IN THE COURT OF APPEALS OF THE STATE OF NEVADA

8 ENTERPRISES, LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A FOOD & FARE; AND JOHN RHEE, AN INDIVIDUAL,
Appellants,
vs.
GREEN LEAF LOTUS, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Respondent.

No. 83688-COA

ORDER OF REVERSAL AND REMAND

8 Enterprises, LLC, and John Rhee appeal from a final judgment in a contract action concerning a commercial lease. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

On April 26, 2018, Spring Mtn Apartments, LLC (Spring Mtn) entered into a lease agreement with 8 Enterprises and a guaranty of lease agreement with Rhee (collectively referred to as 8 Enterprises).[1] 8 Enterprises intended to open a restaurant on the property. The lease term was for ten years and consisted of an initial monthly base rent of $9,412 per month with a two percent annual increase on the monthly rent for the term of the lease. 8 Enterprises was to commence paying rent either the earlier of 90 days after taking possession of the property, or the opening of its business to the public. Because 8 Enterprises never opened its restaurant, rent was due starting on January 21, 2019. In the instance of a breach, Section 23(a) in the lease agreement provided the landlord with the following remedies:

[1]We do not recount the facts except as necessary to our disposition.

> Without limiting the generality of the foregoing, Landlord may recover from Tenant:
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> i. any and all amounts reasonably necessary to compensate Landlord for all the detriment caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course would be likely to result therefrom, including, without limitation, (A) any costs or expenses incurred by Landlord (1) in retaking possession of the Premises; (2) in maintaining, repairing, preserving, restoring, replacing, cleaning, altering, remodeling or rehabilitating the Premises, including such actions undertaken in connection with the reletting or attempted reletting of the Premises to a new tenant or tenants; and (3) in carrying the Premises, including taxes, insurance premiums, utilities and security precautions; (B) any unearned brokerage commissions paid in connection with this Lease; (C) reimbursement of any previously waived or abated Base Rent, rent, or other amounts due hereunder or any free rent or reduced rental rate granted hereunder; and (D) *all Rent due hereunder through the expiration of the Term*; plus
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> ii. such reasonable attorneys' fees incurred by Landlord as a result of Default, and costs in the event suit is filed by Landlord to enforce such remedy; and plus
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> iii. at Landlord's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable law.

(Emphasis added.)

On November 7, 2018, Spring Mtn sold the property, which included its ownership interest in 8 Enterprises' lease, to respondent Green Leaf Lotus, LLC (Green Leaf). The terms of the original lease agreement remained in effect until September 28, 2019. From October 21, 2018, to September 28, 2019, 8 Enterprises failed to pay rent to its new landlord

Green Leaf, did not complete necessary renovations, declined to pay various contractors for renovations already performed (which resulted in mechanics' liens being recorded against the property), and failed to open its restaurant.

To resolve some of the disputes that arose under the original lease, Green Leaf and 8 Enterprises entered into a First Amendment to Lease on September 28, 2019. The First Amendment to Lease provided, in relevant part, that the rent would commence on October 1, 2019, and if 8 Enterprises fully performed its obligations under the First Amendment to Lease, all unpaid rent prior to October 1, 2019, would be waived. Additionally, 8 Enterprises was to open for business no later than 90 days from October 1, 2019, pay outstanding amounts to contractors, and obtain discharges of any liens filed against the property. If 8 Enterprises failed to fully and timely perform its obligations under the First Amendment to Lease, Green Leaf was entitled to pursue the remedies provided under the terms of the original lease.

8 Enterprises failed to perform. As a result, Green Leaf served 8 Enterprises with a three-day notice of default and intent to lockout and demanded a payment in delinquent rent to regain entry to the property. 8 Enterprises did not make the required payment. On October 25, 2019, Green Leaf repossessed the property.

Following the breach, Green Leaf hired North American Commercial to advertise the availability of the subject property for a new tenant to lease. On two occasions, North American Commercial was unsuccessful in securing a new tenant for Green Leaf. However, Green Leaf was eventually able to find a new tenant, Konos Northshore, which leased the property starting on May 5, 2021, for a five-year term, with the option of

renewing for an additional five years. The base monthly rent was $9,412 for the first year, with an annual increase in monthly rent.[2]

On December 11, 2019, before entering into the lease agreement with Konos Northshore, Green Leaf filed a complaint against 8 Enterprises, alleging breach of contract, breach of covenant of good faith and fair dealing, and breach of guaranty. After the district court issued a scheduling order, but before discovery commenced, Green Leaf filed a motion for summary judgment. Green Leaf argued that 8 Enterprises breached the lease and guaranty of lease and was entitled to $1,236,705.24 in unpaid rent through the entire ten-year lease term pursuant to Section 23(a) in the lease agreement.[3] In their opposition to summary judgment, 8 Enterprises did not contest liability but argued that there was a genuine dispute of material fact as to whether Green Leaf mitigated its damages because there was no evidence to demonstrate that Green Leaf had taken steps to re-lease the premises. 8 Enterprises also argued that Section 23(a) in the lease agreement contained an impermissible liquidated damages clause because it was designed to punish them and allowed Green Leaf to seek a double recovery. In response, Green Leaf initially asserted that Section 23(a) was not a liquidated damages clause, arguing, in relevant part:

> The Lease does not contain a liquidated damages provision. Section 23(a) does not contain the word 'liquidated.' Section 23(a) is not an estimate of damages. . . .

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[2]The lease agreement provides the following base rent per month for each year: Months 1-12 = $9,412; Months 13-24 = $9,701.60; Months 25-36 = $9,991.20; Months 37-48 = $10,280.80; and Months 49-60 = $10,599.36.

[3]We note that 8 Enterprises only contest the award of liquidated damages in the amount of unpaid rent for the entire ten-year lease term and not the award of other recoverable costs as well as attorney fees.

> Rather, Section 23(a) constitutes the compensatory damages suffered by Landlord throughout the life of the Lease and puts the Landlord in a position it would be in but for the Tenant's breach.

The district court granted the motion for summary judgment as to liability under the lease and guaranty. However, the district court denied the motion related to damages without prejudice because the court found that 8 Enterprises had shown that there was a genuine issue of fact related to damages and Green Leaf's mitigation efforts.[4] As to damages, the district court found that "[Green Leaf's] demand for payment of approximately nine years of rent and other payment obligations as described therein, may constitute a penalty which is not permitted under Nevada law." The district court's order, however, did not specifically identify the entitlement to unpaid rent under Section 23(a) as a liquidated damages clause. The district court also concluded that Green Leaf had a duty to mitigate its damages. Therefore, the district court permitted the parties an additional 90 days of discovery on damages.

Green Leaf renewed its request for summary judgment on damages at the close of the discovery period. Green Leaf, for the first time,

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[4]While the district court used "genuine issue" of fact for summary judgment, the updated NRCP 56 uses "genuine dispute." *See* NRCP 56(a). The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). However, the amended language does not impact the resolution of this appeal because Nevada's jurisprudence was preserved with the amendments to the rule. *See* NRCP 56(a), Advisory Committee Note to 2019 Amendment.

argued that the district court's order granting summary judgment on liability intimated that there was a liquidated damages clause in Section 23(a) of the lease agreement. Under this interpretation of the district court's first summary judgment order, Green Leaf changed its position and argued that it was entitled to $1,301,474.87 in liquidated damages. Green Leaf also argued that liquidated damages carry a presumption of enforceability, regardless of mitigation efforts, and that 8 Enterprises did not sufficiently prove that the liquidated damages acted as an unenforceable penalty. Alternatively, Green Leaf argued that it was entitled to $489,492.38 in actual damages if the district court did not find that Section 23(a) contained a liquidated damages clause.[5]

8 Enterprises opposed the renewed motion for summary judgment, arguing that Green Leaf failed to mitigate its damages, the calculation of damages did not account for an offset of rent Green Leaf received from Konos Northshore, and interpreted Section 23(a) in the lease agreement as a liquidated damages clause, which acted as an unenforceable penalty. Particularly relevant on appeal, 8 Enterprises argued that "[t]he prior Lease Agreement . . . allowed for 2% annual rent increases, and in comparison to the new Lease Agreement [with Konos Northshore] . . . there is a 3% annual increase based on the first [year's] rent . . . . Any difference in

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[5]It appears that the amount of actual damages was calculated based on unpaid rent and maintenance expenses from the date 8 Enterprises was to pay rent up to the date the lease agreement between Green Leaf and Konos Northshore went into effect. On remand, the district court will need to make the determination of Green Leaf's actual damages in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

the increase obtained by [Green Leaf] has not been calculated." Green Leaf countered, arguing that "[8 Enterprises] incorrectly argue[d] for a reduction of [Green Leaf's] actual damages based on Landlord securing another tenant, Konos Northshore, to lease the Premises."

The district court ultimately granted summary judgment on damages in favor of Green Leaf and found that 8 Enterprises was liable to Green Leaf for liquated damages in the amount of $1,301,474.87. In reaching its conclusion, the district court agreed that there was no genuine dispute that Green Leaf sustained $489,482.38 in actual damages. The district court also found that Green Leaf undertook reasonable efforts to mitigate its damages and such efforts resulted in the new tenant, Konos Northshore, paying rent as of November 2021. However, the district court concluded that 8 Enterprises was not entitled to an offset or a reduction in damages even though Green Leaf would benefit from the new lease agreement with Konos Northshore. As support, the district court relied on Louisiana, New Jersey, and Illinois jurisprudence. The court found that Section 23(a) contained a liquidated damages clause allowing such damages to be awarded without considering a reduction of damages based on successful mitigation efforts. Finally, the district court found that 8 Enterprises failed to meet the burden of demonstrating that the liquidated damages clause constituted an unenforceable penalty under Nevada law.

On appeal, 8 Enterprises argues that the district court erred in granting summary judgment on damages and raise two issues for consideration: (1) whether the liquidated damages clause in the lease is an unenforceable penalty, and (2) whether the district court erred in failing to deduct the rental payments Green Leaf will receive from Konos Northshore when determining Green Leaf's damages.

Standard of review

We review orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment was appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the nonmoving party, demonstrated that no genuine issue of material fact remained in dispute and that the moving party was entitled to judgment as a matter of law." *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009) (citing *Wood*, 121 Nev. at 729, 121 P.3d at 1029). "If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (citing NRCP 56(a), (e)). "Whether a party is 'entitled to a particular measure of damages is a question of law' reviewed de novo." *Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011) (quoting *Toscano v. Greene Music*, 21 Cal. Rptr. 3d 732, 736 (Ct. App. 2004)). This court will also review a district court's interpretation of a contract, a question of law, de novo. *Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev. 76, 80, 482 P.3d 665, 671 (2021) (citing *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012)).

Section 23(a) in the lease agreement does not constitute a liquidated damages clause, but instead provides for recovery of actual damages

8 Enterprises argues that Section 23(a) in the lease agreement was a liquidated damages clause and an unenforceable penalty. Because Green Leaf conceded its actual damages below, and the liquidated damages were $1,301,474.87, 8 Enterprises argues this creates a windfall to Green Leaf and acts as a penalty. On the other hand, Green Leaf argues that

Section 23(a) contains a liquidated damages clause and carries a presumption of enforceability.

Liquidated damages are the amount "a party to a contract agrees to pay if [it] fails to perform, and which, having been arrived at by a good faith effort to estimate the actual damages that will probably ensue from a beach, is recoverable as agreed-upon damages should a breach occur." *Mason v. Fakhimi*, 109 Nev. 1153, 1156, 865 P.2d 333, 335 (1993). More specifically, liquidated damages "serve as a good-faith effort to fix the amount of damages when contractual damages are uncertain or immeasurable." *Khan v. Bakhsh*, 129 Nev. 554, 558, 306 P.3d 411, 414 (2013). In comparison, actual damages are "[a]n amount awarded to . . . compensate for a proven injury or loss." *Davis v. Beling*, 128 Nev. 301, 316, 278 P.3d 501, 512 (2012); *see also J.E. Johns & Assocs. v. Lindberg*, 136 Nev. 477, 484, 470 P.3d 204, 210 (2020) (stating that "actual damages redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct" (internal quotation marks omitted)). "It is well established that in contracts cases, compensatory damages are awarded to make the aggrieved party whole and . . . should place the plaintiff in the position he would have been in had the contract not been breached." *Road & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 392, 284 P.3d 377, 382 (2012) (internal quotation marks omitted) (alteration in original); *see Davis*, 128 Nev. at 316, 278 P.3d at 512 (holding that the term "actual damages" is synonymous with "compensatory damages").

Here, the district court erred in construing Section 23(a) as including a liquidated damages clause. A liquidated damages clause usually contains an estimate of actual damages that are immeasurable and which the parties have agreed can be recovered as liquidated damages in the event of a breach. *See Mason*, 109 Nev. at 1156, 865 P.2d at 335 ("Liquidated

damages are . . . arrived at by a good faith effort to *estimate* the actual damages that will probably ensue from a breach. . . ." (emphasis added)). In this case, Section 23(a), pertaining to rent owed in the event of a breach, makes it possible to ascertain the actual damages Green Leaf is able to recover for the term of the lease. *See Road & Highway Builders, LLC*, 128 Nev. at 392, 284 P.3d at 382 ("It is well established that in contracts cases, compensatory damages are awarded to make the aggrieved party whole and . . . should place the plaintiff in the position he would have been in had the contract not been breached." (internal quotation marks omitted)). Thus, based on our de novo review, we conclude that actual damages pertaining to the unpaid rent by 8 Enterprises can be ascertained from Section 23(a) in the lease agreement. *See Khan*, 129 Nev. at 558, 306 P.3d at 414 (holding "we conclude that the district court erred in awarding liquidated damages to Bakhsh because actual damages were ascertainable"). We further conclude that Section 23(a) does not contain a liquidated damages clause, but rather, provides for an award of actual, compensatory damages in the event of a breach. Therefore, we need not address whether the award of liquidated damages in this case acted as a penalty. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that the appellate court need not address issues that are unnecessary to resolve the case at bar). Thus, we reverse and remand for the district court to ascertain Green Leaf's actual damages as a result of 8 Enterprises' breach of the lease.

Green Leaf mitigated its damages and 8 Enterprises is entitled to an offset

8 Enterprises also argues for an offset in the amount paid by Green Leaf's new tenant, Konos Northshore, otherwise Green Leaf would

benefit from a double recovery of unpaid rent.[6] Green Leaf argues that 8 Enterprises raised offset for the first time on appeal, but if this court were to consider the issue, liquidated damages carry a presumption of enforceability and any mitigation efforts, such as the new lease with Konos Northshore, are irrelevant since offset does not apply. Because we have concluded that the district court awarded liquidated damages in error and should have considered actual damages, we disagree with Green Leaf.

Green Leaf does not appear to dispute it had a duty to mitigate its actual damages. "As a general rule, a party cannot recover damages for loss that [it] could have avoided by reasonable efforts."[7] The record supports that as soon as 8 Enterprises breached the lease, Green Leaf mitigated its damages by hiring North American Commercial to find a new tenant and ultimately by re-leasing the property to Konos Northshore. *See Conner v. S. Nev. Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987). Having concluded that liquated damages do not apply here and that the issue of offset was sufficiently raised below, we determine that the district court

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[6]8 Enterprises initially argued below that Green Leaf did not mitigate its damages. However, the record below supports that 8 Enterprises understood that Green Leaf did ultimately mitigate its damages by leasing to Konos Northshore, and on this basis requested an offset.

[7]Green Leaf asserts that 8 Enterprises failed to preserve the offset argument below. We disagree. 8 Enterprises argued for mitigation below and we also note that 8 Enterprises raised, as an affirmative defense, the duty to mitigate in their answer to Green Leaf's complaint. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014) (holding that the defendant bears the burden of proving an affirmative defense); *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 394 & n.20, 168 P.3d 87, 95 & n.20 (2007) (holding that mitigation of damages is an affirmative defense). As mitigation efforts are relevant when actual damages are awarded, and 8 Enterprises argued for mitigation below, we conclude that the issue of offset was preserved.

erred in failing to apply an offset against Green Leaf's actual damages. An offset or setoff is an equitable remedy based on policies rooted in contract principles. *W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 872, 139 P.3d 858, 860 (2006) (citing *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 119, 110 P.3d 59, 63 (2005) ("Setoff is an equitable remedy that should be granted when justice so requires to prevent inequity.")). The offset rule has origins in the expectancy rule employed in contracts cases, "which seeks to place the plaintiff in the position [it] would have been in had the contract been performed." *Greco v. United States*, 111 Nev. 405, 413, 893 P.2d 345, 350 (1995). An offset prevents a double recovery. *W. Techs.*, 122 Nev. at 872-73, 139 P.3d at 860 ("The offset of a jury award of total damages by a settlement amount with other parties serves to prevent excess recovery by the plaintiff."); *see also Aviation Ventures*, 121 Nev. at 120, 110 P.3d at 63 ("In fact, the claims that give rise to a setoff need not arise out of the same transaction; they may be entirely unrelated."). The offset rule may be applied in contract actions. *W. Techs.*, 122 Nev. at 872, 139 P.3d at 860.

The basis for an offset is that "[a] plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories." *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010). A plaintiff is "entitled to only one of compensatory damage award on one or both theories of liability." *Id.* (internal quotation mark omitted). Consequently, "satisfaction of the plaintiff's damages for an injury bars further recovery for that injury." *Id.*

Here, requiring 8 Enterprises to pay the outstanding rent through the entirety of the ten-year lease term as the damages, while Green Leaf simultaneously recovers rent from a new tenant for part of that term, allows for Green Leaf to recover damages from two different sources for a single breach. This constitutes a double recovery. *See Elyousef*, 126 Nev. at

444, 245 P.3d at 549 ("[A] plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories."). Thus, the district court erred in failing to offset the rent paid or to be paid by Konos Northshore in determining Green Leaf's actual damages in order to preclude a windfall and double recovery.[8] *See W. Techs.*, 122 Nev. at 872-73, 139 P.3d at 860.

Finally, we are not persuaded that the Louisiana, New Jersey, and Illinois jurisprudence the district court relied on below supports that an offset is not required in Nevada.[9] Indeed, it appears that these cases actually

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[8]As indicated above, we disagree that 8 Enterprises raised this issue of offset for the first time on appeal as 8 Enterprises requested an offset for rent paid by Konos Northshore below. Accordingly, we conclude that the offset issue was preserved for appeal and we consider it here. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived); *cf. Schuck v. Signature Flights Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (declining to consider an appellate argument not raised in opposing summary judgment before the district court).

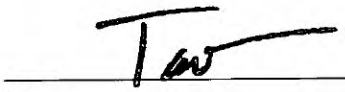
[9]In this case, the issue is whether 8 Enterprises is entitled to an offset of actual damages for the term that Green Leaf will recover rent from its second tenant, Konos Northshore. The Louisiana and New Jersey cases cited by the district court are inapposite to the case at bar because they relate to offset for the term prior to the landlord entering into a second lease agreement. In those cases, the landlords were able to re-lease their property at a higher rental value after their first tenants defaulted on the respective lease agreements. When asked whether the initial tenants were entitled to a retroactive offset, the courts held that excess rent collected from a second tenant could not offset the portion of the first tenant's debt which accrued prior to the second lease. *See D.H. Overmeyer Co., Inc. v. Blakeley Floor Covering, Inc.*, 266 So. 2d 925, 927 (La. Ct. App. 1972); *N.J. Indus. Props., Inc. v. Y.C. & V.L., Inc.*, 495 A.2d 1320, 1330 (N.J. 1985). The Illinois case addresses the burden of proof for showing that a liquidated damages clause acts as a penalty, which we have already established is not an issue we need to reach in the disposition of this appeal. *See Karimi v. 401 N. Wabash Venture, LLC*, 952 N.E.2d 1278, 1288 (Ill. App. Ct. 2011).

support the application of an offset in calculating an appropriate award of actual damages.[10]

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[11]

_____, C.J.
Gibbons



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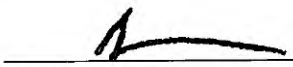

_____, J.
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cc: Hon. David M. Jones, District Judge
Lansford W. Levitt, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Kaempfer Crowell/Las Vegas
Eighth District Court Clerk

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[10]*See D.H. Overmeyer*, 266 So. 2d at 927 ("[T]he rents collected from the second tenant should only be credited against the amount the defaulting lessee would have been required to pay from the time of the second occupancy to the expiration of the lease."); *N.J. Indus. Props., Inc.*, 495 A.2d at 1321 ("The landlord . . . agrees that the defaulting tenant is entitled to credit in the amount of monthly rent due from the tenant for the rent paid by the subsequent tenant during the latter's occupancy of the premises for the unexpired term of the defaulting tenant's lease.").

[11]Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.