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

JOAQUIN M. MANGLONA,
Plaintiff/Appellant,

v.

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

Supreme Court Appeal Nos. 04-012-GA & 04-013-GA
Civil Action No. 97-0486

FOR PUBLICATION

OPINION

Cite as: Manglona v. Commonwealth, 2005 MP 15

Argued and submitted on November 18, 2004
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; ALEXANDRO C. CASTRO, *Associate Justice*; ROBERT J. TORRES, JR., *Justice Pro Tempore*

DEMAPAN, Chief Justice:

¶1 Joaquin M. Manglona filed an action against the Government of the Commonwealth of the Northern Mariana Islands ("Government") for breach of a commercial lease agreement ("the Lease"), as amended, entered into between the Office of Immigration and Naturalization of the Office of the Attorney General and Manglona for a warehouse building located near the Saipan International Airport. The Government answered and counterclaimed asserting that: (1) the Lease was void *ab initio*, (2) Manglona breached the Lease by failing to fulfill his obligation under the Lease, (3) Manglona failed to give the notice of default required under the Lease, (4) Manglona failed to keep the building in habitable condition or suitable for its intended use resulting in a constructive eviction of the Government, and (5) Manglona failed to mitigate his damages. Following a bench trial, the Superior Court held that the Government had unjustifiably breached the Lease and entered an amended judgment in the amount of $1,826,838.00 plus 9% interest from the date of the judgment. The court, however, refused to grant prejudgment interest to Manglona, and he appeals this refusal. The Government cross-appealed the court's judgment, arguing that it did not breach the Lease, and that the Lease was void on public policy grounds because the construction of the premises was in violation of the Commonwealth Building Safety Code, 2 CMC §§ 7101, *et seq*.. After the Government filed a motion to consolidate, the two appeals were consolidated.

¶2 We AFFIRM the trial court in part, REVERSE in part, and REMAND this matter for further proceedings in accordance with this Opinion.

I.

¶3 In December 1992, Manglona entered into the Lease with the Government for 9,460 square feet of office space. In 1994, the parties executed an amendment increasing the leased space to 16,500 square feet and amending the commencement date of the lease to August 1, 1994. The lease was for eight-and-one-half years. Before the Government moved into the building, Manglona renovated and constructed improvements to the interior of the building, at his expense, based on the design and specifications provided by the Government.

¶4 Subsequently, the Government found the warehouse deficiently fit for use during the lease period. On June 27, 1995, then Secretary of the Department of Labor and Immigration, Thomas O. Sablan, wrote a letter to Manglona alleging numerous defects and problems with the building, including wiring that did not comply with the National Electrical Code (NEC), repeated failure with the backup power generators, a leaking roof, noncompliance with the Americans with Disabilities Act (ADA), and lack of water. Manglona initially addressed Sablan's complaints in a letter dated June 30, 1995, and in a further reply on July 20, 1995, stating that the electrical problems had been fully resolved, the building was in compliance with the NEC and the Commonwealth Utilities Corporation (CUC) standards, and that an additional water tank and pump were installed which would be sufficient for the Government's water needs. The Government did not respond to either of these letters and made no other complaints regarding the conditions or repair of the building.

¶5 Later that year, Manglona met with Mitch Pangelinan and Doug Muir, representatives of the Government, at the Governor's Office, to discuss the Lease, and Manglona made three (3) proposals for the termination of the Lease.

¶6 After the meeting, Sablan sent a letter to Manglona, wherein Sablan set forth the Government's understanding of Manglona's three proposals. According to Sablan, the proposals were: (1) payment by the Government of $700,000.00 for the improvements Manglona made to the building; (2) continued possession by the Government of the building for one more year until October 1996, to provide Manglona time to find a new tenant; or (3) release of the Government after its finding a new tenant or assigning the Lease.

¶7 In response, Manglona wrote a letter wherein he stated, "As I explained . . . the [s]econd [p]roposal was . . . that if I find [sic] tenant within a year from the day we talked, I could move you out [at] anytime and no expense for you [sic] . . . . But if for some unforeseen reason whatsoever that I can't do [that] for a year, which I doubt very much, I would still be interested [in] the [s]even [h]undred [t]housand [d]ollars [o]nly ($700,000.00) as indicated [in] proposal number one (1) or [alternatively I would be interested in] proposal number (3)."[1] Subsequently, the Government chose to act as if the second proposal contained in Sablan's letter was elected and informed Manglona that it would vacate the leased premises, which it did in October 1996.

¶8 In January 1997, then Secretary of the Department of Finance, Antonio R. Cabrera, sent a letter to Manglona, formally notifying Manglona that the Government was paying $42,291 to settle "any outstanding dispute" between the Government and Manglona. Cabrera attached a copy of the check issued by the Government, payable to

[1] Letter of 11/02/1995. *See* Excerpts of Record at 70.

the Bank of Saipan for the benefit of Manglona that clearly stated in the memorandum "Accord and Satisfaction--Immigration Building Lease." The payment was assigned to the Bank of Saipan, and Manglona did not personally receive the check or see the check prior to its negotiation by the Bank of Saipan. Notwithstanding the negotiation and application of the check for Manglona's benefit, however, Manglona continued to bill the Government for rent due pursuant to the Lease.

¶9 Consequently, Sablan informed Manglona in a letter that the Lease terminated when the Government vacated the building in October 1996, due to the "problems with structural defects, electrical insufficiency, and general lack of physical integrity of the building . . . ." After the Government vacated the building, Manglona allegedly defaulted on his loans from the Bank of Saipan and faced a court judgment against him, and suffered a credit loss. He claims he was also no longer able to make timely rent payments to the Commonwealth Ports Authority, on whose land the warehouse building is located, and became subject to collection proceedings.

¶10 In May 1997, Manglona commenced a suit against the Government for breach of the Lease and sought recovery of the property.[2] The Government answered and counterclaimed alleging that: (1) the Lease was void *ab initio*, (2) Manglona breached the Lease by failing to fulfill his obligations under the Lease, (3) Manglona failed to give the notice of default required under the Lease, (4) Manglona constructively evicted the Government, and (5) Manglona failed to mitigate his damages. After a bench trial, the Superior Court ruled in favor of Manglona, finding that the Government had breached the Lease and awarded Manglona $1,826,838.00, the amount which would have been due as

[2] The Government also filed third-party claims against various individuals holding government positions who had been involved in negotiating and approving the Lease between Manglona and the Government; however, the third-party claims were dismissed prior to the trial.

rent under the Lease from February 1, 1997 through December 31, 2002, the date the Lease would have terminated in the absence of an earlier termination. The court further determined that under RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.1(3) (1977), Manglona was not required to mitigate his damages. The court, however, refused to grant prejudgment interest to Manglona, and he appeals this refusal. The Government cross-appealed the court's judgment, arguing that it did not breach the Lease, and that the Lease was void on public policy grounds because the construction of the premises was in violation of the Commonwealth Building Safety Code. The two appeals have been consolidated.

II.

¶11 This Court has jurisdiction over this appeal from a final judgment of the Commonwealth Superior Court pursuant to Article IV, section 3 of the Commonwealth Constitution and Title 1, section 3102(a) of the Commonwealth Code.

III.

¶12 We address the issues presented on appeal in two parts. The first part focuses on the issues surrounding the obligations under the Lease, more specifically, whether the Superior Court erred when it determined that the Government unjustifiably breached the Lease and whether the enforcement of the Government's obligations under the Lease would run against sound public policy due to Manglona's alleged Building Safety Code violation. The second part addresses the various damage issues including whether the court erred in its damage calculations when it: (1) refused to grant prejudgment interest to Manglona, (2) ruled that Manglona had no duty to mitigate damages, and (3) failed to abate the rent.

A. Lease Obligations

¶13 We begin our analysis by addressing the issues involving the obligations under the Lease and whether there was a breach of the Lease. The Government asserts on appeal that it did not breach the Lease, but instead was lawfully entitled to terminate the Lease because Manglona did not fulfill his obligations under the Lease.[3] The Government further contends that Maglona did not keep the building in habitable condition or suitable for its intended use resulting in a constructive eviction and that Manglona failed to give the notice of default required by the Lease. Finally, the Government submits that, because the construction of the building violated the Building Safety Code, the Lease is illegal and void and enforcement of the Government's obligations under the Lease would violate public policy. Manglona argues that he fulfilled his obligations under the Lease, the trial court was correct in concluding a constructive eviction was not established and that the Government's obligations under the Lease are enforceable.

i. Nonperformance and Breach By the Government

¶14 We must first review whether the Superior Court erred when it determined that the Government breached the Lease. The "interpretation of a contract and the determination as to its breach are a mixed question of fact and law. *L.K. Comstock & Co. v. United Eng'rs & Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989) (*quoting Libby, McNeill, and Libby v. City Nat'l Bank*, 592 F.2d 504, 512 (9th Cir. 1978)). "In general, factual findings as to what the parties said or did are reviewed under the 'clearly erroneous' standard while principles of contract interpretation applied to the facts are

[3] The Government also argued at trial that there had been an accord and satisfaction when it paid $42,291.00 to the Bank of Saipan for Manglona's benefit but this argument was not raised on appeal.

reviewed de novo." *Id.*; *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 326 (1996) (On appeal, NMI Supreme Court reviews "application of contract law under the de novo standard, and any finding based on extrinsic evidence under the clear error standard.")

¶15 Breach of a contract occurs upon the nonperformance of a contractual duty of immediate performance. *Del Rosario v. Camacho*, 2001 MP 3 ¶ 96, 6 N.M.I. 213, 231. In the present case, the parties contractually agreed to a condition before the failure to pay the rent under the Lease would constitute a breach. Paragraph 15, section (b) of the Lease provides that the tenant is in breach of the Lease if he defaults on his obligation to pay the rent and such default continues for 30 days after notice of such default is given by the landlord to the tenant. It is undisputed that the last rent payment made by the Government was for the month of January 1997. The trial court found that the Government was given notice of its default to pay rent through the numerous demand letters sent by Manglona's accountant to the Government and that the Government's failure to pay the rent 30 days after being given notice of the default constituted a breach of the Lease (*see* Supp'l Excerpts of Record at 32, 33, 35, and 38).

¶16 A separate breach of the Lease occurred when the Government abandoned the premises in October 1996. This action, the trial court determined, constituted a breach under paragraph 15, section (a) of the Lease, which specifically provided that the tenant's abandonment of the leased premises would constitute a breach of the lease.

¶17 We cannot conclude that the Superior Court erred in determining that the Government had failed to perform its obligations required by the Lease. The Government's failure to make rent payments after receiving notice of its default, as well as its abandonment of the premises in October 1996, constituted nonperformance of its

contractual duties required by the Lease. Having agreed with the Superior Court that there was nonperformance by the Government of its contractual duties, we must next inquire as to whether the Government's nonperformance was justified.

¶18 We have previously held that if the nonperformance of a contractual duty is justifiable, then there is no breach. *Del Rosario*, 2001 MP 3 ¶ 96, 6 N.M.I. at 231. The Government advances a number of arguments as to why its breach of the Lease was justified and its nonperformance should be excused. The Government argues that Manglona failed to keep the property in good repair and failed to maintain a standby generator, that the property was not suitable for the use contemplated by the parties and that the Government was constructively evicted from the property. Alternatively the Government claims that it has not yet failed to perform its obligation to pay rent because Manglona's performance of his obligations under the Lease was a precondition for the payment of the rent. We find the Government's arguments unpersuasive.

a. Obligation to Repair Property and to Maintain Generator

¶19 The Government insists it was entitled to terminate the Lease due to Manglona's alleged failure to both keep the leased property in good repair and to maintain a standby generator. Pursuant to paragraphs 7 and 8 of the Lease, respectively Manglona had the duty to "install, operate and maintain at his expense a standby generator adequate for the normal electrical load of the Premises in the case of power outages" and "maintain . . . and keep [the leased property] in good repair at his expense." The Lease, however, is silent regarding the remedial measures available to the tenant in the event of the landlord's default. Given that there is no contractual provision on remedial measures, and because there exists no contrary statutory or customary law, we are constrained in

our ability to formulate the applicable law by the statutory mandate to apply the common law as enunciated in the American Law Institute's Restatements of the Law. 7 CMC § 3401 ("In all proceedings, the rules of the **common law**, as expressed in the **restatements** of the law approved by the American Law Institute and, to the event not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of Commonwealth, in the absence of written law or customary law to the contrary…"(emphasis added)).

¶20 Under RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 7.1 (1977):

> if the landlord fails to perform a valid promise contained in the lease to do something on the leased property, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, the tenant may, [*inter alia*], terminate the lease.

The Government asserts that the repair problems with the leased premises were recurring in nature, the standby generator did not work properly and that Manglona did not respond despite the Government's requests for Manglona to perform. The Superior Court did not find, however, any evidence to show that the Government complained to Manglona regularly, or any evidence to indicate that Manglona failed to perform, within a reasonable period of time after being requested to do so, his obligations under the Lease to maintain and keep the premises in good repair at his expense or to have available a standby power generator.

¶ 21 Instead, the trial court found that Sablan wrote a letter to Manglona on June 27, 1995, alleging numerous defects and problems with the building, including wiring that did not comply with the NEC, repeated failure with the backup power generators, a

leaking roof, noncompliance with the ADA, and lack of water. Manglona initially addressed Sablan's complaints in a letter dated June 30, 1995, and in a further reply on July 20, 1995, stating that the electrical problems had been fully resolved, the building was in compliance with the NEC and the CUC standards, and that an additional water tank and pump were installed which would be sufficient for the Government's water needs. The Government did not respond to either of these letters and made no other complaints regarding the conditions or repair of the building or the generator.

¶22 The Superior Court's findings are not clearly erroneous and we uphold its determination that the Government was not entitled to terminate the Lease on the ground that Manglona allegedly breached his duty to maintain and keep the leased premises in good repair or to maintain a generator.

b. Condition Suitable for Use - Constructive Eviction

¶23 Next, we consider the Government's arguments that it was entitled to terminate the Lease because of the unsuitable condition of the property for the use contemplated by the parties, which was an office building. The Government initially argues that the property was unsuitable for use as an office building and the Government's entry at the commencement of the lease did not constitute a waiver of any remedies since the leased property was unsafe or unhealthy at the time of entry. The Government further suggests that a change in the condition of the property during the tenancy was caused by Manglona's failure to fulfill his obligations to repair, making the property unsuitable as an office and resulting in a constructive eviction of the Government.

¶24 At common law, the landlord bore no responsibility of keeping leased property suitable for the use contemplated by the parties. *Becker v. IRM Corp.*, 698 P.2d 116, 120

(Cal. 1985), *overruled by Peterson v. Superior Court*, 899 P.2d 905 (Cal. 1995). In recent years, however, the definite judicial trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid agreement otherwise, to provide the tenant with the leased property in a condition suitable for the use contemplated by the parties.[4]

¶ 25 RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.3 (1977) states:

> Except to the extent the parties to a lease validly agree otherwise, the remedies available to the tenant before entry, because of the unsuitable condition of the leased property for the use contemplated by the parties, are available to him after entry if the landlord does not correct the situation within a reasonable period of time after being requested to do so by the tenant, unless the tenant's entry constitutes a waiver.

Comment b of this section makes clear that

> entry by the tenant is normally considered a recognition by the tenant that the condition of the property at the time of the entry is suitable for the use contemplated by the parties, unless before entry the tenant affirms the lease and preserves the remedies, other than termination of the lease, given to him . . . .

RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.3 cmt. b (1977). Comment c, however, provides that "[t]he tenant as a matter of law is unable to waive any remedies available to him at the time of entry, if at the time of entry it would be unsafe or unhealthy to use the leased property in the manner contemplated by the parties." *Id*. at cmt. c.

¶26 Paragraph 9 of the Lease specifically provided that the "[a]cceptance of the Premises by Tenant shall be construed as recognition that the Premises are in good state of repair and in sanitary condition." "The intent of contracting parties is generally

[4] *See* RESTATEMENT (SECOND) OF PROPERTY, *infra.*

presumed to be encompassed by the plain language of contract terms." *Riley v. Pub. Sch. Sys.*, 4 N.M.I. 85, 88 (1994). Under the plain language of the lease terms, therefore, we construe the Government's entry into and acceptance of the leased premises, without preserving a right to claim otherwise post-entry, as its recognition that the premises at the time of entry were in a good state of repair and in a sanitary condition. There is, in short, no basis for the Government's view that the property was unsafe or unhealthy at the time of its entry.

¶27 Accordingly, we reject the Government's argument that it was entitled to terminate the Lease because the leased property was not in a condition suitable for the use contemplated by the parties, at the time of the Government's entry.

¶28 We next address the Superior Court's ruling that the Government was not constructively evicted. The Government insists that Manglona constructively evicted the Government and breached the implied covenant of quiet enjoyment when he failed to fulfill his obligation to repair and provide the necessary services regarding electricity, water, and the back-up generator. The Government also asserts that vacating the leased premises more than a year after Sablan's initial June 1995 letter to Manglona should not be deemed untimely, as the problems with the premises were recurring in nature, the Government had provided Manglona with the requisite reasonable time for remedial action, and the task of finding a new office location naturally involved time.

¶29 In response, Manglona contends that the complaints made by the Government regarding the leased premises were adequately addressed by Manglona in a timely manner. Moreover, Manglona argues the Government waived its right to assert a defense of constructive eviction because the Government failed to surrender the premises within a

reasonable time after Manglona's alleged interference with the Government's quiet enjoyment. Manglona points to the 15-month gap between the time Manglona addressed the Government's complaints in June 1995 and its abandonment of the premises in October 1996 as evidence of the Government's waiver.

¶30 A principal covenant on the part of a landlord, which is implied, if not expressed, is that his tenant shall have the quiet enjoyment and possession of the premises. *McDowell v. Hyman*, 48 P. 984, 986 (Cal. 1897). The covenant of quiet possession in a lease is breached when an actual or constructive eviction occurs. *Standard Livestock Co. v. Pentz*, 269 P. 645, 647-48 (Cal. 1928). Constructive eviction occurs through intentional conduct by the landlord which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the leased property, causing him to vacate the premises. *Veysey v. Moriyama*, 195 P. 662, 663 (Cal. 1921); *Lindenberg v. MacDonald*, 214 P.2d 5, 9 (Cal. 1950); *Stewart Title & Trust of Tuscon v. Pribbeno*, 628 P.2d 52, 53 (Ariz. Ct. App. 1981). Generally, the interference by the landlord must render the premises unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased. *Veysey*, 195 P. at 662.

¶ 31 Quoting RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.4 (1977), the court in *Albers v. Bar ZF Ranch, Inc.*, determined:

> There is a breach of the landlord's obligations if, after a tenant's entry and without the fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair, . . . makes the leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation within a reasonable time after being requested by the tenant to do so.

747 P.2d 1347, 1350 (Mont. 1987). The failure of the landlord to fulfill the obligation to repair, thereby making the leased property unsuitable, is also sometimes referred to as constructive eviction. In the event of such breach, the tenant may, *inter alia*, terminate the lease. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.4(1) (1977).

¶32 Here, there is no evidence of intentional conduct on the part of Manglona rendering the leased premises unfit or unsuitable for occupancy in whole or in substantial part for the Government's use of the premises as its office space. There was also no evidence found by the trial court that Manglona did not respond to the Government requests to perform. If anything, the trial court's finding that no further complaints regarding the premises were made by the Government after July 1995 tends to show that Manglona's intervention rendered the leased premises more suitable for the Government's use. Because it is not apparent that the Superior Court's conclusion creates a firm and definite conviction that a mistake has been committed, we cannot conclude that the court erred in concluding the Government failed to establish a constructive eviction.

c. Condition for the Rent Payment

¶33 The Government alternatively argues that it has yet to breach the Lease by failing to pay the rent because Manglona's performance, which did not occur, was a condition precedent to the Government's obligation to pay the rent.

¶34 "A condition is an event, not certain to occur, [but] which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Del Rosario v. Camacho*, 2001 MP 3 ¶ 96, 6 N.M.I. at 231.

> A covenant to repair on the part of the lessor and a covenant to pay the rent on the part of the lessee [were] usually considered as independent covenants, and unless the covenant to repair [was] expressly or impliedly made a condition precedent to the covenant to pay the rent, the breach of the former [did] not justify the refusal on the part of the lessee to perform the latter.

Arnold v. Krigbaum, 146 P. 423, 424 (Cal. 1915); *see also Matte v. Shippee Auto, Inc.*, 876 A.2d 167, 171 (N.H. 2005). This common law doctrine of independent lease covenants "originated in an agrarian society in which the estate in land was the most important feature of the real estate lease." *Richard Barton Enter., Inc. v. Tsern*, 928 P.2d 368, 375 (Utah 1996). The system of feudal tenure, however, has little application in the modern world. One court explained:

> [T]he expectations and relationships of lessors and lessees [has] so hanged from earlier times that it was necessary to recognize that a "residential lessee does not realistically receive an estate in land. Rather, the lessee's rights, liabilities, and expectations are more appropriately viewed as governed by contract and general principles of tort law."

Id. (*quoting Williams v. Melby*, 699 P.2d 723, 727 (Utah 1985)). In many jurisdictions, leases have come to be viewed as more properly analyzed under contract law rather than property law. *Teodori v. Werner*, 415 A.2d 31, 33-34 (Pa. 1980). Some courts treat commercial leases as they would any commercial contract, some have adopted a dependent covenants rule, and others have continued to follow the independent covenants rule. *Wesson v. Leone Enter., Inc.*, 774 N.E.2d 611, 619-20 (Ma. 2002) (deciding to follow the more modern trend and adopting a mutually dependent covenants rule). Along with the modern trend in case law, the RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 7.1 (1977) adopts a rule of dependent covenants. The common law of the Commonwealth is drawn from the Restatements, absent any contrary case law or statute. 7 CMC § 3401; *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268,

272 n.5 (1995). We find this view persuasive and to be in line with our decision today to adopt the more modern rule that a lessor has a duty to mitigate her damages when faced with the lessee's abandonment of the leased premises because a lease is both a conveyance of an estate and a contract, *see infra*.

¶35 Although the covenant to repair and the covenant to pay rent were dependent on each other, there is no evidence that Manglona failed to perform his obligations as the lessor. The Government's duty to pay the rent was therefore unaffected.

ii. Enforcing the Government's Obligations Does Not Violate Public Policy

¶36 We now turn to whether the enforcement of the Government's obligations under the Lease would run contrary to public policy considerations because of Manglona's alleged Building Safety Code violation. The Government argues that Manglona's renovations of the building in 1992 were done without a permit and in violation of the Commonwealth Building Safety Code which took effect in 1990.

¶37 Relying on 2 CMC § 7126(a),[5] the Government claims that the Lease is illegal and void and the Government's obligations should be unenforceable on grounds of public policy. Furthermore, Subsection (1) of § 5.5 of the RESTATEMENTS requires that a landlord "keep the leased property in a condition that meets the requirements of governing health, safety and housing codes." RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT. § 5.5(1) (1977). Although acknowledging that the American Law Institute had not taken a position "as to whether the rule of [subsection (1) of section

[5] "It shall be unlawful for any person, firm or corporation to construct, enlarge, move, equip, use, occupy or maintain any building or structure, or cause to permit the same to be done, in violation of any provisions of this building safety code." 2 CMC § 7126(a).

5] is or should be made available to a tenant of commercial industrial property,"[6] the Government urges this Court to make the rule available to tenants of commercial and industrial property in the Commonwealth.

¶ 38 Manglona, in response, points out that the lease is a commercial and not a residential lease but even if subsection 5.5(1) applies, reporter's note 3 to that section[7] provides that landlords are "responsible only for repairing substantial violations of the code and minor defects on the leased premises will be considered de-minimis and result in no liability on the landlord's part." In addition, the Government had already acknowledged at the time of occupancy that the property was in a good state of repair and in a sanitary condition, the Government made no further complaints regarding repairs after Manglona's June 30, 1995 letter, and any permits required for the renovations to the building were the responsibility of the Government. Finally, Manglona claims the Government is raising the violation of the Building Safety Code for first time on appeal and none of the three narrow exceptions to the rule that issues raised for the first time on appeal will not be considered apply here. We agree.

¶ 39 As a matter of general practice this Court will not consider arguments raised for the first time on appeal. *Camacho v. Northern Marianas Retirement Fund*, 1 N.M.I. 362, 372 (1990). Although there are three exceptions to this rule: (1) a new theory or issue arises because of a change in the law while the appeal was pending; (2) the issue is only one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the appellate court does not consider the case, *Id.*, none of the exceptions applies in this case. We therefore decline to review whether enforcement of

[6] RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT. § 5.5, caveat to subsection (1) (1977).

[7] RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT. § 5.5, reporter's note 3 (1977).

the Lease would be contrary to public policy. We also do not need to decide today whether subsection 5.5(1) of the RESTATEMENT should be available to commercial tenants in the Commonwealth, since a factual record has not been fully developed which reflects the property failed to meet health, safety and building codes. Therefore, the issue is not ripe for review.

B. Damages

¶ 40 We next address the various damages issues, specifically whether the court erred when it: (1) refused to grant prejudgment interest to Manglona, (2) found that Manglona had no duty to mitigate the damages and (3) failed to abate the rent.

i. Prejudgment Interest

¶41 The first damage issue presented is whether the Superior Court erred when it refused to grant prejudgment interest to Manglona. Generally, a decision to award prejudgment interest is reviewed for an abuse of discretion. *See Belk v. Martin*, 39 P.3d 592, 600 (Idaho 2001); *Housing Fin. and Dev. Corp. v. Ferguson*, 979 P.2d 1107, 1118 (Haw. 1999); *Pauley v. Gilbert*, 522 S.E.2d 208, 210 (W. Va. 1999) (explaining prejudgment interest awards are generally reviewed for an abuse of discretion, unless the award hinges on interpretation of decisional or statutory law) ; *but see Blue Valley Coop. v. Nat'l Farmers Org.*, 600 N.W.2d 786 (Neb. 1999) (applying a de novo standard in reviewing prejudgment awards authorized by a state statute).

¶42 According to Manglona, because there was a definite, ascertainable sum of money due at the time of breach pursuant to the lease terms, he should be entitled to an award of prejudgment interest as a matter of right under RESTATEMENT (SECOND) OF CONTRACTS §

354(1) (1981).[8] Prejudgment interest is necessary, Manglona argues, to compensate him for the time within which he could not use the money he was owed, because during the same time period interest was accruing on the various judgments entered against him due to his inability to timely make certain payments. In response, the Government argues that the fact that only post-judgment interest is provided for under 7 CMC § 4101 means that it was the Legislature's intention to provide for post-judgment interest only in the Commonwealth. However, 7 CMC § 2202, specifically states that the Commonwealth will not be liable for prejudgment interest in the torts context; this would be unnecessary if the Government's proposition were true.

¶43 Prejudgment interest serves to compensate for the deprivation of the money due from the time the claim accrues until judgment is entered, "thereby achieving full compensation for the injury that damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2, 107 S.Ct. 702, 706, n.2, 93 L.Ed.2d 639 (1987). Courts may allow interest as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled even where interest is not stipulated for by contract, or authorized by statute. *United States v. North Carolina,* 136 U.S. 211, 216, 10 S.Ct. 920, 922, 4 L.Ed. 336 (1890). Where a sovereign government is a party and interest is not stipulated for by contract or authorized by statute, however, interest is not to be awarded against a sovereign government. *Id.; Fidalgo Island Packing Co. v. Phillips*, 147 F. Supp. 883, 886 (D. Alaska 1957), *amended by Fidalgo Island Packing Co. v. Phillips*, 149 F. Supp. 260 (D. Alaska 1957) ("[the holding that] the state, unless by or

[8] Pursuant to RESTATEMENT (SECOND) OF CONTRACTS § 354(1) (1981), "[i]f a breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled."

pursuant to an explicit statute, is not liable for interest even on a sum certain which is overdue and unpaid . . . has been widely supported"); *United States v. Bedford*, 188 F. Supp. 181, 184 (D.N.J. 1960) ("it has long been and still remains the law that 'interest . . . is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers'").[9] In 7 CMC § 2251(b), the Government allows for claims to be brought against it in the Commonwealth Trial Court where the claim is founded upon any express contract with the Government; this section does not prohibit prejudgment interest as 7 CMC § 2202 does. The same law, PL 3-51, that created 7 CMC § 2202 repealed parts of the original source for § 2251. However, the law failed to limit the liability of the Commonwealth in the context of contract claims.

¶44 Here, interest was stipulated for by the Lease. "Paragraph 22: Interest"[10] of the Lease provides: "[a]ny sum accruing to Landlord under the provisions of the Lease which shall not be paid when due shall bear interest at the rate provided by law from the date notice[11] specifying such nonpayment is given until paid." As we discuss *infra*, Manglona had a duty to mitigate his damages following the Government's abandonment of the leased premises. The award of damages should account for the amount by which Manglona reduced or could have reduced his damages.

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[9] The rule of State immunity from interest, however, does not apply where the State retains no sovereign immunity, such as against the Federal Government. *See West Virginia v. United States*, 479 U.S. 305, 311-12, 107 S.Ct. 702, 706, 93 L.Ed.2d 639 (1987).

[10] Apparently by a mistake two paragraphs are numbered "22" in the Lease. We distinguish the two paragraphs by using the terms, "Paragraph 22: Notice" and "Paragraph 22: Interest."

[11] Under Paragraph 22: Notice, any notice required or permitted under the lease must be "in writing" and is "deemed given when delivered in person or when deposited in the United States mail . . . ."

¶ 45 Though this duty to mitigate could ultimately change the amount of damages awarded Manglona, it does not affect the availability of prejudgment interest because the amount of damages was reasonably certain in the instant case. RESTATEMENT (SECOND) OF CONTRACTS § 354(1) (1981) allows for prejudgment interest on the amount due "less all deductions to which the party in breach is entitled." "Deduction in mitigation of damages" is one such deduction to which the breaching party is entitled. *Spurck v. Civil Service Bd.*, 42 N.W.2d 720, 728 (Minn. 1950). When "the amount due under a contract is certain but is or may be reduced by an unliquidated setoff, interest is allowable on the balance found to be due from the time it became due under the contract". *Condor Corp. v. Arlen Realty & Dev. Corp.*, 529 F.2d 87, 88 (8th Cir. 1976) (affirming the award of prejudgment interest on the balance of damages for a breach of lease after a deduction for mitigation). Here, the Government is entitled to have the amount by which Manglona reduced or could have reduced his damages deducted from the award.[12]

¶46 Accordingly, prejudgment interest should have been awarded on the amount of damages Manglona was entitled to after accounting for his duty to mitigate.

ii. Mitigation

¶47 The next damages issue we address is whether the Superior Court correctly ruled that Manglona had no duty to mitigate his damages. In reviewing a trial court's determination of damages, we examine all issues of law *de novo*. *Boehms v. Crowell*, 139 F.3d 452, 459 (5th Cir. 1998). The Superior Court initially determined that since

[12] Illustration 7 of RESTATEMENT (SECOND) OF CONTRACTS § 354 (1981) deals with the reduction of an award by mitigation specifically. It reads:

> A contracts to work for B at a weekly salary of $2,000. B wrongfully discharges A ten weeks before the contract ends and refuses to pay A anything for the four weeks preceding the discharge. By reasonable efforts, A can find similar work paying $1,500 a week for the last ten weeks. A sues B and recovers $2,000 for each of the first four weeks and $500 for each of the last ten, or $13,000. A is entitled to simple interest on each installment at the legal rate from the date that it was payable.

"[n]o Commonwealth case exists treating the issue of mitigation of damages in landlord tenant disputes. . . . the court must turn to the applicable Restatement rules to find proper guidance . . . ." *Manglona v. Commonwealth*, Civ. No. 97-0486 (N.M.I. Super. Ct. Dec. 30, 2003) ([Unpublished] Supplemental Findings of Fact and Conclusions of Law at 2). The trial court, relying solely on RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.1(3) (1977),[13] ruled that no clause of the Lease required Manglona to mitigate his damages upon abandonment of the property by the Government and "[w]hile mitigation of damages is certainly the rule of law in some jurisdictions throughout the United States, the principle as recognized in the Restatement of Property 2d, does not allow the defense in the Commonwealth." *Manglona v. Commonwealth*, Civ. No. 97-0486 (N.M.I. Super. Ct. Dec. 30, 2003) ([Unpublished] Supplemental Findings of Fact and Conclusions of Law at 3) (provided at Excerpts of Record 28 lines 7–10). The Government argues that in *Camacho v. L & T Int'l Corp*., 4 N.M.I. 323 (1996) this court held that a written lease is a contract subject to the same rules as contracts, and the trial court erred when it failed to consider the applicable law in the RESTATEMENT (SECOND) OF CONTRACTS.[14]

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[13] RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.1 (1977) provides:

> (3) Except to the extent the parties to the lease validly agree otherwise, if the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent, but the landlord may:
>
> (a) accept the tenant's offer of surrender of the leased property, which offer is inherent in the abandonment, and thereby terminate the lease, leaving the tenant liable only for rent accrued before the acceptance and damage caused by the abandonment; or
>
> (b) notify the tenant that he will undertake to relet the leased property for the tenant's account, thereby relieving the tenant of future liabilities under the lease, including liability for future rent, to the extent the same are performed as a result of a reletting on terms that are reasonable.

[14] RESTATEMENT (SECOND) OF CONTRACTS § 350: AVOIDABILITY AS A LIMITATION ON DAMAGES (1981) states:

¶48 Two schools of thought prevail among jurisdictions regarding a commercial landlord's duty to mitigate damages when a tenant breaches a lease and abandons the leased property. The modern trend, and that adopted by the majority of jurisdictions, is to impose some duty on commercial landlords to mitigate damages. Other courts adhere to the traditional view that a landlord has no duty to mitigate and he may allow the property to remain idle and still hold the tenant liable for rent for the balance of the term. In order to effectively determine this issue of Manglona's duty to mitigate, we must examine the evolution of leases, the law in other jurisdictions, public policy considerations, as well as review the express terms of the Lease.

¶49 At common law, a landlord, had no duty to mitigate damages upon the lessee's repudiation of the lease and abandonment of the leased premises, *see Coffin v. Fowler*, 483 P.2d 693, 696 (Alaska 1971); *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 846 (Cal. 1985). Under the traditional view, upon the lessee's abandonment of the property, the lessor may elect either to: (1) refuse to accept abandonment, let the premises be idle and sue the tenant as the rent matures, or (2) accept the lessee's surrender of the premises, thus terminating the lease and reenter for landlord's account, or (3) reenter and relet for tenants account and hold the tenant liable for any difference in the agreed rent and that paid by the new tenant. *See, e.g., Chandler Leasing Div., Pepsico Serv. Indus. Leasing Corp. v. Florida-Vanderbilt Dev. Corp.*, 464 F.2d 267, 271 n.3 (1972). Those jurisdictions today that follow the traditional rule, that a landlord has no duty to mitigate damages upon a tenant's abandonment, proceed from the theory that a lease creates an

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(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

estate in land and the lessee thus becomes the owner of the premises for the term of the lease. *O'Brien v. Black*, 648 A.2d 1374, 1376 (Vt. 1994); *Wright v. Bauman*, 388 P.2d 119, 121 (Or. 1965) ("absolving the lessor from any obligation to mitigate is based upon the theory that the lessee becomes the owner of the premises for a term and therefore the lessor need not concern himself with lessee's abandonment of his own property"). The lease is treated as more of a conveyance of an interest in real property rather than a contract.

¶50 This policy of landlord mitigation was developed in the context of leases of agricultural land. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 905 (Utah 1989). "Those leases generally ran from growing season to growing season. If a tenant vacated after planting time had passed, it was unrealistic to expect the landlord to find a new tenant interested in leasing land that was essentially useless for the remainder of the term." *Id*. "Therefore, a rule requiring mitigation by reletting would have been highly artificial in the practical context of most landlord-tenant relationships." *Id*. However, times changed, economies developed and "agricultural leases constituted only a minor part of the modern leasing market." *Id*. This shift from an agrarian to an industrial society meant leases were more contractual in nature rather than a conveyance of real property.

¶ 51 Recently many courts have emphasized the contractual aspects of the commercial lease and recognized a landlord's duty to mitigate damages reasoning that a modern lease is far more than a conveyance of an estate in land. These courts treat a lease as both a conveyance and a contract. *O'Brien*, 648 A.2d at 1376; *Schneiker v. Go*rdon, 732 P.2d 603, 610 (Colo. 1987) ("it is necessary to recognize the dual nature of the lease as

contract and conveyance and to analyze the . . . breach under contract principles in order to achieve a just result consonant with the intent of the parties to this modern commercial lease . . . . We can perceive no reason why the covenant to pay rent should be treated differently than a covenant to pay contained in any other contract."); *Bernstein v. Seglin*, 171 N.W.2d 247, 250 (Neb. 1969) ("A modern lease of a business building ordinarily involves multiple and mutual running covenants between lessor and lessee. It is difficult to find logical reasons sufficient to justify placing such leases in a category separate and distinct from other fields of the law that have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. The perpetuation of the distinction between such a lease and a contract, in the application of the principle of mitigation of damages, is no longer supportable."); *Wright*, 388 P.2d at 121("[A lease] is an agreement for a continuous interchange of values between landlord and tenant . . . . The transaction is essentially a contract. There is no reason why the principle of mitigation of damages should not be applied to it."); *Schneiker*, 732 P.2d at 610) ("A commercial lease, like other contracts, is predominantly an exchange of promises. . . . We can perceive no reason why the covenant to pay rent should be treated differently than a covenant to pay contained in any other contract.").

¶ 52 "The overwhelming trend among jurisdictions in the United States has thus been toward requiring a landlord to mitigate damages when a tenant abandons the property in breach of the lease agreement,"[15] *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 298 (Tex. 1997); *O'Brien*, 648 A.2d at 1376 (A commercial landlord

[15] "Forty-two states and the District of Columbia have recognized that a landlord has a duty to mitigate damages in at least some situations: when there is a breach of a residential lease, a commercial lease, or both." *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 296 (Tex. 1997). "Only six states have explicitly held that a landlord has no duty to mitigate in any situation." *Id.* at 297.

has a duty to make reasonable efforts to mitigate damages when a tenant abandons the leased premises); *United States Nat'l Bank of Oregon v. Homeland, Inc.*, 631 P.2d 761, 764 (Or. 1981) ("Following abandonment of the leased premises, the [commercial] landlord cannot stand idly and look to the tenant for damages in the amount of the rent which would accrue during the remainder of the leasehold term. The lessor has a duty to make a reasonable effort to mitigate damages by finding a suitable tenant."); *Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299 ("A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise."). Indeed, in recent years, almost all courts which have faced the question of damage mitigation have refused to allow landlords to recover money from a defaulting tenant in damages when the landlord could have avoided those damages by leasing the premises to another with no greater risks to the landlord than he assumed under the original lease. *O'Brien*, 648 A.2d at 1376 (*citing* 5A CORBIN ON CONTRACTS § 1039A (Supp. 1993)).

¶53 Apart from reviewing the historical development of leases and examining the law in other jurisdictions, it is also important to understand some of the policy arguments surrounding a landlord's duty to mitigate. Proponents of the common law conveyance rule, who believe a landlord should have no duty to mitigate, emphasize that mitigation results in an imposition of an obligation, that is not found in the original leasehold agreement, upon a nonbreaching, innocent party. Thomas A. Lucarelli, Note, *Application of the Avoidable Consequences Rule to the Residential Leasehold Agreement*, 57 FORDHAM L. REV 425, 439 (1988) (*citing Wohl v. Yelen*, 161 N.E.2d 339, 343 (Ill. App. Ct. 1959)). This result, they suggest, seems unfair to landlords and allows tenants to

breach leases without facing many consequences. Another argument they advance is that the landlord tenant relationship is personal and the landlord should not be compelled to accept tenants he would not otherwise want. Dawn R. Barker, Note, *Commercial Landlord's Duty Upon Tenant's Abandonment—To Mitigate?*, 20 J. CORP. L. 627, 634 (1995). A third justification against imposing a duty to mitigate is that covenants in a lease are independent and a tenant must pay rent whether or not a landlord tries to mitigate.[16] Stephanie G. Flynn, *Duty to Mitigate Damages Upon A Tenants Abandoment*, 34 REAL PROP. PROB. & TR. J., 721, 727-28 (2000).

¶ 54 The critics of the common law rule reason that mitigation prevents economic waste, encourages productive use of the property and discourages vandalism. *See Schneiker*, 732 P.2d. 603 (Colo.1987); *Wright*, 398 P.2d 119 (Or. 1965); *O'Brien*, 648 A.2d 1374 (Vt. 1994). They point out that the principles of the common law rule are outdated, particularly with respect to commercial leases, since the essential nature of the modern lease is more contractual rather than an estate in property, and landlords should therefore have a duty similar to that of the nonbreaching party in contract cases. *Schneiker*, 732 P.2d at 610; *Wright*, 398 P.2d. at 121; *O'Brien*, 648 A.2d at 1378. Furthermore, modern leases are rarely personal in nature: involving simple transfer of the premises from the lessor to the lessee. Instead they are complex business arrangements that may allocate responsibility for utilities, insurance, maintenance, repairs, taxes and other obligations between the lessor and lessee. *Dushoff v. Phoenix Co.*, 528 P.2d 637, 640 (Ariz. Ct. App. 1974). Moreover, a landlord under a duty to mitigate is not required to accept a tenant who is a financial risk or whose business is precluded by the original lease since only reasonable mitigation efforts are required. *Reid*, 776 P.2d at 905.

[16] Of course, we have rejected the independence of lease covenants. *See* discussion, *supra*.

Finally, advocates of the duty to mitigate submit that applying the traditional common law rule is partially unfair to both the landlord and tenant. According to one commentator:

> The common law rule should be rejected "as a matter of basic fairness . . . the rule leaves the landlord in a dilemma. If the landlord does nothing, the landlord has no duty to mitigate. However, if the landlord attempts to relet for the benefit of the tenant, the landlord develops a duty to mitigate. If the landlord is unsuccessful in reletting, the landlord may have accepted surrender of the property in the process and may have acquired a duty to mitigate. In that case, the tenant would be better off, and the landlord would be worse off; thus, the tenant would have benefited from the tenant's own breach. However, if the landlord did nothing, the property would sit idle for the remainder of the lease, and the tenant would be worse off than a breaching party under contract law.

Dawn R. Barker, Note, *Commercial Landlord's Duty Upon Tenant's Abandonment—To Mitigate?*, 20 J. CORP. L. 627, 644-45 (1995).

¶ 55 We believe the policy arguments in favor of mitigation outweigh those in support of the maintaining the common law rule. In *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 N.M.I. 213, 222 n.8 (1995), we recognized that "a lease is both a conveyance of an estate and a contract," and in *Camacho v. L & T Int'l Corp.* we confirmed that a written lease is a contract subject to the same rules as contracts. 4 N.M.I. 323. Therefore, rather than applying today the antiquated theory that the function of a lease is solely to create an estate in land and render the lessee the owner of the premises for the term of the lease, we reaffirm our previous position that a lease is both a conveyance of an estate and a contract, and subject to the same rules as contracts. Under a contract view, a commercial landlord should be treated like any other nonbreaching party to a contract. We therefore hold that a commercial lessor must mitigate damages when the lessee breaches the lease agreement and abandons the property, unless the commercial landlord and tenant

expressly contract otherwise.[17] *See Austin Hill Country Realty, Inc.*, 948 S.W.2d at 299; *see also O'Brien.*, 648 A.2d at 1376; *United States Nat'l Bank of Oregon,* 631 P.2d at 764, ; *Bernstein,* 171 N.W.2d at 250*; Wright,* 388 P.2d at 121.

¶ 56 To ensure the uniform application of a commercial landlord's duty to mitigate by the trial courts of the Commonwealth and to provide guidance to future landlords and tenants, we are compelled to address and resolve several other issues involving abandonment and breach of a lease by a tenant. First, we must establish the level of efforts the landlord must take to satisfy the duty to mitigate. Second, we need to determine who properly bears the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages. Finally, we must resolve which types of actions by the landlord triggers the duty to mitigate.

¶ 57 A landlord who seeks to hold a breaching tenant liable for unpaid rents has an obligation to take commercially reasonable steps to mitigate her losses, which ordinarily means that the landlord must seek to relet the premises. *Reid,* 776 P.2d at 905. Although some courts imposing a mitigation requirement do not require landlords to show active efforts to relet, holding that the landlord can carry its proof-of-mitigation burden simply by showing that it was passively receptive to opportunities to relet the premises, *see, e.g.*, *Reget v. Dempsey-Tegeler & Co., Inc*., 238 N.E.2d 418, 419 (Ill. Ct. App.1968), we conclude that this minimal showing does not serve the policies that underlie the adoption of a mitigation requirement.

¶ 58 Therefore, we prefer to follow those courts that require the landlord to take affirmative steps reasonably calculated to effect a reletting of the premises. *See, e.g.*,

[17] We do not need to decide today whether the duty to mitigate imposed by law may be negated contractually provided of course that it does not violate public policy.

Reid, 776 P.2d at 906; *Butler Products Co. v. Roush*, 738 P.2d 775, 776 (Ariz. Ct. App. 1987); *Schneiker*, 732 P.2d at 611; *Olsen v. Country Club Sports, Inc.*, 718 P.2d 1227 (Idaho Ct. App. 1985); *Wichita Props. v. Lanterman*, 633 P.2d 1154, 1157-58 (Kan. Ct. App. 1981); *Jefferson Dev. Co. v. Heritage Cleaners*, 311 N.W.2d 426, 428 (Mich. Ct. App. 1981); *Isbey v. Crews*, 284 S.E.2d 534, 537 (N.C. Ct. App 1981); *United States Nat'l Bank of Oregon*, 631 P.2d at 764. What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier. *Danpar Assocs. v. Somersville Mills Sales Room, Inc.*, 438 A.2d 708, 710 (Conn. 1980); *Grueninger Travel Serv. of Fort Wayne, Ind., Inc. v. Lake County Trust Co.*, 413 N.E.2d 1034, 1039 (Ind. Ct. App. 1980).

¶ 59 The landlord's duty is not, however, absolute and the failure to mitigate does not give rise to a cause of action by the tenant. The landlord's failure to use reasonable efforts to mitigate damages will only reduce the recovery against the breaching tenant to the extent that damages reasonably could have been avoided; similarly, the amount of damages that the landlord actually avoided by releasing the premises will reduce the landlord's recovery to the extent of such actual avoidance. *Austin Hill Country Realty, Inc.,* 948 S.W.2d at 299. Requiring mitigation does not in any way undermine the rule of law that prior to termination, a defaulting tenant still has enforceable rights and obligations. *O'Brien*, 648 A.2d at 1379. By the same token, the duty to mitigate damages does nothing to affect a tenant's existing obligation under the lease to pay rent because the landlord is not required to accept a tenant's surrender. *Id*. By imposing a duty to mitigate damages upon commercial landlords, the Court merely seeks to insure that these landlords respond reasonably to their tenants' abandonment. In fact, the duty

to mitigate damages does not require a commercial landlord to sacrifice any substantial right of its own; or to exalt the interests of the tenant above its own. *Id. at* 1380; *Danpar Assocs.*, 438 A.2d at 710.

¶60 We further hold that the breaching tenant should bear the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages. *Austin Hill Country Realty, Inc.,* 948 S.W.2d at 299; *Jefferson Dev. Co.*, 311 N.W.2d at 428 ("The burden is on the tenant to establish that the landlord failed to act reasonably to mitigate damages."); *Grueninger Travel Serv. of Fort Wayne, Ind.,, Inc.*, 413 N.E.2d at 1039-40 (holding that where there is "no mandatory reletting clause in th[e] lease agreement, the burden of proof as to mitigation rest[s] upon [the lessee]."). This is consistent with the rule in traditional contract cases, which is: the breaching party must show the nonbreaching party could have reduced its damages; it is also the view adopted by most of the states requiring mitigation. Stephanie G. Flynn, *Duty to Mitigate Damages Upon A Tenants Abandoment*, 34 REAL PROP. PROB. & TR. J., 721, 768 (2000).

¶ 61 Finally, we must decide to which types of actions by the landlord the duty to mitigate will apply. As we previously indicated, landlords traditionally have three courses of action against the tenant: (1) refuse to accept the abandonment and maintain the lease, suing for rent as it becomes due; (2) accept the lessee's surrender and terminate the lease, reletting for the landlord's account; or (3) treat the breach as a reentry and anticipatory repudiation, and relet for the tenant's account, holding the tenant liable for any deficiency between the agreed rent and that paid by the new tenant.[18]

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[18] The lease did provide the landlord with a right to reenter and relet for the tenant's account as well as a right to terminate and:

¶ 62 Clearly, the Landlord must have a duty to mitigate when he sues for anticipatory repudiation or actually reenters the premises. What is not so obvious is when the landlord wishes to maintain the lease and sue for rent as it becomes due. If the landlord is required to mitigate and forced to reenter the premises, in such situations the landlord runs the risk of terminating the lease or being deemed to have accepted tenant's surrender. Dawn R. Barker, Note, *Commercial Landlord's Duty Upon Tenant's Abandonment—To Mitigate?*, 20 J. CORP. L. 627, 644-45 (1995). If the landlord is unsuccessful in reletting the premises, the tenant would be better off and the landlord worse off. *Austin Hill County Realty, Inc.*, 948 S.W.2d at 298. We therefore hold that a landlord has a duty to mitigate following a tenant's abandonment and breach of lease when the landlord: (1) sues for anticipatory repudiation, (2) actually reenter the premises, or (3) has a right to reenter without reentry being construed as a forfeiture of lease, acceptance of surrender, or eviction of the tenant.

¶ 63 In the case *sub judice*, the Government unilaterally repudiated the Lease and in October 1996, abandoned the leased premises. Following the abandonment, Manglona continued to bill the Government for the rent payments as they became due (Supp'l E.R. at 38) and apparently did not reenter the premises. Manglona's refusal to accept the Government's offer of surrender of the premises by way of abandonment, however, did not automatically release Manglona from his duty to mitigate his damages. Rather, pursuant to the terms of the Lease, Manglona had a right of reentry, and reentry would not terminate the lease unless Manglona gave written notice of termination. Paragraph 10

> recover from Tenant all damage proximately resulting from the breach, including the cost of recovering the premises and the worth of the balance of this Lease over the reasonable rental value of the Premises for the remainder of the Lease term, which sum shall be immediately due Landlord from Tenant.

Lease Paragraph 16(2) and 16 (3).

of Manglona's Complaint also sought recovery of the premises. Manglona, therefore, had a duty to make reasonable efforts to mitigate his damages, i.e., take steps reasonably calculated to effect a reletting of the premises.

¶ 64 In the present case, inadequate evidence was proffered to the trial court as to the reason why the leased premises remained vacant for over six years. *Manglona v. Commonwealth*, Civ. No. 97-0486 (N.M.I. Super. Ct. Nov. 5, 2003) ([Unpublished] Findings of Fact and Conclusions of Law at 18). Although the court ordered the parties to appear at a status conference to discuss the issue of inadequate evidence on the issue of mitigation, *Id.*, there is nothing in the record informing us of what was, in fact, discussed at the status conference. Rather, it appears from the record that the trial court's holding that Manglona did not have a duty to mitigate was entirely based on RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 12.1(3) (1977), *Manglona v. Commonwealth*, Civ. No. 97-0486 (N.M.I. Super. Ct. Dec. 30, 2003) ([Unpublished] Supplemental Findings of Fact and Conclusions of Law at 2-3), which we reject today for the reasons mentioned *supra*.

¶ 65 Accordingly, the Superior Court erred in holding that Manglona had no duty to mitigate his damages. We remand 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 damages.

iii. Abatement and Deduction of costs

¶ 66 Finally, the Government argues that the Superior Court wrongly failed to abate the rent or to deduct from the damage award the costs that Manglona would have

incurred if he had to perform. We find that no error was committed by the court. The lower court's damage award cannot be overturned unless its factual basis is clearly erroneous. *Davis v. United States*, 375 F.3d 590, 592 (7th Cir. 2004).

¶ 67 The Government does not provide this Court with any information as to the nature of the alleged costs Manglona would have incurred costs had it performed, nor does it appear from the record that the Superior Court was presented with such information at any time. The Superior Court, therefore, did not err by failing to make any deductions based on the Government's conclusory argument regarding the costs saved.

¶68 The Government claims that it was entitled to an abatement of the rent pursuant to RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1977); however, section 11.1 provides the terms under which rent payments of a tenant *entitled to an abatement* could be abated.[19] In other words, for section 11.1 to apply in a particular case, there first needs to be a finding of the tenant's entitlement to an abatement. Here, such finding was never made by the Superior Court.

¶69 Moreover, a tenant is entitled to an abatement of the rent only so long as the landlord continues in default. *See Constellation Holding Corp. v. Beckerman*, 42 N.Y.S.2d 143 (N.Y. App. Div. 1943). The tenant's entitlement does not accrue until the expiration of the reasonable period of time allowed the landlord to address the tenant's complaint, because until the expiration of that period, the landlord is not in default. RESTATEMENT (SECOND) OF PROPERTY § 11.1 cmt. f (1977).[20] Here, as discussed *supra*,

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[19] RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1977) begins with: "[i]f the tenant is entitled to an abatement of the rent . . . ."

[20] 7 CMC § 3401 provides that: "[t[he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth…."

no evidence exists to indicate that Manglona was ever in default of his obligation to respond in a reasonable and timely manner to the Government's complaints. Sablan wrote a letter to Manglona on June 27, 1995, alleging numerous defects and problems with the building, including wiring that did not comply with the NEC) repeated failure with the backup power generators, a leaking roof, noncompliance with the Americans with Disabilities Act, and lack of water. Manglona initially addressed Sablan's complaints in a letter dated June 30, 1995, and in a further reply on July 20, 1995, stating that the electrical problems had been fully resolved, the building was in compliance with the NEC and CUC standards, and that an additional water tank and pump were installed which would be sufficient for the Government's water needs. The Government did not respond to either of these letters and made no other complaints regarding the conditions or repair of the building.[21]

¶ 70 Given the dearth of evidence going to Manglona's alleged failure to timely address the Government's complaints, default could not be attributed to Manglona, and in the absence of such requisite default, it was not in error for the Superior Court to refrain from abating the rent.

IV.

¶71 For the foregoing reasons, the Superior Court's judgment is hereby **AFFIRMED** in part. The court's holding that Manglona had no duty to mitigate his damages is hereby **REVERSED**, and we **REMAND** for further proceedings in accordance with this Opinion, to determine, upon a 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 damages.

[21] *See* Pl.'s Excerpts of Record at 42.

¶71 **SO ORDERED** THIS 4th DAY OF OCTOBER 2005.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
ALEXANDRO C. CASTRO
Associate Justice

/s/_____
ROBERT J. TORRES, JR.
Justice *Pro Tempore*