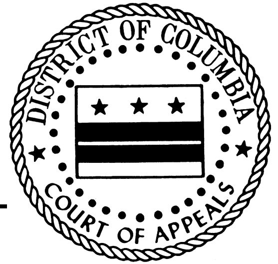

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Nos. 22-CV-636 & 22-CV-645

DISTRICT OF COLUMBIA
COURT OF APPEALS

HTO7, LLC,
Appellant/Cross-Appellee
v.
ELEVATE, LLC,
Appellee/Cross-Appellant

Appeal from the Superior Court of the District of Columbia
Civil Division
Case No. 2020 CA 003769 B
The Honorable Jason Park

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE HTO7, LLC

KRISTEN WARD BROZ
BRETT A. BERMAN (*PRO HAC VICE FORTHCOMING)**
FOX ROTHSCHILD LLP
2020 K Street, N.W., Suite 500
Telephone: (202) 794-1220
Facsimile (202) 461-3102
Washington, D.C. 20006

Counsel for Appellant/Cross-Appellee HTO7, LLC

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The trial court correctly found that Appellee, Elevate LLC ("Elevate") breached its Lease Agreement with Hto7 (the, "Lease") when it unilaterally terminated the Lease and abandoned the Leased Premises (the "Premises") on or around July 31, 2020. Importantly, although the Lease set forth multiple and limited bases on which Elevate could unilaterally terminate the Lease, on the record below, it was undisputed that Elevate's purported basis for terminating – that Hto7 failed to return a security deposit reduction within Elevate's requested timeframe – was not one of the express, negotiated bases upon which Elevate could terminate the Lease. The trial court thus correctly found that Section 16.4 of the Lease required Elevate to bring an action for damages against Hto7 for failure to return the security deposit – but did not permit Elevate to terminate the Lease on that same basis (Appx. 0027).

The trial court further correctly found that its interpretation of the Lease was "bolstered by the inclusion of two other provisions in the Lease that expressly allow Elevate to unilaterally terminate the Lease early." (Appx. 0028). The existence of these provisions coupled with Section 16.4 providing that Elevate's sole recourse for any claim against Hto7 is an action for damages, supported the trial court's correct conclusion that Elevate bargained away its ability to unilaterally terminate the Lease for any other reason, including material breach. *Id.*

Elevate's failure to negotiate a Lease provision permitting such a termination right was particularly noteworthy given that the Lease was negotiated by two

sophisticated entities who were represented by competent counsel. Although Elevate's counsel extensively negotiated various lease terms, counsel did not negotiate a provision that would provide Elevate a unilateral termination right in the event the reduction was not returned within the requested timeframe. With no express right to terminate the Lease based on Hto7's failure to return the security deposit reduction, Elevate could not terminate the Lease on that basis.

Further, the record was replete with admissions that Elevate used the security deposit issue as a pretext to terminate the Lease when Elevate would start having to pay full rent. The record showed that Elevate made multiple attempts to use maintenance issues, as well as the COVID-19 pandemic, to prematurely terminate the Lease before deciding to use the security deposit as its basis for termination.

Elevate argues it had a right to unilaterally terminate the Lease because Hto7's failure to return the security deposit reduction within a certain time frame was a "material" breach of the Lease. This argument is contradicted by the Lease, which unequivocally foreclosed Elevate's right to unilaterally terminate, even for material breach. The case law on which Elevate relies does not suggest otherwise.

Although the trial court correctly held that Elevate breached the Lease, the Court clearly erred in finding that Hto7 failed to mitigate damages as of March 3, 2021. Specifically, the trial court erred in finding that Hto7's efforts to mitigate damages were no longer reasonable as of March 3, 2021, because it did not have

two-dimensional as-built floor plans available to provide to its commercial real estate broker, Newmark, even though Hto7 and Newmark had already created and provided substantial marketing materials to third-parties, including a three-dimensional tour of the space. (Appx. at 0033). The trial court's inference that, had as-built floor plans been available as of March 3, 2021, Hto7 would have immediately found a replacement tenant was both legally and factually untenable. Elevate's highly misleading citations to the record do not demonstrate otherwise.

As there was no factual basis to conclude that Hto7 failed to mitigate its damages, there was no legal basis to calculate damages as if Hto7 had found a replacement tenant in March 2021. Moreover, the trial court's decision reducing Hto7's attorneys fees should be reversed as well because it was based on the erroneous finding that Hto7 failed to mitigate damages.

Therefore, Hto7 respectfully requests that the Court affirm the trial court's finding that Elevate breached the Lease and reverse the trial court's finding that Hto7 failed to mitigate damages, and the resulting damages and fees calculations.[1]

---

[1] Hto7 incorporates its Statement of the Issues from its Opening Brief (Br. at 1). In response to the Statement of the Issues in Elevate's Cross-Appeal, Hto7 adds the following issue: "Whether the trial court correctly determined, viewing the contract as a whole, that Elevate breached the Lease, where the Lease provided that Elevate's sole remedy was to bring an action for damages and Elevate's basis for termination was not one of the express, negotiated bases upon which Elevate could terminate the Lease."

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT ELEVATE BREACHED THE LEASE

It is undisputed that Elevate unilaterally terminated the Lease Agreement on July 31, 2020 and abandoned the Premises. (Appx. 0030-31). Under Section 20.1 of the Lease, Elevate's abandonment of the Premises and failure to pay rent constituted Default. (Appx. at 0405-06). Elevate's sole purported basis for termination – that Hto7 breached by failing to return the security deposit reduction – was invalid, because the Landlord's failure to return the security deposit reduction was not an express basis on which Elevate could unilaterally terminate. *See, e.g., Kaufman v. McLaughlin Co.*, 357 F.2d 283, 287 (D.C. Cir. 1966) ("in the absence of express provision . . . we do not consider that a lease agreement may be canceled").

Indeed, the trial court correctly found that the Lease specifically outlined the circumstances under which the Tenant may unilaterally terminate the Lease. Section 18.4 of the Lease provides that the Tenant may terminate the Lease early where the Premises is damaged and the Landlord fails to provide a timely restoration date. Section 29.1 allows the Tenant the option to terminate the lease at the end of the seventh Lease year. Significantly, no section of the Lease permits the Tenant to terminate the lease and surrender the Premises because the Landlord failed to return a security deposit reduction. Courts routinely hold that a party cannot unilaterally terminate a Lease for reasons not enumerated in a negotiated termination provision.

See, e.g., Lumpkins v. CSL Locksmith, LLC, 911 A.2d 418, 423 (D.C. 2006) (affirming summary judgment where the lease termination provision was unambiguous and created clear, express limitations on the party's right to terminate).

This is particularly so where, as here, the parties were both represented by counsel when they negotiated the Lease. *See, e.g., Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108, 110 (D.C. 1973) (affirming trial court's finding of breach where, "this commercial lease was negotiated by counsel on behalf of clients manifestly experienced in their phases of the commercial world"); *Sekulow v. 11th & F St. Valet*, 162 F.2d 19, 21 (D.C. Cir. 1947) (noting that where lessees were represented by counsel, it must be assumed that they knew of their rights under the lease). Notably, even though Elevate's counsel specifically negotiated a provision regarding the security deposit reduction, it is undisputed that Elevate did not negotiate a corresponding provision permitting Elevate to terminate the Lease in the event that Hto7 failed to return that reduction by a specific date. Instead, Elevate's abandonment of the Premises and failure to continue paying rent to Hto7 constituted a Default under the Lease. Ex. 13, Lease at Section 20.1 (Appx. at 405-06).

Moreover, Section 16.4 of the Lease provides the only remedy for Elevate: "in the event that at any time during the Lease Term Tenant shall have a claim against Landlord . . . Tenant's sole method for recovering upon such claim shall be

to institute an independent action against Landlord." (Appx. 0402).[2] Elevate's attempted termination of the Lease therefore was not authorized by any provision of the Lease as neither one of the two provisions allowing for Elevate's termination of the Lease were applicable. Further, Elevate was limited in its remedies to filing an action against Hto7, which it only did after it had already breached the Lease.

The trial court correctly found that Elevate's purported basis for termination – that Hto7 breached the Lease by failing to return the security deposit reduction – was invalid, as a right of termination on this basis was never negotiated nor expressly provided for in the Lease. Thus, Elevate breached the Lease when it abandoned the Premises and the trial court's decision on this issue should be affirmed.[3]

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[2] Elevate argues that Section 16.4 prevented Elevate from withholding rent but did not prevent it from terminating the Lease. (Opp. at 22). This reading is completely inconsistent with the plain language of Section 16.4 that provides tenant's "sole method" of recovering upon a claim is to institute an independent action.

[3] Although the trial court considered extrinsic evidence at trial regarding the history of the Lease negotiations, it ultimately (and correctly) decided that the Lease foreclosed Elevate's common law right to unilaterally terminate based on a plain language interpretation of the Lease. (Appx. 0027-0030). Thus, even under a *de novo* standard of review, the trial court's determination that Elevate breached the Lease should be affirmed. Further, to the extent the trial court's interpretation of the Lease provisions took into consideration extrinsic evidence, the history of the parties' Lease negotiations bolstered the conclusion that Elevate bargained away its right to unilaterally terminate the Lease in the event of a material breach by Hto7. The trial court's factual findings regarding the Lease negotiations should not be overturned unless this Court finds clear error. *See Estate of Walker v. Stefan*, 160 A.3d 1165, 1172 (D.C. 2017). Elevate has not challenged these factual findings.

II. THE "TIME IS OF THE ESSENCE" PROVISION DOES NOT ALTER THE ANALYSIS

According to Elevate, because one provision in the Lease provided that "time is of the essence in the Lease," any minor breach involving the failure to comply with a limitation of time prescribed by the Lease gave Elevate the right to terminate. However, this proposed interpretation renders the specific provisions of the Lease governing default, liability, remedies, and termination completely superfluous. *See Indep. Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 867 (D.C. 2005) (finding that a contract "must be interpreted as a whole, giving a reasonable, lawful and effective meaning to all its terms"). The trial court reached the same conclusion.

While it is true that parties to an agreement may make time an essential part of the contract, the cases Elevate cites in support of its argument that "time is of the essence" applies to the return of the security deposit reduction do not address situations where the party who is terminating, rescinding or voiding the contract relies on a standalone "time is of the essence" provision; *i.e.,* one that is not tied to a specific date, time or action. *See*, *e.g.*, *Siegel v. Banker*, 486 A.2d 1163, 1186 (D.C. 1984) (finding that explicit terms in the financing contingency provision demonstrated that the parties regarded time of performance to be of vital importance with respect to that provision); *Cheston L. Eshelman Co. v. Friedberg*, 133 A.2d 68, 71 (Md. 1957) (contract explicitly stated that deadlines for delivery of product were to be completed by a certain date and that time was of the essence).

Importantly, when this Court was previously faced with determining whether a standalone "time is of the essence" provision applied, it noted that the plaintiff's assumption of applicability was "questionable" because "the clause ***did not relate to a specific date or time***, which is normally the purpose of a provision that 'time is of the essence.'" *Indep. Mgmt. Co.*, 874 A.2d at 869-70, n.10 (emphasis added) ("even assuming, *arguendo* that Paragraph 20 was an effective 'time is of the essence' clause germane to the present dispute," plaintiff is not able to invoke the time is of the essence provision). As a result, this Court should affirm the trial court's finding that "time is of the essence" is not applicable to Section 5.1 of the Lease.

Vermont Marble Co. v. Baltimore Contractors, Inc, 520 F. Supp. 922 (D.D.C. 1981) is instructive. In *Vermont Marble Co.*, the plaintiff subcontractor argued that performance delays amounted to a breach of the subcontract, which gave plaintiff the right to terminate under the common law. *Id.* at 926. In support of its argument, plaintiff relied on the contract's "time is of the essence" clause and took the position that any delay amounted to a material breach. *Id.* at 927. Considering the contract as a whole, the court determined that the "time is of the essence" provision did not apply to the delay and that the subcontractor had wrongfully rescinded. The court found significant a "painstakingly negotiated" provision of the contract which provided that, in the event of a delay, the subcontractor's sole remedy was to make a claim with the general contractor. *Id.* at 927-28.

Similarly, here, this court should affirm the trial court's determination that Elevate did not have a right to unilaterally terminate the Lease. Even though Elevate (1) repeatedly asserted that the return of the security deposit reduction was of the utmost importance, (2) acknowledged that Section 5.1 of the Lease was specifically negotiated; and (3) despite knowing that Section 16.4 would be Elevate's sole remedy in the event of a breach by Hto7, Elevate **did not** negotiate an option to terminate the Lease for a breach of Section 5.1. Elevate cannot rely on Sections 28.3 and 28.20 in light of the express provisions that govern termination (§§ 18.4 and 29.1).[4] Interpreting the Lease without regard to the other relevant provisions, would result in a "drastic" and unfair interpretation of the "time is of the essence" provision.

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[4] Further, Elevate cannot rely on Section 20.5 of the Lease, a catchall provision regarding rights that exist in law or equity. Elevate extensively negotiated this Lease and the Lease provides no right to terminate for failure to return the security deposit reduction within a specific timeframe. Moreover, the security deposit reduction was a mere $38,316.75, less than one-percent (1%) of Elevate's total obligation of more than five million dollars under the eleven-year Lease. No reasonable fact finder could have found that failure to return within a discrete time frame such a small amount of money (and from a deposit that was in place *to protect the Landlord*) was material. Thus, assuming *arguendo* that Elevate retained any common law right to unilaterally terminate in the event of a material breach, Elevate failed to establish on the record below that the failure to return the security deposit reduction was a material breach – or that Elevate would have reasonably believed it had the right to terminate on this basis in light of the parties' Lease negotiations and the plain language of the Lease.

Vermont Marble Co., 520 F. Supp. at 927 (finding other provisions in the contract favored a less "drastic" interpretation of "the time is of the essence" clause).

Moreover, Elevate cites *Drazin v. American Oil Co.*, 395 A.2d 32 (D.C. 1978) for the proposition that a contract provision can be made "of the essence," and asserts that Elevate's June 23, 2020 Notice of Default had such an effect. Opp. at 27. However, Elevate's reliance is misplaced. The *Drazin* court determined that, in a contract for the sale of real property, when time is not of the essence, a party may under certain circumstance make time of the essence by giving ***clear, explicit and unequivocal notice to that effect*** and providing a reasonable time for performance. 395 A.2d at 35-36 (emphasis added) (finding notice was clear and explicit when it advised the purchaser that if settlement was not held by a date certain the "contract will become null and void" and the earnest money would be obtained as damages); *see also Adams v. Agnew*, 860 F.2d 1093, 1096 (D.C. Cir. 1988) ("ultimatum letter," which stated that settlement communications would not continue unless paperwork was executed by a date certain, was sufficient notice that time was "of the essence.").

Elevate's Notice of Default did not provide Hto7 with clear, explicit or unequivocal notice of its intention to terminate. Nowhere in the Notice of Default did Elevate state that if the security deposit reduction was not returned it would terminate the Lease. (Appx. at 0492). In fact, the Notice of Default did not indicate that Elevate would take any further action if Hto7 did not return the security deposit

reduction. *Id*. Further, nothing in *Drazin* overcomes the trial court's finding that Elevate bargained out of the Lease a right to unilaterally terminate for failure to return the security deposit reduction. Elevate's sole remedy was to bring an action for damages. Thus, the trial court correctly found that Elevate breached the Lease.

III. THE TRIAL COURT ERRED IN FINDING HTO7 FAILED TO MITIGATE DAMAGES

In order for the trial court to have concluded that Hto7's mitigation efforts were no longer reasonable as of March 3, 2021, the Court had to first find that Hto7 lost a reasonable opportunity to re-let as of that date. *Obelisk Corp. v. Riggs Nat'l Bank of Washington, D.C.*, 668 A.2d 847, 856 (D.C. 1995). To that end, the trial court found that because Hto7 did not have the as-built floor plans ready for the Premises by March 3, 2021, Hto7 frustrated reletting efforts and thwarted Newmark's ability to market the premises to interested tenants, resulting in a forfeiture of a reasonable opportunity to mitigate its damages. (Appx. at 0032-33). Yet, the record lacked any evidentiary or testimonial support for the trial court to have concluded that Newmark was unable to market the Premises without the as-built "floor plans," in light of the fact that it had so many other tools at its disposal, including the CoStar listing, Matterport 3D walkthrough virtual tours, and marketing materials (Appx. at 0524-31). There was no evidence that Hto7 lost a reasonable opportunity because the as-built floor plans were not available. Moreover, there was nothing in the record to support the underlying premise that not having the as-built

floor plans available before March 3, 2021 was unreasonable. Thus, the trial court's determination that Hto7 failed to mitigate damages was error. *See Norris v. Green*, 656 A.2d 282, 287 (D.C. 1995) ("because the tenant failed to prove that Norris did not use reasonable efforts to mitigate his damages, the trial court erred in sustaining the jury verdict"); *see also Amberjack, Ltd. v. Thompson*, No. 02A01-9512-CV-00281, 1997 WL 613676, at *6-7 (Tenn. Ct. App. Oct. 7, 1997) (trial court erred in finding lessor did not mitigate damages where finding overstated lessor's duty to mitigate and exceeded the fair and reasonable standard).

The trial court's mitigation finding was based solely on an email chain between Newmark and a third-party broker, Theo Slagle. (Appx. at 0032); (Appx. at 0504-55). This email was not addressed in either party's expert report and did not form the basis for either expert's mitigation opinions. (Appx. at 0607 and 0626). Moreover, the ***only*** testimony at trial about this specific email was during cross-examination of Hto7's expert Michael Goldman. *See* 9/30/21 Tr. at 57:18-61:7 (Appx. at 0550-51). There was absolutely nothing in Mr. Goldman's testimony from which the Court could have inferred it was unreasonable for Hto7 to not have had the floor plans available, or that Newmark's inability to produce two-dimensional "as-built" floor plans in response to Mr. Slagle's inquiry resulted in a missed opportunity. Instead, Mr. Goldman specifically testified that it was ***not unreasonable*** that the "floor plans" were not available as of that date, as they take

time to prepare, especially for an atypical space such as the Premises. *Id.* at 58:10-18. He also testified that the information Newmark did have was sufficient to market the space, and noted that the 3D tour was preferable to floor plans. *Id.* at 58:8-59:7. Elevate presented no evidence at trial to refute Mr. Goldman's testimony.

Elevate argues that the Court's mitigation finding is supported by Mr. Kluger's testimony that Newmark's failure to include the marketing materials with the CoStar listing for over ten (10) months is "well beyond the norm." Opp. at 34. Mr. Kluger's opinion is irrelevant to whether Newmark's inability to produce the as-built "floor plans" on March 3, 2021 resulted in a missed opportunity to re-let the Premises. More importantly, Mr. Kluger's opinion has nothing to do with the "floor plans." When Mr. Kluger testified about "marketing materials" he was referring specifically to the documents attached to Mr. Goldman's expert report. (Appx. at 0524-31); 9/30/21 Tr. at 179:16-19 (Appx. at 0568). Mr. Kluger was **not** referring to two-dimensional "as-built" floor plans. In fact, there was no trial testimony from Mr. Kluger about "floor plans" or that the failure to have "floor plans," in light of the available marketing materials, 3D tour, etc., was critical to mitigation, nor did he offer any opinions in his report about how long it takes to prepare "as-built" floor plans for a space such as the Premises. *See*, *e.g.*, (Appx. at 0626-56).

Elevate cites a single sentence plucked from Mr. Kluger's report which allegedly stands for the proposition that the as-built floor plans should have been

complete as of March 3, 2021. Opp. at 34. Yet, Elevate's reliance on Mr. Kluger's remark is unwarranted. Mr. Kluger simply notes that, "from the emails reviewed, for the few inquiries by potential replacement tenants, the Landlord had not furnished floor plans or an accurate square footage." Ex. 102 ¶ 14. (Appx. 0634). Even though it is unclear to which "emails" Mr. Kluger refers, as he did not identify **any** emails that post-date Elevate's breach of the Lease that he reviewed in connection with preparing his expert report, it matters not. *Id.* at ¶ 4. (Appx. at 0629). Mr. Kluger's report does not draw any conclusion or reach any opinions based on the fact that the "floor plans" were allegedly not provided in response to those undated emails. *Id.* at Appx. 0626-56). Moreover, and as noted above, Mr. Kluger did not offer **any** testimony about the "floor plans" at trial.

Further, Joint Tr. Ex. 52, on which Elevate relies, is simply an email reflecting that a potential tenant asked about as built floorplans for the space in January 2021 (Appx. 0499-504). There was nothing in the record showing that that same tenant declined to rent the space on the basis that Hto7 was unable to provide two-dimensional floor plans. Importantly, Elevate, as the party who had the burden of proof on this issue, did not call witnesses for Newmark or any of the parties to the email chain to confirm whether not providing an as-built floor plan in anyway impacted Hto7's ability to rent the space. It was thus, clear error, for the Court to draw this conclusion on the evidence provided. *Norris* 656 A.2d at 287.

Elevate has not identified any record "support" for the trial court's findings, nor could it. Hto7 had no notice from Elevate or the Court that the availability of the as-built "floor plans" on March 3, 2021 would be relevant to the Court's mitigation analysis, and thus, had no reasonable opportunity to prepare and introduce evidence on that issue at trial. The only reference to "floor plans" in Mr. Kluger's report is the single sentence discussed above. Ex. 102 ¶ 14. (Appx. 0634).[5]

Finally, the record was replete with evidence of substantial efforts Elevate undertook to relet the premises including, hiring the well-respected broker, Newmark, creating and disseminating marketing materials throughout the brokerage community, developing a 3D scan of the Premises, listing the Premises on CoStar, and routinely following up about reletting efforts. (Br. at 20-21). Despite these efforts, Elevate was unable to find a tenant due in no small part to the impact of the COVID-19 pandemic. Yet, the trial court made an untenable inference that such a tenant might have existed from unsupported hearsay about an unknown party who

[5] In fact, in response to Elevate's subpoena, Newmark produced documents that directly refute the trial court's findings that the inability to produce the as-built floor plans on March 3, 2021 thwarted Newmark's ability to market the Premises, resulting in a missed opportunity to relet the space.

merely inquired about the property. Thus, the trial court's findings go against the weight of the evidence and cannot stand.[6]

IV. THE TRIAL COURT'S REDUCTION IN DAMAGES WAS IN ERROR

The trial court's damages calculation was based on the unsupportable conclusion that Hto7 lost a reasonably available opportunity to relet the Premises on March 3, 2021 because it did not have as-built floor plans available as of that date. (Appx. at 0033). Since the trial court's findings were in error, the decision should be reversed and Hto7 should be awarded unmitigated damages through the end of the Lease Term. *See Johnston v. Hundley*, 987 A.2d 1123, 1130-31 (D.C. 2010) (reversing damages award because "there was no 'significant probative evidence' in the record and little more than speculation to support the trial court's finding").

Elevate fails to articulate any credible reason why Hto7 is not entitled to an award of damages for unmitigated rent through April 2029, plus interest, service fees, and additional rent including operating and tax costs. *See* Ex. 13 at §§ 3.1, 4.1, 4.4, 20.2, 20.5 (Appx. at 0369, 370, 379, 406, 408). First, Elevate argues that Hto7

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[6] Moreover, the trial court's factual findings with respect to Exhibit 52; *i.e.,* that "the interested tenant requested floor plans and measurements for the space multiple times" are not supported by the exhibit. (Appx. at 0025). There were not repeated requests for the "floor plans" in January 2021. Rather, after initially inquiring about the floor plan and the rentable square footage, the broker made a follow-up request about the measurements and ceiling heights, not for "floor plans." (Appx. at 0500).

"presented no evidence whatsoever as to any 'additional rent' or 'service fees,' so these elements are not before the Court." Opp. at 40. This argument is baffling, as the trial court specifically acknowledged that Hto7 was entitled to recover these damages under the Lease, addressed these damages in its Decision and awarded Hto7 service fees in the amount $30,115.05 for the period of August 2020 to October 2021. (Appx. at 0034-36). There is, therefore, no question that Hto7 is entitled to recover base rent, interest, service fees, and additional rent, including operating and tax costs. *Id.*

Elevate next argues that an award of all base rent through the end of the Lease Term would result in a "massive financial benefit" to Hto7 because it is currently in possession of the Premises. Opp. at 40.[7] This argument is equally without merit, as the Lease clearly provides that Hto7 is entitled to recover all base rent through to the time at which the Premises is re-let, regardless of whether it is in possession of the Premises. (Appx. at 0031); Ex. 13 at § 20.2(a)(5) (Appx. at 0407-08). Further, Elevate was represented by sophisticated counsel both during the Lease negotiations and throughout the termination process, and was thus fully aware of the risks

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[7] Elevate improperly frames the mitigation question as whether "Hto7 reasonably should have done more to take advantage of the value of the premises in its possession." Opp. at 41. Elevate's position is contrary to the case law (*Obelisk Corp.*, 668 A.2d at 856) which makes it Elevate's burden to prove failure to mitigate.

associated with terminating the Lease, including that it would be liable for all damages available under the Lease. *See*, *e.g.*, Ex. 40 (Appx. at 0497-98).

Elevate further argues that the trail court's projected damages, which were calculated as if Hto7 found a replacement tenant in March 2021, "are appropriately based off" of the Court's findings of fact and conclusions of law. Opp. at 41. Yet, Elevate offers no actual evidence supporting the projected damages. This argument must fail as Hto7 has already demonstrated why the trail court's findings are in error and cannot support the trail court's damages calculation.

Lastly, Elevate argues that the trial court correctly calculated damages pursuant to Section 20.2(5) of the Lease, but fails to address the arguments Hto7 previously raised that calculating damages under this Section is improper in situations where there is no actual replacement tenant. Opp. at 42. As the prevailing party on its breach of contract claim, Hto7 is entitled to "a sum of money that will, to the extent possible, put [it] in as good a position as [it] would have been in had the contract been performed." *Vector Realty Grp., Inc. v. 711 Fourteenth St., Inc.*, 659 A.2d 230, 234, n.8 (D.C. 1994) (citations omitted).

The trial court's damages calculation, which was based on the unsupportable finding that Hto7 lost a reasonable opportunity to re-let the Premises as of March 3, 2021, does not come close to putting Hto7 in as good of a position as it would have been in had Elevate not breached the Lease. *Truitt v. Evangel Temple, Inc.*, 486 A.2d

1169, 1173 (D.C. 1984). The fact is, the Premises remained vacant at all relevant times and Hto7 continued to incur daily damages due to Elevate's breach. The trial court's damages calculation is not only contrary to the evidence, but also results in a radical reworking of mitigation law; it should thus be reversed.

V. THE TRIAL COURT ERRED IN REDUCING HTO7'S ATTORNEYS' FEES

If this Court finds that the trial court erred in determining that Hto7 failed to mitigate damages, it must reverse the trial court's downward adjustment of Elevate's attorneys' fees because that decision was based entirely on the trial court's erroneous finding that Hto7 failed to mitigate damages as of March 3, 2021. (Appx. at 0069). *See, e.g., Norris*, 656 A.2d at 288 (reversing and remanding decision of trial court not to award attorneys' fees to landlord where that decision was based on underlying erroneous finding that landlord failed to mitigate damages).

Elevate does not dispute that a reversal on mitigation would necessarily require a modification to the fee award. Elevate argues only that the trial court's fee determination was reasonable based on its erroneous mitigation finding. But, even that decision was an abuse of discretion because the court failed to properly consider "the significance of the overall relief obtain[ed]…in relation to the hours reasonably expended on the litigation." *See, e.g., Goos v. Nat'l Ass'n of Realtors*, 68 F.3d 1380, 1387–88 (D.C. Cir. 1995), *decision clarified on denial of reh'g*, 74 F.3d 300 (D.C. Cir. 1996) (remanding trial court's fee determination where court applied a

percentage reduction to fees based on purported "degree of success" without properly focusing on the significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation.").

It is undisputed that Hto7 prevailed at trial on the only claim it asserted and was successful in its defense of Hto7's amended counterclaim for the entire security deposit. Further, as noted in its Opening Brief, most of the hours Hto7 expended litigating this matter were in response to Elevate's aggressive discovery tactics and the case was litigated, in full, to trial. All of Hto7's hours were necessary both in pursuit of its claims and in defense of Elevate's remaining counterclaim – and, were substantially less than the fees Elevate incurred defending this action. The trial court, thus, abused its discretion in applying a downward percentage reduction to Hto7's attorneys' fees, without focusing on the significance of the overall relief obtained in relation to the hours reasonably expended. *See Goos v.* 68 F.3d at 1387–88.

CONCLUSION

For the foregoing reasons, Hto7 respectfully requests that the Court affirm the trial court's finding that Elevate breached the lease. Hto7 further requests that this Court reverse the erroneous decision of the trial court finding that Hto7 failed to mitigate damages, and award full damages to Hto7, accordingly. Hto7 additionally requests that this Court reverse the erroneous decision of the trial court to apply a downward adjustment to Hto7's prevailing party attorneys' fees.

Dated: March 16, 2023

Respectfully submitted,

/s/ Kristen Ward Broz

Kristen Ward Broz
Brett A. Berman (*pro hac vice forthcoming)*
FOX ROTHSCHILD LLP
2020 K Street, N.W., Suite 500
Telephone: (202) 794-1220
Facsimile (202) 461-3102
Washington, D.C. 20006
KBroz@foxrothschild.com
BBerman@foxrothschild.com

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2023, I caused a true and accurate copy of the foregoing to be served, via the Court's electronic filing system, which will serve all counsel of record as follows:

Matthew J. MacLean (D.C. Bar No. 479257)
Katherine T. Danial (D.C. Bar No. 888314735)
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036-3006
Phone: 202-663-8000
Fax: 202-663-8007
matthew.maclean@pillsburylaw.com
katherine.danial@pillsburylaw.com
Counsel for Elevate LLC

/s/ *Kristen Ward Broz*
Kristen Ward Broz
(D.C. Bar No. 101075)
FOX ROTHSCHILD LLP
Counsel forAppellant-Cross-Appellee, Hto7, LLC

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Kristen W Broz
Signature

Nos. 22-CV-636 & 22-CV-645
Case Number(s)

Kristen W. Broz
Name

3/16/2023
Date

KBROZ@FOXROTHSCHILD.COM
Email Address