In the United States Court of Federal Claims

Case No. 01-220C
(Filed: July 21, 2006)
NOT TO BE PUBLISHED

****

INVERSA, S.A. *
*
and *
*
ASSEMBLY OF TORRE MIRAMAR *
CONDOMINIUM, *
Plaintiffs, *
*
v. *
*
THE UNITED STATES OF AMERICA, *
Defendant. *
*

****

Jon W. van Horne, Gaithersburg, Maryland, attorney of record for the Plaintiffs.

Brian S. Smith, Commercial Litigation Branch, Department of Justice, Washington, D.C., attorney of record for the Defendant. With him on the briefs were ***Peter D. Keisler***, Assistant Attorney General, ***David M. Cohen***, Director, ***Robert E. Kirschman, Jr.***, Assistant Director, and ***James W. Poirier***, Attorney.

Sarah Leigh Martin, law clerk.

OPINION

BASKIR, Judge.

This is a landlord-tenant case. It involves a commercial lease agreement for several floors in a building in Panama City, Panama, between the Plaintiffs, the landlords, and the U.S. Department of State, the tenant. On April 12, 2001, Plaintiffs filed their Complaint in this Court, bringing claims against the Government for various breaches of the lease.

After years of litigation, three of the seven counts in the Complaint have been completely resolved; two more were recently settled; and one is hereby dismissed pursuant to an agreement of the parties.

In this Opinion we resolve Count 6, the remaining count, which concerns disputes as to lease extension and termination of floors 6 and 7. We conclude that the Government first extended the lease and then gave notice of termination for floors 6 and 7. As a consequence, it is obligated to make the total rental payment in advance, less applicable offsets. **We therefore GRANT Plaintiffs' Motion for Summary Judgment.**

RECAPITULATION

I. Counts 1, 2, and 3

Counts 1 and 3 of the Complaint involved claims for failure to erect a permanent fire stairway and preventing other tenants access to parking spaces, respectively. Plaintiffs conceded Count 1, and moved to dismiss Count 3 without prejudice. The Court dismissed both Counts by Order on January 28, 2004. Count 2 concerned liability for security and safety enhancements. In an Opinion of September 13, 2005, this Court found that the Defendant spent over $2 million on security and safety enhancements in accordance with the parties' settlement agreement. Count 2 was then dismissed by this Court's December 8, 2005, Order.

II. Counts 4 and 7

In 2006, the parties agreed to participate in this Court's Alternative Dispute Resolution ("ADR") program. At that time, four counts remained unresolved – Counts 4, 6, and 7, as well as the remaining issue of Count 5.

With the much-appreciated assistance of Senior ADR Judge Lawrence S. Margolis of this Court, the parties have reached a settlement agreement with regard to Counts 4 and 7. They agree that the lease required Defendant to provide for its own trash removal, but that it failed to do so. They also agree that Defendant's contractor removed a commercial air conditioning unit from the leased premises in violation of the lease. Both parties have agreed upon a settlement amount of $75,000, to fully resolve both counts. The Court will enter final judgment for $75,000 at a later date, once all remaining counts have been fully resolved.

II. Count 5

Count 5 concerned whether proper notice was given for the termination of floors 14 and 15 of the lease, and whether a holdover tenancy was created by an alleged failure to restore those floors. In an Opinion of September 9, 2005, we found that Inversa received notice of the lease termination no later than July 29, 1996. We noted that Count 5 contained one additional issue, whether a holdover tenancy was created for the 1998-2000 lease extension period with respect to floors 14 and 15, but did not resolve that issue.

In ADR, the parties agreed that the remaining issue of Count 5 was never properly before the Court. In the Plaintiffs' unopposed Motion to resolve this count, they state, "The parties have agreed that this second issue was not addressed specifically in the Plaintiffs' requests for Contracting Officer's Final Decision or the Complaint and is, therefore, not properly before the Court for lack of jurisdiction." Pl. Motion at 2. Accordingly, the Court will dismiss the remaining issue in Count 5, whether a holdover tenancy was created, upon entry of final judgment in this case.

COUNT 6

After ADR concluded, the Plaintiffs on April 13, 2006, filed a Motion for Summary Judgment regarding Count 6. The Motion was fully briefed. The Court deems an oral argument unnecessary.

I. Facts

On August 17, 1990, the Defendant, the U.S. Department of State and the U.S. Embassy in Panama (the "Government") and the Plaintiffs, Inversa, S.A. and Assembly of Co-Owners Torre Miramar Condominium (collectively, "Inversa") entered into a lease agreement (Lease No. 1030-040003, hereinafter, "the Lease"), which, in part, included floors 6 and 7 within the Torre Miramar Building in Panama. (Count 6 concerns these two floors.) The Lease was part of a settlement agreement over the Defendant's refusal to pay rent from 1989 through 1990 pursuant to a prior lease agreement between the parties. Consolidated Statement of Uncontroverted Facts ("CSUF") ¶ 2; Pl. Br. at 12. The original term in the Lease was for 8 years, from March 15, 1990, through March 14, 1998. The Lease explicitly incorporates the laws of the Republic of Panama for contract interpretation and construction. Lease Art. 22 ¶ B, CSUF ¶ 7, Pl. App. at 7.

As will be discussed in more detail below, the Lease allowed the Government to extend the Lease terms for as many as three 2-year periods, by giving notice 12 months in advance. The Lease required advance payment of rent for each such extension period. According to the Lease, the Government had the option to terminate the Lease at any time, provided it gave advance notice of 180 days. In the event of such a termination, the Lease provided that Inversa would refund a portion of the Defendant's rent payment at the end of each lease year, but only in an amount that took into account what Inversa received from actual replacement tenants.

Shortly after signing the lease, Inversa, on December 14, 1990, sent a clarification letter to the Contracting Officer:

> Lessor's interpretation of Article 4, Paragraph D, is that the Lessee would be obligated, in the event of a termination prior to payment of rent for lease years seven and eight, to make the rent payment (either on the date of termination or on the [first day of the seventh lease year], at Lessee's

> option), calculated as provided in Article 4, Paragraph B. Then, on each March 15th following the termination, the Lessor would remit to Lessee such refund as may be due under Article 4, Paragraph D.

CSUF ¶ 8, Pl. App. at 19-20.

On March 13, 1997, the Defendant exercised its option to renew the Lease for an additional 2-year period, from March 15, 1998, through March 14, 2000, by sending a letter to Inversa:

> We are hereby notifying you, in accordance with Article 3.B. of the referenced lease agreement, that we wish to exercise our option to renew this lease for a two-year period commencing March 15, 1998.

CSUF ¶ 9, Pl. App. at 16. The parties do not dispute that this notice complied with Article 3 of the Lease and applied to all the premises under the Lease. On February 20, 1998, less than one month before the start of the new lease term, Defendant provided a notice of partial termination for the sixth and seventh floors:

> [W]e wish to terminate the lease in part by giving notice that we are returning floors 6 and 7 to you as they are excess [of] our needs. We intend to return these floors to you prior to lease expiration on March 14, 1998, so that you may re-lease those floors for productive use.

CSUF ¶ 11, Pl. App. at 23. Inversa responded, noting that the Defendant had not given adequate advance notice of termination, and therefore:

> [The Defendant] must pay the full 2 year rent pertaining to floors 6 and 7 and, at best, terminate the lease on these floors 180 days after February 20, 1998 for which [the Defendant] could expect a refund of [its] rent only in the event [Inversa] can find a replacement tenant as expressed in article 4D of the Lease Agreement.

CSUF ¶ 12, Pl. App. at 24. The Defendant did not make the payment for the 2-year rent period.

Beginning in 1998, Inversa attempted to find new tenants. CSUF ¶ 19; Pl. Rep. at 7. Inversa sent letters to sixteen real estate professionals in Panama inviting them to purchase or lease the floors. *Id.* One letter was sent on October 15, 1998, and updated letters were sent on August 3, 1999, to the same real estate professionals. *Id.* Additionally, Inversa hung "For Sale" and "For Rent" signs from the balconies of the building. *Id.* However, Inversa was unable to rent or sell the floors during 1998-2000. *Id.*

In response to the Defendant's refusal to pay, Inversa on February 7, 2000, submitted to the Contracting Officer a request for an equitable adjustment, which included the unpaid rent on floors 6 and 7 for the renewed 2-year lease period:

> Even if the February 20, 1998 letter were effective notice . . . , the rent would not be adjusted unless the lessor was able to relet the space. . . . [V]acant space in the Torre Miramar Building is presently unmarketable because of the oppressive security measures instituted by the Embassy . . . . In any event, the space has not been relet and no adjustment of the rent is presently in order. Accordingly, a lease payment of $307,567.84 for the sixth and seventh floors has been due since March 14, 1998 . . . .

CSUF ¶ 15, Pl. App. at 9-10. On April 20, 2000, the Contracting Officer issued his decision:

> [I]t is clear that under the terms of the Lease the termination notice given on February 20, 1998 was not effective under the Lease until August 17, 1998, 180 days from the notice.
>
> Since the effective date of this partial termination was established prior to the due date and since the Lessor has violated the Lease by failing to acknowledge or accept both partial terminations, I find that the Department's rental obligation was limited to the period from 3/15/98 to 8/17/98.

CSUF ¶ 16, Pl. App. at 14. The Contracting Officer then authorized payment of rent for $66,212.80, covering the rental period from March 15, 1998, through August 17, 1998. CSUF ¶ 17, Pl. App. at 14. The Contracting Officer also noted that the Defendant had previously terminated floors 14 and 15 on January 31, 1996, and despite that termination the Defendant had paid in advance the full rent due in March 1996. Pl. App. at 13; *see also* CSUF ¶ 18. The Defendant paid Inversa the $66,212.80 authorized by the Contracting Officer, and Plaintiffs now seek payment for the rest of the period with interest, for a total of $255,944.59.

II. Legal Framework

A motion for summary judgment should be granted when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material facts are those facts that may affect the outcome of the litigation. *Anderson*, 477 U.S. at 248. The Court must resolve all reasonable inferences in favor of the non-moving party. *Champagne v. United States*, 35 Fed. Cl. 198, 206 (1996).

The non-moving party is required to go beyond the pleadings by submitting affidavits and other evidence to show that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-moving party may not establish a factual dispute merely by disagreeing with the movant's assertion or through a general denial. *Barman Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984) ("The party opposing the motion must point to an

evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.").

As stated above, the parties specifically agreed that the Lease be governed by Panamanian law. In determining foreign law, the Court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." RCFC 44.1. This rule does not shift the burden onto the Court "to search for documentation necessary for determination of a question of foreign law, particularly in the circumstances where the litigant before the court conducts a business in the foreign country, subject to its laws." *Bank of Am. Nat'l Trust & Sav. Ass'n v. United States*, 198 Ct. Cl. 263, 269 (1972). While the parties may rely on expert testimony and relevant evidence, the proper interpretation of foreign law is a question of law that the Court must resolve. *Nat'l Westminster Bank, PLC v. United States*, 69 Fed. Cl. 128, 138 (2005); *accord* RCFC 44.1 ("The court's determination shall be treated as a ruling on a question of law.").

Interpretation of the Lease is governed by the Civil Code of Panama. According to the parties' agreed-upon English translations of the Code, the "contracting parties may establish any pacts, clauses and conditions they may deem advisable, provided they are not contrary to law, morals, or public order." Civ. Code Art. 1106, CSUF ¶ 1 at 4.

In accordance with the parties' submissions, Panamanian law poses three basic rules of contract interpretation. First, "if the terms of a contract are clear and leave no doubt as to the intention of the contracting parties, the literal sense of its wording shall be followed." Civ. Code Art. 1132, CSUF ¶ 1 at 4. Second, "if the words appear to the contrary to the evident intention of the contracting parties, the intention shall prevail." *Id.*, CSUF ¶ 1 at 5. The parties' intent is determined by their "conduct at the time of making the contract and subsequently thereto." Civ. Code Art. 1133, CSUF ¶ 1 at 5. Third, the contractual language should not be interpreted in a way that renders the contractual terms meaningless, and the contract terms should be interpreted in relation to one another, so as to give meaning to all terms of an agreement. Civ. Code Arts. 1135, 1136, CSUF ¶ 1 at 5.

Finally, the Panamanian Civil Code explains the type of damages recoverable in civil cases:

> The losses and damages for which a debtor in good faith is liable are those foreseen, or which might have been foreseen, at the time of constituting the obligation, and which are a necessary consequence of the failure to perform it.

Civ. Code. Art. 992, CSUF ¶ 1 at 4.

III. The Lease Provisions

As mentioned above, the Lease contained an option to extend, which the Defendant invoked:

> Option to Extend: . . . LESSOR grants to LESSEE an option to extend this Lease for three two (2) year periods on the same terms and conditions applicable to the original term, except that the rent due and payable shall be determined in accordance with Article 4 hereof.

Lease Art. 3 ¶ A, CSUF ¶ 4, Pl. App. at 2. To exercise this option, the Lease requires the Defendant to give proper notice 12 months in advance:

> Exercise of Option: Each of said options shall be exercised by LESSEE giving written notice of intent . . . at least twelve (12) calendar months before the expiration of the then existing term.

Lease Art. 3 ¶ B, CSUF ¶ 4, Pl. App. at 3. Another provision requires advance payment of rent for the option period:

> Option Period Rent: The rent for each two (2) year option period will be payable in advance at the beginning of each two (2) year option period (e.g., on March 15, 1998 for the 1998-2000 lease years), payable in a lump sum consisting of rent for the two year period . . . .

Lease Art. 4 ¶ C, CSUF ¶ 5, Pl. App. at 4. This provision was specifically included as part of the settlement agreement as a result of the Defendant's failure to pay rent in the past. *See* Pl. Br. at 12; *see also* CSUF ¶ 2, Pl. App. at 17 ("[N]o rental payments have been made for the lease year beginning March 15, 1990.").

The Defendant could also terminate the Lease with 180 days advance notice:

> LESSEE's Right to Terminate: LESSEE may, for its convenience, terminate this Lease in whole or in part at any time . . . by giving written notice of termination to LESSOR 180 days in advance.

Lease Art. 14 ¶ A, CSUF ¶ 6, Pl. App. at 6. The Lease addresses reimbursement in the event of termination:

> LESSEE's Right to Recover Prepaid Rent: In the event this Lease is terminated by LESSEE prior to the date agreed upon during the initial lease period or any subsequent renewal option lease period . . . , the LESSOR shall reimburse to LESSEE all rents paid in advance for the remaining portion of the lease period in the manner and to the extent provided in Article 4, Paragraph D hereof.

Lease Art. 14 ¶ B, CSUF ¶ 6, Pl. App. at 6. Article 4, Paragraph D further explains:

> Rent Adjustment in the Event of Termination: It is further understood and agreed that in the case of early termination of the initial lease period or any additional option period thereof by LESSEE, the LESSOR will refund to LESSEE all rents paid in advance for the remainder portion of the lease period, but only in an amount not to exceed the lesser of either (i) the actual rents received from replacement tenants for the Leased Space or a portion thereof or (ii) an amount calculated . . . for the portion of the Leased Space occupied by the replacement tenants, such payments to be due at the end of each lease year during the then current term for space leased during the prior year.

Lease Art. 4 ¶ D, CSUF ¶ 5, Pl. App. at 4.

IV. Analysis

The Court must decide whether, based on the above-quoted provisions of the law of the Republic of Panama, the Government breached the terms of the Lease as to floors 6 and 7, and if so, what is the appropriate measure of damages.

A. The Defendant's Liability

Based upon the plain meaning of the Lease, it is abundantly clear that the Defendant breached the Lease agreement by not paying rent for the entire 2-year extension period on the day it was due – March 15, 1998, the first day of the 2-year period. To hold otherwise would render certain terms of the Lease meaningless, in violation of the Civil Code of Panama. *See* Civ. Code Arts. 1135, 1136, CSUF ¶ 1 at 5.

As delineated above, the Lease plainly allowed the Defendant to renew the Lease for a 2-year period by providing advance notice of 12 months, which the Defendant did in this case. Article 4, paragraph C of the Lease also required the Defendant to pay the rent for any such extension, in one lump sum, "at the beginning of each two (2) year option period (e.g., on March 15, 1998 for the 1998-2000 lease years)." Lease Art. 4 ¶ C, CSUF ¶ 5, Pl. App. at 4. Thus, unless the Defendant properly terminated the lease before March 15, 1998, it was required to pay rent for the entire two years on that day.

The Defendant did not terminate the lease before March 15, 1998. Article 14 of the Lease allowed Defendant to terminate the Lease "by giving written notice of termination to LESSOR 180 days in advance." Lease Art. 14 ¶ A, CSUF ¶ 6, Pl. App. at 6. That is, it could provide notice of termination at any time, and any such notice would effectively terminate the Lease 180 days later. To read this provision otherwise would render the 180-day notice requirement entirely meaningless. Defendant's termination of the 2-year Lease extension was effective on August 19, 1998, 180 days after the notice was given. The Contracting Officer's final decision is consistent with this conclusion. *See* CSUF ¶ 16, Pl. App. at 14; *see also* Pl. Br. at 13 (noting that the Contracting Officer miscalculated the effective date of termination by two days).

The intent of the parties, as reflected by their conduct, also supports our interpretation of the Lease. *See* Civ. Code Art. 1133, CSUF ¶ 1 at 5 (The parties' intent is determined by their "conduct at the time of making the contract and subsequently thereto."). Inversa's December 1990 clarification letter, discussing the amendment of the Lease from 6 to 8 years, stated that "in the event of termination prior to payment of rent . . . [the Lessee would be obligated] to make the rent payment (. . . on the [first day of the new term])." CSUF ¶ 8, Pl. App. at 19-20.

The Defendant sent a similar notice of termination for floors 14 and 15 on January 31, 1996, less than 180 days before the new lease term began. Pl. App. at 13. Despite the notice termination on January 31, the Defendant still paid the full two years' rent in advance on the March due date, indicating an agreement with Inversa's interpretation of the Lease. CSUF ¶ 18, Pl. App. at 13.

Defendant also argues that Plaintiffs' interpretation of the Lease would prevent the Defendant from being able to terminate the Lease "at any time," thus rendering the 180-day notice provision meaningless. Def. Br. at 6. Consistent with this position, Defendant claims that if it wanted to terminate all or part of the Lease at some point in time after the 2-year term began, it would be required to "engage in the folly of terminating the lease, waiting until March 15, 1998. . ., paying full rent on space that would never be used, then waiting for a rent refund under the recovery provisions of the lease." *Id.* Defendant's recitation of this hypothetical chain of events is a correct interpretation of the Lease. What Defendant actually takes issue with in this passage is not whether it had the ability to "terminate" the Lease at any time, but what the legal effect of that termination was. Taken together, Articles 3 and 4 of the Lease require the Defendant to pay rent for the entire 2-year period up front, and allow for a refund in the event of termination only under certain circumstances, as Defendant accurately summarized. If Defendant had wished to avoid paying the full 2-year rent in advance, its termination notice would have had to be provided more than 180 days prior to the start of the 2-year option period.

If Defendant found this result undesirable, it should not have signed a Lease containing such language. It is not the province of the Court to override the parties' intent at the time of signing in order to strike down a contract provision that now seems unfavorable to one party. This is especially so considering that the parties specifically negotiated this provision based upon Defendant's past failures to pay rent that was due. *See* CSUF ¶ 2.

The Government's obligation to pay rent for the entire 2-year period at the start of the lease term would not require the Defendant to engage in a pointless exercise. *See* Def. Br. at 6. Contrary to the implication in its brief, the Defendant is not entitled to an automatic refund in the event of termination. The refund contemplated by Articles 4 and 14 is only issued at the end of the lease year following termination and reletting. Lease Art. 4 ¶ D, CSUF ¶ 5, Pl. App. at 4 (refunding rent "at the end of each lease year during the then current term for space leased during the prior year."). The refund is "not to exceed the lesser of either (i) the actual rents received from replacement tenants . . . or (ii) an amount calculated . . . for the portion . . . occupied by the replacement

tenants." *Id.* This limitation on refund can only be calculated after reletting the apartment. Therefore, had the Defendant paid in full, it would not have been entitled to an immediate, automatic refund *pro rata* through August. Instead, it would have been reimbursed at the end of the lease year only if Inversa had successfully relet the premises.

B. Plaintiffs' Duty to Mitigate Damages

The Court must next analyze how much of Defendant's rent payment, if any, Plaintiffs would have been obligated to refund. As quoted above, Article 4, paragraph D of the Lease requires the Plaintiff, upon termination of the Lease, to refund to Defendant all rents paid in advance,

> but only in an amount not to exceed the lesser of either (i) the actual rents received from replacement tenants for the Leased Space or a portion thereof or (ii) an amount calculated . . . for the portion of the Leased Space occupied by the replacement tenants, such payments to be due at the end of each lease year during the then current term for space leased during the prior year.

Lease Art. 4 ¶ D, CSUF ¶ 5, Pl. App. at 4.

We conclude that Plaintiffs had a duty to mitigate damages by making reasonable efforts to relet the premises to another tenant. This duty is found from three sources – 1) the text of the Lease's refund provision, 2) the Civil Code, and 3) the Plaintiffs' own mitigation efforts.

First, Article 4, paragraph D of the Lease anticipates that Plaintiffs will attempt to relet the premises; it specifically refers to "replacement tenants." Lease Art. 4 ¶ D, CSUF ¶ 5, Pl. App. at 4. This reference to rent collected from replacement tenants evidences the parties' intent that Plaintiffs would attempt to find such replacement tenants. To hold otherwise would render this provision meaningless. Assuming Plaintiffs' mitigation efforts were successful, this provision prevents a double recovery by requiring Plaintiffs to refund Defendant's prepaid rent, in the amount recovered from the replacement tenants.

Second, the Panamanian Civil Code explicitly limits damages to those that are "a necessary consequence" of the legal violation. Civ. Code. Art. 992, CSUF ¶ 1 at 4. As in American law, damages are not "necessary" if they could have been avoided through reasonable mitigation efforts. *See* 2-17 Powell on Real Property § 17.05 ("The contract law rule of avoidable consequences prevents a party who acts improperly from recovering losses that could have been avoided, but does not prevent recovery of unavoidable losses."). Because the Panamanian Civil Code adopts this principle, the Plaintiffs cannot recover for Defendant's failure to pay rent unless they attempted to recover their losses through replacement tenants.

Third, the Plaintiffs have espoused an intent to mitigate damages. *See* Civ. Code Art. 1133, CSUF ¶ 1 at 5 ("In order to judge as to the intention of the contracting parties, attention must be paid principally to their conduct at the time of making the contract and subsequently thereto."). On February 7, 2000, Inversa sent a letter to the Defendant claiming that "the rent would not be adjusted unless the lessor was able to relet the space." CSUF ¶ 15, Pl. App. at 9. Pursuant to this expressed intent, Inversa made actual attempts to relet floors 6 and 7, as well as floors 14 and 15, which the Defendant had also abandoned. CSUF ¶ 19, Attach. to Pl. Rep. at 1-2. These efforts will be discussed in more detail below, but suffice it to say that they confirm Plaintiffs' original interpretation of the Lease as requiring mitigation efforts, their current litigation position notwithstanding.

C. Satisfying the Duty to Mitigate

Plaintiffs have offered prima facie evidence that they made reasonable efforts to mitigate damages. As set forth in the CSUF and supported by the sworn Declaration of Inversa's President Dr. Arias, Inversa made several attempts to relet the sixth and seventh floors to replacement tenants. Specifically,

> Beginning in 1998, in order to find new tenants for the Building, Dr. Arias spoke to a number of real estate professionals in Panama and had his personal secretary and building administrator . . . send sixteen of them letters inviting consideration of the purchase or lease of floors 6, 7, 14 and 15. . . . Similar updated letters were sent out on August 3, 1999 to the same sixteen real estate brokers. Inversa also prominently displayed "For Sale" and "For Rent" signs on the balconies of the Torre Miramar Building. Notwithstanding these efforts, Inversa was unable to rent or sell floors 6, 7 or 14 during the 1998-2000 lease extension period.

CSUF ¶ 19; *accord* Attach. to Pl. Rep. at 1-2. Thus, in addition to hanging signs, Plaintiffs contacted a considerable number of real estate brokers to rent or sell the property in October 1998, and again in August 1999, just a few months before the 2-year extension period expired. Plaintiffs also requested the keys from Defendant in order to show the floors to prospective tenants. These efforts were partially successful; Plaintiffs relet a portion of the fifteenth floor for a period of time.

The Defendant does not challenge the accuracy of these factual assertions and has not offered any evidence to counter them, so they are deemed admitted. *See* Special Procedures Order ¶¶ 11, 12 (Nov. 25, 2003) (referring to RCFC 56); *see also* RCFC 56(h)(3) ("In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are controverted by affidavit or other written or oral evidence."); *Barman*, 731 F.2d at 836 (A party may not oppose summary judgment by a mere denial or conclusory statement.). The Defendant objects to Plaintiffs' asserted and supported facts, but does not offer any evidence or cogent legal argument to the contrary.

The Defendant's only objection to Plaintiffs' evidence is that Dr. Arias' declaration is "new to the case" – it was submitted as an attachment to Plaintiffs' Reply Brief and cited in the CSUF at the conclusion of briefing. *See* CSUF ¶ 19. To the contrary, Plaintiffs proffered their evidence in a proper manner. In their Reply brief, they raised specific examples of mitigation in response to Defendant's general argument that Plaintiffs had failed to mitigate damages. *Compare* Def. Br. at 9, *with* Pl. Rep. at 7. They supported their argument with sworn testimony, in contrast with Defendant's unsupported assertions. Finally, Plaintiffs set forth the relevant facts in the CSUF, with proper evidentiary support. The Defendant, having raised the alleged failure to mitigate in the form of an affirmative defense, has utterly failed to meet its summary judgment burden and cannot support its case through an unfounded objection to Plaintiffs' evidentiary support.

Accordingly, Defendant has conceded the issue of Inversa's mitigation efforts. We therefore conclude that Plaintiffs made reasonable efforts to mitigate damages by attempting to relet floors 6 and 7.

V. Conclusion

In sum, the Court holds that the Defendant breached the Lease by failing to pay rent for the entire 2-year extension period on the first day of that period, before its termination was effective. Plaintiffs had a duty to mitigate damages by making reasonable efforts to relet the premises. They fulfilled this duty, but their efforts were unsuccessful. The Defendant is liable for the rent for the lease period, less the amount it already paid pursuant to the Contracting Officer's decision.

The Plaintiffs claim damages in the amount of $255,944.59. Plaintiffs are hereby ORDERED to submit an accounting of this figure no later than August 18, 2006. If Defendant has an objection to the amount of damages claimed, it must submit an opposition to the accounting no later than September 15, 2006. The Court will enter final judgment on all the remaining counts once the amount of damages for Count 6 has been established.

IT IS SO ORDERED.

_____
LAWRENCE M. BASKIR
Judge