | : | |
| v. | : | DECISION AND JUDGMENT ENTRY |
| Denti Restaurants Inc., DBA Max & Erma's, et al., | : | |
| | : | **RELEASED 6/13/2023** |
| Defendants-Appellants. | | |

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APPEARANCES:

James A. Coutinho and Tom Shafirstein, Allen Stovall Neuman & Ashton LLP, Columbus, Ohio, for appellant Denti Restaurants Inc., DBA Max & Erma's.

Patricia J. Friesinger and Zachary B. White, Coolidge Wall Co., L.P.A., Dayton, Ohio, for appellee.

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Hess, J.

**{¶1}** Denti Restaurants Inc., DBA Max & Erma's ("Denti"), appeals from a judgment of the Ross County Court of Common Pleas in favor of Chilli Associates Limited Partnership ("Chilli") in an action concerning a ground lease. In the sole assignment of error, Denti essentially challenges the trial court's grant of partial summary judgment to Chilli on its breach of contract claim. For the reasons which follow, we overrule the assignment of error and affirm the trial court's judgment.

## I. FACTS AND PROCEDURAL HISTORY

### A. The Complaint

**{¶2}** In 2019, Chilli filed a three-count complaint against Denti; Advant Mortgage, LLC ("Advant"); ADVMTG II, LLC ("ADVMTG"); Community Capital Development Corporation ("CCDC"); and the U.S. Small Business Administration ("SBA").

The complaint alleged the following. In 2003, Chilli and Denti entered a written ground lease in which Chilli agreed to lease real property it owned to Denti. Denti encumbered its leasehold estate with a mortgage held by Advant (later assigned to ADVMTG II) and a mortgage held by CCDC (later assigned to SBA). Denti did so in order to finance improvements on the property, namely, the construction and/or renovation of a Max & Erma's restaurant. In August 2017, Denti stopped paying rent. In March 2018, Chilli filed a forcible entry and detainer action in Chillicothe Municipal Court. Around May 2018, Denti vacated the property and returned possession to Chilli, and the parties filed a Stipulation of Restitution and Dismissal in the municipal court. As of March 1, 2019, a new tenant has occupied the property.

**{¶3}** Count I of the complaint was titled "breach of contract/collection of rents." It alleged Denti materially breached the lease by "failing to pay rent, real estate taxes, interest, costs, and all other charges and expenses due and owing" under the lease. Count I alleged that Chilli suffered damages due to the breach, that as of March 1, 2019, Denti was liable to it for $144,299.48 for unpaid rent, real estate taxes, interest, and an administrative fee, and that Denti was liable for "all charges, costs, expenses, and attorney's fees incurred by Plaintiff in mitigating its losses and enforcing its rights under the Ground Lease as a result of Denti Inc.'s material breach thereof." Count II was titled "declaratory judgment" and requested an order declaring that the lease and all encumbrances related to it were terminated as a matter of law, that the defendants had no interest in the property, and that Chilli holds title to the property in fee, free and clear of any claims or interests of the defendants. Count III was titled "action for costs, expenses, and attorney's fees." That count alleged Denti was liable under Article 15.1(C) of the lease for "all costs, expenses, and attorney's fees" Chilli incurred "in enforcing its

rights under" the lease as a result of Denti's material breach of it. Count III also alleged that Denti was liable for "all prior and future costs, expenses, and attorney's fees incurred by Plaintiff in mitigating its losses and enforcing its rights under" the lease.

B. The Ground Lease

**{¶4}** Chilli attached to the complaint a copy of the ground lease, which was executed on September 22, 2003. The lease term was 20 years, but Denti had the option to extend the lease for four additional terms of 5 years each. Under Article 2 of the lease, "[t]he parties acknowledge that Tenant intends to use the Premises for the development of a Max & Erma's restaurant." Denti had the option to terminate the lease within 150 days after its execution if Denti was unable to satisfy in its discretion certain conditions which impacted its ability to develop the restaurant. Under Article 7.1 of the lease, Denti had "the right to use the Premises for the purposes of operating a Max & Erma's casual dining restaurant and other restaurant uses, and for no other purpose without Landlord's consent, which consent Landlord shall not unreasonably withhold condition, or delay." Under Article 14.1, Denti had "no right to assign, convey, sublease or transfer Tenant's interest in this Lease and the leasehold estate created hereby * * * without the written consent of Landlord to such assignment which consent shall not be unreasonably withheld, conditioned or delayed."

**{¶5}** Under Article 6.1, Denti agreed to pay "Base Rent," which after the first ten lease years, increased every five years. Under Article 6.3, Denti agreed to pay interest and administrative fees in connection with late payments. And under Article 6.4, Denti agreed to reimburse Chilli for all real property taxes levied or assessed upon the premises during the lease term.

**{¶6}** Article 8.1 gave Denti "the right, at any time and from time to time during the Term of this Lease, to erect * * * Improvements on the Premises" subject to certain conditions, such as that the costs of construction "shall be borne and paid for by Tenant." The lease defines "Improvements" as "all buildings, structures, signs, paving, walkways, parking lots or other construction of whatever nature." Article 8.3 of the lease states: "Upon the expiration or sooner termination of this Lease, title to all Improvements (except for Tenant's trade fixtures, furniture, equipment, décor package, hoods, bars and bar backs, and walk-in coolers) installed or erected by Tenant, its successors and assigns, which have become affixed to the Premises shall belong to and become the property of Landlord, its successors and assigns."

**{¶7}** Article 15.1(B) sets forth options Chilli has if an event in Article 15.1(A) occurs, such as that Denti is "in default" "in the payment of Rent or other sums of money required to be paid under this Lease, and said amount is not paid to Landlord within thirty (30) days after written demand therefor by Landlord." Article 15.1(B) states: "In any such above event and at the option of Landlord, Landlord may terminate this Lease or, without terminating this Lease, may re-enter the Premises, through appropriate judicial proceedings and take possession thereof and Landlord shall not be liable for damages by reason of such re-entry or forfeiture." Article 15.1(C) states: "Notwithstanding such re-entry by Landlord, Tenant shall remain liable for all Rent as it becomes due and all costs, expenses, and attorney fees to enforce this Lease." Article 15.1(D) states:

> In the event of re-entry, Landlord may, without regard to whether Landlord has terminated this Lease, make such alterations and repairs as Landlord reasonably deems necessary or desirable to relet the Premises or any part thereof. Any reletting shall be on such terms and at such Rent as Landlord deems reasonably acceptable and any such monies received shall be applied first, to the payment of any indebtedness other than Rent due from Tenant, and then to Landlord's expenses, including but not limited to, commissions for reletting the Premises, the repairs, renovation or

> alterations of the Premises. Notwithstanding anything else contained herein, Landlord retains all other rights and remedies at law or in equity.

Article 1.10 defines "Rent" as "Base Rent, together with Real Estate Taxes, CAM Charges, and all other sums due hereunder."

C. Additional Pleadings and Motions

**{¶8}** Denti and SBA filed answers. Chilli moved for default judgment against Advant, ADVMTG, and CCDC, due to their failure to plead or otherwise defend against the action. The trial court granted the motions.

**{¶9}** Chilli then filed a motion requesting summary judgment against Denti on "all claims" in the complaint and "a hearing to establish the amount of [Chilli's] damages, costs, expenses, and attorney's fees compensable in accordance with Counts I and III of the Complaint." Chilli also requested summary judgment against SBA, the only other remaining defendant, on Count II. Chilli supported the motion with Denti's discovery responses and the affidavit of Paul Miller, who had served as an authorized representative of Chilli in his role as Executive Vice President of Real Estate for RG Properties, Inc., which was affiliated with Chilli. Miller averred that Chilli "complied with its obligations under the Ground Lease," that Denti constructed a Max & Erma's on Chilli's property as permitted by the lease, that Denti stopped paying rent and related costs due under the lease in August 2017, that Chilli served Denti with a Notice to Leave the Premises and filed an eviction lawsuit in municipal court in March 2018, and that Denti surrendered possession of the property on or about May 3, 2018. Miller averred that despite Chilli's "reasonable efforts, which included listing the Property for rent and typical marketing activities, the Property was not re-let to a new tenant until March 1, 2019." Miller averred that as of March 1, 2019, Denti owed Chilli "at least $144,299.48" for "unpaid rent, real estate taxes, interest, and administrative fees due under the Ground

Lease," that Chilli had "incurred additional fees, costs, and expenses to market the Property and find a suitable tenant," and that Chilli had "incurred substantial fees (including legal fees), costs, and expenses to enforce its rights under the Ground Lease."

**{¶10}** Denti filed a memorandum contra, but SBA did not. Denti stated that it was "not contesting Count II of the Complaint for a declaration that the ground lease is terminated" but asked the court to deny Chilli's motion as to Counts I and III. Denti asserted that Chilli had already recovered its losses because Denti was entitled to offset the building's value and "excess rent" from the new tenant against Chilli's claims for damages on Counts I and III. Denti also asserted that there was a genuine dispute as to whether Chilli mitigated its damages "when it failed to re-let the property for a year and stymied Denti's efforts to mitigate Plaintiff's damages."

**{¶11}** Denti supported its memorandum contra with the affidavit of its president, David Denti ("Mr. Denti"). Mr. Denti averred that Denti had no obligation to construct any improvements on the property but spent approximately $2 million to build a restaurant to operate a Max & Erma's franchise. Mr. Denti averred that even though Chilli had "cleared the mortgages" from the property "through a default judgment against" Advant and CCDC, "Denti continues to be liable on the mortgage notes. In other words, Denti must continue paying for the cost of a building that Plaintiff gets to keep for free." Mr. Denti averred that "Denti paid rent for a period of 15 years before it ran into financial issues that did not allow it to pay all amounts due under the ground lease." He averred that "[o]nce Denti ran into its financial issues that prevented it from paying the full amount of rent, it attempted to mitigate both the Plaintiff's damages and Denti's liability under the ground lease."

**{¶12}** Mr. Denti averred that "Denti sought to sell the building and assign the ground lease to a viable purchaser. Denti received an offer from Nourse Chillicothe

Automall for the purchase of the building for $580,000 on September 15, 2017. * * * However, the sale was rejected by the Plaintiff and the proposed buyer was not allowed to obtain an assignment of the ground lease or a new ground lease." Mr. Denti incorporated into his affidavit a September 15, 2017 letter to him from Dick Nourse of Nourse Chillicothe Automall which states: "As we discussed on the phone yesterday I am sending you this note, expressing my interest to buy the Max & Erma's building for $580,000, cash at closing. As you know this offer is contingent on successfully negotiating a land lease for the Max & Erma's property with R.G. and Associates." Mr. Denti also averred that "Denti sought to sublease an unused portion of the parking lot on the Property to Nourse Chillicothe Automall. The payments from the subleasing arrangement would have sustained Denti's operations and enabled Denti to pay its rent to the Plaintiff. However, the Plaintiff rejected any sublease of the parking lot." In addition, Mr. Denti averred that Chilli "moved to evict Denti" in March 2018 even though it was his "understanding" that Chilli "did not have a replacement tenant at the time." He averred that if Chilli "had allowed Denti to remain longer in the Property and at least pay partial rent, Denti could have done so and that would have mitigated [Chilli's] damages under the ground lease." He averred that "Denti could have at least made partial payments for about a year before the new tenant moved in" and that the eviction "effectively prevented Denti from selling the building."

**{¶13}** Mr. Denti also averred that "[t]he new tenant is operating a Mexican restaurant out of the same building that Denti constructed on the Property," so Chilli "likely did not have to incur much costs or take much time to prepare the building for its new tenant because the building was already designed to function as a restaurant." He averred that he had "experience in leases in the restaurant industry," that he was "familiar

with the differences between a lease solely for a vacant lot and a lease of a building," and that "[t]he lease of a building is generally more expensive than the lease of a vacant lot." He averred: "Given my experience in the restaurant industry, I believe that Plaintiff is charging its new tenant more in rent than it did Denti because the new tenant is renting a building and land, rather than just vacant land like Denti did under the ground lease."

D. Summary Judgment Entry

**{¶14}** On February 23, 2021, the trial court issued an entry granting Chilli summary judgment on "all counts in its complaint." With respect to Count I, the court granted Chilli judgment against Denti for $144,299.48, i.e., the amount Chilli had alleged was owed for unpaid rent, real estate taxes, interest, and administrative fees. With respect to Count II, the court declared, among other things, that the ground lease "is terminated as a matter of law" and that Chilli holds title to the property "in fee, free and clear of all adverse claims or interests by the Defendants." With respect to Count III, the court granted Chilli judgment against Denti and awarded Chilli its "costs, expenses, and attorney's fees incurred mitigating its losses and enforcing its rights under the Ground Lease, in an amount to be established at a damages hearing which will be set by further order of this Court."

**{¶15}** Denti filed an appeal from this entry which we dismissed for lack of jurisdiction. *Chilli Assocs. Ltd. Partnership v. Denti Restaurants, Inc.*, 4th Dist. Ross No. 21CA3743, 2022-Ohio-848, ¶ 1. We explained that Denti challenged the portions of the entry regarding Counts I and III of the complaint. *Id.* However, the entry was not a final appealable order as to those counts because "[t]hey set forth a single claim breach for contract" which the trial court had "not fully resolved because it deferred for later adjudication the amount of Chilli's damages for costs, expenses, and attorney fees." *Id.*

**{¶16}** Subsequently, the trial court issued an agreed judgment entry on costs, expenses, and attorney fees. The entry states that "in an effort to promote judicial economy and avoid additional expense to the litigants that would result from an evidentiary hearing to determine a certain amount of [Chilli's] award of costs, expenses, and attorney fees," the parties agreed the trial court should award no costs, expenses, or attorney fees. Thus, the court reaffirmed its prior grant of summary judgment and awarded Chilli no costs, expenses, and attorney fees. This appeal followed.

## II. ASSIGNMENT OF ERROR

**{¶17}** Denti presents one assignment of error:

> The Trial Court erred in entering the *Decision, Order, and Entry*: *(1) Granting in Full Plaintiff's Motion for Summary Judgment on All Counts; (2) Issuing Declaratory Relief in Favor of Plaintiff and Against All Defendants* on February 23, 2021, as part of the *Agreed Judgment Entry on Costs, Expenses and Attorney's Fee* entered by the Trial Court on July 27, 2022.[1]

## III. STANDARD OF REVIEW

**{¶18}** Although the assignment of error is broadly worded, Denti's argument challenges only the portion of the February 23, 2021 entry which effectively granted partial summary judgment to Chilli on its breach of contract claim. We review a trial court's decision on a motion for summary judgment de novo. *Harter v. Chillicothe Long-Term Care, Inc.,* 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12. We afford no deference to the trial court's decision but rather conduct an independent review to determine whether summary judgment is appropriate. *Id.* "A summary judgment is appropriate only when: (1) there is no genuine issue of material fact; (2) reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that

[1] The assignment of error is taken from page 8 of the appellant's brief and is worded slightly differently on page 1 of the brief.

conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law." *Hawk v. Menasha Packaging*, 4th Dist. Ross No. 07CA2966, 2008-Ohio-483, ¶ 6.

**{¶19}** "The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law." *DeepRock Disposal Solutions, LLC v. Forté Prods., LLC*, 4th Dist. Washington No. 20CA15, 2021-Ohio-1436, ¶ 68. However, "[a] plaintiff * * * moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses." *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, syllabus. " '[I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' " *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

**{¶20}** In addition, " 'leases are contracts and are subject to the traditional rules of contract interpretation.' " *Lang v. Piersol Outdoor Advertising Co.*, 2018-Ohio-2156, 116 N.E.3d 667, ¶ 16 (4th Dist.), quoting *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, ¶ 29 (4th Dist.). "Appellate courts apply a de novo standard of review to an appeal from a summary judgment based on the interpretation of a contract." *Id*. " 'In construing a written instrument, the primary and paramount objective is to ascertain the intent of the parties so as to give effect to that intent.' " *Id.* at ¶ 17, quoting *Shafer v. Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013-Ohio-885, ¶ 10. " 'When the terms of a contract are

unambiguous, courts will not, in effect, create a new contract by finding an intent not expressed in the clear language employed by the parties.' " *Id.*, quoting *Waina v. Abdallah*, 8th Dist. Cuyahoga No. 86629, 2006-Ohio-2090, ¶ 31. " ' "If a contract is clear and unambiguous, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead, the court must give effect to the agreement's express terms." ' " *Id.* at ¶ 18, quoting *Shafer* at ¶ 10, quoting *Uebelacker v. Cincom Sys., Inc.*, 48 Ohio App.3d 268, 271, 549 N.E.2d 1210 (1st Dist.1988). "Courts may not rewrite clear and unambiguous contract provisions to achieve a more equitable result." *Central Allied Ents., Inc. v. Adjutant Gen.'s Dept.*, 10th Dist. Franklin No. 10AP-701, 2011-Ohio-4920, ¶ 19, citing *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶ 39.

## IV. RECOVERY OF DAMAGES

**{¶21}** Denti contends that the trial court erred in granting Chilli partial summary judgment on the breach of contract claim because Chilli fully recovered its damages. Denti maintains that the trial court should have offset the damages Chilli claimed with the value of the restaurant and any rent Chilli has received and will receive from the new tenant which is in excess of that due under the ground lease. Denti divides its argument on this topic into two subsections.

**{¶22}** The first subsection is titled: "Chilli cannot recover more than its expectation damages for its claims—any additional recovery beyond that is an impermissible windfall." Denti asserts that "[a]llowing the injured party in a breach of contract action to receive more than it is entitled to under a contract is contrary to well-established Ohio law" and that the injured party's recovery must be offset by any benefit that party received. Denti maintains that if the trial court's decision stands, "Chilli will be in a better position than if

Denti never breached." Denti asserts that if it had not breached, Chilli would have gotten (1) a depreciated restaurant in 2023 at the end of the initial lease term or a further depreciated restaurant in 2045 if Denti exercised its renewal options, and (2) rent due under the lease. Denti claims Chilli got a windfall because the damages award does not account for the fact that Denti had no duty to build the restaurant, and "thanks to Denti's efforts in building the Restaurant, Chilli is receiving greater rent from the Property's current tenant than Denti." Denti asserts that its requested damages calculation is "consistent with the law of Ohio and other jurisdictions," directing our attention to *O'Brien v. Illinois Sur. Co.*, 203 F. 436 (6th Cir.1913); *Sanders Constr. Co. v. San Joaquin First Fed. S. & L. Assn.*, 136 Cal. App.3d 387 (1982); and *Anna Holdings, LLC v. McClanahan*, 2019-Ohio-4697, 148 N.E.3d 1255 (2d Dist.).

**{¶23}** The second subsection is titled: "Denti is entitled to an equitable offset for the value of the Restaurant against Chilli's claimed damages." Denti asserts that "[e]quitable principles" permit a court "to grant equitable relief where a contract is silent." Denti maintains that the lease "is silent regarding whether Denti is entitled to offset the Restaurant's value against Chilli's damages" and that "equity affords Denti that relief." Denti asserts that its requested offset is "supported by the general law of restitution, which dictates that '[a] person who improves the real * * * property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment.' Restatement (Third) of Restitution and Unjust Enrichment § 10 (2001)." Denti claims Ohio and "many other courts" recognize "this principle of equitable offset," directing our attention to *Dakin v. Lecklider*, 10 Ohio C.D. 308, 19 Ohio C.C. 254 (1899); *Nilsen v. Bonugli*, 220 S.W.2d 178 (Tex.Civ.App. 1949); *Miceli v. Riley*, 79 A.D.2d 165, 436 N.Y.S.2d 72 (1981); and *Cano*

*v. Lovato*, 105 N.M. 522, 734 P.2d. 762 (1986); and *Manning v. Wingo*, 577 So.2d 865 (Ala.1991).

**{¶24}** Denti also asserts that "[e]quitable principles governing forfeiture support an equitable offset for Denti against Chilli's damages." Quoting *Wagner v. Flo-lizer, Inc.*, 4th Dist. Pike No. 407, 1988 WL 38848, * 7 (Apr. 21, 1988), Denti asserts that " '[e]quity abhors a forfeiture and a forfeiture will not be declared where the equities of the parties can be adjusted.' " Denti claims the trial court "should have exercised its equitable power to relieve Denti from the harsh consequence sought by Chilli through the forfeiture of Denti's leasehold interest—recovering rent and other expenses under the Ground Lease while receiving, for free, a fully functioning restaurant that it has already leased out to another tenant." Denti maintains that Article 8.3 is a forfeiture provision, that it is silent about whether the value of improvements should be offset against amounts owed under the lease, and that it should be strictly construed to not preclude an equitable offset. Denti asserts that "[i]n both commercial and residential settings, courts have consistently found that it is inequitable to order a forfeiture when a tenant has invested significant sums into real property," citing *Whitmore v. Meenach*, 33 Ohio Law Abs. 95, 33 N.E.2d 408 (2d Dist.1940); *Southern Hotel Co. v. Miscott, Inc.*, 44 Ohio App.2d 217, 337 N.E.2d 660 (10th Dist.1975); *Takis, L.L.C. v. C.D. Morelock Properties, Inc.*, 180 Ohio App.3d 243, 2008-Ohio-6676, 905 N.E.2d 204 (10th Dist.); and *Franklin Steel Co. v. 350 S. High Ltd.*, 10th Dist. Franklin Nos. 87AP-391, 87AP-392, 1988 WL 37061 (Mar. 29, 1998). Denti claims that *Executive Business Centres, Inc. v. TransPacific Mfg., Ltd.*, 6th Dist. Lucas No. L-08-1060, 2009-Ohio-516 ("*TransPacific*"), and *Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020 (Colo.App. 2005), support the offset it seeks.

A. Legal Principles

**{¶25}** " ' "In order to succeed on a breach of contract claim, a party must prove the existence of a contract, the party's performance under the contract, the opposing party's breach, and resulting damage." ' " *Zimmerview Dairy Farms, LLC v. Protégé Energy III LLC*, 4th Dist. Washington No. 21CA1, 2022-Ohio-1282, ¶ 55, quoting *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 36 (4th Dist.), quoting *DePompei v. Santabarbara*, 8th Dist. Cuyahoga No. 101163, 2015-Ohio-18, ¶ 20. " 'Generally, a party injured by a breach of contract is entitled to [the party's] expectation interest or "[the party's] interest in having the benefit of [the party's] bargain by being put in as good a position as [the party] would have been in had the contract been performed." ' " *Clifton v. Johnson*, 4th Dist. Pickaway No. 18CA13, 2019-Ohio-2702, ¶ 18, quoting *Rasnick v. Tubbs*, 126 Ohio App.3d 431, 437, 710 N.E.2d 750 (3d Dist. 1998), quoting Restatement of the Law 2d, Contracts, Section 344, at 102-103 (1981). " '[T]he general measure of damages in a contract action is the amount necessary to place the nonbreaching party in the position [that party] would have been in had the breaching party fully performed under the contract.' " *Washington Cty. Dept. of Job & Family Servs. v. Binegar*, 4th Dist. Washington No. 02CA42, 2003-Ohio-2855, ¶ 17, quoting *Allied Erecting & Dismantling Co. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 62. " ' "Although a party damaged by the acts of another is entitled to be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred." ' " *Sutherland v. Gaylor*, 10th Dist. Franklin No. 20AP-257, 2021-Ohio-1941, ¶ 32, quoting *Briggs v. GLA Water Mgt.*, 6th Dist. Wood Nos. WD-12-062,

WD-12-063, 2014-Ohio-1551, ¶ 28, quoting *Triangle Properties, Inc. v. Homewood Corp.*, 2013-Ohio-3926, 3 N.E.3d 241, ¶ 52 (10th Dist.).

B. Analysis

**{¶26}** Chilli met its initial summary judgment burden with respect to its breach of contract claim. Through the affidavit of Miller, Chilli presented summary judgment evidence that the parties had a contract, that Chilli performed under the contract, that Denti breached the contract, and that Chilli suffered damages as a result of the breach. Therefore, the burden shifted to Denti to set forth specific facts showing that there was a genuine issue for trial. Denti failed to do so.

**{¶27}** Under the ground lease, Denti had a duty to pay Base Rent, property taxes, and interest and administrative fees in connection with late payments. The ground lease did not obligate Denti to build a restaurant; Denti could have left the property empty and unused without violating Article 7.1's use provision. However, the lease contemplated that Denti would build a restaurant, and the parties agreed under Article 8.3 that if Denti made improvements, title to them "shall belong to and become the property of" Chilli "[u]pon the expiration or sooner termination of" the lease. Therefore, to make Chilli whole following Denti's breach and termination of the lease, the trial court had to award Chilli damages for unpaid Base Rent, property taxes, interest, and administrative fees, and title to improvements Denti made to the property. This is precisely what the trial court did.

**{¶28}** The contention that the trial court should have offset the unpaid Base Rent, property taxes, interest, and administrative fees with the value of the restaurant is not well-taken. The ground lease is not silent or ambiguous about what happens to the value of the restaurant upon termination of the lease. Under Article 8.3, the parties agreed that Chilli would get title to all improvements upon termination of the lease. Article 8.3 does

not require Chilli to compensate or reimburse Denti for the improvements, even if the lease terminates before the end of its term, which the parties explicitly contemplated might occur. Thus, under Article 8.3, Chilli unconditionally gets title to, and thus the value of, all improvements upon termination of the lease. If the trial court had reduced Chilli's damages by the value of the restaurant, the court would have in effect been rewriting the lease to require Chilli to compensate Denti for improvements.

**{¶29}** The contention that the trial court should have offset Chilli's damages with excess rent Chilli has or will receive from its new tenant is also not well-taken. As Chilli points out, there is no evidence that the new tenant agreed to pay higher rent than Denti did under the ground lease. The only summary judgment evidence Denti submitted was Mr. Denti's affidavit. Mr. Denti averred that based on his experience with leases in the restaurant industry, he *believed* Chilli was charging its new tenant more rent than Denti because the new tenant was renting a building and land, Denti was only renting vacant land, and leasing a building is *generally* more expensive than leasing a vacant lot. Affidavits opposing summary judgment must be "made on personal knowledge." Civ.R. 56(E). Mr. Denti's averments indicate that he had no personal knowledge of the terms of Chilli's agreement with its new tenant and was merely speculating that the new tenant agreed to pay more than Denti had.

C. Inapposite Cases

1. *O'Brien v. Illinois Surety Co.*

**{¶30}** In *O'Brien*, the lessor leased a vacant lot to the lessee for 97 years beginning in January 1907. *O'Brien*, 203 F. at 437. The lessee agreed to pay rent and taxes, erect a building on the lot within the first year, and give a bond to secure the erection of the building. *Id.* The lessee gave the bond but did not pay rent or taxes or

erect the building. *Id.* at 437-438. In January 1909, the lessor sued the surety company, and in March 1909, the lessor gave the lessee notice to cancel and forfeit the lease and reentered the property. *Id.* at 438. The surety company argued that the sole measure of damages for nonerection of the building "was the lessened value of the reversion falling in at the end of the stated term, which expectant diminution must be reduced to terms of present worth" and that that amount was too speculative to compute. *Id.* at 438-439. The trial court dismissed the complaint. *Id.* at 438.

**{¶31}** The Sixth Circuit Court of Appeals concluded damages were recoverable and reversed. *Id.* at 440-441. The court did "not doubt that a building so promised constitutes, in effect, additional rent, payable at the end of the term, and that the present worth of such future subtraction from reversion value is the primary and ordinary measure of damages." *Id.* at 439. However, the court further explained that (1) "it was necessarily within the contemplation of the parties that a reversion might occur" before the end of the lease term; and (2) "[w]henever a building, to be erected by a lessee, will materially increase the rental value of the premises, and the lease reserves to the lessor such a periodical rent that his stipulated right of re-entry into the vacant premises may not be, of itself, ample indemnity for any default, it is clear that the building is intended to constitute, not only an additional rental payable at the end of the term, but also an additional security for the rent currently accruing." *Id.* at 439. Thus, the building had a "double character." *Id.* at 439. It was "a contingent, future, bonus rent, to fall in at the end of the maximum period, or at some uncertain earlier period, and, as such, it [was] more or less speculative," and it was "a continuing, actual, and valuable security for each installment of rent as the same accrues, and in that capacity, and to that extent, [was] not, in the least, speculative." *Id.* at 439. Therefore, the lessor "was entitled to have this building in

existence to serve as security for whatever payments of rent and taxes might be in default whenever the lease terminated, and to the extent that these were in default, in March, 1909, and to the extent that the building, if erected and reverting, would have made him good therefor," the lessor was "entitled to damages" and the surety company was liable for such damages "up to the penalty of the bond." *Id.*

**{¶32}** Denti cites *O'Brien* for the proposition that "[u]nder Ohio law, the Restaurant serves as security against the future nonpayment of rents under the Ground Lease, and therefore its value must be subtracted from Chilli's damages under that lease." *O'Brien* is inapposite. It considered the measure of damages for a breach of a promise to construct a building on leased property. Denti did not breach a promise to construct a building on Chilli's property. Denti exercised its right to construct a building on Chilli's property and then breached the ground lease by failing to pay money due under it, and the trial court declared that the lease is terminated. The parties agreed that whenever the lease terminated, Chilli would get title to, and thus the value of, the improvements Denti made. Nothing in *O'Brien* supports the proposition that under these circumstances, the value of the improvements must be offset against Chilli's damages because the building serves as security for unpaid rent.

2. *Sanders Constr. Co. v. San Joaquin First Fed. S. &. L. Assn.*

**{¶33}** In *Sanders*, a construction company agreed to construct a building on an unimproved lot it owned and lease "a major portion" of the building to a savings and loan association for 25 years. *Sanders*, 136 Cal. App.3d at 391, 397. Subsequently, the parties modified their agreement such that the association would construct the building instead. *Id.* at 396. The association failed to do so, and the trial court awarded the construction company damages for rent liability and the failure to construct the

improvements, which the court calculated by taking an estimate for the construction costs and deducting the amount the construction company was required to contribute toward them. *Id.* at 397.

**{¶34}** The appellate court held the measure of damages "was erroneous," *id.* at 398, and "remanded for recomputation of damages," *id.* at 402. The appellate court explained that the trial court awarded the construction company "the present cost of the improvements even though it could not enjoy them until 25 years later at the end of the lease term," when the building "would have depreciated in real value." *Id.* at 398. The appellate court agreed with the association "that the building should be valued at the end of the lease (25 years after commencement) and that that value should be discounted to present value." *Id.* at 401. But citing *O'Brien*, the appellate court noted that an award of just this value "neglects to account for the benefit of having a substantial building on the premises during the lease term as security for payment of rent. The fact that the tenant paid more than $160,000 for constructing the building would be substantial inducement to maintain possession and pay rent." (Footnote omitted.) *Id.* at 399-400, fn. 4.

**{¶35}** The appellate court also found the trial court disregarded a remedy in the California Civil Code—"the difference between the rental loss for the balance of the term under the lease and the amount of rent which [the construction company] could reasonably secure for the same period." *Id.* at 400. The appellate court stated that in determining this amount, the trial court should try to "ascertain the amount of yearly rent allocable to the bare land as negotiated by the parties herein * * * as against the rent for the land for any new lease on the premises." *Id.* at 401. If a new lease was "on more favorable terms," the association was "entitled to a credit." *Id.* In addition, the appellate court found that because the matter had to "be remanded for further evidence on

damages," pursuant to the California Civil Code, "lost rent between the last trial and the new hearing should be awarded to the extent that [the association] cannot prove that the loss could have been reasonably avoided." *Id.* at 400. The appellate court explained the rent "should be reduced by the amount of interest" the construction company would have had to pay on a loan for its share of the construction costs because this expense "would have reduced the real income from rent." *Id.* at 400, fn. 5.

**{¶36}** Denti claims *Sanders* "reversed the trial court's damages award of rent liability and failure to construct improvements under principles that apply to this case." Denti asserts *Sanders* "cited *O'Brien* for the premise that a damages award under a ground lease should 'account for the benefit of having a substantial building on the premises during the lease term as security for payment of rent.' " Denti suggests its request for an offset for the restaurant's value is analogous to the rent credit *Sanders* held that the association was entitled to for the interest expense the construction company saved. Denti asserts that "through the default of the mortgagees, Chilli has no exposure under their mortgages (while Denti remains liable on the mortgage notes), a benefit that the Trial Court failed to incorporate into the damages award." Denti also asserts that "as requested here," *Sanders* held that a lessee was "entitled to a credit for the difference between the ground lease's rent, i.e., rent on bare land, and higher rent charged under a subsequent lease." Denti maintains that the trial court "failed to account for this excess rent Chilli has been receiving."

**{¶37}** Like *O'Brien*, *Sanders* considered the measure of damages for a breach of a promise to construct a building on leased property, and nothing in *Sanders* supports the proposition that under the circumstances presented in this case, the value of the improvements Denti made must be offset against Chilli's damages. Denti's request for

an offset for the restaurant's value is not analogous to the rent credit in *Sanders* for interest the construction company would have paid on a loan for its share of the construction costs if the association had not breached the contract. This interest was an expense which would have reduced the company's real income from rent. The value of the restaurant is not an expense Chilli would have incurred if Denti had not breached the ground lease which would have reduced Chilli's real income from rent. *Sanders* also does not support Denti's request for an offset for excess rent. As previously explained, Denti submitted no summary judgment evidence that Chilli's new tenant agreed to pay more rent than Denti did under the ground lease.

3. *Anna Holdings, LLC v. McClanahan*

**{¶38}** In *Anna Holdings*, the seller under a land installment contract filed a complaint seeking restitution of the property, forfeiture of the contract, and damages. *Anna Holdings*, 2019-Ohio-4697, 148 N.E.3d 1255, at ¶ 2, 5. The trial court granted restitution of the property and cancelled the contract, *id.* at ¶ 7, but the court offset the seller's damages "by the amount of the buyers' down payment and awarded no damages," *id.* at ¶ 1. In affirming, the appellate court explained that "R.C. Chapter 5313 governs land installment contracts for residential dwellings." *Id.* at ¶ 11. R.C. 5313.08 authorizes an action for forfeiture of rights in a land installment contract and restitution of the property. *Id.* at ¶ 13. But if the seller pursues an action under R.C. 5313.08, their "remedy is limited by R.C. 5313.10." *Id.* The appellate court explained that "R.C. 5313.10 allowed [the seller] to seek forfeiture of the buyers' rights in the land installment contract and to obtain restitution and, if the amount paid by the buyers was less than the fair rental value of the property, to recover the difference between the amount paid and the fair rental value." *Id.* at ¶ 18. Because the buyers' down payment exceeded the unpaid

balance of the fair rental value of the property, R.C. 5313.10 did not permit the seller "to recover anything more than it already retained." *Id.* at ¶ 18-19.

**{¶39}** Denti asserts "[t]he value of the Restaurant as security is * * * analogous to the value of a land contract purchaser's down payment in *Anna Holdings*, which the Second District offset against the vendor's damages and awarded no damages." However, *Anna Holdings* was premised on a statutory provision applicable to land installment contracts which limited the seller's remedy in that case. This case involves a ground lease, not a land installment contract.

4. Other Expectation Damages Authorities

**{¶40}** We observe that under the expectation damages subsection of its appellate brief, Denti cited three additional cases for which it provided some factual details. Denti cited *PAG Holdings v. Love*, 2d Dist. Greene No. 12CA0012, 2012-Ohio-3388, and *Hines v. Somerville*, 8th Dist. Cuyahoga No. 68040, 1995 WL 614502 (Oct. 19, 1995), to support the position that "[c]ourts must accurately award damages in landlord-tenant actions to avoid windfalls." In a parenthetical Denti explained that *PAG Holdings* held that a landlord could not recover the cost to replace kitchen cabinets and flooring from a tenant because the landlord could not prove their condition at the start of the lease, so an award of their replacement cost would constitute a windfall. In another parenthetical, Denti explained that *Hines* awarded a landlord a portion of its lowest estimate to replace damaged carpeting because making the tenant pay the entire cost would constitute a windfall. No similarity between *PAG Holdings* or *Hines* and the present case is apparent from these descriptions.

**{¶41}** Denti also cited *Yurchak v. Jack Boiman Constr. Co.*, 3 Ohio App.3d 15, 443 N.E.2d 526 (1st Dist.1981), for the proposition that "in a breach of contract action,

the plaintiff's recovery must be offset by any benefit received by the plaintiff." In a parenthetical, Denti quoted the following language in *Yurchak*: "The restitution sought by plaintiff in this case was the payment he made on the contract ($2,400). However if defendants' services resulted in any benefit to the plaintiff, the plaintiff's restitution must be offset by the value of that benefit. * * * The jury apparently gave credit to testimony that defendants' work had stopped some of the mud that had previously oozed into plaintiff's basement and offset plaintiff's award by $400." *Yurchak* at 17, fn. 3. After the parenthetical, Denti stated that "Chilli was not entitled to Denti constructing a Restaurant under the Ground Lease—that is why, under the Trial Court's decision, the value of the Restaurant affords Chilli a windfall." No similarity between *Yurchak* and the present case is apparent from the excerpt Denti quoted. The value of the restaurant is not a benefit Chilli received which must be offset against its damages. As we previously explained, the parties agreed that whenever the lease terminated, Chilli would get title to, and thus the value of, the building.

5. *Executive Business Centres, Inc. v. TransPacific Mfg., Ltd.*

**{¶42}** In *TransPacific*, the trial court found that one of the defendants breached the terms of a lease agreement by not making all payments due for services and space provided by the plaintiff and awarded the plaintiff damages. *TransPacific*, 6th Dist. Lucas No. L-08-1060, 2009-Ohio-516, at ¶ 11. On appeal, that defendant and its owner asserted that the trial court erred by failing to credit them with a deposit given to the plaintiff. *Id.* at ¶ 2, 33. The deposit was made as a partial payment on a retainer due under an agreement which stated that if that defendant "ceases using contract services before the expiration of its contract or * * * commits an event of default," the plaintiff "may retain the Retainer in partial satisfaction of its damages." *Id.* at ¶ 33, 35. The appellate court found

this provision was ambiguous, that it had to be construed against the plaintiff as the drafting party, "that the retainer should not be construed as a separate component of damages," and that the retainer payment "should be credited as offsetting any damages that were suffered by" the plaintiff. *Id.* at ¶ 38.

**{¶43}** Denti asserts that "because this Ground Lease does not say how the value of the Restaurant should be applied to unpaid amounts, the Trial Court should be instructed to view the Restaurant as collateral that should be credited against Denti's liability, just like the *TransPacific* tenant's retainer." However, as previously explained, the ground lease in this case is not silent or ambiguous about what happens to the value of the restaurant upon termination of the lease. Under Article 8.3, Chilli gets title to, and thus the value of, the restaurant.

6. *Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*

**{¶44}** In *Highlands Ranch*, the landlord and tenant entered a ground lease under which the tenant "was to construct a 5300-square foot building on the lease site and lease the premises for twenty years with options for renewal." *Highlands Ranch*, 129 P.3d at 1022. The tenant did not construct the building, so the landlord "gave notice of termination of the lease, caused construction of a somewhat larger building on the premises, and entered into build-to-suit leases with two new tenants." *Id.* at 1023. The combined rent from the new leases exceeded the rent under the original lease. *Id.* The landlord sued the original tenant and its guarantor, and the trial court ruled in favor of the landlord. *Id.* at 1022-1023.

**{¶45}** The appellate court held that the trial court erred in calculating damages. *Id.* at 1026. The appellate court explained that if the tenant had performed, "it would have constructed a building at no cost to landlord." *Id.* at 1027. Instead, the landlord

"constructed a larger building at its own expense," and "the trial court awarded landlord all its construction expenses as damages * * * even though landlord constructed a larger building." *Id.* Thus, the "landlord has obtained a windfall because the trial court did not offset landlord's damages for construction expenses * * * by the difference in terminal value between the building that tenant was to have constructed and the building that landlord in fact constructed." *Id.* The trial court also "limited its mitigation and damages analysis to the first two years of the lease." *Id.* at 1026. However, a lease provision "contemplated that tenant's liability for rental to be paid during the entire lease term would be 'reduced by any net sums thereafter received by [l]andlord.' " *Id.* at 1026. Therefore, the trial court had to determine "the amount of excess rental" and "offset that amount as a credit against lost rental under the lease." *Id.*

**{¶46}** Denti asserts that *Highland Ranch* "bears extremely similar facts to this" case, though unlike the tenant in *Highlands Ranch*, "Denti was not even obligated to build the Restaurant." Denti asserts that "like the *Highlands Ranch* tenant, Denti should receive an offset for the value of the building that exists—as compared with the bigger building in *Highland Ranch*—versus what the Ground Lease actually required from Denti: rent and other expenses—as compared with the smaller building required in *Highlands Ranch*." Denti also asserts that as in *Highland Ranch*, the property in this case has been leased to a new tenant. Denti claims that "[i]t stands to reason that Chilli would be making more rent money from a leased building than a vacant lot, which is what Denti rented," and that "like *Highlands Ranch*, the language of the Ground Lease supports a reduction of Denti's damages by the net sums paid by a subsequent tenant." Denti asserts that Article 15.1(C) "only provides that Denti remains liable for rent as it became due upon 're-entry by the Landlord,' i.e., eviction, rather than reletting, and [Article] 15.1(D) of the Ground Lease

provides that monies received from a new tenant will be applied to Chilli's damages upon reclaiming the Property." And Denti asserts that "[b]ecause the Ground Lease does not keep Denti liable once the Property is re-let, the Trial Court erred in failing to offset excess rent received from a new tenant against Chilli's claimed damages."

**{¶47}** This case is distinguishable from *Highlands Ranch.* In addressing the issue of construction costs, *Highlands Ranch* was considering the measure of damages for a breach of a promise to construct a building on leased property, which is not what occurred in this case. Denti exercised its right to construct a building on Chilli's property, and the parties agreed that whenever the lease terminated, Chilli would get title to, and thus the value of, that building. And unlike in *Highlands Ranch*, there is no evidence in this case that Chilli's new tenant agreed to pay more rent than Denti did under the ground lease.

7. Other Equitable Offset Authorities

**{¶48}** Denti's reliance on *Whitmore*, *Southern Hotel*, *Takis*, and *Franklin Steel* is misplaced. In *Whitmore*, *Southern Hotel*, and *Franklin Steel*, the courts considered whether a lessee's failure to pay money due under a lease should result in a forfeiture of a lease where the tenant or tenant's creditor had paid or was prepared to pay the arrearage. *Whitmore*, 33 Ohio Law Abs. 95, 33 N.E.2d 408 (lessor did not sustain right to forfeiture and cancellation of 99-year lease where lessees averred that they made $20,000 in improvements which would be "a complete loss" if lessor could evict them, only breach "had to do with the obligation of money payment," when case was presented to appellate court all payments due had been made, and there was "assurance that there will be no further breach"); *Southern Hotel*, 44 Ohio App.2d 217, 337 N.E.2d 660 (affirming denial of landlord's request for forfeiture of lease for nonpayment of rent where tenant tendered delinquent rent and "a substantial portion" of tenant's over $60,000 investment

in equipment and leasehold improvements could not be recovered if it had to vacate the premises); *Franklin Steel*, 10th Dist. Franklin Nos. 87AP-391, 87AP-392, 1988 WL 37061 (affirming denial of claim that lease be forfeited where creditor of leasehold assignee was "ready, willing and able to pay the past rent due" and "cure the arrearage, thereby protecting its collateral consisting of approximately $900,000 worth of renovations and improvements"). *Takis* held that a trial court erred in failing to consider the equities of a forfeiture before ordering termination of a lease, noting the breaches appeared to be "relatively insignificant" and the breaching parties had "invested significant amounts of money in preparing the premises for their restaurant, all of which would be forfeited under the trial court's strict application of the lease language." *Takis*, 180 Ohio App.3d 243, 2008-Ohio-6676, 905 N.E.2d 204, ¶ 19 (10th Dist.).

**{¶49}** Denti does not seek to avoid forfeiture of the lease. Denti did not oppose Chilli's request for a declaratory judgment that the ground lease is terminated or appeal the trial court's decision granting that request. Instead, Denti asked the trial court and now this court to rewrite the ground lease, under the guise of equity, to make Chilli compensate Denti for the value of the restaurant via an offset of the restaurant's value against money Denti owes under the ground lease.

**{¶50}** Denti's reliance on *Dakin*, *Nilsen*, *Miceli*, *Cano*, and *Manning* is also misplaced. These cases involved individuals or entities who made improvements to property under a mistaken belief that they owned or were going to own the property. *Dakin*, 10 Ohio C.D. 308, 19 Ohio C.C. 254 (buyer entered contract to purchase real property from seller who did not have title, buyer took possession and constructed cottages, and court held proceeds from property sale would be applied to satisfy mechanic's liens of individuals who furnished material and labor for the construction "in

so far as" the proceeds "are the avails of the value of the improvements"); *Nilsen*, 220 S.W.2d 178 (defendants who took possession of property "under the belief that they were acquiring the same as their own, but under a contract which was legally unenforcible" had to pay owner reasonable rent but got a credit for improvements made with owner's knowledge and consent); *Miceli*, 79 A.D.2d 165, 436 N.Y.S.2d 72 (grantors deeded unimproved land to plaintiff, grantors then deeded land to a corporation, corporation built houses which were sold to the defendants, and while plaintiff had right to possession, plaintiff got no damages for wrongful withholding of property because defendants "acted wholly in good faith under color of title and in ignorance of the plaintiff's rights" and thus got offset for value of improvements); *Cano*, 105 N.M. 522, 734 P.2d. 762 (defendant who executed contract to buy real property from an estate the same day it was sold to plaintiffs at a tax sale entitled to equitable lien for cost of improvements made before receiving notice of plaintiffs' claim to property, if plaintiffs had superior title); *Manning*, 577 So.2d 865 (individual purported to convey property he did not own to defendants, defendants were not bona fide purchasers for value because they had constructive notice of that fact, but there was evidence defendants made some improvements before getting actual notice of plaintiff's interest, and under the circumstances and balancing the equities, defendants were entitled to value of improvements).

**{¶51}** Denti did not build the restaurant under the mistaken belief that it owned or was going to own the land on which it sits. Denti entered a contract to lease land from Chilli. The parties agreed that if Denti made improvements to Chilli's property, upon termination of the lease, Chilli would get title to, and thus the value of, those improvements.

**{¶52}** In its reply brief, Denti also supplies some factual details about another case, *Franklin Fin. Co. v. Bowden*, 36 Ohio App. 19, 172 N.E. 698 (5th Dist.1930). [Reply Br. 9] In *Bowden*, a finance company sued on "a note and mortgage dated September 14, 1927, from Edgar P. Bowden and wife." *Id.* at 20. One defendant, Clark Charles, claimed a vendee's lien on a lot subject to the mortgage; he had a land contract with the Bowdens dated November 14, 1926, and claimed to have made payments on it. *Id.* The finance company's foreclosure action was consolidated with a case Mr. Bowden filed against Charles. *Id.* The "principal question" was whether Mr. Bowden "made a case justifying a forfeiture of this land contract." *Id.* at 20-21. The appellate court found Charles "made compliance with the terms of his contract up to the time of the filing of Bowden's action in this court. He surely would not be compelled to pay in more money when the vendor was claiming a breach of contract and seeking to obtain a forefeiture of the payments made." *Id.* at 23. The appellate court granted the finance company's prayer for foreclosure but held that Charles had a vendee's lien which was entitled to priority over the plaintiff's mortgage to the extent of the payments made before he had actual notice of the mortgage and that payments he made to the finance company and for taxes should be returned. *Id.*

**{¶53}** Denti suggests *Bowden* supports its request for an equitable offset because *Bowden* is an example of a case in which a court adjusted equities to prevent a forfeiture even though a tenant failed to cure a default and the leasehold interest terminated. However, *Bowden* involved a land contract, not a lease. And the facts in *Bowden* are in no way like the facts of this case.

D. Summary

**{¶54}** For the foregoing reasons, we overrule the sole assignment of error to the extent that Denti contends that the trial court erred in granting Chilli partial summary judgment on the breach of contract claim because Chilli fully recovered its damages.

V. MITIGATION OF DAMAGES

**{¶55}** Denti contends that the trial court erred in granting partial summary judgment to Chilli on the breach of contract claim because there is a genuine issue of material fact regarding whether Chilli failed to mitigate its damages. Denti asserts that Chilli "unreasonably refused to re-let the Property to Nourse Chillicothe Automall through a new ground lease and unreasonably refused to allow Denti to sell the Restaurant to Nourse Chillicothe Automall—a sale that would have undoubtedly mitigated all of Chilli's damages." Denti asserts that Chilli "also refused to re-let the Property's ***unused*** portion of its parking lot through a sublease to Nourse Chillicothe Automall, a sublease that would have allowed Denti to pay its rent under the Ground Lease." (Emphasis sic.) Instead, Chilli "evicted Denti and let the Property remain unused for almost a year without reletting it" even though "[a]t least for part of that time Denti could have continued to operate the Max & Erma's and made some money to pay Chilli's rent." Denti asserts that Chilli evicted it "without a replacement tenant" and that the eviction "prevented Denti from selling the building." Denti also asserts that "[i]t is unlikely that the Property had to remain unused for almost a year for Chilli to renovate and prepare the building for its new tenant, a Mexican restaurant, because the building Denti constructed was already designed to be used as a restaurant." Denti asserts Chilli "only submitted a couple of conclusory statements regarding mitigation" in its summary judgment motion and that "merely

advertising the Property, like Chilli claims it did in its motion, does not, by itself, show that the landlord reasonably mitigated its damages."

**{¶56}** "[L]andlords owe a duty to mitigate their damages caused by a breaching tenant." *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, ¶ 20. " 'Landlords mitigate by attempting to rerent the property.' " *Id.* at ¶ 15, quoting *Dennis v. Morgan*, 89 Ohio St.3d 417, 419, 732 N.E.2d 391 (2000). "The lessor's efforts to mitigate must be reasonable, and the reasonableness should be determined by the trial court." *Id.* at paragraph two of the syllabus.

**{¶57}** "Failure to mitigate damages caused by a breach of a commercial lease is an affirmative defense." *Id.* at ¶ 21. As previously stated, "[a] plaintiff * * * moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses." *Todd Dev. Co.*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, at syllabus. The Supreme Court of Ohio has explained that

> there is no requirement in the Civil Rules that a moving party must negate the nonmoving party's every possible defense to its motion for summary judgment. To the contrary, Civ.R. 56(E) states that a party opposing summary judgment may not rest upon its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. If a moving party meets the standard for summary judgment required by Civ.R. 56, and a nonmoving party fails to respond with evidence of a genuine issue of material fact, a court does not err in granting summary judgment in favor of the moving party.

*Id.* at ¶ 14.

**{¶58}** Chilli met its initial summary judgment burden, and Denti failed to respond with evidence of a genuine issue of material fact regarding its affirmative defense that Chilli failed to mitigate damages. Chilli did not fail to mitigate its damages by refusing to relet the property to and allow Denti to sell the restaurant to Nourse Chillicothe Automall. In the letter attached to Mr. Denti's affidavit, Nourse Chillicothe Automall only expressed

interest in entering a "land lease for the Max & Erma's property" in connection with a purchase of "the Max & Erma's building." Denti had no right to sell the building because the parties agreed that upon termination of the lease, Chilli would get title to all improvements Denti made. And Chilli did not have to agree to a sale of the building to mitigate its damages. *See generally Frenchtown* at ¶ 15, quoting *Dennis* at 419 (" 'Landlords mitigate by attempting to *rerent* the property.' " (Emphasis added.)).

**{¶59}** Chilli also did not fail to mitigate its damages by refusing to (1) let Denti keep possession of the premises and pay partial rent until Chilli found a replacement tenant; or (2) let Denti keep possession of most of the premises and sublet an unused portion of the parking lot to Nourse Chillicothe Automall. Denti cites no legal authority which stands for the position that Chilli's duty to mitigate damages requires such measures. Such a finding would be inconsistent with Chilli's rights under the ground lease following a default, which included the right to terminate the lease, or without terminating the lease, re-enter the premises through appropriate judicial proceedings, take possession of the premises, make alterations and repairs as Chilli reasonably deemed necessary or desirable to relet all or part of the premises, and relet the premises "on such terms and at such Rent as" Chilli deemed "reasonably acceptable."

**{¶60}** The fact that Chilli did not relet the property until approximately 10 months after Denti surrendered possession, standing alone, does not indicate that Chilli's efforts to mitigate its damages were unreasonable. And the suggestion that Chilli took an excessive amount of time to renovate and prepare the building for its new tenant is not well-taken. Mr. Denti averred that Chilli "likely did not have to * * * take much time to prepare the building for its new tenant"—a Mexican restaurant—"because the building was already designed to function as a restaurant." However, Denti did not submit any

summary judgment evidence which indicates what renovations or preparations Chilli made for the new tenant, how long the renovations or preparations took, or that the length of time was excessive.

**{¶61}** For the foregoing reasons, we overrule the sole assignment of error to the extent that Denti contends that the trial court erred in granting partial summary judgment to Chilli on the breach of contract claim because there is a genuine issue of material fact regarding whether Chilli failed to mitigate its damages.

## VI. CONCLUSION

**{¶62}** We reject the contention that the trial court erred in granting Chilli partial summary judgment on the breach of contract claim. Chilli met its initial summary judgment burden, Denti failed to meet its reciprocal burden, and the trial court appropriately entered partial summary judgment in favor of Chilli and against Denti. Therefore, we overrule the sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**