SUMMARY
June 15, 2023

2023COA54

No. 22CA1009, *Tremitek, LLC v. Resilience Code, LLC and Chad Prusmack* — Landlords and Tenants — Commercial Leases — Tenant Default — Liquidated Damages — Landlord's Duty to Mitigate Damages

A division of the court of appeals holds that a landlord is not required to exercise reasonable efforts to sell leased property to satisfy its duty to mitigate damages following a tenant's breach, even when the landlord has previously listed the property for sale.

In this case, the tenant defaulted on a lease with seven years remaining. Finding that the landlord failed to mitigate its damages by refusing to sell the property, the district court limited damages to five months of rent, which it found to be a reasonable period of time to sell. Because the district court erroneously imposed a duty on the landlord to sell its property, the damages award is reversed.

The division also holds that the liquidated damages provision in the lease is unenforceable to the extent it allowed the landlord to recover the full amount of unpaid rent without deducting the reasonable rental value of the property for the remaining lease term.

The division remands the case to the district court to recalculate damages by (1) determining whether the landlord exercised reasonable efforts to re-lease the property; (2) if not, calculating the amount the landlord could have received if it had done so; and (3) awarding damages for the difference between that amount and the amount of unpaid rent due under the lease.

COLORADO COURT OF APPEALS **2023COA54**

Court of Appeals No. 22CA1009
Arapahoe County District Court No. 21CV30646
Honorable Elizabeth Beebe Volz, Judge

Tremitek, LLC, a Pennsylvania limited liability company,

Plaintiff-Appellant,

v.

Resilience Code, LLC, a Colorado limited liability company, and Chad Prusmack,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE SCHOCK
Pawar and Vogt*, JJ., concur

Announced June 15, 2023

Fox Rothschild LLP, Christopher T. Groen, Risa B. Brown, Denver, Colorado, for Plaintiff-Appellant

Greenberg Traurig LLP, John A. Wharton, Camille Papini-Chapla, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 When a tenant defaults on a commercial lease, a landlord has a duty to mitigate the damages caused by the tenant's breach. Most commonly, a landlord fulfills that duty by making reasonable efforts to find a replacement tenant. But must a landlord that has listed the leased property for sale exercise reasonable efforts to accomplish that sale? We hold that a landlord has no such duty.

¶ 2 In this case, Tremitek, LLC (landlord) sued Resilience Code, LLC and Chad Prusmack (collectively, tenant) after tenant stopped paying rent three years into a ten-year lease. Although there were seven years left on the lease at the time of the default, the district court awarded landlord only five months of rent because it found that landlord reasonably could have sold the property in that time.

¶ 3 Landlord appeals the damages award, arguing that the district court erred in finding that it failed to mitigate damages by refusing to sell the property. We agree. Because landlord had no duty to sell its property to remedy tenant's breach, its failure to make reasonable efforts to do so could not violate its duty to mitigate.

¶ 4 We reverse the judgment with respect to damages only and remand to the district court to enter a revised damages award consistent with this opinion.

I. Background

¶ 5 In January 2017, landlord and tenant entered into a 128-month commercial lease (the lease) for a business suite to be used as a health clinic (the property). The first eight months of the lease were rent free, after which tenant was required to pay monthly base rent that increased each year according to a set schedule.

¶ 6 The lease contained a liquidated damages provision, which provided that, upon a tenant default, landlord could elect to accelerate rent and recover from tenant "the then present value of rent and other sums" payable under the lease for the remaining term of the lease, discounted at a rate of ten percent per annum.

¶ 7 In October 2020, tenant stopped paying rent and defaulted on the lease. Tenant vacated the property on February 15, 2021.

A. Landlord's Efforts to Sell the Property

¶ 8 In January 2020, months before tenant stopped paying rent, landlord hired a commercial real estate broker and listed the property for sale at a price of $1.6 million. The property was marketed as a "net lease investment," meaning there was already a tenant in place. Landlord received one below-list offer to purchase

the property — at a price of $1.3 million — before tenant defaulted. But the potential buyer did not respond to landlord's counteroffer.

¶ 9 After tenant defaulted, landlord received two additional offers to purchase the property. The first came in October 2020, days after tenant's default. The potential purchaser offered to buy the property for $1.5 million. Landlord asked tenant to contribute $95,000 to "bridge the gap" between the offer and the $1.6 million list price, but tenant declined. Landlord did not accept the offer.

¶ 10 The second post-default purchase offer came in March 2022, on the eve of the trial in this case. That offer was for $1.2 million. Landlord's broker believed the potential buyer might be willing to pay up to $1.45 million. Tenant offered to contribute an additional $115,000 to help "bridge the gap." But landlord rejected the offer.

B. Landlord's Efforts to Re-Lease the Property

¶ 11 In January 2021, after tenant had stopped paying rent but before it had vacated the property, landlord listed the property for lease on several commercial real estate websites. The listed rent price was below the monthly base rent under the lease. The property was listed continuously through the time of trial.

¶ 12 Landlord received several inquiries but only two offers. The first was in June 2021, for a lease beginning in September 2021. The prospective tenant offered to lease the property for $7,000 per month, which was approximately $1,000 less per month than the base rent in the lease. Landlord rejected the offer because it believed the proposal would result in a loss of $60,000 per year.

¶ 13 The second offer to lease the property came in September 2021, again at a proposed rent below that in the lease. Landlord rejected that offer because of its concerns about the prospective tenant's financial condition and its ability to afford the rent.

C. District Court Proceedings

¶ 14 Landlord sued tenant in April 2021 for breach of contract and unjust enrichment, seeking as damages the unpaid rent under the lease. Tenant asserted that landlord had failed to mitigate damages because it had "failed to make reasonable efforts to re-let the premises and expressly rejected an offer to sell the premises."

¶ 15 Landlord moved for summary judgment under the liquidated damages provision. It argued that, under that provision, it was entitled to recover the full amount of rent remaining under the lease from the date of default through the end of the lease term, subject

to the contractual discount rate of ten percent per annum. The district court denied the motion for summary judgment, concluding that the liquidated damages provision was unenforceable because (1) the amount of damages for failure to pay rent was easily calculable, and (2) the amount of damages was unreasonable.

¶ 16 The case proceeded to a bench trial. The district court found that tenant had breached the lease, and it awarded landlord five months of unpaid rent for the period between October 2020 and February 2021, while tenant occupied the property. But it did not award damages for rent due after February 2021, finding that landlord had failed to mitigate its damages by "stubbornly refus[ing] to sell at a reasonable price when offers have been made and [refusing] to lease the [property]." The district court found that "a reasonable period of time to sell the property was 120 days" from the breach, and thus, landlord was not entitled to any damages for rent due from then on. The court also found that landlord "failed to mitigate its damages with regard to finding a Tenant, separate and apart from the evidence of reasonable options to sell the property."

II. Analysis

¶ 17 Landlord challenges the district court's damages award on three primary grounds. It argues that the district court erred by (1) refusing to enforce the liquidated damages provision in the lease; (2) requiring the landlord to sell its property as part of its duty to mitigate damages; and (3) finding that landlord failed to exercise reasonable efforts to find a replacement tenant. Relatedly, landlord argues that the district court applied the wrong measure of damages by capping damages based on a reasonable time to sell.

¶ 18 We agree with the district court that the liquidated damages provision was unenforceable because it failed to account for the reasonable rental value of the property. But the district court erred by concluding that landlord was required to sell its property to mitigate its damages. Because the district court's damages award was based on that erroneous conclusion, we reverse the award.

A. Duty to Mitigate and Measure of Damages

¶ 19 A landlord's claim against a tenant for breach of a commercial lease is a breach of contract claim that "requires nothing more than application of established principles of contract law." *Schneiker v. Gordon*, 732 P.2d 603, 612 (Colo. 1987). The proper measure of

damages in such an action is "the amount it takes to place the landlord in the position [it] would have occupied had the breach not occurred, taking into account the landlord's duty to mitigate." *Id.*

¶ 20 The duty to mitigate means that a landlord cannot "sit by idly and suffer avoidable economic loss." *Id.* at 610. But neither must a landlord undertake "inordinate or unreasonable measures" to avoid that loss. *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997). Nor must an aggrieved party mitigate damages "by giving up its rights under the contract." *U.S. Welding, Inc. v. Advanced Circuits, Inc.*, 2018 CO 56, ¶ 2. Rather, a landlord fulfills its duty to mitigate if it makes "reasonable efforts" to reduce the damages sustained. *Schneiker*, 732 P.2d at 611-12. Ordinarily, this means the landlord must "exercise reasonable efforts to procure a substitute tenant" — including by taking "some affirmative steps" to do so. *Pomeranz v. McDonald's Corp.*, 821 P.2d 843, 847 (Colo. App. 1991), *aff'd in part and rev'd in part on other grounds*, 843 P.2d 1378 (Colo. 1993).

¶ 21 A tenant's abandonment of the premises and failure to pay rent when it comes due is "an anticipatory repudiation amounting to a total breach" of the lease. *Schneiker*, 732 P.2d at 611. The damages for such a breach will usually be "the difference between

the rent reserved in the lease and the reasonable rental value of the premises for the duration of the term of the lease, plus any other consequential damages caused by the breach." *Id.* at 612. But if the landlord is unable to secure a substitute tenant despite its reasonable efforts, the landlord is entitled to "the full amount of rent reserved in the lease," plus consequential damages. *Id.*

¶ 22 The tenant bears the burden of proving the landlord failed to mitigate damages. *Pomeranz*, 821 P.2d at 847. The failure to mitigate is not a bar to recovery, but it reduces the total damages by the amount of the loss that could reasonably have been avoided. *U.S. Welding*, ¶ 20; *see also Pomeranz*, 821 P.2d at 848 (reducing damages by "the reasonable rental value of the premises").

¶ 23 Whether an injured party has exercised reasonable efforts to mitigate is generally a question of fact that we review for clear error. *Fair*, 943 P.2d at 437. But whether the trial court applied the correct legal standard is a question of law that we review de novo. *Highlands Ranch Univ. Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1026 (Colo. App. 2005). Similarly, "the question whether taking particular steps to avoid damages would entail the

relinquishment of contractual rights is clearly a matter of contract interpretation, and therefore a matter of law." *U.S. Welding*, ¶ 17.

B. Liquidated Damages

¶ 24 We first address landlord's contention that it was entitled to the full present value of the remaining rent under the liquidated damages provision of the lease. We agree with the district court that the liquidated damages provision is unenforceable.

1. Applicable Law and Standard of Review

¶ 25 A liquidated damages provision is valid and enforceable only if three elements are satisfied: (1) the parties intended to liquidate damages; (2) at the time of the contract, the amount of liquidated damages was a reasonable estimate of the actual damages that a breach would cause; and (3) at the time of the contract, the amount of actual damages was difficult to ascertain. *Ravenstar, LLC v. One Ski Hill Place, LLC*, 2017 CO 83, ¶ 10. Such a provision is "invalid as a penalty" if the amount of liquidated damages is "unreasonably large for the expected loss from a breach of contract." *Klinger v. Adams Cnty. Sch. Dist. No. 50*, 130 P.3d 1027, 1034 (Colo. 2006).

¶ 26 The enforceability of a liquidated damages provision is a question of law that we review de novo. *Ravenstar*, ¶ 9. But the

determination of whether the specified damages constitute a penalty is generally a question of fact. *Klinger*, 130 P.3d at 1034.

2. Not a Reasonable Estimate of Actual Damages

¶ 27 We conclude that the liquidated damages provision was not a reasonable estimate of the actual damages caused by tenant's breach. As set forth above, the measure of actual damages for a tenant's breach of a lease is the amount required to restore the landlord to the position it would have been in without the breach, taking into account the landlord's duty to mitigate. *Schneiker*, 732 P.2d at 612. That means that, unless the landlord cannot reasonably secure a substitute tenant, the actual damages are the total remaining unpaid rent under the lease *minus* the reasonable rental value of the property for the remainder of the lease term. *Id.*

¶ 28 Thus, a division of this court has upheld a lease provision that authorized a landlord to recover "the worth of the balance of this lease over the reasonable rental value of the premises for the remainder of the lease term." *Emrich v. Joyce's Submarine Sandwiches, Inc.*, 751 P.2d 651, 652 (Colo. App. 1987). Because the provision "require[d] that there be deducted from [the total present value of the future payments] the present worth of the

reasonable rental value," it was a reasonable estimate of the landlord's actual damages and not an improper penalty. *Id.*

¶ 29 But the liquidated damages provision here lacks the critical feature that made the provision enforceable in *Emrich*. It grants landlord the full present value of the remaining rent, *without* deducting the reasonable rental value of the property. That would be a reasonable estimate of landlord's actual damages only if the parties reasonably anticipated at the time of the lease that landlord would be unable to find a suitable replacement tenant at any point in the lease term. Nothing in the record suggests that was the case.

¶ 30 Not only would the liquidated damages provision here supplant the duty to mitigate, but it would place landlord in a better position than it would have been in without the breach. If tenant had not breached, landlord would have continued to receive rent over the following seven years. But under the liquidated damages provision, landlord would receive the present value of that seven years of rent *and* would be able to re-lease the property, thus effectively receiving double rent for any period during which the property was occupied by a new tenant. *See Ultra Grp. of Cos. v. S & A 1488 Mgmt., Inc.*, 849 S.E.2d 531, 534 (Ga. Ct. App. 2020)

(noting court's prior rejection of liquidated damages clauses "where the lessor received all future revenue and full possession of the property with the ability to re-rent or sell" because such damages place the landlord in a "far better position than it would have been if the contract had never been breached") (citation omitted).

¶ 31 As one court aptly put it, "liquidated damages and mitigation of damages are antithetic doctrines." *Browning Ferris Indus. of Neb., Inc. v. Eating Establishment-90th & Fort, Inc.*, 575 N.W.2d 885, 890 (Neb. Ct. App. 1998); *see also Summers v. Crestview Apartments*, 2010 MT 164, ¶ 27 ("[A]s a matter of law an accelerated rent provision in a lease agreement conflicts with the landlord's duty to mitigate damages . . . ."). Thus, several other courts have likewise refused to enforce liquidated damages provisions that allow a landlord to recover the full amount of unpaid rent and *also* re-lease the property. *See, e.g.*, *Summers*, ¶¶ 24-28; *Cummings Props., LLC v. Hines*, 201 N.E.3d 295, 300 (Mass. App. Ct. 2022); *Peterson v. P.C. Towers, L.P.*, 426 S.E.2d 243, 246-47 (Ga. Ct. App. 1992); *cf. Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc.*, 548 N.W.2d 153, 157 (Iowa 1996) (enforcing liquidated damages provision because "it [took] into account the landlord's duty to mitigate

damages by offsetting any claim by amounts received in reletting the property"). *But see H.L. Realty, LLC v. Edwards*, 15 N.Y.S.3d 413, 415 (App. Div. 2015) (enforcing liquidated damages provision where landlord had no duty to mitigate under state law).

¶ 32 Landlord points out that it provided tenant eight months of free rent and approximately $265,000 to adapt the property for tenant's use as part of the parties' deal. But those additional accommodations have no bearing on landlord's actual damages because the lease did not obligate tenant to repay those amounts. Landlord cannot use the liquidated damages provision to recover funds to which it would not have been entitled under the terms of the lease. *See Ravenstar*, ¶ 10 (noting that "liquidated damages are intended as fair compensation for the breach") (citation omitted).

¶ 33 Because the liquidated damages provision required tenant to pay landlord the full present value of the remaining rent due under the lease, without deducting the reasonable rental value of the property for that period, it was not a reasonable estimate of the presumed actual damages and is therefore unenforceable. *Id.*

C. No Duty to Sell

¶ 34 Although seven years remained on the lease when tenant defaulted, the district court limited landlord's recovery to five months of rent because it found that to be a reasonable period of time to sell the property. Landlord contends that, in doing so, the district court erroneously imposed a duty on landlord to sell its property to mitigate tenant's breach of the lease. We agree.

¶ 35 We first reject the district court's apparent premise that landlord's sale of the property would necessarily extinguish its damages. Because a lease is a contract, a landlord that surrenders its *property* interest after a tenant's default does not relinquish its *contractual* right to damages for lost rent. *Schneiker*, 732 P.2d at 611-12. Rather, the tenant remains liable under the lease for the unpaid rent.[1] *Id.* at 611. It is possible that a sale of the property could mitigate the landlord's damages in other ways — for example, if the sale price includes a value for future rent or an assignment of the right to the unpaid rent. But the district court did not consider

[1] That does not mean that a landlord who sells the property after a tenant breach is automatically entitled to the *full* amount of unpaid rent. The landlord's damages must still take into account the duty to mitigate. *Schneiker v. Gordon*, 732 P.2d 603, 612 (Colo. 1987).

whether any hypothetical sale would have compensated landlord for some or all of its lost rent. It simply cut off rent altogether.

¶ 36 In any event, even if landlord *could* have spared tenant from further liability by selling the property, it was not required to do so. A landlord's duty of mitigation requires only that the landlord take "reasonable steps to minimize the damages resulting from the breach." *Highlands Broadway OPCO, LLC v. Barre Boss LLC*, 2023 COA 5, ¶ 22. Typically, that means a landlord must make commercially reasonable efforts to find a replacement tenant. *Pomeranz*, 821 P.2d at 847. While there may be other reasonable ways in which a landlord can mitigate its damages, a landlord is not required to take extraordinary steps to maximize mitigation. *See Schneiker*, 732 P.2d at 612 (concluding that sublessor fulfilled duty to mitigate sublessee's breach by surrendering primary lease).

¶ 37 No Colorado case has required a landlord to exercise reasonable efforts to *sell* its property to mitigate damages from a tenant's breach of a lease, and we now reject such a requirement. A landlord who enters into a lease with a tenant reasonably expects to receive rental income over the course of the lease and, unless it chooses otherwise, to retain ownership of the property at the end of

the lease. Requiring a landlord to sell its property in response to a tenant breach goes far beyond reasonable efforts to reduce damages. It forces a landlord to choose between its property right and its contract right, and it effectively "subordinate[s] the injured [landlord's] broader business interests to the needs of the defaulting [tenant]." *Tech Ctr. 2000, LLC v. Zrii, LLC*, 2015 UT App 281, ¶ 27.

¶ 38 We find persuasive the Utah Court of Appeals' opinion in *Tech Center 2000*. In that case, the tenant argued that the landlord failed to mitigate its damages by abandoning a potential sale of the leased property. *Id.* at ¶ 24. Rejecting that argument, the court held that "a landowner currently in the business of leasing its property is [not] required to sell that property in order to maximize mitigation, even if that landowner might be willing to sell its property as a general matter." *Id.* at ¶ 26. Rather, "a property owner faced with a tenant's default [may] choose, based on the owner's assessment of benefits and risks, whether to relet the property or to sell it, even if either option might be reasonable." *Id.* We agree that the decision whether to sell property is one that should be made by the property owner, not the court.

¶ 39 Moreover, "the relinquishment of a party's rights under the original contract is never a reasonable step that a non-breaching party has a duty to take in order to mitigate damages." *U.S. Welding*, ¶ 17. But that is exactly what the district court required. As noted above, the district court apparently presumed that, by selling the property, landlord would be forgoing its right to receive further rent. Yet it found landlord had to sell nonetheless. Such a result is not so much mitigation as it is an escape hatch for the breaching tenant — one that shifts all loss to the landlord. The duty to mitigate should be applied "to prevent a landlord from passively suffering preventable economic loss," *Schneiker*, 732 P.2d at 611, not to relieve a tenant of the consequences of its breach.

¶ 40 The district court's analysis would place a landlord faced with a breaching tenant in a catch-22: it could either sell the property and relinquish its right to rent as a result of the sale, or not sell the property and relinquish its right to rent by failing to mitigate.

¶ 41 Neither of those options "place[s] the landlord in the position [it] would have occupied had the breach not occurred." *Id.* at 612. Had the breach not occurred, landlord would have had two distinct assets: (1) its ownership interest in the property and (2) its contract

right to ten years of rent. The sale of the property simply would have liquidated the first of those two assets. Without more, it would have done nothing to compensate landlord for the loss of the second. That is true regardless of whether the sale was at a profit or a loss. As long as the sale was at fair market value, it would still just provide landlord the value of the property it already owned.

¶ 42 Tenant cites cases from other jurisdictions for the proposition that a landlord *may* choose to sell the property as one way to mitigate damages from a tenant breach. *See, e.g.*, *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Neb., Inc.*, 905 N.W.2d 644, 658 (Neb. 2018) (holding that landlord may satisfy duty to mitigate by "making reasonable efforts to relet . . . , to sell the property, or both"); *Krasne v. Tedeschi & Grasso*, 762 N.E.2d 841, 847 (Mass. 2002) ("A landlord can mitigate damages in other ways, and selling the property is one such way."). *But see Wilson v. Ruhl*, 356 A.2d 544, 547 (Md. 1976) (holding that "the listing of the property for sale did not satisfy the duty to mitigate damages").

¶ 43 But we need not decide whether a landlord *could* mitigate its damages by selling the property, or the circumstances under which it could do so, because landlord did not sell. Nor did it claim that it

satisfied its duty to mitigate by attempting to do so. We also do not decide how a hypothetical sale might have affected the measure of damages *if* such a sale had occurred. We hold only that a landlord is not *required* to make reasonable efforts to sell the property to fulfill its duty to mitigate damages from a tenant's breach.

¶ 44 In concluding otherwise, the district court reasoned that by listing the property for sale, landlord had "already decided to sell." But a landlord's listing of property for sale, or even its desire to sell, does not obligate it to proceed with such a sale. And it certainly does not require it to sell at a price lower than it deems fit — or even at a loss — to relieve the *tenant* of its rent obligations.

¶ 45 The facts here highlight the problem with the district court's analysis. Landlord listed the property for sale at its desired price nine months before tenant's breach, ostensibly because, as a real estate investor, it routinely lists its properties for sale once a tenant is in place. In nine months, landlord received just one offer, at a below-list price that it deemed unacceptable and rejected. But the district court reasoned that once tenant breached (likely reducing the market value of the property), landlord was *required* to sell within four months — not only if the right offer came along, but

even if it did not — because that was how long two recently sold, comparable properties had been on the market.[2] Such a result would effectively allow a breaching tenant to force the landlord's hand and dictate the terms of its business decision.

¶ 46 Thus, the district court erred in concluding that landlord failed to mitigate damages by failing to act reasonably in selling the property. Because the damages award was based on that erroneous conclusion, we reverse the award and remand for the district court to recalculate damages as detailed below.

D. Efforts to Find a Substitute Tenant

¶ 47 Although the district court based its damages calculation on the conclusion that landlord could have *sold* the property, it also found that landlord "failed to mitigate its damages with regard to finding a Tenant." Landlord disputes this finding, arguing that it took several reasonable steps to re-lease the property, including by hiring a commercial real estate broker, listing the property at a rental rate below that in the lease, and marketing the property.

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[2] The "average days on the market" figure that the district court cited was based on two properties, one of which sold before the start of the COVID-19 pandemic. Notably, the district court did not consider the time on the market for any property that had *not* sold.

¶ 48 Because the district court's damages award rested solely on landlord's failure to sell the property, it did not explain the basis for, or effect of, its subsidiary finding regarding the failure to re-lease. It did not, for example, explain (1) what other efforts landlord should have made; (2) which, if any, potential tenant landlord should have accepted; or (3) what losses landlord could have reasonably recouped. Without further explanation, we are unable to review the district court's finding. And to the extent the district court intended to suggest that landlord's failure to find a substitute tenant could support its decision to cut off damages entirely as of February 2021 — the month tenant vacated the property — neither the record nor the district court's findings support that conclusion.

¶ 49 We therefore remand to the district court to consider landlord's mitigation efforts and recalculate the damages award in light of this opinion.[3] In doing so, the court should (1) determine whether landlord "exercise[d] reasonable efforts to procure a substitute tenant," *Pomeranz*, 821 P.2d at 847; (2) if not, calculate

[3] The parties agree that the district court erred by not awarding damages for taxes, which were tenant's obligation under the lease. The revised damages award should therefore include those taxes.

what amount landlord could have received if it had done so; and (3) award damages for the difference between that amount and the amount due under the lease. *See Schneiker*, 732 P.2d at 612.

¶ 50 We highlight three principles to guide the district court in making this determination. First, the lease provides that, upon default by tenant, landlord "may relet the [property] at such rates and for such uses as Landlord, in its sole discretion[,] may determine." Although such a contract provision does not supplant the duty to mitigate, landlord's efforts to mitigate "must be viewed in light of [this] lease provision[]." *Del E. Webb Realty & Mgmt. Co. of Colo. v. Wessbecker*, 628 P.2d 114, 116 (Colo. App. 1980).

¶ 51 Second, the duty to mitigate requires only reasonable efforts, not necessarily successful ones. Thus, while a landlord may not arbitrarily refuse to accept a suitable tenant, *Bert Bidwell Inv. Corp. v. LaSalle & Schiffer, P.C.*, 797 P.2d 811, 812 (Colo. App. 1990), it need not accept an unsuitable one. *See Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997) ("The landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances."). Nor does a landlord need to accept *any* offer.

¶ 52 On the other hand, a landlord may not reject a reasonable offer simply because it does not allow the landlord to recoup *all* of its losses. The standard is one of reasonableness. If a landlord reasonably leases the property for less than the rent in the original lease, it retains its right to recover the difference from the tenant.

¶ 53 Third, the failure to mitigate is not a complete bar to damages. It bars only those damages that landlord could have reasonably avoided. *U.S. Welding*, ¶ 20. Thus, even if unreasonable, landlord's rejection of an offer to rent the property for less than in the original lease would not eliminate its damages. Landlord would still be entitled to recover the difference between those two rates. *See Schneiker*, 732 P.2d at 612. That hypothetical substitute lease would also have no bearing on landlord's right to recover unpaid rent for the period before the start of the putative lease.

III. Attorney Fees

¶ 54 Landlord requests an award of its appellate attorney fees under two provisions of the lease. The first provides that "Landlord shall be entitled to reimbursement upon demand of all reasonable attorneys' fees and expenses incurred by Landlord in connection with any default." The second provides that

> [i]f Landlord or Tenant is required to commence any action or proceeding against the other in order to enforce or interpret the provisions of this Lease, the prevailing party in such action shall be awarded, in addition to any amounts or relief otherwise awarded, all reasonable costs incurred in connection therewith, including attorneys' fees.

¶ 55 Tenant does not dispute that *if* landlord prevails in this appeal, landlord is entitled to an award of its attorney fees.

¶ 56 Because this action is one "to enforce or interpret the provisions" of the lease and landlord is the prevailing party, we award landlord its reasonable attorney fees incurred on appeal. We remand to the district court to determine the amount of that award.

IV. Disposition

¶ 57 The judgment is reversed with respect to damages only and the case is remanded for further proceedings consistent with this opinion.

JUDGE PAWAR and JUDGE VOGT concur.