[Cite as *Apple Ohio, L.L.C. v. Rose Italian Kitchen Solon, L.L.C.*, 2023-Ohio-2880.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF OHIO

APPLE OHIO, LLC,	:	
Plaintiff-Appellee,	:	No. 112281
v.	:	
ROSE ITALIAN KITCHEN SOLON, LLC, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: August 17, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-934978

Appearances:

Porter Wright Morris & Arthur LLP, Jill G. Okun, and McDaniel M. Kelly, *for appellee*.

Gallagher Sharp LLP, Richard C. O. Rezie, and Taylor M. Iacobacci, *for appellants*.

SEAN C. GALLAGHER, J.:

{¶ 1} Appellants Rose Italian Kitchen Solon, LLC ("Rose Italian"), and Burntwood Tavern Holdings, LLC ("Burntwood Tavern"), appeal the trial court's decision to enter summary judgment against them and to award monetary damages

to appellee Apple Ohio, LLC ("Apple Ohio"), without holding a trial by jury and/or evidentiary hearing on mitigation of damages. Upon review, we reverse the summary-judgment decision on the issue of mitigation of damages only, and we remand the matter to the trial court for the determination of whether Apple Ohio properly mitigated its damages. We otherwise affirm the decision to grant summary judgment on the claims.

{¶ 2} On July 17, 2020, Apple Ohio filed this action raising a claim of breach of contract against Rose Italian and a claim of breach of guaranty against Burntwood Tavern. Apple Ohio alleged that Rose Italian had defaulted on payments due under a sublease agreement and had failed to timely cure the default.[1] Apple Ohio also alleged that Burntwood Tavern failed to honor its obligations under a guaranty by failing to pay the amounts owed. Apple Ohio demanded judgment against each defendant and sought monetary damages.

{¶ 3} In their answer to the complaint, appellants admitted to the sublease agreement for the premises and the related guaranty. They also admitted to issues with payment, which they attributed to the COVID-19 pandemic, but they denied other allegations. Among their affirmative defenses, appellants specifically raised failure to mitigate damages.

{¶ 4} During the course of proceedings, Apple Ohio filed a motion for summary judgment and argued that the appellants' breaches of their respective

[1] The sublease was assigned to Rose Italian by its predecessor in interest in April 2018.

obligations had damaged Apple Ohio "in the amount of $410,083.23" and that the damages "will continue through the Sub-Lease's expiration in October 2023." With regard to the affirmative defense of "failure to mitigate" that was raised, Apple Ohio argued that "Plaintiff owes Defendants no duty to relet the Premises under the plain, undisputed terms of the Sub-Lease."

{¶ 5} Section 15.2 of the sublease agreement addresses the landlord's remedies in the event of default. Relevant to the mitigation issue, Section 15.2(c) of the sublease agreement provides as follows:

> (c) If Landlord elects to reenter the Premises under subsection (a)(ii) above and takes possession of the Premises, Landlord may, but *except to the extent required by applicable law* or court order, shall not be obligated to, relet the Premises for a term, rate and upon such other provisions as Landlord deems appropriate. * * * If Landlord is unable to so relet the Premises, then Tenant shall pay to Landlord monthly on the first day of each month during the period that Tenant's right to possession is terminated, a sum equal to the Rent due under this Lease for that month. If the Premises are relet, Landlord shall apply the rents therefrom first to payment of Landlord's expenses incurred by reason of Tenant's default, second, to payment of Landlord's expenses of reletting * * *, and third, to payment of Rent due from Tenant under this Lease.

(Emphasis added.)

{¶ 6} In their opposition to the motion for summary judgment, appellants conceded that they vacated the premises and returned the keys, but they maintained that the language of the sublease incorporated the "applicable law" and that Apple Ohio had an affirmative duty under Ohio law to mitigate its damages. Appellants also presented evidence to support its argument that Apple Ohio failed to make reasonable efforts to mitigate its damages. In its reply, Apple Ohio continued to

maintain that pursuant to the terms of the sublease agreement it had no duty to mitigate by reletting the premises.

{¶ 7} The trial court summarily granted Apple Ohio's motion for summary judgment, but initially did not render a damages award. As a result, the initial appeal to this court was dismissed. Apple Ohio filed a motion for entry of monetary judgment in the trial court. Appellants opposed the motion, again raised the issue of mitigation of damages, and requested a hearing on damages. Apple Ohio filed a reply in which it asserted it was entitled to an entry of a monetary judgment in the amount sought because its motion for summary judgment had been granted.

{¶ 8} The trial court granted Apple Ohio's motion for entry of monetary judgment and awarded Apple Ohio the full amount sought. The trial court determined that "Plaintiff Apple Ohio LLC is entitled to judgment as a matter of law in the amount of $689,554.94 against defendants" Rose Italian and Burntwood Tavern. Appellants timely filed this appeal.

{¶ 9} Under their sole assignment of error, appellants challenge the trial court's decision to enter summary judgment against them and to award monetary damages to Apple Ohio without a trial by jury and/or an evidentiary hearing on mitigation of damages.[2]

{¶ 10} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-

[2] We have considered, but need not discuss, every argument presented; and we will not address arguments raised for the first time on appeal.

8374, 75 N.E.3d 161, ¶ 14, citing *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481 ¶ 29. Summary judgment is appropriate "only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and, viewing the evidence in the light most favorable to the nonmoving party, reasonable minds can reach a conclusion only in favor of the moving party." *Id.*, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12; Civ.R. 56(C).

{¶ 11} Also, the interpretation of a written contract is a question of law that we review de novo. *Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, 50 N.E.3d 502, ¶ 10, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. When interpreting a contract, we must give effect to the intent of the parties as evidenced by the actual language of the contract. *See Transtar Elec. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 9, citing *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. When contract terms are clear and unambiguous, courts cannot, in effect, create a new contract by finding an intent not expressed in the clear language employed by the parties. *Motorists Mut. Ins. Co. v. Ironics, Inc.*, 168 Ohio St.3d 467, 2022-Ohio-841, 200 N.E.3d 149, ¶ 14, citing *Alexander v. Buckeye Pipeline Co.,* 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

{¶ 12} Here, pursuant to the clear and unambiguous terms of Section 15.2(c) of the sublease agreement, if upon default "Landlord elects to reenter * * * and takes possession of the premises, Landlord may, *but except to the extent required by*

applicable law, shall not be obligated to, relet the premises * * *." (Emphasis added.) Section 21.11 of the sublease defines "applicable law" and provides that "the rights and obligations * * * hereunder shall be governed by and construed in accordance with the laws and judicial decisions in effect in the State in which the Premises is located."[3]

{¶ 13} Pursuant to applicable law in Ohio, "[a] lessor has a duty to mitigate damages caused by a lessee's breach of a commercial lease if the lessee abandons the leasehold" and "the lessor's efforts to mitigate must be reasonable[.]" *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, ¶ 21. "The duty to mitigate arises in all commercial leases of real property, just as it exists in all other contracts." *Id.* at ¶ 18. "Accordingly, barring contrary contract provisions, a duty to mitigate damages applies to all leases." *Id.* at ¶ 20.

{¶ 14} In this case, we must give effect to the intent of the parties as evidenced by the actual language of the sublease agreement. The language expressly states that the landlord "except to the extent required by applicable law" shall not be obligated to relet the premises. The contracting parties specifically included an exception incorporating the applicable law. Reasonably construed, the exception incorporates the applicable law requiring a commercial landlord to make reasonable

[3] The term "applicable law" appears in multiple contexts throughout the lease.

efforts to mitigate its damages, and there is no contrary provision in the sublease agreement that obviates the duty to mitigate.

{¶ 15} We are not persuaded by Apple Ohio's arguments otherwise, and we find the cases cited by Apple Ohio do not involve the contractual language at issue. For instance, in *Frenchtown Square Partnership v. Nick Ents., Inc.*, 11th Dist. Trumbull No. 2020-T-0038, 2021-Ohio-663, the duty to mitigate was eliminated by a contrary contract provision in a lease that provided the landlord "has no duty to attempt to mitigate any damages" resulting from the tenant's breach. *Id.* at ¶ 12. No such language appears in the sublease agreement herein. In *G&E HC Reit II Parkway Med. Ctr., L.L.C. v. Drs. Ford & Soud, Inc.*, 8th Dist. Cuyahoga No. 107172, 2019-Ohio-791, the lease included a contrary contract provision that provided the landlord the right to re-lease the premises to a third party "without waiving any right to claim against Tenant and without incurring any obligation to pay over to Tenant any amounts collected pursuant to rental." *Id.* at ¶ 34. Unlike *G&E*, the sublease agreement in this case requires the landlord to apply the sums received from reletting the premises "third, to payment of Rent due from Tenant under this Lease." Further, none of the cases cited by Apple Ohio involve a lease provision that includes "except to the extent required by applicable law" or similar language.

{¶ 16} Nevertheless, Apple Ohio argues that the applicable law allows parties to a commercial lease to agree to eliminate the landlord's duty to mitigate. However, we cannot overlook that the negotiated language is inclusive of what is required by the applicable law, and the rule of law is that "landlords owe a duty to mitigate their

damages caused by a breaching tenant." *See Frenchtown Square*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, at ¶ 20. Comparably, it was held by a Washington court that a commercial lease incorporating "applicable law" on mitigation of damages did just that, finding "[t]he language in the Lease reflects the law: 'To the extent required by applicable law, [Regency] shall use reasonable efforts to mitigate its damage related to a default[.]'" *Regency Ctrs., L.P. v. Larsen*, W.D.Wash. No. C13-1828 MJP, 2014 U.S. Dist. LEXIS 71473, 8-9 (May 23, 2014).

{¶ 17} In this matter, the language of the sublease agreement is consistent with "[t]he duty to mitigate [that] arises in all commercial leases" and the caveat that "[t]he duty to mitigate requires only reasonable efforts." *Frenchtown Square* at ¶ 18, 19. As stated by one court addressing a lease-mitigation provision with a refusal-to-relet clause, "nothing in this provision, if read reasonably, relieves the landlord of its obligation to try to mitigate its damages by re-letting the premises to a suitable tenant." *Westfield Franklin Park Mall L.L.C. v. Vanity Shop of Grand Forks, Inc.*, 642 F.Supp.2d 756, 757 (N.D.Ohio 2008).[4] As the court observed in *Westfield*, "[a]ll that the refusal clause — if read reasonably and in conjunction and consistently with the mitigation clause — does is to permit the landlord to use reasonable commercial judgment in determining whether to rent to a successor tenant." *Id.* Likewise, as recognized in *Frenchtown Square*, factors such as "the

[4] In *Westfield* the lease expressly required the landlord to "use its reasonable efforts to mitigate its damages," but provided "the failure or refusal of Landlord to relet the Premises shall not affect Tenant's liability." *Id.* The court found that the landlord had an obligation to mitigate damages. *Id.*

tenant mix may reasonably factor into a lessor's decisions to relet." *Id.* at ¶ 19. This is consistent with the language employed in the sublease agreement herein.

{¶ 18} Accordingly, construing the sublease contract in accordance with the applicable law, Apple Ohio was required to use reasonable efforts to mitigate damages related to the tenant's default.

{¶ 19} Whether a landlord has made reasonable efforts to mitigate its damages is a question for the trier of fact. *See id.* at ¶ 19; *Oldendick v. Crocker*, 2016-Ohio-5621, 70 N.E.3d 1033, ¶ 62 (8th Dist.), citing *Cobblestone Square II Co. v. L&B Food Servs.*, 8th Dist. Cuyahoga No. 95968, 2011-Ohio-4817, ¶ 36. "[T]he burden of proving a failure to mitigate damages lies with the party asserting the defense." *Id.*, citing *Telecom Acquisition Corp. I v. Lucic Ents.*, 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 69 (8th Dist.).[5]

{¶ 20} The record herein demonstrates that appellants presented sufficient evidence to establish a genuine issue of material fact as to whether Apple Ohio failed to use reasonable efforts to mitigate its damages. The evidence reflects that Apple Ohio was unwilling to contact prospective tenants provided from Rose Italian and that Apple Ohio informed appellants not to contact Apple Ohio's landlord.[6] Apple

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[5] In *Telecom*, it also was stated that "'[a] landlord is not required to use extraordinary efforts to find a new tenant or attempt the unreasonable or impracticable.'" *Id.* at ¶ 69, quoting *Hines v. Riley*, 129 Ohio App.3d 379, 383, 717 N.E.2d 1133 (4th Dist.1998).

[6] Section 13.1 of the sublease precludes the tenant from subletting the premises and does not allow an assignment "without prior written consent of Landlord."

Ohio also conceded that it never placed "for rent" signs on the premises and did not advertise to relet the premises. There also was evidence that Apple Ohio waited over one year to sign a listing agreement with a real estate broker. Other evidence supporting appellants' argument that Apple Ohio failed to mitigate its damages was provided.

{¶ 21} Upon our review, we find the trial court erred in granting summary judgment on the issue of mitigation of damages, and we reverse the trial court's decision on this issue only. Although appellants argue the merits of the issue in their brief, "[t]he lessor's efforts to mitigate must be reasonable, and the reasonableness should be determined by the trial court." *Frenchtown Square*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, at paragraph one of the syllabus.

{¶ 22} For the foregoing reasons, the judgment of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court for the determination of whether Apple Ohio properly mitigated its damages. The trial court is instructed to vacate the prior damages award.[7]

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[7] We note that appellants requested that the matter be remanded for a jury trial or, at a minimum, an evidentiary hearing on the issue of mitigation of damages. The trial court should determine the nature of the proceeding upon remand. It appears from the record that the parties consented to the withdrawal of the jury demand, and Section 21.26 of the sublease contains a waiver of trial by jury. Appellants also state in their appellate brief that they do not object to an evidentiary hearing/bench trial on remand.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN T. GALLAGHER, J., CONCUR