IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOAQUIN M. MANGLONA,
Appellant,

v.

GOVERNMENT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Appellee.

SUPREME COURT NO. CV-07-0003-GA
SUPERIOR COURT NO. 97-0486

Cite as: 2010 MP 10

Decided June 25, 2010

Douglas F. Cushnie, Commonwealth of the Northern Mariana Islands, for Appellant
R. Anthony Welch, Commonwealth of the Northern Mariana Islands, for Appellee
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and ROBERT J. TORRES, Justice Pro Tem

CASTRO, J.:

¶ 1 Joaquin M. Manglona ("Manglona") appeals the trial court's judgment finding that he did not take reasonable steps to locate a new tenant when the Commonwealth Government breached its lease with him for office space. He argues that the government failed to satisfy its burden of proof in demonstrating that he made unreasonable efforts to locate a new tenant. Manglona also appeals the trial court's award of prejudgment interest arguing that the three percent rate awarded constitutes an abuse of discretion because it does not adequately compensate him for his losses. The government disputes these contentions. We hold that the Commonwealth did not satisfy its burden of proof, and that the award of a three percent prejudgment interest rate constitutes an abuse of discretion. Therefore, we REVERSE and REMAND this matter to the trial court for further proceedings consistent with this opinion.

I

¶ 2 In July of 1989 Manglona entered into a fifteen year lease with the Commonwealth Ports Authority ("CPA") for approximately 60,000 square feet of CPA property at the Saipan International Airport. The property was undeveloped, and the terms of the lease required Manglona to improve the land; he did so by constructing a large steel frame warehouse. The lease terms specified that the property could only be used for "activities relating to handling, receipt, dispatch, loading and unloading of airfreight cargo and airmail," in addition to related uses such as the maintenance of necessary equipment, storage of repair parts and supplies, equipment parking, and office space in connection with air cargo operations. Appellant's Excerpts of Record ("ER") at 72. The lease, however, specifically forbid Manglona from engaging in any type of business unrelated to air cargo. The CPA diligently enforced the lease terms, and on various occasions informed Manglona that certain activities, such as the storage of ocean freight and the cutting of garments, violated the lease's terms and must be remedied.

¶ 3 In 1992, the Office of the Attorney General contacted the CPA about allowing Manglona to lease a portion of the warehouse to the Commonwealth Government. The CPA gave specific approval, and modified the terms of the lease so that the government could rent office space from Manglona. As a result, he subleased 9,460 square feet of the warehouse to the Commonwealth, and modified that space by turning a portion of it into small offices and cubicles for the Department of Immigration and the Department of Labor. The government required the modifications as a condition to its leasing the space, and Manglona made the changes at his own expense. In 1994, the parties amended the sublease by increasing the space to 16,500 square feet

and changing the commencement date to August 1, 1994; the lease term was for eight and a half years.

¶ 4 In October 1996, the government vacated the premises citing structural defects, insufficient electrical systems, and the buildings general lack of integrity; Manglona filed suit in May 1997 for breach of the lease, and the government counterclaimed.[1] The trial court found in favor of Manglona, and awarded him $1,826,838.00, which was the full amount due under the lease; Manglona was not required to mitigate his damages, but there was no award of prejudgment interest. Both parties appealed, and the Court issued *Manglona v. Commonwealth*, 2005 MP 15 ("*Manglona II*"), holding in relevant part that Manglona had a duty to take commercially reasonable steps to mitigate his damages by attempting to find a new tenant; the Commonwealth, however, had the burden of proof to demonstrate that Manglona did not make reasonable efforts to release the space. *Id*. ¶ 65. We held that the failure to reasonably attempt to mitigate results in a reduced damage award. We also held that Manglona was entitled to an award of prejudgment interest.

¶ 5 In response to *Manglona II*, the trial court held an evidentiary hearing to determine whether Manglona reasonably attempted to mitigate his damages, and if he failed to reasonably mitigate, how much should it reduce the award. The government's case consisted of an expert witness who discussed the property, an exhibit addressing the fair market rental value of the lease, and Manglona's testimony at the hearing. The government allegedly impeached Manglona during its direct examination of him, and relied on his statements that he did not bring documentary evidence or witnesses to the hearing to corroborate his alleged attempts to relet the premises. Manglona testified that he contacted various individuals in the government, including several governors, about leasing the premises, and about his placement of advertisements in the newspaper and a real estate publication. He also brought in letters from his other tenants, all of whom either terminated their leases prior to their respective expiration dates or decided against renewing their leases due to the bad economy, to prove that no individual or organization on Saipan would be able to take-over the government's lease. After the hearing, the trial court issued its Supplemental Findings of Fact and Conclusions of Law ("appealed order") deciding that the government carried its burden in demonstrating that Manglona failed to take commercially reasonable efforts to relet the premises, reducing his damage award by $416,150.00, and awarding prejudgment interest at three percent. Manglona appealed the entire order.

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[1] This Court issued *Manglona v. Commonwealth*, 2002 MP 7 ("*Manglona I*"), which addressed whether the absence of the Governor's signature on the lease voided the lease; we ruled that the while the governor must have approved of the lease, his signature was not the only means to give approval under government procurement regulations. The case has no bearing on the issues raised in this appeal.

II

A. The Burden of Proof

¶ 6 We must determine if the Commonwealth Government satisfied its burden of proof concerning the reasonableness of Manglona's mitigation efforts. We review de novo whether a party discharged its burden of proof. *See Lin Zhong v. United States Department of Justice*, 480 F.3d 104, 117 (2d Cir. 2006). If the Commonwealth met its burden then the Court will consider the steps Manglona took to release the building, and the amount his award must be reduced by; if however, the Commonwealth failed to carry its burden then we need not address these issues.

¶ 7 In *Manglona II*, the Court held that a lessor must take commercially reasonable steps to release a property when its tenant abandons the property and breaches the lease. *Id*. ¶ 51. While the landlord must mitigate, the breaching tenant bears the burden of proof to demonstrate that the landlord failed to make commercially reasonable efforts to mitigate the damages flowing from the breach, *id*. ¶ 60, and if the tenant fails to meet its burden it is presumed that the landlord made reasonable efforts to mitigate. *Ruud v. Larson*, 392 N.W.2d 62, 63 (N.D. 1986). In our previous opinion we cited to *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997), in support of the duty to mitigate rule; the case also specified that alleging failure to reasonably attempt to mitigate is an affirmative defense. In our decision, we remanded "the issue of mitigation to the Superior Court to determine, upon showing by the Government, the reasonableness of the efforts, if any, made by Manglona to relet the premises, and the amount by which Manglona reduced or could have reduced his damage." *Id*. ¶ 65. The Court required the government to bear the burden of proof to demonstrate that Manglona did not reasonably mitigate his damages, and only if it met this burden, would the reasonableness of Manglona's efforts and how much to reduce his damages arise.

¶ 8 The burden of proof, while commonly used in legal parlance is imprecise and can refer either to the burden of production or the burden or persuasion, or at times it refers to the combined burdens of production and persuasion. *Sablan v. Roberto*, 2002 MP 23 ¶ 18 n.11.[2] "The burden of production is the responsibility to move forward with the presentation of evidence regarding evidentiary facts." *Id*. (citing *Dir., Office of Workers' Comp. Progs. v. Greenwich Collieries Director*, 512 U.S. 267, 272-77 (1994)). [3] In *Schaffer v. Weast*, 546 U.S. 49, 56

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[2] *Sablan* discussed the burden of proof in a summary judgment context, and therefore, its detailed analysis is not useful in understanding the burden of proof in an affirmative defense context.

[3] The case discusses the burden of proof as it is defined by statute, and therefore, it is not useful because the duty to mitigate is a common law affirmative defense.

(2005),[4] the Court stated that the burden of production determines, "which party bears the obligation to come forward with the evidence at different points in the proceeding." On the other hand, "[t]he burden of persuasion is the onus to affirmatively convince the trier of fact of the existence or non-existence of required facts." *Sablan* at ¶ 18. Similarly, the burden of persuasion determines "which party loses if the evidence is closely balanced." *Schaffer*, 546 U.S. at 56. Thus, we must determine the specific nature of the burden of proof placed on the government for the affirmative defense of avoidable consequences.

¶ 9 In *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299, the breaching tenant bore the burden of proof to demonstrate that the landlord failed to make reasonable attempts to relet the premises. In discussing this burden, the court stated that when the "tenant's contention [is] that the landlord failed to mitigate damages . . . [it] is similar to an avoidance defense; *evidence* of failure to mitigate is admissible only if the tenant pleads the failure to mitigate as an affirmative defense." (emphasis added). *Id*. at 300. The court did not, however, specifically discuss the burden of proof. In *Cash America International v. Hampton Place*, 955 S.W.2d 459, 462-63 (Tex. App. 1997), the court considered whether certain evidence proffered by the breaching tenant met the *Austin Hill Country* burden of proof standard, requiring the question of mitigation to go to the jury. On cross-examination, a partner for the landlord partnership entity testified that he placed a "for rent" sign in the window and placed some ads in the local newspaper, but never listed the property with a commercial broker. *Id*. The tenant's expert witness testified that a "for rent" sign in the window was insufficient, and described the steps that a landlord should undertake to actively market the property; the landlord's expert did not counter these points, but instead spoke about the best uses for the property. *Id*. The court ruled that this evidence satisfied the defendant's burden, and failing to give the jury instruction regarding mitigation was reversible error. *Id*. Thus, in *Cash America International*, the tenant met its burden with both expert testimony and the cross-examination of the landlord.

¶ 10 In *Brendle's Stores, Inc. v. OTR*, 978 F.2d 150, 158 (4th Cir. 1992) (interpreting South Carolina law), the court recognized that the party asserting a failure to mitigate defense bears the burden of proof. It found that the landlord hired a realtor to lease the building or sell it at a rate higher than the appraised value. *Id*. These actions, however, were insufficient to show a failure to attempt to reasonably mitigate because trying to sell the building for a price higher than its appraised value was unrelated to the efforts made to lease the building. The court also found that

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[4] Like the above two cases, *Schaffer* discusses the burden of proof in an inapposite context; these case are mentioned, however, because of their excellent discussion of the burden of proof in general, even though the detailed analysis is not useful to the question before us at this time.

the landlord failed to make necessary repairs to the building. The tenant did not, however, present any evidence that the failure to make repairs discouraged prospective tenants. Finally, the tenant's bare assertions that widespread advertising would have resulted in a new lessee was not supported by any evidence. *Id*. Thus, the tenant failed to carry its burden of proof, and the court did not reduce the landlord's damages. *Id*.

¶ 11 In *Hailey v. Cunningham*, 654 S.W.2d 392, 395 (Tenn. 1983), a landlord and his attorney testified that they hired a realtor, placed newspaper ads, and put a for rent sign in the window in an attempt to find a new tenant; the lessee, however, did not introduce any evidence demonstrating that the landlord failed to take reasonable steps to relet the premises. The court expounded on the tenant's burden of proof by stating "[w]ith respect to the burden of proof in such cases, the general rule is that the defendant has the onus of establishing matters asserted by him in mitigation or reduction of the amount of plaintiff's damages." *Id*. at 396 (citing *Int'l Correspondence Sch., Inc. v. Crabtree*, 34 S.W.2d 447, 449 (1931)). A party who pleads a mitigation defense has "the opportunity of adducing evidence" to support its position. *Id*. at 396. As a result, the court upheld the finding that the landlord engaged in reasonable efforts to relet the premises even though he did not find any suitable tenants. In *Barnes v. Lopez*, 544 P.2d 694, 698 (Ariz. Ct. App. 1976), the court held that for a mitigation defense to be considered by the jury there must be competent evidence to show that the landlord failed to reasonably attempt to mitigate damages. In *Del E. Webb Realty & Management Co. v. Wessbecker*, 628 P.2d 114, 116 (Colo. Ct. App. 1980), the court cited to *Hoehne Ditch Co. v. John Flood Ditch Co.*, 233 P. 167 (Colo. 1925) for the proposition that a breaching tenant bears the burden of proof in demonstrating that the landlord failed to make reasonable attempts to mitigate. *Hoehne Ditch Co.*, concerned the duty to mitigate damages from the breach of a contract, and in discussing that duty, the court stated the defendant must introduce evidence to support its mitigation defense. 233 P. at 171.

¶ 12 In *Mar-Son, Inc. v. Terwaho Enterprises*, 259 N.W.2d 289, 293 (N.D. 1977), the landlord claimed that the trial court improperly placed the "burden of mitigation" on him instead of on the breaching tenant. The court acknowledged, but did not define, the ambiguous term burden of mitigation," but it did examine whether the burdens of production and persuasion "were properly placed and met." *Id*. The court held that the breaching tenant must demonstrate that the landlord did not act reasonably in trying to find a new tenant; otherwise, the presumption is that the landlord acted in good faith. *Id*. The court found that nothing in the record indicated that the burden was placed on the landlord. Although the bulk of the evidence put on by the tenant came

from the cross-examination of the landlord, this was of no consequence. *Id*. Therefore, the tenant met its burden largely, though not exclusively, through the cross-examination of the landlord.[5]

¶ 13 In *Manor Park Apartments, LLC v. Delfosse*, 2006 Ohio 6867, ¶ 28 (Ohio App.), the appellate court adopted the rule that the landlord bears the burden of proving that its efforts to relet were reasonable because placing the burden on the tenant forces them to prove a negative when they do not have access to any of the landlord's documents demonstrating what efforts it took to find new tenants. Although the rule is contrary to our own, the court analyzed several opinions by its sister courts that are useful to the disposition of this case; those courts, like us, place the burden of proof on the breaching tenant. It discussed how in *Oakwood Estates v. Crosby*, 2005 Ohio 2457, ¶ 14 (Ohio App.), and *Pinnacle Management v. Smith*, 2004 Ohio 6928, ¶ 15 (Ohio App.), all of the evidence concerning the landlord's efforts to release the property came from the landlord either in the form of testimony or documents, and the tenant produced nothing. *Id*. ¶ 29. While those courts allowed the tenant to meet its burden solely on the basis of the landlord's testimony and documentary evidence, the *Manor Park* court found that this clearly shifted the burden away from the tenant and onto the landlord. If the burden rests with the tenant, it must produce evidence, and the landlord's testimony by itself does not satisfy the burden. Although we disagree with the *Manor Park* rule, we agree with the court's analysis of our rule; if a tenant is going to bear the burden of proof it cannot meet that burden by relying solely on the lessor testimony and documentary evidence.

¶ 14 *Manglona II* and *Austin Hill Country* are noncommittal concerning the distinction between the burden of production and the burden of persuasion. In *Cash America International*, 955 S.W.2d at 462-63, the tenant was entitled to have the jury consider its mitigation defense based on its own expert witness and the cross-examination testimony of the landlord. In *Barnes*, 544 P.2d at 698, the court explicitly stated that the defendant must produce evidence to substantiate its failure to mitigate defense. Likewise, *Del E. Webb Realty & Management Co.*, 628 P.2d at 116 and *Hoehne Ditch Co.*, 233 P. at 171, both stand for the proposition that the party asserting an avoidability defense must produce evidence. Finally, *Manor Park*, explicitly pointed out that allowing a tenant to meet its burden of proof with nothing more than the landlord's testimony actually shifts the burden away from the tenant and onto the property owner. Considering the above authority, the Commonwealth was required to produce evidence to meet its burden of proof.

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[5] The court was silent regarding what this other evidence was, but earlier in the opinion, it discussed how the landlord's attempt to relet the premises for $12,600 more a year indicated a lack of reasonable effort. *Id*. at 292.

¶ 15 To prove its case, the government called an expert witness, introduced an exhibit, and conducted a direct examination of Manglona. The government's expert witness, Mr. Mitch Aaron ("Aaron"), is an appraiser who conducted a comparison of the building in question with similar buildings to determine its fair market rental value. He brought a document to the hearing, exhibit EV-A, that was a compilation of his findings regarding the actual rental values of similar buildings, and the other leases at Manglona's warehouse. The government moved to enter the document into evidence, Manglona's counsel objected, and the trial court ultimately decided to take the matter under advisement. When the parties were arguing over the admissibility of the document, the government stated that there were two questions before the court. The first was whether Manglona made reasonable efforts to relet the building, and the government admitted it would get to that issue later. The second question concerned the reasonable rental value for the property, and Aaron's testimony and the exhibit concerned this question. Therefore, the government did not meet its burden of proof concerning whether Manglona took reasonable steps to mitigate his losses with either Aaron's testimony or exhibit EV-A because this evidence did not address that issue.

¶ 16 After Aaron's testimony, the Commonwealth called Manglona to the stand. It asked him if at trial he testified to considering using the warehouse for self-storage units, and he stated that he did not remember. The government then showed him a copy of his previous testimony, and he remembered considering converting the other part of the warehouse into self-storage units. The government then attempted to analogize the small size of self-storage units to the small size of the offices that it rented from Manglona. The government theorized that Manglona could use the office space as self-storage units, but he unequivocally testified that the design and layout of the offices would not be suitable for public-access self-storage. The government attempted several times to get Manglona to admit that the office space could be used for self-storage, but he flatly denied this was possible due to the nature of public-access self-storage and the design of the office space. The questions then shifted to whether Manglona sought investors to remove the office structures he put in, and convert it back into warehouse space. Manglona testified that he looked for investors, but could not find anyone. When the government asked him if he brought documents or evidence to back up his assertions, he stated that he did not bring witnesses or affidavits to the hearing. He further stated that he asked numerous government officials, including every governor since the breach, about leasing the space, but he was unsuccessful in locating a new tenant. He did not introduce any corroborating evidence to back-up these claims. The government specifically asked:

> Q: and, you – you don't have any evidence you can show the court to show that you approached any investors, and banks, anybody else about getting the money to retrofit this property, isn't that –
>
> A: oh, I could get an affidavit from that person that I approach later on down the line.
>
> Q: That might be a little too late.

Appellee's ER at 220. Manglona also testified that he placed some ads in the newspaper, but he did not provide hard copies or other documentary proof of placing the advertisements.

¶ 17 When the government finished its examination of Manglona, Manglona's attorney asked for judgment in his favor because the government failed to establish that Manglona did not make any commercially reasonable efforts to release the premises. The government responded that the trial court already made this determination in paragraph eighty-four of an earlier findings of fact and conclusions of law,[6] and that in any event, he just asked Manglona what he did to release the premises, and there was not any evidence introduced demonstrating that Manglona took any commercially reasonable steps to find new tenants. The trial court denied Manglona's motion. In the appealed order, the court found that:

> The testimony and exhibits introduced by Manglona, however, provide the bulk of the relevant facts that are necessary to dispose of the avoidability issue. The Court is skeptical of Manglona's several undocumented assertions that he had contacted various officials within the governorships in the CNMI. No one from the government testified to these discussions. No documents memorializing these discussions were introduced into evidence. Further, the Commonwealth exposed several infirmities in Manglona's credibility as a witness by impeaching him on the stand on the issues regarding whether he considered using his premises as a public self-storage business and about the feasibility of retrofitting the office space back into warehouse space. Therefore, the Court cannot make any concrete findings that Manglona actually took up such extensive bargaining with members of the CNMI gubernatorial administrations.
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> Secondly, the Court finds that Manglona made only one attempt during the period of six years to relet his premises by publishing an advertisement in a printed circulatory. The advertisement consisted of little more than three sentences. Moreover, Manglona described the property as "warehouse space" in the advertisement – an assertion which undermines the credibility of his claims that retrofitting his premises as a warehouse – or even merely marketing the building as such – was economically unfeasible.

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[6] This document is not part of the record. The Findings of Fact and Conclusions of Law referenced in the transcript was part of the appellant's excerpts of record at page forty from *Manglona II*. We take judicial notice of the fact that no evidence of Manglona's mitigation efforts were presented to the trial court, but this prior determination by the lower court regarding Manglona's efforts to release the premise must have been proved again irrespective of the earlier finding because *Manglona II* placed the burden of proof on the government. *See* Appellee's ER at 222.

Appellant's ER at 24. The trial court found that Manglona did not reasonably attempt to avoid damages based on his testimony and the lack of corroborating evidence.

¶ 18 Even though the trial court did not believe Manglona's version of the events, the government did not offer any other evidence indicating how he could have mitigated his damages. Manglona did not state that he did not do anything to release the premises; instead, he testified about his efforts to find new tenants. His story, however, was not considered credible and he did not bring in much extrinsic evidence to bolster his claims.[7] Manglona's direct examination would likely not satisfy the government's burden under *Mar-Son* because while the tenant in that case carried its burden largely on its cross-examination of the landlord, it also introduced other evidence. 259 N.W.2d at 293. Here, the Commonwealth presented no other evidence. As *Manor Park* noted, allowing a breaching tenant to meet its burden based solely on the landlord's testimony and exhibits actually shifts the burden away from the breaching tenant, and under this reasoning, the government certainly failed to satisfy its burden. 2006 Ohio 6867, ¶ 28.

¶ 19 The Commonwealth also failed to meet its burden of production under *Barnes*, 544 P.2d at 698, *Del E. Webb Realty & Management Co.*, 628 P.2d at 116, and *Hoehne Ditch Co.*, 233 P. at 171, by failing to introduce any other evidence to support its position. The government neither produced evidence demonstrating what Manglona did or failed to do, nor an expert witness to explain how he should have gone about looking for a new tenant, or why his efforts were unreasonable. Furthermore, the trial court's order addressed this issue by stating "[t]he testimony and exhibits *introduced by Manglona*, however, provide the bulk of the relevant facts that are necessary to dispose of the avoidability issue." Appellant's ER at 24 (emphasis added). The trial court focused on what Manglona produced, and in violation of *Manglona II*, did not require the Commonwealth to come forward with evidence to support its position. *Manglona II* placed a burden of production in addition to a burden of persuasion on the government, and the trial court erred in allowing the Commonwealth to meet this burden with nothing more than Manglona's

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[7] The trial court was "skeptical of Manglona's several undocumented assertions that he had contacted various officials," and found that "the Commonwealth exposed several infirmities in Manglona's credibility as a witness by impeaching him on the stand . . . ." Appellant's ER at 24. Manglona was not impeached by the government when it questioned him concerning converting the office space into self-storage units. The government asked Manglona whether he testified at trial to converting the space into self-storage units, and he answered that he did not remember. When shown his previous statement, he remembered, and a discussion ensued concerning the feasibility of using the office space for public-access self-storage; Manglona was adamant that the office space was not appropriate for self-storage as it was presently configured. ER at 208-11. Thus, Manglona was not impeached on the stand since all the government did was refresh his recollection. Manglona was also not impeached concerning his efforts to locate investors to retrofit the office space into self-storage space because he said he contacted investors, and the government did not present any evidence contradicting Manglona's account. Thus, no impeachment occurred, and the government cannot argue that it carried its burden on this basis.

testimony. Therefore, because the government did not prove that Manglona acted unreasonably in attempting to release the office space, we presume that his mitigation efforts were reasonable.

B. Prejudgment Interest

¶ 20 In *Manglona II* we ordered the trial court to award prejudgment interest to Manglona for the government's breach of the lease. 2005 MP 15 ¶ 46. We held the government liable for prejudgment interest, but left the issue of the applicable rate to the trial court's discretion. There is no statutory prejudgment interest rate in the Commonwealth. Therefore, we must decide whether the three percent interest rate was appropriate, and if not, what the trial court should have awarded. An award of prejudgment interest is reviewed for an abuse of discretion. *Manglona v. Commonwealth*, 2005 MP 15 ¶ 41; *Int'l Turbine Servs. v. VASP Brazilian Airlines*, 278 F.3d 494, 499 (5th Cir. 2002). In *Myint v. Allstate Insurance Co.*, 970 S.W.2d 920, 927 (Tenn. 1998), the court discussed the abuse of discretion standard in a prejudgment interest context, and stated that the standard:

> [c]learly vests the trial court with considerable deference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court. Thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found.

¶ 21 Thus, if the trial court's decision to award three percent is supported by evidence, we cannot merely substitute our judgment for that of the lower courts. The appealed order, however, awarded a three percent rate without reference to any applicable law or factual analysis. The discussion of the rate consisted of one sentence stating: "Manglona shall be awarded pre-judgment interest at the annual rate of 3% starting from the date of the breach, January 22nd, 1997." The decision to award three percent was made without any discussion of Manglona's damages, or statutory or common law to support the award; this constitutes an abuse of discretion because the trial court failed to provide any factual or legal justification to support its decision. Therefore, we will review the law of the Commonwealth, the law of other jurisdictions, and the record to determine an appropriate prejudgment interest rate.

¶ 22 In the eminent domain context, 1 CMC § 9227(b),[8] specifies that when the government takes property and complies with eminent domain procedures, it must deposit what it deems to be the fair market value of the property with the clerk of court, and that sum accrues interest at three

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[8] 1 CMC § 9227(b): That a sum of money which is considered to be the fair value of the property has been paid to the clerk of courts, which sum shall draw interest at the rate of three percent per annum from the date of the summons until claimed by the defendant or ordered paid to the defendant by the court.

percent per year. Our post-judgment interest statute, 7 CMC § 4101,[9] specifies that a nine percent interest rate applies to all money judgments from the date of entry. Our laws prohibiting usury limit the amount of chargeable interest, and 4 CMC § 5301[10] allows for no more than a one percent interest rate per month on a contract where the principal sum is over three hundred dollars. Bounced checks, in addition to other penalties, carry an interest rate of twelve percent, 7 CMC § 2442;[11] child support payments accrue interest at the rate specified by law, 8 CMC § 1574;[12] and when interest is due on commercial paper, but no rate is specified in the instrument, the judgment rate is used, 5 CMC § 3118(d).[13] These are some of the Commonwealth's statutes that discuss interest rates with enough specificity for the Court to consider in determining if there is any statutory basis for determining the prejudgment interest rate.[14]

¶ 23 In *Estate of Muna*, 2007 MP 16, the Court discussed 1 CMC § 9227(b) in determining the appropriate prejudgment interest rate in an inverse condemnation case. In this context, the Fifth Amendment to the U.S. Constitution requires that the government pay just compensation to a property owner who forfeits property. *Id.* ¶ 13 (citing *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 9 (1984). As a result, the Constitution requires a court to award just compensation for the seized land; this amount includes an award of prejudgment interest, and statutory interest rates do not bind a court when determining just compensation. *Id.* ¶ 14. In awarding prejudgment interest, a court must ensure that the amount of compensation the landowner receives, including prejudgment interest, adequately compensates the landowner for the taking. *Id.* ¶ 14 (citing

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[9] 7 CMC § 4101: Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered. The process to enforce a judgment for the payment of money may be a writ of execution or an order in aid of judgment, as provided in chapter 2 of this division (commencing with 7 CMC § 4201).

[10] 4 CMC § 5301: No action shall be maintained in any court of the Commonwealth to recover a higher rate of interest than two percent per month on the balance due upon any contract made in the Commonwealth on or after February 15, 1965, involving a principal sum of $300 or less, nor to recover a higher rate of interest than one percent per month on the balance due on any such contract involving a principal sum of over $300.

[11] 7 CMC § 2442: . . . shall be liable to the payee for the amount owing upon such check plus interest at the rate of 12 percent per annum . . .

[12] 8 CMC § 1574: All child support payments which are delinquent for more than thirty-one days become automatic judgments and shall earn interest at the rate established by law.

[13] 5 CMC § 3118: Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

[14] Interest rates in the context of the Retirement Fund, Commonwealth Development Authority, Workers' Compensation, and the Commonwealth Utilities Corporation are not useful to determining the legal prejudgment interest rate for a cause of action concerning the breach of a lease.

Schneider v. County of San Diego, 285 F.3d 784, 794 (9th Cir. 2002)). Thus, the U.S. Constitution gives courts broad discretion to ensure that landowners receive adequate compensation irrespective of statutory constraints.

¶ 24 The facts of an inverse condemnation case, however, are inapposite to the facts before the Court today. Whereas *Estate of Muna* concerned itself with properly compensating a landowner for property seized by the government, today we must ascertain an appropriate prejudgment interest rate for the breach of a lease. This does not implicate Constitutional considerations because the government's failure to pay rent is not analogous to permanently seizing real property. At all times since the breach, Manglona was in a position to exercise dominion over the office space, and actually had a duty to use commercially reasonable efforts to find a new tenant for the space. When the government breached the lease Manglona lost the benefit of his bargain, and as *Manglona II* held, he should be compensated for that loss. He did not, however, lose the actual property as in an inverse condemnation or eminent domain context, and therefore, the terms of the lease and relevant statutory and decision law control our disposition of this appeal and not the broad principles elucidated in the Fifth Amendment. Similarly, 1 CMC § 9227(b) is also inapposite in determining the appropriate prejudgment interest rate because the government breaching the lease is not analogous to Manglona forfeiting his property to the government through formal eminent domain procedures. Therefore, we may neither use *Estate of Muna* nor 1 CMC § 9227(b) as precedent in ascertaining the appropriate prejudgment interest rate because the facts that implicate those laws are dissimilar from the facts before us today. Nevertheless, the considerations relevant in *Estate of Muna* and the present situation are the same – that the aggrieved party receives compensation for actual losses.

¶ 25 *L & T International Corp. v. Benavente*, 1997 MP 24 ¶ 17, discussed 4 CMC § 5301, the Commonwealth's usury statute in the context of an equitable mortgage. The Court found that the statute's meaning was clear, and that on a principle sum of more than three hundred dollars, interest could not exceed twelve percent a year. *Id.* Nothing in the language of the statute, or the one case interpreting it, would provide support for applying the twelve percent rate of interest to the facts of this case. A lease is not analogous to an equitable mortgage, and the breach of a lease is not analogous to usurious interest being charged to a borrower. Therefore, adopting a twelve percent prejudgment interest rate based on 4 CMC § 5301 is inappropriate. Likewise, the interest rate on bounced checks, and the interest rate applicable to child support payments, are factually dissimilar from prejudgment interest in a lease context; therefore, those statutes are also unhelpful.

¶ 26 The federal courts have also considered prejudgment interest rates in the absence of controlling statutory law. In *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989), the Court considered when a post-judgment motion for prejudgment interest constituted a motion to alter or amend the judgment under Rule 59(e). In considering how prejudgment interest concerns the merits of a case, the Court reiterated the longstanding rule that prejudgment interest is an element of the plaintiff's complete claim. *Id*. In determining the appropriate interest rate, a court must consider the underlying merits of the case. *Id*. It cited to *Blau v. Lehman*, 368 U.S. 403, 414 (1962), for the proposition that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness," and noted that an award of prejudgment interest should be based on the merits of the case and the extent of the plaintiff's damages. *Id*. The appellate court should have the "benefit of the district court's plenary findings with regard to factual and legal issues subsumed in the decision to grant discretionary prejudgment interest, such as the wrongfulness of the defendant's conduct and the plaintiff's full damages, as well as other matters of equity bearing on the merits of the litigation." *Osterneck* at 177. While the specific holding of the case is not useful as persuasive precedent, its general statements concerning interest awards, and how such awards are based on factual and equitable considerations, is highly instructive.

¶ 27 In *Acequia, Inc. v. Clinton*, 34 F.3d 800, 818 (9th Cir. 1994), the court said that an award of prejudgment interest is within the sound discretion of the district court, and that such awards "are governed by considerations of fairness and are awarded when it is necessary to make the wronged party whole." In *Equal Employment Opportunity Commission v. Wooster Brush Co. Employees Relief Association*, 727 F.2d 566 (6th Cir. 1984), plaintiff EEOC successfully brought suit claiming that the defendant employer violated the Pregnacy Discrimination Act; the circuit court affirmed. In discussing prejudgment interest, the court noted that Title VII gives district courts discretion to determine the appropriate rate. *Id*. at 579. The statute provided for prejudgment interest for the purpose of putting the aggrieved party in the position he or she would have been in had the discrimination never occurred. In looking at what some lower courts did in the past to adequately compensate an aggrieved plaintiff, the court found that

> . . . in California a district court has recently awarded interest tied to the prime rate. *EEOC v. Pacific Press Publishing Association*, 482 F. Supp. 1291 (N.D. Cal. 1979) (interest was awarded based upon the adjusted prime rate as used by the Internal Revenue Service). In *Richardson v. Restaurant Marketing Associates*, 527 F. Supp. 690 (N.D. Cal. 1981), another district court awarded interest at the rate of ninety percent of the average prime rate for the year in which the quarter occurs. In *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177 (3d Cir.), cert. denied, 454 U.S. 1123 (1981), the concerns of fluctuating interest rates and inflation prompted the National Labor Relations Board to fix an interest

> rate of twelve percent. The court in *North Cambria* noted that the Board's interest rate was related to the employer's cost of borrowing. The rate therefore furthered the Board's objective of preventing employers from borrowing from employees instead of paying backpay awards promptly and, at the same time, was relatively responsive to the going rates in the commercial market.

Id. The court noted that these other courts were concerned with adequately compensating the plaintiff for sustained losses. It also found that the federal post-judgment interest rate, 28 U.S.C. § 1961(a), might influence district courts in determining an appropriate award of pre-judgment interest, but that the choice of a rate was nevertheless within the district court's discretion. *Id*.

¶ 28 In *Waterside Ocean Navigation Co. v. International Navigation, Ltd.*, 737 F.2d 150 (2d Cir. 1984), the court considered whether an award of prejudgment interest was allowed under 9 U.S.C. § 207, the federal statute that implemented the Convention on the Recognition and Enforcement of Foreign Arbitration Awards; both the federal statute and the Convention were silent on the issue of prejudgment interest. The court noted "that 'whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts.'" *Id*. at 153 (citing *Lodges 743 & 1746, International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), cert. denied, 429 U.S. 825, 50 L. Ed. 2d 87, 97 S. Ct. 79).

¶ 29 In *Wickham Contracting Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 955 F.2d 831, 833-34 (2d Cir. 1992), the court also recognized that district courts are vested with authority to award prejudgment interest at their discretion. Some factors the lower court should consider include: "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." Furthermore, a court may award prejudgment interest in the absence of explicit statutory authorization.[15] *Id*. Prejudgment interest is not allowed, however, when the language of the statute indicates a contrary Congressional intent, and the award may not over-compensate a plaintiff. *Id*.

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[15] *See Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988) (suit for back pay under Title VII); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (suit under takings clause of Fifth Amendment; interest viewed as part of "just compensation"); *Waite v. United States*, 282 U.S. 508, 509 (1931) (patent law infringement suit; interest viewed as part of "entire compensation" to which statute referred); *Miller v. Robertson*, 266 U.S. 243, 250, 258 (1924) (contract suit under Trading With the Enemy Act); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 302 (1923) (suit for taking of property under the Lever Act; interest viewed as part of "just compensation" to which statute referred); *Billings v. United States*, 232 U.S. 261, 284-88 (1914) (suit to recover federal excise taxes paid).

¶ 30 Under federal law, the district courts enjoy a great deal of discretion in determining a prejudgment interest rate in the absence of controlling statutory law. The lower court must consider whether the rate fully compensates the plaintiff for its losses and whether the award is equitable. In the Commonwealth our legislature has not enacted a prejudgment interest rate statue, and none of our other statutory laws discussing interest rates are analogous enough to a prejudgment interest context to use them in setting the appropriate rate. Therefore, we decide to follow the federal approach, and the trial court's award of prejudgment interest must be equitable and compensate a party for its actual losses.

¶ 31 The trial court's decision to award a three percent interest rate without any reference to Manglona's losses or reliance on any legal principles constitutes an abuse of discretion. As the court in *Myint* stated, "in cases where the evidence supports the trial court's decision, no abuse of discretion is found." 970 S.W.2d at 927. Here, the appealed order did not discuss any evidence concerning Manglona's losses as a result of the government's breach. On appeal, Manglona argues that the record supports a twelve percent rate based principally on the Bank of Saipan's success against him in an unrelated suit. He argues that he defaulted on his obligation with the Bank because the government's breach deprived him of money he would have used to pay the Bank; the Bank received prejudgment interest at twelve percent. The record does not support this argument because the judgment in favor of the Bank is silent regarding why that rate was chosen. The judgment does not discuss whether the rate was agreed to by the parties in a contract, or whether it was a rate that equitably compensated it for its actual losses. In any event, we cannot rely solely on the judgment against Manglona as the basis for awarding him a twelve percent rate, and the record does not contain any other evidence that we could use to ascertain his damages and make an equitable award. Therefore, the trial court must award Manglona prejudgment interest on the basis of equity and his actual losses.

III

¶ 32 For the foregoing reasons, we hold that the Commonwealth failed to meet its burden of proof; as a result, the reduction of his damage award was erroneous, and Manglona is entitled to $1,826,838 for the government's breach of the lease. Also, the trial court's award of a three percent prejudgment interest rate constitutes an abuse of discretion; the trial court must award prejudgment interest that is equitable and compensates Manglona for his actual losses. Therefore, we REVERSE and REMAND this matter to the trial court for further proceedings consistent with this opinion.

SO ORDERED this 25th day of June, 2010.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
ALEXANDRO C. CASTRO
Associate Justice

/s/_____
ROBERT J. TORRES
Justice Pro Tem